Court File No. CV-16-11549-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF URBANCORP (WOODBINE) INC. AND URBANCORP (BRIDLEPATH) INC., THE TOWNHOUSES OF HOGG'S HOLLOW INC., KING TOWNS INC., NEWTOWNS AT KINGTOWNS INC. AND DEAJA PARTNER (BAY) INC. (COLLECTIVELY, THE "APPLICANTS")

AND IN THE MATTER OF TCC URBANCORP (BAY) LIMITED PARTNERSHIP

JOINT FACTUM OF THE FUNCTIONARY AND TERRA FIRMA CAPITAL CORPORATION

April 20, 2018

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TO: THE SERVICE LIST

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PART I - OVERVIEW

1. This factum is filed in support of the joint motion of Guy Gissin, in his capacity as the Israeli court-appointed Functionary and Foreign Representative ("**Functionary**") and Terra Firma Capital Corporation ("**TFCC**") for an Order: (a) deeming the Functionary to have validly late filed a claim ("**UCI Bondholder Claim**") on behalf of the Bondholders in the amount of $8 million to KSV Kofman Inc. ("**KSV**"), in its capacity as monitor ("**Monitor**") of TCC Urbancorp (Bay) Limited Partnership ("**TCC Bay**") in relation to the $6 million promissory note, dated December 11, 2015 (the "**$6 Million Promissory Note**"), originally issued in favour of Urbancorp Toronto Management Inc. ("**UTMI**") and then assigned to UCI, and the $2 million promissory note, dated December 11, 2015 ("**$2 Million Promissory Note**" and, collectively, with the $6 Million Promissory Notes, "**Promissory Notes**"), originally issued in favour of UTMI and then assigned by UTMI to Urbancorp Realtyco Inc. ("**RealtyCo**") for the benefit of UCI; and (b) Approving a settlement agreement ("**Settlement Agreement**") between the Functionary and TFCC with respect to the within proceeding.

2. The facts with respect to this motion are set out in the Ninth Report to the Court of the Functionary dated February 15, 2018 ("**Ninth Report**"), and in the reply affidavit of Sandra Cooper, sworn April 13, 2018 ("**Cooper Affidavit**").

3. The only party opposing the settlement is DS (Bay) Holdings Inc. ("**DS Bay**"), the principal of which is Doreen Saskin, the spouse of Alan Saskin. As outlined below, the issues giving rise to the claims in dispute arise from the actions of Alan Saskin. All creditors of TCC Bay will benefit from the Settlement Agreement.

4. To the extent DS Bay has a liability to the Canada Revenue Agency, that situation does not arise from the Settlement Agreement. Had the Promissory Notes been valid, no money would have flowed to DS Bay in any event, but it would still have had the tax liability. As found by Mr. Justice Newbould, Alan Saskin knew there was no money owing at the time he caused TCC Bay to issue the Promissory Notes. This Court should not countenance a result that would ultimately allow Doreen Saskin to benefit from her husband's malfeasance at the expense of his company's creditors.

5. Rejection of the Settlement Agreement does not even assure Doreen Saskin of any ultimate recovery. Instead, the result would be hearings to determine the validity of each of TFCC Claim and the UCI Bondholder Claim. The Settlement Agreement materially reduces the TFCC Claim. If both claims are valid then there is unlikely to be sufficient amounts to pay all of the current disputed claims to the potential detriment of all TCC Bay's creditors. TFCC would also lose the benefit of release that the Functionary has agreed to provide to it under the Settlement Agreement if it is not approved.

PART II – FACTS

A. UCI Claim

6. On December 15, 2014, TCC Bay purported to issue a promissory note in the principal amount of $8 million (the "**2014 Promissory Note**"). The 2014 Promissory Note was allegedly issued in consideration of management fees that were owed to UTMI in an amount equal to at least $8 million.

*Ninth Report, Motion Record of the Functionary ("***Functionary's Motion Record***"),* Tab 2, p.14 at para. 10.

7. UCI was created for the sole purpose of the Israeli bond issuance (the "**Bond Issuance**").

Ninth Report, Functionary Motion Record, Tab 2, p.15 at para. 13.

8. The bondholders were consistently reassured through representations contained in the prospectus (the "**Prospectus**") issued in respect of the Bond Issuance that $8 million of intercompany loans would be assigned to UCI as a condition of the Bond Issuance.

Ninth Report, Functionary's Motion Record, Tab 2, p.15 at para. 13.

9. It now turns out that the 2014 Promissory Note did not exist at the time of the Bond Issuance. Nevertheless, Alan Saskin received $8 million in credit as part of his obligations under the Prospectus. Furthermore, as explained in more detail below, it turns out that nothing was owed on account of the alleged debt that supported the 2014 Promissory Note.

Cooper Affidavit, Reply Motion Record of the Functionary, Tab 1, p.4.

10. In anticipation of UCI's bond issuance, and apparently for tax reasons, the alleged 2014 Promissory Note was replaced with two promissory notes in the principal amounts of $6 million and $2 million that were issued in favour of UTMI on December 11, 2015 (collectively, the "**2015 Promissory Notes**"). Aside from the addition of interest at a rate of 1% per annum, the terms of the 2015 Promissory Notes were otherwise identical to the 2014 Promissory Note.

Ninth Report, Functionary's Motion Record, Tab 2, pp.14-15, at para. 11.

11. UTMI assigned the $6 million promissory note to UCI. UTMI assigned the $2 million promissory note to RealtyCo, for the benefit of UCI in anticipation of and as part consideration for the Bond Issuance.

Ninth Report, Functionary's Motion Record, Tab 2, p.15 at para. 12.

12. On October 18, 2016, this Honourable Court issued a claims process order (the "**Claims Procedure Order**") requiring creditors to submit claims in respect of the Applicants on or before November 23, 2016 (the "**Claims Bar Date**").

Ninth Report, Functionary's Motion Record, Tab 2, p.15 at para. 15.

13. In accordance with the Claims Procedure Order, the Functionary submitted a claim (the "**UCI Claim**") to the Monitor in connection with the 2015 Promissory Notes before the Claims Bar Date.

Ninth Report, Functionary's Motion Record, Tab 2, p.15 at para. 16.

14. Subsequently, the Monitor disallowed the UCI Claim asserting that nothing was owed by TCC Bay in relation to the 2015 Promissory Notes and therefore there was no consideration to support the 2015 Promissory Notes. The Monitor took the position that the balance, if any, had been satisfied through a series of intercompany transactions such that the amounts had been fully repaid during the course of 2015 and, certainly before the 2015 Promissory Notes were purported to be issued.

Ninth Report, Functionary's Motion Record, Tab 2, p.16 at para. 17-18.

15. The Functionary appealed the disallowance to this Honourable Court and a hearing was held on May 2, 2017, with respect to the validity of the disallowance. The Functionary also sought, in the alternative, a declaration that the first $8 million of funds from TCC Bay that might otherwise be received by Vestaco Investments Inc. ("**Vestaco**"), as the nominee of Doreen Saskin, be held in trust for UCI and RealtyCo and be paid to the Functionary on behalf of UCI. Vestaco is allegedly a nominee of Doreen Saskin that might otherwise receive distributions if the UCI Bondholder Claim is not allowed.[1]

Ninth Report, Functionary's Motion Record, Tab 2, p.16 at para. 19.

16. The declaratory relief being sought against Vestaco was adjourned pending the outcome of the appeal of the disallowance.

Ninth Report, Functionary's Motion Record, Tab 2, p.16 at para. 20.

17. On May 11, 2017, the Honourable Mr. Justice Newbould upheld the Monitor's disallowance of the UCI Claim (the "**Decision**").

[1] Vestaco allegedly assigned its interest to DS Bay in December 2017.

Ninth Report, Functionary's Motion Record, Tab 2, p. 16 at para. 20.
Decision, Functionary's Motion Record, Tab C, pp. 53-68.

18. In the Decision, the Court found that "...the management fees owing by Bay LP (referred to herein as TCC Bay) to UTMI *have been paid and were paid* by the time the [2015 Promissory Notes] were issued" (emphasis added).

Decision, Functionary's Motion Record, Tab C, p.64 at para. 31.

19. The Court further found that it could not "...put any store in Mr. Saskin's assertions of a present day belief that the [2015 Promissory Notes] are valid and enforceable or were at the time he signed them".

Decision, Functionary's Motion Record, Tab C, p.66 at para. 37.

20. Finally, the Court held that it agreed "...with the Monitor that given that UCI and RealtyCo were controlled completely by Mr. Saskin, as were UTMI and Bay LP, and all relevant documents were signed by him, it cannot be reasonably held that UCI or RealtyCo were unaware of this state of affairs between UTMI and Bay LP....They cannot be said to not have actual notice of the state of their own intercompany affairs and the fact that the management fee pursuant to the Original Fee Agreement, as amended, had been fully booked as an expense against reported taxable income and 'settled' or 'paid' via postings to the intercompany account, especially given that UTMI administered the internal affairs of all of them".

Decision, Functionary's Motion Record, Tab C, pp. 66-67 at para. 39.

21. All the facts relating to the intercompany dealings came to the attention of the Functionary and the Bondholders subsequent to the Claims Bar Date and solely as a result of the reports of the Monitor and the findings in the Decision.

Ninth Report, Functionary's Motion Record, Tab 2, p. 18 at para. 30.

22. Shortly after the Decision, the Functionary did advise the Monitor of the intention to bring the UCI Bondholder Claim. However, certain steps needed to occur in Israel to place the Functionary in the legal position to pursue the UCI Bondholder Claim.

Ninth Report, Functionary's Motion Record, Tab 2, p. 18 at para. 32.

23. On September 26, 2017, the Israeli Court approved a creditors' arrangement plan ("**Plan**") in respect of UCI ("**Plan Approval Order**"). The Plan Approval Order appoints the Functionary as trustee of the UCI estate and, pursuant to the Plan, the Bondholders' rights to pursue any causes of action were assigned to the Functionary.

Ninth Report, Functionary's Motion Record, Tab 2, p. 14 at para. 8.

24. The Plan Approval Order gave the Functionary the legal ability to pursue the UCI Bondholder Claim. Since the granting of the Plan Approval Order the Functionary has been working with TFCC to resolve their remaining claims in the TCC Bay estate and which has now culminated in the Settlement Agreement. The Functionary has kept the Monitor apprised of the status of its dealings with TFCC concerning this matter.

Ninth Report, Functionary's Motion Record, Tab 2, pp. 18-19 at para. 32.

B. Terra Firma Claim

25. On November 22, 2016, TFCC filed secured proofs of claim in these proceedings in the respective amounts of $6,512,874.95 as against Urbancorp (Woodbine) Inc. ("**Woodbine**"), $6,230,764.08 as against Urbancorp (Bridlepath) Inc. ("**Bridlepath**") and $6,013,865.10 as against TCC Bay (collectively, the "**TFCC Claims**").

Ninth Report, Functionary's Motion Record, Tab 2, p. 19 at para. 33.

26. The TFCC Claims relate to guarantees and second mortgages which Woodbine, Bayview and TCC Bay provided to TFCC with respect to a loan from TFCC to Urbancorp Holdings Inc. ("**UHI**"), the parent company of UCI.

Ninth Report, Functionary's Motion Record, Tab 2, p. 19 at para. 34.

27. The TFCC Claims were disallowed (although the amounts of $216,898.98 as against Bridlepath and $499,009.85 against Woodbine were allowed as unsecured claims and have been paid out) on the basis, inter alia, that they constituted transfers at undervalue, fraudulent conveyances and were oppressive to TCC Bay's creditors.

Ninth Report, Functionary's Motion Record, Tab 2, p. 19 at para. 35.

28. TFCC has appealed the disallowance of its claim. The hearing of the appeal has been adjourned sine die.

Ninth Report, Functionary's Motion Record, Tab 2, p.19 at para. 36.

29. The Settlement Agreement provides a significant reduction in the TFCC Claim.

Ninth Report, Functionary's Motion Record, Tab 2, p. 20 at para. 40.

C. General Matters

30. All proven claims of the debtors have been paid in full other than certain inter-company claims (the "**Inter-Company Claims**"). Other than the Inter-Company Claims, the only remaining claims are disputed claims. Aside from the UCI Claim and the TFCC Claim, the Monitor has fully reserved for both the Inter-Company Claims and the remaining disputed claims. Among the disputed claims are claims by two former employees of UTMI (the "**Employee Claims**"). The Monitor has fully reserved $2.4 million for the Employee Claims in each of these proceedings, as well as in the companion Cumberland 1 proceedings.

Ninth Report, Functionary's Motion Record, Tab 2, p. 19 at para. 38.

31. UCI is the only remaining proven creditor in the Cumberland 1 proceedings, other than disputed claims which have been fully reserved in those proceedings. UCI has agreed that in the event the Settlement Agreement is approved by both this Honourable Court, as well as the Israeli Court, the Employee Claims can be satisfied from the monies reserved in Cumberland 1 and accordingly the reserves for such claims in these proceedings can be distributed to UCI.

Ninth Report, Functionary's Motion Record, Tab 2, pp. 19-20 at para. 38

32. The only other disputed claim remaining to be determined in these proceedings is a claim of Tarion Warranty Corporation for which the Monitor has fully reserved.

Ninth Report, Functionary's Motion Record, Tab 2, p. 20 at para. 39.

33. Other than UCI and TFCC, the only party with any potential financial interest in these proceedings and this Settlement Agreement is allegedly DS Bay, an entity Doreen Saskin purportedly owns. For DS Bay to have any entitlement to funds from these debtors one, or more likely, both of the UCI Bondholder Claim and the TFCC Claim would have to be disallowed. In

order for DS Bay to have any entitlement in priority to UCI, the Court would have to allow Doreen Saskin to benefit from the wrongful conduct (as so found by Mr. Justice Newbould) of her husband, Alan Saskin.

Ninth Report, Functionary's Motion Record, Tab C.

34. As the only potential creditors of these debtors, UCI and TFCC have agreed to a settlement which provides for: (a) a material reduction in TFCC's claim, (b) the allowance of UCI's claim, (c) distribution of funds to both TFCC, and UCI, (d) a release in favour of TFCC from UCI, and (e) protects the rights of other disputed creditors to a full recovery on their claims if valid. Approval of the Settlement Agreement will also avoid material litigation, enable these CCAA proceedings to be terminated in the near term and thereby save material further expense.

Minutes of Settlement, Functionary's Motion Record, Tab D, pp. 69-72.

PART III - LAW AND ARGUMENT

A. Settlement Approval

35. It is well-established that CCAA courts have jurisdiction to approve transactions, including settlements, in the course of overseeing proceedings during a CCAA stay period and prior to any plan of arrangement being proposed to creditors.

Nortel Networks Corporation, (Re), 2010 ONSC 1708 [*Nortel*], at para. 71; Book of Authorities of the Functionary ("**BoA**"), Tab 1;

Calpine Canada Energy Ltd., (Re), 2007 ABCA 266 [*Calpine*], at para. 23; BoA, Tab, 2;

Great Basin Gold Ltd., (Re), 2012 BCSC 1773 [*Great Basin Gold*], at para. 16; BoA, Tab 3;

Walter Energy Canada Holdings Inc., (Re), 2017 BCSC 1968 [*Walter Energy*], at para. 32; BoA, Tab 4.

36. Support for this jurisdiction is found, *inter alia*, in the broad jurisdiction of the court pursuant to section 11 of the CCAA to make any order that it considers appropriate, and in the inherent jurisdiction of the court to "fill the gaps" of the CCAA in order to give effect to its purpose.

Nortel at para. 68; BoA, Tab 1;

Calpine at para. 24; BoA, Tab 2;

Great Basin Gold at para. 13; BoA, Tab 3;

Walter Energy at para. 32; BoA, Tab 4.

37. In *Nortel*, Justice Morawetz set out the test for approving a settlement agreement in the CCAA context and held that a court may approve a settlement agreement if it is consistent with the spirit and purpose of the CCAA, and is fair and reasonable in all circumstances. What makes a settlement agreement fair and reasonable is its balancing of the interests of all parties; its equitable treatment of the parties, including creditors who are not signatories to a settlement agreement; and its benefit to the CCAA applicants and its stakeholders.

Nortel at para. 73; BoA, Tab 1.

38. Accordingly, when approving a settlement under the CCAA, the court must be satisfied that: (i) the transaction is fair and reasonable; (ii) the transaction will be beneficial to the debtor and its stakeholders generally; and (iii) that the settlement is consistent with the purpose and spirit of the CCAA.

Labourers' Pension Fund of Central and Eastern Canada v. Sino-Forest Corp., 2013 ONSC 1078, at para. 49; BoA, Tab 5;

Walter Energy, at para. 33; BoA, Tab 4. (The same test applies to the approval of settlement agreements that are primarily intended to resolve inter-creditor and disputed claims.)

39. In *Great Basin Gold*, the court approved a settlement agreement that was primarily intended to resolve a dispute between an ad hoc group of debenture holders and the debtor-in-possession ("**DIP**") lender to the CCAA applicants in order to allow for the continuation of the DIP financing. Applying the test set out in *Nortel,* Justice Fitzpatrick approved the settlement agreement, noting that "settlement agreements between parties in these types of proceedings are very much encouraged where resolutions take place in the boardrooms, as opposed to the courtroom. There is every reason to encourage such settlements, with approval and implementation subject to appropriate judicial oversight."

Great Basin Gold at para. 15; BoA, Tab 3.

40. Similarly, in *Walter Energy*, the court approved an agreement to settle a disputed creditor claim and to establish a distribution process on facts that are analogous to those at hand. The settlement agreement in *Walter Energy* was entered into by the applicants, the United Mine Workers of America 1974 Pension Plan and Trust ("**1974 Plan**") and Warrior Met Coal LLC ("**Warrior**"). 1974 Plan had asserted a significant $1.2 billion claim against the applicants which, if valid, would have consumed the majority of funds available for distribution to other creditors. Warrior had a claim against certain of the applicants' assets and was more likely recover on it if 1974 Plan's claim was invalid. The court ultimately determined that 1974 Plan's claim was invalid and 1974 Plan obtained leave to appeal that decision. The settlement was reached before the appeal was argued.

Walter Energy at para. 11; BoA, Tab 4.

41. Applying the above-noted test, the court held that the settlement agreement was fair and reasonable and consistent with the purpose and spirit of the CCAA on the basis that, *inter alia*, (i) the settlement removed a major impediment to distributions to creditors; (ii) allowing the litigation (1974 Plan's appeal) to proceed would cause significant delay and cost to the applicants, the monitor and the chief restructuring officer; (iii) the payments to 1974 Plan had no impact on distributions to creditors with allowed claims; and (iv) the settlement agreement provided a substantial benefit to the applicants' creditors.

Walter Energy at paras. 34 & 42; BoA, Tab 4.

42. Similar circumstances arise in the case at hand. The Settlement Agreement compromises the claims of TFCC and UCI, which are the only potential creditors of the Applicants that remain unpaid and in respect of whom a reserve has not been established. Aside from the UCI Bondholder Claim and the TFCC Claim, the Monitor has fully reserved for the remaining disputed claims.

43. Moreover, as in *Walter Energy*, the Settlement Agreement: (i) has no impact on creditors with proven claims as all proven claims have already been paid in full; (ii) removes a major impediment to the distribution of proceeds to creditors, and additionally, allows the Monitor to terminate the Bay CCAA Proceedings thereby reducing the cost thereof; (iii) avoids lengthy and costly litigation in respect of both the TFCC Claim and the UCI Bondholder Claim, as well as

the potential claim of UCI against TFCC; (iv) represents a reasonable settlement of significant claims against the Applicants; and (v) ensures that any of the disputed claims which are subsequently allowed will be paid in full.

44. The fact that the Settlement Agreement compromises significant claims and avoids complex and costly litigation is consistent with the purpose of the CCAA, which, as Justice Fitzpatrick notes in *Walter Energy*, can be "a testament to the ingenuity of the stakeholders and the flexibility that the CCAA affords in these difficult circumstances".

Walter Energy at para. 35; BoA, Tab 4.

45. For these reasons, the Settlement Agreement is fair and reasonable, accords with the purpose and spirit of the CCAA and, having satisfied the requisite test, should be approved.

B. Merits of UCI Claims

46. Although Part A should be sufficient to address approval of the Settlement Agreement, this part of the Factum addresses the validity of the UCI Bondholder Claim as showing a viable claim on the merits.

47. The tort of negligent misrepresentation requires five elements:

(i) A duty of care based on a "special relationship" exists between the representor and the representee.

(ii) The representation in question was untrue, inaccurate, or misleading.

(iii) The representor acted negligently in making the misrepresentation.

(iv) The representee reasonably relied on the misrepresentation.

(v) The reliance was detrimental to the representee in the sense that damages resulted.

Douglas J. Queen v. Cognos Incorporated, [1993] 1 S.C.R. 87 at para. 34; BoA, Tab 6;

Singh v. Trump, 2016 ONCA 747 at paras. 81-82 (leave to appeal refused, 2017 CarswellOnt 3575 (S.C.C.)); BoA, Tab 7.

48. As found by Mr. Justice Newbould, TCC Bay (and Alan Saskin) knew or ought to have known that the 2015 Promissory Notes were not valid or enforceable when it issued the 2015

Promissory Notes, which it knew formed part of the consideration for the Bond Issuance. Despite this, TCC Bay issued the 2015 Promissory Notes.

49. By issuing the 2015 Promissory Notes, TCC Bay, through Alan Saskin, expressly or impliedly represented that the notes were valid and enforceable. The issuance of the 2015 Promissory Notes created a false impression that there was a debt owing by TCC Bay to UCI.

50. A *prima facie* duty of care arises if (i) the circumstances disclose sufficient proximity between the parties such that the defendant's failure to take reasonable care might foreseeably cause harm to the plaintiff; and (ii) there are no policy concerns that arise from the relationship between the parties. If a *prima facie* duty of care is established, the next question is whether there are any residual policy considerations that ought to negate or limit that duty.

Cooper v. Hobart, 2001 SCC 79, [2001] 3 S.C.R. 537 at para. 30; BoA, Tab 8.

51. TCC Bay knew that the 2015 Promissory Notes formed part of the consideration for the Bond Issuance. Specifically, Alan Saskin expressly acknowledged that he received $8 million in equity in exchange for the assignment of the intercompany debt and the Promissory Notes. Therefore, it was reasonably foreseeable that the Bondholders would rely on the representation that an $8 million intercompany loan was owed to UCI, which was included as a current asset on the financial statements in the Prospectus, and that such reliance would be reasonable.

52. Saskin/TCC Bay owed a duty of care to UCI and the Bondholders not to issue the 2015 Promissory Notes in respect of debt that had been previously repaid. Saskin/TCC Bay was required to exercise reasonable care to ensure that the representations were accurate and not misleading. Saskin/TCC Bay were required to refrain from issuing the 2015 Promissory Notes when no debt from TCC Bay to UTMI remained. Instead, by issuing the 2015 Promissory Notes, TCC Bay made a misrepresentation that was negligent or reckless, and breached its duty of care to the Bondholders and UCI.

53. The plaintiff is not required to establish actual reliance with affirmative evidence however, as actual reliance may be inferred where the representation is one calculated, or would naturally tend, to induce the plaintiff to act upon it; the defendant bears the burden of rebutting the inference. The plaintiff in a negligent misrepresentation claim only has to prove that the

misrepresentation was at least one factor which induced the plaintiff to act to his or her detriment.

> *Kripps v Touch Ross & Co.* (1997), 33 BCLR (3d) 245, 1997 CarswellBC 925 at para. 103 (C.A.) (leave to appeal refused, 1997 WL 1932120 (S.C.C.)); BoA, Tab 9;
>
> *Soprema Inc. v. Wolrige Mahon LLP*, 2016 BCCA 471 at para. 17; BoA, Tab 10.

54. The 2015 Promissory Notes were a crucial element to the Bondholders' participation in the Bond Issuance. The references in the Prospectus to the $8 million intercompany loan being assigned to UCI, which was included as a current asset on the financial statements in the Prospectus, were based upon the issuance of the 2015 Promissory Notes to evidence this supposed loan. This was a single, uniform representation contained in the Prospectus, a statutorily-mandated disclosure document. The misrepresentation was one that was calculated or which would naturally tend to induce the Bondholders' to act upon it and, therefore, reliance may be inferred.

55. Furthermore, under applicable Israeli securities law, the Bondholders are deemed to have relied upon the misrepresentation contained in the Prospectus. Ontario law is similar.

> *Israeli Securities Law 5728-1968*, ss. 16, 32, *Ninth Report,* Functionary's Motion Record, Tab 2, p. 18 at para. 28;
>
> *Securities Act*, R.S.O. 1990, c. S.5, s.138.3.

56. A duty of care will exist where "as a matter of simple justice, the defendant may have been said to have had an obligation to be mindful of the plaintiff's interests in going about his or her business" and there is not a concern about indeterminate liability on the facts of the case. Indeterminate liability will be negated where the defendant knows of the plaintiff or a class of plaintiffs and where the defendant's statements are used for the specific purpose with which they were made.

> *Lavender v. Miller Bernstein,* 2017 ONSC 3958 at paras. 19 & 26; BoA, Tab 11;

57. Alternatively, as a matter of "simple justice", TCC Bay had an obligation to be mindful of the Bondholders' and UCI's interests in going about its business and therefore, owed them a duty of care. TCC Bay, through Alan Saskin, issued the 2015 Promissory Notes in order to

induce potential investors (i.e. the Bondholders) to invest in UCI. Clearly, UCI and the Bondholders were known to TCC Bay.

58. TCC Bay knew, or ought to have known, that negligently issuing the 2015 Promissory Notes when there was in fact no monies owing to UCI would expose the Bondholders' to the very loss that they incurred.

59. Therefore, it was reasonably foreseeable that TCC Bay's failure to take reasonable care in respect of the issuance of the 2015 Promissory Notes would result in harm to the Bondholders.

60. The tort of unlawful means conspiracy requires the following elements must be present:

(i) It acted in combination (with UCI and Saskin) – that is, in concert, by agreement or with a common design;

(ii) Its conduct was unlawful;

(iii) Its conduct is directed towards the plaintiffs;

(iv) The defendant should know that, in the circumstances, injury to the plaintiffs is likely to result; and

(v) Its conduct caused injury to the plaintiffs.

> *Agribrands Purina Canada Inc. v. Kasamekas*, 2011 ONCA 460 at para. 26; BoA, Tab 12.

61. The preparation of false records and reports by one contracting party to another satisfies the unlawful act test.

> *XY Inc. v. International Newtech Development Inc.*, 2013 BCCA 352 at para. 50; BoA, Tab 13.

62. TCC Bay, together with Alan Saskin, acted in concert, either by agreement or with a common design, for TCC Bay to issue the invalid 2015 Promissory Notes and for UCI to disclose the assignment of the intercompany loans in the Prospectus in order to obtain $8 million of equity in UCI. Had it been disclosed that there was no intercompany loan and that the Promissory Notes were issued when no debt owed, Saskin would have been required to provide an additional $8 million of equity.

63. At the time TCC Bay issued the 2015 Promissory Notes, it knew that the management fees owing by TCC Bay to UTMI had been paid and that there was no consideration underlying the 2015 Promissory Notes. Consequently, the 2015 Promissory Notes were a false record of the balance owing from TCC Bay to UTMI (and ultimately to UCI).

64. The Bondholders suffered losses as a result and are entitled to be restored to the position they would otherwise have been in as if the 2015 Promissory Notes had been outstanding.

C. Merits of the TFCC Claim

65. The merits of the TFCC Claim is separately addressed in the Factum TFCC has filed in connection with this motion.

RELIEF REQUESTED

66. For the foregoing reasons, the Functionary and TFCC respectfully requests that this Honourable Court grant Orders:

(a) Deeming the Functionary to have validly late filed a UCI Bondholder Claim on behalf of the Bondholders in the amount of $8 million to KSV, in its capacity as Monitor of TCC Bay in relation to the Promissory Notes, originally issued in favour of UTMI and then assigned by UTMI to RealtyCo for the benefit of UCI; and

(b) Approving the Settlement.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

April 20, 2018

DENTONS CANADA LLP

Lawyers for the Moving Party, Guy Gissin the Israeli Court-appointed functionary officer and foreign representative of Urbancorp Inc.

per.

THORNTON GROUT FINNIGAN LLP

Counsel for Terra Firma Capital Corporation

Schedule "A" – Table of Cases

1) *Nortel Networks Corporation, (Re),* 2010 ONSC 1708.

2) *Calpine Canada Energy Ltd., (Re),* 2007 ABCA 266.

3) *Great Basin Gold Ltd., (Re)*, 2012 BCSC 1773.

4) *Walter Energy Canada Holdings Inc.*, (Re), 2017 BCSC 1968.

5) *Labourers' Pension Fund of Central and Eastern Canada v. Sino-Forest Corp.*, 2013 ONSC 1078.

6) *Douglas J. Queen v. Cognos Incorporated,* [1993] 1 S.C.R. 87.

7) *Singh v. Trump,* 2016 ONCA 747.

8) *Cooper v. Hobart*, 2001 SCC 79.

9) *Kripps v Touch Ross & Co.* 1997 CarswellBC 952 (C.A.).

10) *Soprema Inc. v. Wolrige Mahon LLP*, 2016 BCCA 471.

11) *Lavender v. Miller Bernstein,* 2017 ONSC 3958.

12) *Agribrands Purina Canada Inc. v. Kasamekas*, 2011 ONCA 460.

13) *XY Inc. v. International Newtech Development Inc.*, 2013 BCCA 352.

Schedule "B" – Statutory Provisions

***Securities Act*, R.S.O. 1990, c S. 5**

Liability for secondary market disclosure

Documents released by responsible issuer

138.3 (1) Where a responsible issuer or a person or company with actual, implied or apparent authority to act on behalf of a responsible issuer releases a document that contains a misrepresentation, a person or company who acquires or disposes of the issuer's security during the period between the time when the document was released and the time when the misrepresentation contained in the document was publicly corrected has, without regard to whether the person or company relied on the misrepresentation, a right of action for damages against,

(a) the responsible issuer;

(b) each director of the responsible issuer at the time the document was released;

(c) each officer of the responsible issuer who authorized, permitted or acquiesced in the release of the document;

(d) each influential person, and each director and officer of an influential person, who knowingly influenced,

> (i) the responsible issuer or any person or company acting on behalf of the responsible issuer to release the document, or
>
> (ii) a director or officer of the responsible issuer to authorize, permit or acquiesce in the release of the document; and

(e) each expert where,

> (i) the misrepresentation is also contained in a report, statement or opinion made by the expert,
>
> (ii) the document includes, summarizes or quotes from the report, statement or opinion of the expert, and
>
> (iii) if the document was released by a person or company other than the expert, the expert consented in writing to the use of the report, statement or opinion in the document. 2002, c. 22, s. 185; 2004, c. 31, Sched. 34, s. 12 (1, 2).

Public oral statements by responsible issuer

(2) Where a person with actual, implied or apparent authority to speak on behalf of a responsible issuer makes a public oral statement that relates to the business or affairs of the responsible issuer and that contains a misrepresentation, a person or company who acquires or disposes of the issuer's security during the period between the time when the public oral statement was made and the time when the misrepresentation contained in the public oral statement was publicly corrected has, without regard to whether the person or company relied on the misrepresentation, a right of action for damages against,

(a) the responsible issuer;

(b) the person who made the public oral statement;

(c) each director and officer of the responsible issuer who authorized, permitted or acquiesced in the making of the public oral statement;

(d) each influential person, and each director and officer of the influential person, who knowingly influenced,

(i) the person who made the public oral statement to make the public oral statement, or

(ii) a director or officer of the responsible issuer to authorize, permit or acquiesce in the making of the public oral statement; and

(e) each expert where,

(i) the misrepresentation is also contained in a report, statement or opinion made by the expert,

(ii) the person making the public oral statement includes, summarizes or quotes from the report, statement or opinion of the expert, and

(iii) if the public oral statement was made by a person other than the expert, the expert consented in writing to the use of the report, statement or opinion in the public oral statement. 2002, c. 22, s. 185; 2004, c. 31, Sched. 34, s. 12 (3).

Influential persons

(3) Where an influential person or a person or company with actual, implied or apparent authority to act or speak on behalf of the influential person releases a document or makes a public oral statement that relates to a responsible issuer and that contains a misrepresentation, a person or company who acquires or disposes of the issuer's security during the period between the time when the document was released or the public oral statement was made and the time

when the misrepresentation contained in the document or public oral statement was publicly corrected has, without regard to whether the person or company relied on the misrepresentation, a right of action for damages against,

(a) the responsible issuer, if a director or officer of the responsible issuer, or where the responsible issuer is an investment fund, the investment fund manager, authorized, permitted or acquiesced in the release of the document or the making of the public oral statement;

(b) the person who made the public oral statement;

(c) each director and officer of the responsible issuer who authorized, permitted or acquiesced in the release of the document or the making of the public oral statement;

(d) the influential person;

(e) each director and officer of the influential person who authorized, permitted or acquiesced in the release of the document or the making of the public oral statement; and

(f) each expert where,

(i) the misrepresentation is also contained in a report, statement or opinion made by the expert,

(ii) the document or public oral statement includes, summarizes or quotes from the report, statement or opinion of the expert, and

(iii) if the document was released or the public oral statement was made by a person other than the expert, the expert consented in writing to the use of the report, statement or opinion in the document or public oral statement. 2002, c. 22, s. 185; 2004, c. 31, Sched. 34, s. 12 (4).

Failure to make timely disclosure

(4) Where a responsible issuer fails to make a timely disclosure, a person or company who acquires or disposes of the issuer's security between the time when the material change was required to be disclosed in the manner required under this Act or the regulations and the subsequent disclosure of the material change has, without regard to whether the person or company relied on the responsible issuer having complied with its disclosure requirements, a right of action for damages against,

(a) the responsible issuer;

(b) each director and officer of the responsible issuer who authorized, permitted or acquiesced in the failure to make timely disclosure; and

(c) each influential person, and each director and officer of an influential person, who knowingly influenced,

(i) the responsible issuer or any person or company acting on behalf of the responsible issuer in the failure to make timely disclosure, or

(ii) a director or officer of the responsible issuer to authorize, permit or acquiesce in the failure to make timely disclosure. 2002, c. 22, s. 185; 2004, c. 31, Sched. 34, s. 12 (5); 2006, c. 33, Sched. Z.5, s. 15.

Multiple roles

(5) In an action under this section, a person who is a director or officer of an influential person is not liable in that capacity if the person is liable as a director or officer of the responsible issuer. 2002, c. 22, s. 185; 2004, c. 31, Sched. 34, s. 12 (6).

Multiple misrepresentations

(6) In an action under this section,

(a) multiple misrepresentations having common subject matter or content may, in the discretion of the court, be treated as a single misrepresentation; and

(b) multiple instances of failure to make timely disclosure of a material change or material changes concerning common subject matter may, in the discretion of the court, be treated as a single failure to make timely disclosure. 2002, c. 22, s. 185; 2004, c. 31, Sched. 34, s. 12 (7).

No implied or actual authority

(7) In an action under subsection (2) or (3), if the person who made the public oral statement had apparent authority, but not implied or actual authority, to speak on behalf of the issuer, no other person is liable with respect to any of the responsible issuer's securities that were acquired or disposed of before that other person became, or should reasonably have become, aware of the misrepresentation. 2004, c. 31, Sched. 34, s. 12 (8).

Court File No. CV-16-11549-00CL

IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, C. c-36, AS AMENDED, AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF URBANCORP (WOODBINE) INC. AND URBANCORP (BRIDLEPATH) INC., THE TOWNHOUSES OF HOGG'S HOLLOW INC., KING TOWNS INC., NEWTOWNS AT KINGTOWNS INC. AND DEAJA PARTNER (BAY) INC. (COLLECTIVELY, THE "APPLICANTS") AND IN THE MATTER OF TCC URBANCORP (BAY) LIMITED PARTNERSHIP

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)
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