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**

FACTUM OF THE RESPONDENT, DS (BAY) HOLDINGS INC. (MOTION RET. MAY 1, 2018)

April 26, 2018

LAX O'SULLIVAN LISUS GOTTLIEB LLP
Counsel
Suite 2750, 145 King Street West
Toronto, ON M5H 1J8

Matthew P. Gottlieb LSUC#: 32268B
mgottlieb@counsel-toronto.com
Tel: 416 644 5353

Andrew Winton LSUC#: 54473I
awinton@counsel-toronto.com
Tel: 416 644 5342

Fax: 416 598 3730

Lawyers for the Respondent,
DS (Bay) Holdings Inc.

TO: Service List

PART I - INTRODUCTION

1. A corporation with a disallowed claim against a CCAA debtor meets with the foreign representative of foreign claimants who also have a disallowed claim against the same CCAA debtor, and together these parties (neither with a proven claim in the CCAA debtor's estate) divide up the debtor's residual estate between them. This is not the beginning of a poorly-conceived insolvency joke – this is the premise for the moving parties' motion before this Court.

2. The issue on this motion is whether this Court should approve a "settlement" of the moving parties' claims against the Applicant TCC/Urbancorp (Bay) Limited Partnership ("Bay LP") when the claims remain unproven under the Court-approved claims process.

3. In the case of one party ("Terra Firma"), the claim was disallowed by the Monitor and Terra Firma has not pursued its motion before this Court to overturn the disallowance.

4. The other party ("Gissin") is a Court-appointed foreign representative of foreign claimants whose initial claim was disallowed by the Monitor. Gissin's motion to overturn the disallowance was dismissed by this Court. Last June, Gissin brought a motion to file a second, late claim, but that motion has not yet been heard by this Court and no provable claim has been filed with, or evaluated by, the Monitor. Notably, Gissin's new claim is identical to a claim that this Court held a few months was too complicated to determine on a summary basis in an Ontario bankruptcy proceeding.

5. In both cases, the moving parties seek to bypass the Court-ordered process for proving their claims and to avoid scrutiny by the Monitor of their claims.

6. DS (Bay) Holdings Inc. ("DS Bay") is a limited partner in Bay LP with a priority claim to any distributions to Bay LP's partners, and thus it is a stakeholder with an interest in the outcome of this motion. DS Bay's position is that this Court should not approve the moving parties' settlement, which short-circuits the claims process for no good reason and seeks approval of claims without sufficient proof that the claims have merit.

7. That is not to say that the residual assets of Bay LP should be paid immediately to DS Bay. DS Bay's position is that the moving parties should be required to follow this Court's Orders, including the Claims Procedure Order, by proving their claims in accordance with the process set out in that Order, before they can claim any right to the assets of Bay LP.

PART II - SUMMARY OF FACTS

8. Many of the undisputed facts relevant to this motion are summarized in the 13th Report of KSV Kofman Inc., in its capacity as the CCAA Monitor for Bay LP (the "Monitor"). Other facts are based on the undisputed affidavit of evidence of Brandon Hodge, a tax professional at MNP LLP, the external accounting firm for DS Bay, and on materials already filed in this proceeding or other Urbancorp-related court actions, both before this Court and before the Israeli court.

9. In contrast to these undisputed sources of evidence, Gissin seeks to rely on his ninth "report" to the Court to set out "facts" relating to his new claim against Bay LP, including facts concerning Israeli securities law. As explained below, Gissin's "report" is inadmissible for the truth of its statements and cannot be relied on by this Court as evidence in this motion.

(A) BAY LP AND DS BAY

10. Bay LP is a limited partnership that was started in 1999. Bay LP owned, through nominee corporations, various real estate projects, including projects known as the "Woodbine Property" and the "Bayview Property".[1]

11. The Woodbine Property and the Bayview Property were sold during NOI proceedings that were converted into this CCAA proceeding. The proceeds generated from the sales of the properties were used to fund distributions to creditors of Bay LP and to fund the costs of the proceedings.[2]

12. DS Bay is a 20% limited partner of Bay LP, with a contractual right to a priority return of earnings and partners' distributions.[3]

(B) DISPUTED CLAIMS, DISALLOWED CLAIMS, LATE CLAIM

(i) The Claims Process Established by the Claims Procedure Order

13. In October 2016, this Court issued a Claims Procedure Oder establishing a claims process for the identification and quantification of claims against, among others, Bay LP (the "Claims Process"). The Order was made without opposition by any party.[4]

14. Pursuant to the Claims Process:

(a) Any Claimant that intends to assert a Pre-Filing Claim shall file a Proof of Claim with the Monitor on or before the Claims Bar Date, regardless of whether or not a

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[1] Thirteenth Report of the Monitor dated February 21, 2018 ("Monitor's 13th Report"), ¶2.2(1).
[2] Monitor's 13th Report, ¶2.2(2).
[3] Monitor's 13th Report, ¶2.2(3)-(4).
[4] Claims Procedure Order; RMR, Tab 5, p. 649.

legal proceeding in respect of such Pre-Filing Claim has been previously commenced;

(b) The Monitor shall review all Proofs of Claim and shall accept, revise or reject each Claim;

(c) Any Claimant who intends to dispute a Notice of Revision or Disallowance shall deliver a Notice of Dispute of Revision or Disallowance to the Monitor and, if the dispute is not settled, the Monitor shall refer the dispute to a Claims Officer or the Court for adjudication at its election; and

(d) The Monitor may refer any Claim to a Claims Officer or the Court for adjudication at its election at any time.[5]

15. After October 2016, the Monitor ran the Claims Process in accordance with the Claims Procedure Order. As of February 15, 2018, Bay LP had already paid out over $8.5 million in admitted claims and its liquid assets consisted of approximately $11.5 million in cash. In addition, there were approximately $13 million in disputed claims, including a $10 million disputed claim submitted by Terra Firma.[6]

[5] Claims Procedure Order, ¶25, 33, 36, and 38; RMR, Tab 5, pp. 664, 667, and 668. All capitalized terms are defined in the Claims Procedure Order.
[6] Monitor's 13th Report, ¶2.2.1(1)-(3).

(ii) Terra Firma's Claim Disallowed by the Monitor

16. In accordance with the Claims Process, Terra Firma filed a claim in respect of guarantees granted to it by Bay LP relating to a balance outstanding on a loan made by Terra Firma to Urbancorp Holdings Inc. ("UHI"), the parent company of Urbancorp Inc. ("UCI").[7]

17. The Monitor disallowed Terra Firma's claim on the basis that, among other things:

(a) Bay LP was insolvent at the date of the loan to UHI;

(b) Bay LP received no benefit or consideration in granting the guarantee;

(c) Terra Firm was aware both before and at the time the UHI loan was made of the Urbancorp Group's financial circumstances generally and Bay LP's specifically; and

(d) The granting of the guarantee was oppressive, unfairly prejudicial to or unfairly disregarded the interests of Bay LP's other creditors.[8]

18. On May 8, 2017, Terra Firma brought a motion to set aside the Monitor's disallowance of its claim. The motion was adjourned *sine die* at the request of Terra Firma.[9]

19. To date, Terra Firma's motion has still not been heard, meaning that in accordance with the Claims Process, it does not have a proven claim against Bay LP.

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[7] Monitor's 13th Report, ¶2.4(1).
[8] Monitor's 13th Report, ¶2.4(2).
[9] Monitor's 13th Report, ¶2.3(4).

(iii) UCI's Claim Disallowed by the Monitor, Motion to Overturn Dismissed

20. In addition to the allowed claims, paid claims, and disputed claims summarized above, Gissin filed claims on behalf of UCI totalling approximately $8 million in this proceeding. The claims were based on promissory notes issued by Bay LP in favour of Urbancorp Toronto Mangement Inc. ("UTMI"), which assigned the promissory notes to UCI.[10]

21. The Monitor disallowed UCI's claim on the basis that Bay LP was not indebted to UTMI at the time the promissory notes were issued. Following the Claims Process, UCI brought a motion to set aside the disallowance of its claim. That motion was dismissed by this Court on May 11, 2017.[11]

(iv) UCI Moves to File Late Claim – Motion Adjourned Sine Die

22. UCI did not seek leave to appeal from the Court's disallowance. Instead, on June 23, 2017, Gissin filed a motion seeking to late file an $8 million claim on the basis of misrepresentations in the UCI Israeli prospectus concerning the promissory notes.[12] On June 27, 2017, Gissin's motion to late file the claim was adjourned *sine die*.[13]

23. As a result of the adjournment, leave to file a late claim has not yet been granted, a proof of claim has not been filed, and the merits of the proposed claim have not been evaluated by the Monitor in accordance with the Claims Process.

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[10] Monitor's 13th Report, ¶2.3(1).
[11] Monitor's 13th Report, ¶2.3(2)-(3).
[12] Gissin's Notice of Motion is attached at RMR, Tab 6.
[13] Monitor's 13th Report, ¶2.3(4). See also RMR, Tab 7 for the Court's endorsement adjourning the motion.

24. UCI and Gissin are in the same position as Terra Firma in respect of this proceeding – the moving parties have failed to prove their claims in accordance with the Claims Process and neither party has a proven claim in the Bay LP estate.

(C) DS BAY'S TAX LIABILITY

25. As a result of the sale of the Woodbine Property and the Bayview Property, Bay LP generated taxable income of approximately $12.9 million for the year ended December 31, 2016, of which approximately $12.6 million was allocated to DS Bay.[14]

26. As a result of this allocation, DS Bay currently has an estimated tax liability of approximately $3.2 million. This tax liability will be payable to Canada Revenue Agency regardless of whether or not any distribution of proceeds is actually made to DS Bay by Bay LP.[15]

27. Because DS Bay has no other assets or sources of income other than its partnership interest in Bay LP, in the event that no distribution to DS Bay is made to Bay LP, DS Bay will be insolvent, with a significant debt owing to Canada Revenue Agency.[16]

(D) THE ISRAELI ACTION

(i) UCI Raises Funds through an Israeli Prospectus under Israeli Securities Law

28. In December 2015, UCI issued bonds on the Israeli market through a prospectus issued in Israel (the "Prospectus"). The securities sold through the Prospectus were not sold in Ontario or

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[14] Monitor's 13th Report, ¶2.5(5).
[15] Affidavit of Brandon Hodge, sworn April 9, 2018 ("Hodge Affidavit), ¶6; Responding Motion Record ("RMR"), Tab 1, p. 2.
[16] Hodge Affidavit, ¶7; RMR, Tab 1, pp. 2-3.

any other jurisdiction in Canada, with express limitations on distribution to Ontario residents so as to avoid the application of Ontario securities legislation.[17]

29. The Prospectus repeatedly provided that the law governing the deed of trust and its appendices, including the bonds, is Israeli law, and the sole court with jurisdiction to consider matters related to the deed of trust and its appendices, and the bonds, shall be the court in Tel Aviv-Jaffa. The only Ontario laws that applied were the OBCA and Canadian bankruptcy law.[18]

30. The Prospectus repeatedly provided that UCI, its controlling shareholder (Alan Saskin) and the officers of UCI attorned to the local jurisdiction of the Court in Israel in connection with any proceeding brought by the trustee or the bondholders, and they agreed to provide written undertakings of their attornment to the Israeli courts.[19] No such express provision applied to, and no such written undertaking was sought from or given by, Bay LP, DS Bay, or Doreen Saskin.

31. The Prospectus was signed by UCI and its three directors: Alan Saskin, David Mandell and Phillip Gales.[20] Bay LP, DS Bay and Doreen Saskin did not sign the Prospectus and there is no representation from them in the Prospectus concerning any statement made therein.

(ii) Gissin Commences an Action in Israel against Doreen Saskin and Others

32. In June 2017, Gissin commenced an action in Israel against Alan Saskin, Doreen Saskin, UHI, Urbancorp Management Inc., and others, in which he alleges that the defendants are liable for breach of undertakings they undertook in favour of UCI (the "Israeli Action"). In the Israeli

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[17] Affidavit of M. Lilly Iannacito, sworn April 10, 2018 ("Iannacito Affidavit"), Exhibit "A" ("Prospectus"); RMR, Tab 2-A, pp. 23-25.
[18] Prospectus; RMR, Tab 2-A, pp. 166, 207, 434 and 493.
[19] *Ibid.*, pp. 166-67, 207, 434-35 and 493.
[20] *Ibid.*, p. 515.

Action, Gissin seeks damages on a joint and several basis of approximately NIS 95 million (approximately C$34 million).[21]

33. Doreen Saskin has not defended the Israeli Action. Instead, in November 2017, she filed a motion to vacate leave to effect service outside Israel – in effect, a motion contesting the Israeli court's jurisdiction over her.

34. In her motion materials, among other things, Doreen notes that:

(a) She did not sign the Prospectus;

(b) She did not make any representation or undertaking within the prospectus or sign any document confirming or creating an undertaking on her part;

(c) There is no evidence that:

(i) She created the alleged undertaking ascribed to her in the Israeli Action;

(ii) She consented to the alleged undertaking;

(iii) She had any knowledge of the undertaking; or

(iv) She is a party to an agreement formed in Israel.[22]

[21] Iannacito Affidavit, Exhibit "B"; RMR, Tab 2-B.
[22] Iannacito Affidavit, Exhibit "C", ¶4.2-4.5 & 14; RMR, Tab 2-C, p. 551-52 and 553.

35. After Doreen Saskin's motion was filed, Gissin sought, with Ms. Saskin's consent, numerous extensions to the deadline by which he was required to deliver his response to the motion. Gissin claimed he required these extensions due to the workload in his office.[23]

36. More recently, after DS Bay objected to the joint motion before this Court to approve Gissin's settlement agreement with Terra Firma, Gissin delivered another motion to extend the time to respond to Doreen Saskin's jurisdiction motion to a date after the motion before this Court was scheduled to be heard. In his motion materials, Gissin wrote:

> [Together] with her motion and her attempt to avoid her responsibility for the Company's collapse and her breach of her duties to it which are the subject of these proceedings, Ms. Saskin is currently taking action in Canada in order to add insult to injury in an attempt to harm the approval of the creditor arrangement that is being led by the official who is seeking to obtain recognition and actual payment of the debt claim in the sum of C$8 million that was filed by the official in the framework of the Canadian insolvency proceedings for TCC/Urbancorp (Bay) Limited Partnership (hereinafter: "TCC Bay"). To the best of the official's knowledge, Ms. Saskin is the sole person objecting to the arrangement and is the only current obstacle to payment of the debt claim according to the provisions of the creditor arrangement that has been submitted to the Canadian courts, as shall be specified in Chapter B, below.[24]

37. Gissin's description of Doreen Saskin's conduct in bringing the jusrisdiction motion demonstrates that, in the Israeli court, he is not a neutral bystander, but rather he is a partisan player who is vigorously pursuing a claim on behalf of the bondholders:

> To the official's dismay, intentionally and unlawfully, Ms. Saskin is chosen to refrain from presenting any position justifying her Motion to Rescind Leave to Effect Service, or prove that she bears no responsibility for the collapse of the Company and the breach of the

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[23] Iannacito Affidavit, ¶5; RMR, Tab 2, p. 6.
[24] Iannacito Affidavit, Exhibit "D"; RMR, Tab 2-D, p. 599.

> undertakings given by her and by her husband in order to raise bonds from the Israeli public.
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> [...]
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> This is a motion that contains not less than 37 pages(!) and is written in a twisted manner by means of denying the official's claims or blatantly and improperly attempting to create a misleading impression that this is a version of the facts, without alleging them, in a foolish attempt to leave her conduct shrouded in fog and to avoid providing an affidavit as required of Ms. Saskin.[25]

38. Gissin's partisan approach is most evident in his direct attacks on Ms. Saskin's character and motivations. He is, both in Ontario and Israel, a zealous advocate for the bondholders on whose behalf he seeks a recovery.

(iii) Gissin Seeks Leave to Continue the Israeli Action against Alan Saskin

39. Alan Saskin delivered a Notice of Intention to make a Proposal under the *BIA*, which stayed all creditors' enforcement actions against him.

40. Prior to the bringing of the current motion concerning Bay LP, Gissin brought a motion to lift the stay against Mr. Saskin to continue, among other things, the Israeli Action against him.[26]

41. In reasons for decision granting Gissin's motion, this Court held:

> No one disagrees that the stay ought to be lifted to allow the claims to be heard and quantified. The two Israeli claims readily meet the requisite test applicable to a motion of this type. [Citation omitted.] **Many of the causes of action alleged against Mr. Saskin would not be discharged in a bankruptcy. They are complex. They involve Israeli securities law and a very complicated set of dealings among numerous sophisticated parties in a substantial transaction. There is no efficiency and much risk of prejudice in hiving off the claims against Mr. Saskin from those against his related parties or those against the third parties associated with the bond underwriting.** In both pieces of litigation, Mr. Saskin is

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[25] *Ibid.*; RMR, Tab 2-D, pp. 600-601.

[26] Reasons for Decision of Justice Myers dated January 22, 2018 ("Lift Stay Reasons"), ¶1; RMR, Tab 8, p. 689.

> the key player. His presence is necessary. **A summary process under the BIA would not suffice as it would not catch the other parties and because the adjudication of the claims requires full procedural rights and time that is not generally available in a BIA summary proceeding.** [Emphasis added.][27]

PART III - STATEMENT OF ISSUES, LAW & AUTHORITIES

42. DS Bay does not dispute that in proper circumstances, this Court has the jurisdiction to approve a settlement agreement during a CCAA stay period and prior to any plan of arrangement being proposed to creditors. The issue to determine on this motion is whether the Court should approve the proposed joint settlement between Terra Firma and Gissin when neither party has proven their respective claims against Bay LP.

43. DS Bay agrees with the moving parties' articulation of the accepted test for determining when a settlement agreement can be approved – the agreement has to be consistent with the spirit and purpose of the CCAA and fair and reasonable in all circumstances. What makes a settlement fair and reasonable is:

(a) Its balancing of the interests of all parties;

(b) Its equitable treatment of the parties; and

(c) Its benefit to the Applicant and its stakeholders generally.[28]

44. DS Bay submits that the proposed settlement does not meet this test for the following reasons:

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[27] Lift Stay Reasons, ¶6; RMR, Tab 8, p. 690.
[28] *Nortel Networks Corp. (Re),* 2010 ONSC 1708 at ¶73. Moving Parties' Joint Book of Authorities, Tab 1.

(a) Terra Firma and Gissin seek to bypass the Claims Process set out in the Claims Procedure Order to avoid scrutiny of their claims by the Monitor, and thus seek special treatment of their claims as compared to every other parties' claims;

(b) Gissin's purported claim is unsupported by required expert evidence to supports his allegation that DS Bay is liable to the UCI bondholders under Israeli law; and

(c) Approval of the proposed settlement before Terra Firma's and Gissin's claims have been properly proven in accordance with the Claims Procedure Order prejudices DS Bay's right to the residual proceeds of the Bay LP estate.

(A) CLAIMANTS MUST FOLLOW THE CLAIMS PROCEDURE ORDER TO PROVE THEIR CLAIMS

45. The CCAA process is one of building blocks. It cannot be disputed that in a CCAA proceeding, it is essential that the Court's Orders be respected and followed. This especially applies to a Claims Procedure Order, which sets out in detail the framework to be followed to quantify claims. It is not appropriate for parties to the proceeding to try to change the rules to benefit their interests, at the expense of other stakeholders, in midstream.[29]

46. Terra Firma and Gissin seek to ignore this basic principle of fairness under the CCAA by ignoring the steps claimants are required to follow under the Claims Procedure Order in order to prove their claims. The Claims Procedure Order expressly states how a claimant with a disallowed claim should seek to overturn the disallowance – the claimant is required to deliver a Notice of Dispute of Revision or Disallowance to the Monitor, following which, if the Monitor and the

[29] *Target Canada Co. (Re)*, 2016 ONSC 316, ¶81-84.

claimant cannot resolve the dispute, the Monitor shall refer the dispute to a Claims Officer or the Court for adjudication.[30]

(i) Terra Firma Does not Have a Proven Claim

47. Terra Firma's claim was disallowed by the Monitor, which means, at present, it does not have a proven claim against Bay LP and therefore it is not a creditor. In order to become a creditor, Terra Firma was required to have its disallowance overturned by this Court.

48. Terra Firma was aware of the process it was required to follow and it began to follow that process – it served a notice of motion and factum in support of a motion to overturn the disallowance of its claim. However, before the Monitor could deliver a responding factum, Terra Firma intentionally chose to adjourn that motion *sine die*, and the motion remains on hold.

49. Terra Firma therefore does not have a proven claim and, consequently, is not currently a creditor of Bay LP.

(ii) Gissin Does not Have a Proven Claim

50. Likewise, Gissin has not proven a claim and is not a creditor of Bay LP. Gissin's initial claim was disallowed by the Monitor and its motion to overturn the disallowance was dismissed by this Court. Gissin did not appeal that decision – instead, it brought a motion seeking to file a late claim after the Claims Bar Date.

51. That motion was never heard – instead, as with Terra Firma's motion, the motion was adjourned *sine die*.

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[30] Claims Procedure Order, ¶36.

52. On this motion, Gissin does not just seek to file a late claim, he also seeks to have the claim allowed for the full amount claimed. Like Terra Firma, Gissin seeks to bypass the entire Claims Procedure Order. If this motion is granted, Gissin will be permitted to avoid having to file a proof of claim and having the Monitor evaluate the validity of his claim, as required under the Claims Procedure Order. These are more than just procedural steps – these are substantive steps imposed on every Claimant under the Order to ensure that claims are subject to equal scrutiny.

(B) GISSIN'S CLAIM CANNOT BE ALLOWED BY THIS COURT

53. While DS Bay should not be in the position of having to respond to either Terra Firma's or Gissin's claim on the merits, it is notable that Gissin's claim is not supported by essential evidence he needs to prove before his claim can be allowed.

54. On this motion, Gissin seeks to prove his claim by reference to Ontario securities law when it is undisputed that the Prospectus is governed by Israeli securities law and Ontario law does not apply.

55. Moreover, there is insufficient evidence to support Gissin's bald claim that Bay LP would be liable to the UCI bondholders under Israeli securities law. Gissin seeks to adduce evidence concerning Israeli securities law in his "report", but that evidence is inadmissible for several reasons, including because it is not properly put before the Court by way of affidavit and because Gissin is unqualified to provide expert evidence of foreign law.

(i) Gissin's "Report" is not Evidence

56. In the Ontario CCAA proceedings, Gissin is the foreign representative of UCI. He is not an officer of this Court. His role as foreign representative is limited to keeping the Court informed of any material steps taken in UCI's Israeli insolvency proceeding. His Court-appointed function

does not include advancing claims in domestic CCAA proceedings on behalf of foreign claimants. To the extent Gissin pursues such claims, he is no different than any other claimant seeking to prove a claim in this proceeding.

57. While Gissin may hold himself out as an officer of this Court, his conduct on this motion falls far beyond the conduct expected of a court officer.

58. An officer of the court is the Court's "eyes and ears," with a mandate to act independently to assist the court in its supervisory role. An officer is not an advocate for any party in the *CCAA* process.[31]

59. In this motion, Gissin is intensely partisan – he is advancing a claim against DS Bay. He does not seek to assist the Court. Rather, in this motion, he has removed his cloak of officer of the court to put on a different cloak, one of a party with an interest in the outcome of the motion.

60. In his capacity as an advocate on behalf of the UCI bondholders advancing a claim against DS Bay, Gissin cannot file "reports" that purport to adduce evidence on contested matters. He is required, like any other party to a motion, to follow the *Rules of Civil Procedure* and to adduce evidence by way of a sworn affidavit. Having failed to do so, Gissin's "evidence" is inadmissible and cannot be considered by this Court.

61. Nor can this Court treat Gissin's report as an affidavit. The report contains several statements that are inadmissible as argument. It is, in essence, a factum that argues the merits of the proposed late claim. It is not an affidavit.

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[31] *Pine Valley Mining Corp. (Re)*, 2008 BCSC 446, ¶10-12.

(ii) Foreign Law in Gissin's Report is Inadmissible

62. Gissin's report purports to argue issues of Israeli securities law in support of his claim. His efforts to do so are inadmissible and, in any event, do not address the key issue in his claim, which is whether under Israeli securities law, a non-signatory to a prospectus (in this case, Bay LP) can be held liable for alleged misrepresentations in that prospectus.

63. It is trite law that a party seeking to have a claim resolved through reliance on foreign law must plead the material facts of his or her foreign law claim or defence, and the onus of proof is on the party pleading the foreign law. The content of foreign law is an issue of fact, and must be specifically pleaded and proved by expert evidence. In the absence of expert opinion evidence on foreign law, parties may not rely on it.[32]

64. In this case, Gissin is not qualified to provide the Court with an expert opinion on Israeli securities law. Recent case law confirms that the Court is required to determine the admissibility of expert opinion evidence through a two-step analysis:

(a) The proponent of the evidence must establish the threshold *Mohan* requirements of admissibility (relevance, necessity, absence of an exclusionary rule and a properly qualified expert); and

(b) the Court then balances the potential risks and benefits of admitting the evidence in order to decide whether the potential benefits justify the risks.[33]

65. As the Court of Appeal held in *Alfano v Piersanti*, as a matter of common sense, a court will look to the question of the expert's independence or objectivity as part of the exercise of

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[32] *Das v. George Weston Limited*, 2017 ONSC 4129, ¶200-205.
[33] *Fortress Real Developments Inc. v Franklin*, 2018 ONSC 296, ¶36.

determining the expert's evidence will be helpful. A biased expert is unlikely to provide useful assistance. To the extent he is not neutral and objective, he is not properly qualified to give expert opinions.[34]

66. It is not helpful to the Court for an expert opinion to parrot the position of the client – an expert's opinion should not be a platform from which to argue the client's case. If the court determines that an expert witness has not met the requirements to be neutral and objective, then the court has the discretion to exclude the evidence.[35]

67. The court will strike in its entirety the evidence of a putative expert witnesses who does not sign an acknowledgement of an expert's duties, who does not claim to be neutral, unbiased or unpartisan in his or her evidence, and who is not tendered as a qualified expert.[36]

68. In this case, the only "evidence" of Israeli securities law is contained in Gissin's report and is inadmissible. In the absence of admissible evidence on this point, this Court cannot assume that Gissin's claim against Bay LP has merit. The claim requires a finding, under Israeli law, that a non-party to a prospectus is liable for a misrepresentation in that prospectus. This is not an obvious point of law – it is highly technical, and requires proof in the form of admissible expert evidence.

(iii) Bay LP not Liable Under Ontario Securities Law

69. Moreover, even if the Court were to apply Ontario securities law (which it cannot under the terms of the Prospsectus), Gissin has not proven that Bay LP is liable for a misrepresentation in the Prospectus.

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[34] *Alfano v Piersanti*, 2012 ONCA 297, ¶105 and 107.
[35] *Ibid.* at ¶108 and 111.
[36] *Lockridge v. Ontario (Director, Ministry of the Environment)*, 2012 ONSC 2316, ¶96.

70. Subsection 130(1) of the Ontario *Securies Act* lists the persons who are potentially liable for misrepresentation in a prospectus. Liability is limited to:

(a) The issuer or selling security holder on whose behalf the distribution is made;

(b) Each underwriter of the securities;

(c) Every director of the issuer at the time the prospectus was filed;

(d) Every person or company whose consent to disclosure of information in the prospectus has been filed pursuant to the regulations, but only with respect to reports, opinions or statements made by them; and

(e) Every person or company who signed the prospectus.[37]

71. Bay LP does not fit into any of these categories. Thus, even under Ontario law, Gissin has not proven that the bondholders have a valid claim against Bay LP on the basis of an alleged misrepresentation in the Prospectus and the claim cannot be allowed at this stage of the proceeding.

(iv) Gissin's Claim is Too Complicated to Determine on a Summary Basis

72. In addition or in the alternative, Gissin's claim is too complicated to determine on a summary basis. That was the finding of this Court in a related proceeding (Alan Saskin's NOI proceeding), and it remains equally applicable in the context of the current motion before this Court.[38]

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[37] *Securities Act*, RSO 1990, c. S.5, s. 130(1).
[38] Endorsement of Justice Myers dated January 22, 2018, ¶6; RMR, Tab 8, p. 690.

73. Earlier this year, Gissin sought this Court's approval to continue an action in Israel against Alan Saskin in which it is alleged that Mr. Saskin, Doreen Saskin, and others, breached Israeli securities law in relation to the Prospectus. The Israeli Action is still in its early stages – the defendants have not yet filed a defence and it is unclear whether the action will be permitted to continue as against Doreen Saskin.

74. It would be unfair for this Court to determine in one insolvency proceeding that Gissin's claim is too complicated to determine summarily, while in another proceeding, allow the same claim to be determined in a summary fashion based. The Court should not apply a double standard within related proceedings to the same claim.

75. On this basis alone, the Court should refuse to allow Gissin's new claim and the motion should be dismissed.

(v) The Settlement Prejudices the Interests of DS Bay

76. DS Bay is the beneficiary of the equitable interest in Bay LP, and as such is a stakeholder with in an interest in this proceeding. It is one of the parties whose interests must be taken into account by the Court when it determines whether it is fair and reasonable to approve the settlement between Terra Firma and Gissin.

77. It is clearly unfair and unreasonable for this Court to approve a settlement among two parties who both have unproven claims against Bay LP. The cases the moving parties rely on in support of their motion can all be distinguished by an important fact – they all involved settlements where at least one of the settling parties had a proven claim that it was agreeing to compromise.

78. In the present case, both Terra Firma and Bay LP have unproven claims. The Monitor has not taken a position on the motion and neither supports nor opposes the settlement. Nor does Bay LP support the settlement. This case is clearly different from past cases where settlements were approved by the CCAA Court prior to finalization of a Plan of Arrangement.

79. In this case, approval of the settlement will permit the moving parties to bypass the Claims Process ordered by this Court, to the prejudice of Bay LP. That would be manifestly unfair, as it is clear from the Monitor's reasons for disallowing the Terra Firma claim, and from the obvious defects in Gissin's claim, that neither claim is guaranteed to succeed.

80. DS Bay does not claim an automatic or immediate right to the assets of Bay LP. All it asks is that the moving parties be required to follow the Claims Process this Court ordered all claimants to follow, without exceptions. If one or both claims are allowed under the proper process, then DS Bay will have no cause for complaint. But the current motion seeks to stretch the elastic discretion of a CCAA Court too far.

PART IV - ORDER REQUESTED

81. For the reasons submitted, DS Bay respectfully requests that this motion be dismissed.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 26th day of April, 2018.

Andrew J. Winton

LAX O'SULLIVAN LISUS GOTTLIEB LLP
Counsel
Suite 2750, 145 King Street West
Toronto, ON M5H 1J8

Matthew P. Gottlieb LSUC#: 32268B
mgottlieb@counsel-toronto.com
Tel: 416 644 5353

Andrew Winton LSUC#: 54473I
awinton@counsel-toronto.com
Tel: 416 644 5342

Fax: 416 598 3730

Lawyers for the Respondent,
DS (Bay) Holdings Inc.

SCHEDULE "A"

LIST OF AUTHORITIES

1. *Target Canada Co. (Re)*, 2016 ONSC 316.

2. *Pine Valley Mining Corp. (Re)*, 2008 BCSC 446.

3. *Das v. George Weston Limited*, 2017 ONSC 4129.

4. *Fortress Real Developments Inc. v Franklin,* 2018 ONSC 296.

5. *Alfano v Piersanti*, 2012 ONCA 297.

6. *Lockridge v. Ontario (Director, Ministry of the Environment)*, 2012 ONSC 2316.

SCHEDULE "B"

TEXT OF STATUTES, REGULATIONS & BY - LAWS

1. *Securities Act*, RSO 1990, c. S.5, s. 130(1).

Liability for misrepresentation in prospectus

130 (1) Where a prospectus, together with any amendment to the prospectus, contains a misrepresentation, a purchaser who purchases a security offered by the prospectus during the period of distribution or during distribution to the public has, without regard to whether the purchaser relied on the misrepresentation, a right of action for damages against,

(a) the issuer or a selling security holder on whose behalf the distribution is made;

(b) each underwriter of the securities who is required to sign the certificate required by section 59;

(c) every director of the issuer at the time the prospectus or the amendment to the prospectus was filed;

(d) every person or company whose consent to disclosure of information in the prospectus has been filed pursuant to a requirement of the regulations but only with respect to reports, opinions or statements that have been made by them; and

(e) every person or company who signed the prospectus or the amendment to the prospectus other than the persons or companies included in clauses (a) to (d),

or, where the purchaser purchased the security from a person or company referred to in clause (a) or (b) or from another underwriter of the securities, the purchaser may elect to exercise a right of rescission against such person, company or underwriter, in which case the purchaser shall have no right of action for damages against such person, company or underwriter.

2. *Rules of Civil Procedure*, RRO 1990, Reg 194.

Rule 4.1 Duty of Expert

4.1.01 (1) It is the duty of every expert engaged by or on behalf of a party to provide evidence in relation to a proceeding under these rules,

(a) to provide opinion evidence that is fair, objective and non-partisan;

(b) to provide opinion evidence that is related only to matters that are within the expert's area of expertise; and

(c) to provide such additional assistance as the court may reasonably require to determine a matter in issue.

Rule 39 Evidence on Motions and Applications

39.01 (1) Evidence on a motion or application may be given by affidavit unless a statute or these rules provide otherwise.

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., et al.
Applicants

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

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

PROCEEDING COMMENCED AT
TORONTO

FACTUM OF THE RESPONDENT, DS (BAY) HOLDINGS INC. (MOTION RETURNABLE MAY 1, 2018)

LAX O'SULLIVAN LISUS GOTTLIEB LLP
Counsel
Suite 2750, 145 King Street West
Toronto, ON M5H 1J8

Matthew P. Gottlieb LSUC#: 32268B
mgottlieb@counsel-toronto.com
Tel: 416 644 5353

Andrew Winton LSUC#: 54473I
awinton@counsel-toronto.com
Tel: 416 644 5342

Fax: 416 598 3730

Lawyers for the Respondent, DS (Bay) Holdings Inc.