

**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.
URBANCORP (BRIDLEPATH) INC., THE TOWNHOUSES
OF HOGG'S HOLLOW INC., KING TOWNS INC.,
NEWTOWNS AT KING TOWNS INC. AND DEAJA
PARTNER (BAY) INC. (COLLECTIVELY, THE
"APPLICANTS")**

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

**FACTUM OF THE MOVING PARTY,
TERRA FIRMA CAPITAL CORPORATION**

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PART I - NATURE OF THE MOTION

1. This factum is delivered in support of a Motion brought by Terra Firma Capital Corporation ("TFCC") for an Order:
 - (a) setting aside the disallowance of the proof of claim (the "**Woodbine Claim**") that TFCC received from KSV Kofman Inc. ("**KSV**" or the "**Monitor**"), in its capacity as monitor of Urbancorp (Woodbine) Inc. ("**Woodbine**") dated December 14, 2016 in relation to the second mortgage registered as instrument YR2411107 (the "**Woodbine Second Mortgage**") and allowing the claim against Woodbine in full;

- (b) setting aside the disallowance of the proof of claim (the “**Bridlepath Claim**”) that TFCC received from KSV, in its capacity as monitor of Urbancorp (Bridlepath) Inc. (“**Bridlepath**”) dated December 14, 2016 in relation to the second mortgage registered as instrument AT4107508 (the “**Bridlepath Second Mortgage**”) and allowing the claim against Bridlepath in full;
 - (c) setting aside the disallowance of the proof of claim (the “**Bay Claim**”) that TFCC received from KSV in its capacity as monitor of TCC/Urbancorp (Bay) Limited Partnership (“**Bay LP**”) dated December 14, 2016 in relation to the General Security Agreement (the “**Bay GSA**”) and Guarantee and Postponement of Claim (the “**Bay Guarantee**”) provided by Bay LP to TFCC and allowing the claim against Bay LP in full;
 - (d) confirming the validity and enforceability of the Woodbine Second Mortgage, the Bridlepath Second Mortgage, the Bay GSA and the Bay Guarantee (collectively, the “**TFCC Security**”); and
 - (e) directing the Monitor of Woodbine, Bridlepath and Bay LP (together, the “**Guarantors**”) to make an immediate distribution of all amounts owing to TFCC in respect of the TFCC Security.
2. Capitalized terms used herein and not otherwise defined have the meaning given to them in the affidavit of Glenn Watchorn sworn May 8, 2017 (the “**First Watchorn Affidavit**”), the affidavit of Glenn Watchorn sworn February 14, 2018 (the “**Second Watchorn Affidavit**”), and the tenth report of the Monitor dated July 25, 2017 (the “**Tenth Report**”).

PART II - THE FACTS

3. The relevant parties mentioned in this factum are:
- (a) Urbancorp Holdco Inc. (“**UHI**”), a holding company established to hold all the issued shares of UCI, with 100 common shares outstanding owned by Saskin and with five classes “A” through “E” of special shares;
 - (b) Urbancorp Inc. (“**UCI**”), a wholly owned subsidiary of UHI that completed a \$64 million bond offering in Tel Aviv;
 - (c) TFCC, the lender of \$10,000,000 to UHI and holder of the TFCC Security granted by the Guarantors pursuant to the March Loan (as defined below);
 - (d) Alan Saskin (“**Saskin**”), the principal of UHI, Limited Partner of Bay LP;
 - (e) Doreen Saskin, the sole owner and shareholder of Vestaco (defined below);
 - (f) Bay LP, the beneficial owner of the Woodbine Property and the Bridlepath Property and the owner of 100% of Class D shares of UHI;
 - (g) Deaja Partner (Bay) Inc. (“**Deaja**”), the General Partner of Bay LP;
 - (h) Vestaco Investments Inc. (“**Vestaco**”), a Limited Partner of Bay LP;
 - (i) Woodbine, a corporation whose sole owner and shareholder is Bay LP and is a bare trustee that held the Woodbine Property in trust for Bay LP pursuant to a certain trust declaration; and

- (j) Bridlepath, a corporation whose sole owner and shareholder is Bay LP and is a bare trustee that held the Bridlepath Property in trust for Bay LP pursuant to a certain trust declaration.

December Loan

- 4. Pursuant to a letter of interest dated December 22, 2015 and a letter agreement dated December 22, 2015, TFCC agreed to provide UHI with a loan (the “**December Loan**”) in the amount of \$12,000,000 (the “**December Funds**”) to provide UHI with funds to enhance the equity capital of UCI. Pursuant to the terms of the December Loan: (i) Bay LP agreed to provide the Bay Guarantee and the Bay GSA in favour of TFCC; (ii) Woodbine agreed to provide TFCC with the Woodbine Second Mortgage; and (iii) Bridlepath agreed to provide TFCC with the Bridlepath Second Mortgage.

First Watchorn Affidavit at para. 4, Motion Record of TFCC, Tab B.

- 5. The December Funds were placed in escrow, in a jointly controlled account, pending satisfaction of the terms and conditions of the Original Loan. The December Funds were never received by UHI.
- 6. In or around February, 2016, Saskin advised TFCC that the December Loan did not meet UHI’s requirements. As a result, the December Loan was cancelled and the \$12,000,000 in funds were returned to TFCC without payment of the loan fee or any accrued interest. However, the security interest registrations related to the TFCC Security were never discharged.

First Watchorn Affidavit at paras. 5 and 6, Motion Record of TFCC, Tab B.

March Loan

7. Notwithstanding the cancellation of the December Loan, TFCC and Saskin continued to engage in discussions regarding new financing on amended terms and conditions. These discussions culminated in a new offer of financing by TFCC to UHI pursuant to the terms of a letter of interest dated March 6, 2016 (the “**March Loan**”).

First Watchorn Affidavit at para. 6, Motion Record of TFCC, Tab B.

8. Pursuant to the terms of the March Loan, TFCC agreed to loan UHI \$10,000,000 (the “**March Funds**”) for the purpose of providing UHI with funds to enhance the equity capital of UCI, which funds were to be paid by UCI to the Canada Revenue Agency (the “**CRA**”) to pay outstanding Harmonized Sales Tax (“**HST**”) in respect of certain assets owned by a wholly owned subsidiary of UCI. UHI was the sole borrower of the March Loan. Among other related parties, Bay LP, Woodbine and Bridlepath were parties to the March Loan and executed the letter agreement.

First Watchorn Affidavit at para. 7, Motion Record of TFCC, Tab B.

9. As an additional term of the March Loan, UHI, Bay LP, Woodbine and Bridlepath, among others, executed an acknowledgment regarding the TFCC Security that was executed and registered in relation to the December Loan. Through the acknowledgment, the parties acknowledged and agreed to the existence of the TFCC Security provided in connection with the December Loan and that the TFCC Security would secure the indebtedness of UHI with respect to the March Loan.

First Watchorn Affidavit at para. 12, Motion Record of TFCC, Tab B.

10. TFCC made the March Loan conditional on the delivery of officer's certificates and certified directors' resolutions which confirmed the validity and enforceability of the security granted by UHI, Woodbine, Bridlepath and Bay LP.

First Watchorn Affidavit at paras. 13 and 14, Motion Record of TFCC, Tab B.

TFCC Claims

11. On November 22, 2016, TFCC filed separate secured claims against Woodbine, Bridlepath and Bay LP in the amounts of \$6,512,875, \$6,230,764 and \$6,013,865, respectively (collectively, the "**TFCC Claims**"). The majority of each claim (\$6,013,865) represented the balance of the March Loan at the time.

Tenth Report of the Monitor at Section 3.0, para. 1.

12. On December 14, 2016, the Monitor delivered to TFCC Notices of Revision or Disallowance in respect of the TFCC Claims (the "**Disallowances**"). The Monitor advised counsel for TFCC that the Disallowances were based on the Monitor's concerns that Woodbine, Bridlepath and Bay LP did not receive consideration as part of the March Loan.

First Watchorn Affidavit at para. 21, Motion Record of TFCC, Tab B.

13. Contrary to the Monitor's concerns regarding consideration for the TFCC Security, Bay LP received consideration for providing TFCC with the Bay LP Guarantee and the Bay LP GSA. The recitals to the Bay Guarantee provide:

WHEREAS TERRA FIRMA CAPITAL CORPORATION (hereinafter called the "**Lender**") has advanced funds or is about to advance funds to Urbancorp Holdco Inc. (hereinafter called the "**Borrower**") and in consideration of your intention to advance the said funds to the Borrower, and other good and valuable

consideration and the sum of Two (\$2.00) Dollars, the receipt and sufficiency of which are hereby acknowledged, each of the undersigned, (each hereinafter called a “**Guarantor**”) hereby declares, covenants and agrees as follows:

Bay Guarantee, Motion Record of TFCC, Tab B-4.

14. At all materials times, TFCC understood that the March Loan was for a legitimate business purpose and that the March Loan was duly authorized as set out in the officers certificates and directors resolutions. The March Loan was executed in good faith and the advance of the March Funds was valuable consideration in return for the TFCC Security granted by the Guarantors.

First Watchorn Affidavit at para. 23, Motion Record of TFCC, Tab B.

PART III - THE ISSUES

15. The issues on this Motion are as follows:
- (a) Did TFCC provide good and valuable consideration in exchange for the TFCC Security?
 - (b) Is the March Loan and TFCC Security a Transfer at Undervalue pursuant to section 96(1) of the *Bankruptcy and Insolvency Act*?
 - (c) Should this Court void the March Loan and TFCC Security pursuant to the *Fraudulent Conveyances Act* (Ontario)?
 - (d) Should this Court void the March Loan and TFCC Security pursuant to the *Assignment and Preferences Act* (Ontario)?

PART IV - THE LAW

ISSUE 1: **Good and valuable consideration was provided by TFCC in exchange for the TFCC Security.**

16. In *U.S. Steel Inc., Re*, the Ontario Superior Court of Justice held that if consideration is required for a security interest granted by a general security agreement to be effective, it was satisfied in the following three ways:

First, the October Security Agreement recites that consideration was given, the receipt and sufficiency of which is acknowledged by both parties to the Agreement. It is an elementary principle that courts will not enter into an inquiry as to the adequacy of consideration.

Second, [...] the third recital to the October Security Agreement recites, in effect, that Credit Corp required the provision of security as a condition of continued advances under the Revolver Loan Agreement.

...

Third, I am also of the opinion that any lack of consideration for the October Security Agreement was cured by the actual advances of monies under the Revolver Loan Agreement comprising the Second Tranche Indebtedness. If the execution of the October Security Agreement and the advance of monies had occurred concurrently, there would have been no issue regarding a lack of consideration. The advance of monies itself would have satisfied any requirement for consideration under the October Security Agreement.

U.S. Steel Canada Inc., Re, 2016 ONSC 569 at paras. 397 – 400, Book of Authorities of TFCC (“BOA”), Tab 1.

17. TFCC submits that good and valuable consideration was provided in exchange for the TFCC Security for the following reasons:
- (a) the recitals of the Bay Guarantee provide that good and valuable consideration was acknowledged;

- (b) the March Loan required all security to be in place to the full and complete satisfaction of TFCC; and
- (c) TFCC advanced the March Funds to UHI.

**First Watchorn Affidavit at paras. 7 and 12.
Bay Guarantee, Motion Record of TFCC, Tab B-4.**

18. It is well-established law that a promise to one party is sufficient consideration to guarantee the indebtedness of a third party to the promisor. In *Royal Bank v. Kiska*, the Ontario Court of Appeal considered a situation where a bank agreed to forbear from enforcement proceedings against the debtor but required the defendant to provide the bank with a guarantee. The Court held:

The law is clear, even trite, that a promise of forbearance for no defined period is sufficient consideration for a guarantee of a third person's indebtedness to the promisor and that the guarantee, where given in writing, is enforceable against the guarantor although the benefit of the promise runs to the principal debtor only.

***Royal Bank v. Kiska*, 1967 CarswellOnt 125 at para. 28 (per Laskin J.A., dissenting on other grounds), BOA, Tab 2.**

19. In *Manufacturers & Traders Trust Co. v. Amlinger*, the Court observed at the outset that consideration for a promise can consist of a benefit conferred on a third party. In this case, the Court held that a creditor's forbearance from enforcing a loan and agreeing to restructure the loan facility was adequate consideration for a guarantee from a non-debtor.

***Manufacturers & Traders Trust Co. v. Amlinger*, 2006 CarswellOnt 5238 at para. 33, BOA, Tab 3.**

20. Consideration with respect to a mortgage was considered in *Maocheia v. Amado*. The plaintiff executed a mortgage in favour of the defendant and, sixteen years later, challenged

the validity of the mortgage on the basis that no consideration was provided. The Court described the approach to assessing whether consideration had been provided as follows:

Consideration between two parties executing a security agreement such as a promissory note or a mortgage can be evidenced in a number of ways: there can be a benefit conferred on the mortgagor; there can be a detriment incurred by the mortgagee; or there can be a benefit provided to a third party that otherwise would not have existed. [emphasis added]

Maocheia v. Amado, 2010 BCSC 429 at para. 62, BOA, Tab 4.

21. In connection with the March Loan, TFCC advanced \$10,000,000 to UHI to enhance the equity capital of UCI and to allow for the payment of outstanding HST amounts owed by UCI to the CRA.

First Watchorn Affidavit at para. 7, Motion Record of TFCC, Tab B.

22. In the Tenth Report, the Monitor recognizes that the provision of the TFCC Security by the Guarantors were conditions precedent to the March Loan. Without the TFCC Security and accompanying acknowledgments, the March Funds would not have been advanced to UHI.

Tenth Report of the Monitor at Section 2.4, para. 7.

23. The consideration given by TFCC to Bay LP, Woodbine and Bridlepath was the advance of the March Funds to UHI pursuant to the March Loan. It is adequate consideration in that it provides a benefit to a related third party that otherwise would not have existed. The benefit is the advance of \$10 million to UHI that was used for the purpose outlined in the March Loan.

24. In the Tenth Report, the Monitor relies on the opinion of Davies Ward Phillips & Vineberg LLP (“**Davies**”) which opined that no consideration passed from TFCC to the Guarantors in exchange for the mortgages. The Davies opinion relies on *XDG Ltd. v. 1099606 Ontario Ltd.*

Tenth Report of the Monitor, Appendix D, pages 6 - 9.
XDG Ltd. v. 1099606 Ontario Ltd., 2002 CarswellOnt 4535 [“*XDG*”], BOA, Tab 5.

25. The facts in *XDG* are distinguishable. The case considers a guarantee and mortgage provided by a numbered company (“**109**”) in favour of a lender to secure the indebtedness of a related party (“**Euro United**”). The Court held that no consideration had been given to 109 as the sole purpose of these documents was to secure past indebtedness of Euro United. The further cash advances that the lender made were merely a continuation under the revolving letter of credit.

Ibid at para. 51.

26. As described above, the provision of security was for a fresh advance of funds through the March Loan. The TFCC Security was granted in consideration for the advance of the March Funds and not consideration for past indebtedness. As described above, the December Funds held in escrow were returned to TFCC when the December Loan was cancelled.

ISSUE 2: The March Loan and TFCC Security cannot be found to be a transfer at undervalue pursuant to section 96 of the *Bankruptcy and Insolvency Act*.

- (a) **TFCC provided good and valuable consideration by advancing \$10 million in cash pursuant to the March Loan.**

27. Section 96(2) of the *Bankruptcy and Insolvency Act* (“**BIA**”) provides:

In making the application referred to in this section, the trustee shall state what, in the trustee's opinion, was the fair market value of the property or services and what, in the trustee's opinion, was the value of the actual consideration given or received by the debtor, and the values on which the court makes any finding under this section are, in the absence of evidence to the contrary, the values stated by the trustee.

Bankruptcy and Insolvency Act, R.S.C., 1985, c. B-3 ["BIA"].

28. As described further in paragraphs 16 through 26, separate consideration is not required to flow to a guarantor or another party providing security to a creditor for a fresh advance of funds. TFCC provided a cash injection of \$10 million to UHI as consideration for the TFCC Security.

First Watchorn Affidavit at paras. 7 and 12.

29. It is impossible for the Monitor to establish that the actual consideration given to UHI is less than the fair market value. The TFCC Security cannot be valued at an amount greater than the outstanding obligations owed by UHI to TFCC and in any event, TFCC could not claim more from the Guarantors than the amount of indebtedness owed pursuant to the terms of the March Loan.

(b) TFCC and UHI dealt with each other at arm's length

30. In the alternative, if the Court finds that the TFCC Security was transferred to TFCC at undervalue, the Monitor must meet the test set out in section 96(1) of the BIA. First, the Monitor must establish whether or not TFCC dealt with UHI at arm's length.
31. Section 4(5) of the BIA presumes that persons who are related to each other are deemed not to deal with each other at arm's length. For the purpose of paragraph 96(1)(b) of the

BIA, the persons are deemed not to deal with each other at arm's length in the absence of contrary evidence.

BIA, section 4(5).

32. Two entities are defined as related persons if:

(i) both are controlled by the same person or group of persons, (ii) each of which is controlled by one person and the person who controls one of the entities is related to the person who controls the other entity, (iii) one of which is controlled by one person and that person is related to any member of a related group that controls the other entity, (iv) one of which is controlled by one person and that person is related to each member of an unrelated group that control the other entity, (v) one of which is controlled by a related group a member of which is related to each member of an unrelated group that controls the other entity, or (vi) one of which is controlled by an unrelated group each member of which is related to at least one member of an unrelated group that controls the other entity.

BIA, section 4(2)(c).

33. TFCC and UHI do not fall under any of the categories described above. If two entities are not related, it is a question of fact whether someone is at arm's length.

BIA, section 4(4).

34. Both the December Loan and the March Loan were heavily negotiated between TFCC and UHI and reflected commercial terms agreed upon by two arm's length parties. Further, the stringent conditions precedent and the cancellation of the December Loan evidences that TFCC and UHI acted at all times at arm's length from each other.

(c) **Transfer at Undervalue**

35. Since TFCC and UHI acted at arm's length, the Monitor must prove that: (i) the transfer occurred within one year of the initial bankruptcy event or the date of bankruptcy, (ii) UHI or the Guarantors were insolvent at the time of the transfer or was rendered insolvent by the transfer, and (iii) that UHI or the Guarantors intended to defraud, defeat or delay a creditor.
36. TFCC does not dispute that the March Loan occurred within one year of the initial bankruptcy event and that UHI and the Guarantors were cash-flow insolvent at the time of the March Loan.
37. The Monitor cannot demonstrate that UHI or the Guarantors intended to defraud, defeat or delay any creditors by granting the TFCC Security required pursuant to the March Loan. As described above, the funds that UHI received by entering into the March Loan made cash available to UHI and its related parties under the corporate structure.
38. Whether the intent to defraud, defeat or delay a creditor exists is a question of fact, to be determined from all the circumstances as they existed at the time of the conveyance.

Montor Business Corp. (Trustee of) v. Goldfinger, 2016 ONCA 406 at para. 72
[*"Montor"*], BOA, Tab 6.

39. The intent to defraud, defeat or delay a creditor may be inferred from the existence of one or more badges of fraud, although the presence of such indicia does not mandate a finding of intent.

Ibid at para. 72.

40. Jurisprudence on the topic have developed a non-exhaustive list of badges of fraud, These include:
- (a) the transferor has few remaining assets after the transfer;
 - (b) the transfer was made to a non-arm's length person;
 - (c) the transferor was facing actual or potential liabilities, was insolvent, or about to enter a risky undertaking;
 - (d) the consideration for the transaction was grossly inadequate;
 - (e) the transferor remained in possession of the property for his own use after the transfer;
 - (f) the deed of transfer contained a self-serving and unusual provision;
 - (g) the transfer was secret;
 - (h) the transfer was effected with unusual haste; or
 - (i) the transaction was made in the face of an outstanding judgment against the debtor.

Ibid at para. 73.

41. The only badge of fraud that may apply is that the debtor was insolvent at the time the March Loan was executed. However, insolvency in of itself is not the sole determining factor. The debtor must have been facing actual or potential liabilities or the debtor was about to enter into a risky undertaking. Neither of those facts are present in this case.
42. The test to void a transaction under section 96 of the BIA has not been met because TFCC provided good and valuable consideration in the form of the March Funds to UHI.

43. In the alternative, if the Court does not find that TFCC provided good and valuable consideration, the Monitor cannot demonstrate that there was an intent to defraud, defeat or delay any creditors of UHI or the Guarantors. The officers and the directors of UHI and the Guarantors delivered both certificates and resolutions, which confirmed the validity and enforceability of the TFCC Security and provided the requisite authorization for the March Loan. Although the effect of the March Loan allowed TFCC to become a secured creditor of the Guarantors, this was a term of the business deal and TFCC provided an advance of the March Funds in exchange.
44. As a result of the foregoing, TFCC submits that the March Loan cannot be voided through the application of section 96 of the BIA and the TFCC Security is valid and enforceable.

ISSUE 3: The March Loan and TFCC Security cannot be voided under the *Fraudulent Conveyances Act*.

45. In the Tenth Report, the Monitor recommended that the Court set aside and declare the TFCC Security as unenforceable pursuant to the *Fraudulent Conveyances Act* (Ontario) (the “FCA”). Section 2 of the FCA provides:

Every conveyance of real property or personal property and every bond, suit, judgment and execution heretofore or hereafter made with intent to defeat, hinder, delay or defraud creditors or others of their just and lawful actions, suits, debts, accounts, damages, penalties or forfeitures are void as against such persons and their assigns.

Fraudulent Conveyances Act, R.S.O 1990, c F.29 [“FCA”], section 2.

46. The FCA defines a conveyance as any gift, grant, alienation, bargain, charge, encumbrance, limitation of use or uses of, in, to or out of real or personal property by writing or otherwise.

FCA, section 1.

47. Section 3 of the FCA carves out section 2 if an interest in real property or personal property is conveyed upon good consideration and in good faith to a person that, at the time of the conveyance, did not have notice or knowledge of the conveyors intent to defeat, hinder, delay or defraud its creditors.

(b) The TFCC Security was conveyed upon good consideration and in good faith

48. Good consideration does not have to be for the full value of the property being transferred, but it must be more than nominal or completely inadequate consideration.

Meeker Cedar Products Ltd. v. Edge, 1968 CarswellBC 6 at para. 8, BOA, Tab 7.

49. As described above in paragraphs 8 to 10, TFCC provided a cash advance of \$10 million to UHI, a related party to the Guarantors, in exchange for the TFCC Security. Therefore, the consideration passing from TFCC to UHI was sufficient and cannot be found to be either nominal or completely inadequate consideration for the conveyance of the TFCC Security.

50. Once it is established that good consideration was provided for the conveyance, the onus is on the party attacking the transaction to demonstrate that there was fraudulent intent by both parties for the transaction to be void.

Bank of Nova Scotia v. Bass, 1983 CarswellMan 28 at para. 7, BOA, Tab 8.

51. The March Loan was negotiated and executed in good faith by TFCC. At no material time did TFCC have knowledge that the March Loan was intended to defeat, hinder, delay or

defraud any creditors of the Guarantors. The March Loan provides that the purpose of the March Funds was to enhance the equity capital of UCI and pay outstanding HST owed by UCI to the CRA. At all material times, TFCC viewed the March Loan as a transaction that was entered into to assist UHI, UCI and their related entities.

52. Pursuant to section 3 of the FCA, this Court cannot void the March Loan and the TFCC Security because TFCC provided good consideration in good faith and had no knowledge of any illicit intent on behalf of the Guarantors.

(c) The TFCC Security was not granted with the intent to defeat, hinder, delay or defraud creditors of the Guarantor.

53. In the alternative, if this Court does not find that TFCC provided good consideration in good faith for the TFCC Security granted to TFCC by the Guarantors, there is a rebuttable presumption that the TFCC Security was not granted with the intent to defeat, hinder, delay or defraud creditors of the Guarantor. To rebut this presumption, there must be suspicious circumstances that raise a *prima facie* presumption of intent to hinder, defeat or defraud a creditor. In such circumstances, the Court may find such intent unless the presumption is displaced by corroborative evidence of the *bona fides* of the debtor in the suspect transaction.

Prodigy Graphics Group Inc. v. Fitz-Andrews, 2000 CarswellOnt 1178 at para. 154, BOA, Tab 9.

54. There are no suspicious circumstances in this case that create a presumption of intent to hinder, defeat or defraud the Guarantors' creditors. Instead, TFCC promised to advance UHI money if the Guarantors provided the TFCC Security. At all times, this was an

ordinary course commercial transaction that was negotiated between two commercially sophisticated parties.

55. As discussed above in paragraph 38, the question of whether there was an intent to defraud creditors is one of fact, which must be decided on the merits of a particular cases. Presence of any of the badges of fraud outlined in paragraph 40 are strong indicators that there was an intent to defraud.

Montor, supra at para. 73, BOA, Tab 6.

56. TFCC submits that none of the above described badges of fraud are present in these circumstances. Further, for the reasons described in paragraphs 41 and 42, no facts exist that indicate there was any intent by the Guarantors to defeat, hinder, delay or defraud its creditors.
57. The March Loan and the TFCC Security should not be voided under the FCA because TFCC provided good and valuable consideration in the form of the March Funds. Further, for the reasons provided above, the test to void a transaction under the FCA has not been met as the Monitor cannot demonstrate that there was an intent to defeat, hinder, delay or defraud creditors of UHI or the Guarantors. None of the badges of fraud are present in these facts and there are no additional facts that suggest any intent by UHI or the Guarantors to defeat, hinder, delay or defraud their creditors. As stated above, the TFCC Security was provided as a term of the business deal negotiated between TFCC, UHI and the Guarantors.

58. As a result of the foregoing, TFCC submits that the March Loan cannot be voided through the application of section 2 of the FCA and the TFCC Security is valid and enforceable.

ISSUE 4: The March Loan is not voidable under the *Assignment and Preferences Act*.

59. In its Tenth Report, the Monitor states that the March Loan should be voided pursuant to section 4 of the *Assignments and Preferences Act* (Ontario) (“**APA**”). Section 4(1) of the APA provides that subject to section 5 of the APA, every conveyance, assignment or transfer of any property, real or personal, made by a person when insolvent or unable to pay the person’s debts in full or when the person that that he, she or it is on the eve of insolvency, with the intent to defeat, hinder, delay or prejudice creditors, is void as against the creditor or creditors injured, delayed or prejudiced.

Assignments and Preferences Act, R.S.O 1990, c. A.33, section 4(1) [*“APA”*].

60. Section 5 of the APA provides that nothing in section 4(1) applies to a conveyance, assignment, or transfer of any goods, real or personal, if it is made in good faith in consideration of a present actual payment of money or by way of security for a present actual advance of money.

APA, section 5(1).

61. As described above in paragraphs 8 to 10, TFCC provided an advance of \$10 million to UHI in exchange for the Guarantors granting the TFCC Security. This commercial transaction was negotiated and executed in good faith and TFCC submits that section 5(1) of the APA applies. Therefore, the Monitor cannot rely on section 4(1) of the APA to void the March Loan.

(b) There was no intent to give TFCC, as a creditor, a preference over other creditors

62. In the alternative, if the Court does not find that TFCC provided consideration for the TFCC Security in good faith, there was no intent to give TFCC an unjust preference over other creditors.

APA, section 4(2).

63. Section 4(3) of the APA provides that if a transaction with a creditor has the effect of giving that creditor a preference over the other creditors of the debtor, it shall be presumed, in the absence of evidence to the contrary, to have been made with the intent to give that creditor an unjust preference over other creditors. This is limited to any action or proceedings that are brought within sixty days to impeach or set aside such transaction.

APA, section 4(3).

64. This Court cannot presume that there was an intent to give TFCC an unjust preference over other creditors of the Guarantors. The purpose of section 4 of the APA is to protect existing creditors of a debtor against such debtor unfairly preferring one creditor to others. Although other entities of the Urbancorp Group were indebted to TFCC when the March Loan was advanced, the TFCC Security did not put TFCC in a better priority position with respect to the other indebtedness. The TFCC Security only secured the amounts owing under the March Loan. Therefore, the March Loan and the TFCC Security did not have the effect of giving TFCC a preference over other creditors of the debtor.

65. Without any presumption of intent, the burden falls on the Monitor to prove to the Court that the Guarantors provided the TFCC Security with an intent to unfairly prejudice its

other creditors. The Court will consider the presence of any of the badges of fraud outlined in paragraph 40. As described above, TFCC submits that there are no facts that support the presence of any of the badges of fraud.

66. The Monitor is unable to establish the Guarantor's intent to unfairly prejudice its other creditors because TFCC would not have advanced the March Funds if the Guarantors were not willing to provide the TFCC Security. This is not an attempt by the Guarantors to unfairly prefer TFCC over their other creditors. Instead, UHI secured additional financing for use by its related entities and a condition to that financing was the TFCC Security.
67. The March Loan and the TFCC Security cannot be voided under the APA because TFCC provided good and valuable consideration in the form of the March Funds. Further, for the reasons provided above, the test to void a transaction under the APA has not been met as the Monitor cannot demonstrate that there was an intent to unfairly prejudice its other creditors in favour of TFCC.
68. As a result of the foregoing, TFCC submits that the March Loan cannot be voided through the application of 4 of the APA and the TFCC Security is valid and enforceable.

PART V - RELIEF REQUESTED

69. In light of the foregoing, TFCC respectfully requests that this Court set aside the disallowances by the Monitor regarding the TFCC Claims, confirm the validity of the TFCC Security and to direct the Monitor to make an immediate distribution of all amounts owing to TFCC relating to the TFCC Security.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 14th day of February, 2019.

February 14, 2019

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TAB A

**SCHEDULE “A”
LIST OF AUTHORITIES**

1. *U.S. Steel Canada Inc., Re*, 2016 ONSC 569.
2. *Royal Bank v. Kiska*, 1967 CarswellOnt 125.
3. *Manufacturers & Traders Trust Co. v. Amlinger*, 2006 CarswellOnt 5238.
4. *Maocheia v. Amado*, 2010 BCSC 429.
5. *XDG Ltd. v. 1099606 Ontario Ltd.*, 2002 CarswellOnt 4535.
6. *Montor Business Corp. (Trustee of) v. Goldfinger*, 2016 ONCA 406.
7. *Meeker Cedar Products Ltd. v. Edge*, 1968 CarswellBC 6.
8. *Bank of Nova Scotia v. Bass*, 1983 CarswellMan 28.
9. *Prodigy Graphics Group Inc. v. Fitz-Andrews*, 2000 CarswellOnt 1178.

TAB B

**SCHEDULE “B”
RELEVANT STATUTES**

Assignments and Preferences Act, R.S.O. 1990, c. A.33

Nullity of gifts, transfers, etc., made with intent to defeat or prejudice creditors

4(1) Subject to section 5, every gift, conveyance, assignment or transfer, delivery over or payment of goods, chattels or effects, or of bills, bonds, notes or securities, or of shares, dividends, premiums or bonus in any bank, company or corporation, or of any other property, real or personal, made by a person when insolvent or unable to pay the person’s debts in full or when the person knows that he, she or it is on the eve of insolvency, with intent to defeat, hinder, delay or prejudice creditors, or any one or more of them, is void as against the creditor or creditors injured, delayed or prejudiced.

Unjust preferences

4(2) Subject to section 5, every such gift, conveyance, assignment or transfer, delivery over or payment made by a person being at the time in insolvent circumstances, or unable to pay his, her or its debts in full, or knowing himself, herself or itself to be on the eve of insolvency, to or for a creditor with the intent to give such creditor an unjust preference over other creditors or over any one or more of them is void as against the creditor or creditors injured, delayed, prejudiced or postponed.

When there is presumption of intention if transaction has effect of unjust preference

4(3) Subject to section 5, if such a transaction with or for a creditor has the effect of giving that creditor a preference over the other creditors of the debtor or over any one or more of them, it shall, in and with respect to any action or proceeding that, within sixty days thereafter, is brought, had or taken to impeach or set aside such transaction, be presumed, in the absence of evidence to the contrary, to have been made with the intent mentioned in subsection (2), and to be an unjust preference within the meaning of this Act whether it be made voluntarily or under pressure.

Assignments for benefit of creditors and good faith sales, etc., protected

5(1) Nothing in section 4 applies to an assignment made to the sheriff for the area in which the debtor resides or carries on business or, with the consent of a majority of the creditors having claims of \$100 and upwards computed according to section 24, to another assignee resident in Ontario, for the purpose of paying rateably and proportionately and without preference or priority all the creditors of the debtor their just debts, nor to any sale or payment made in good faith in the ordinary course of trade or calling to an innocent purchaser or person, nor to any payment of money to a creditor, nor to any conveyance, assignment, transfer or delivery over of any goods or property of any kind, that is made in good faith in consideration of a present actual payment in money, or by way of security for a present actual advance of money, or that is made in consideration of a present actual sale or delivery of goods or other property where the money paid or the goods or

other property sold or delivered bear a fair and reasonable relative value to the consideration therefor.

Bankruptcy and Insolvency Act, R.S.C., 1985, c. B-3

Definition of related persons

4(2)(c) two entities

- (i) both controlled by the same person or group of persons,
- (ii) each of which is controlled by one person and the person who controls one of the entities is related to the person who controls the other entity,
- (iii) one of which is controlled by one person and that person is related to any member of a related group that controls the other entity,
- (iv) one of which is controlled by one person and that person is related to each member of an unrelated group that controls the other entity,
- (v) one of which is controlled by a related group a member of which is related to each member of an unrelated group that controls the other entity, or
- (vi) one of which is controlled by an unrelated group each member of which is related to at least one member of an unrelated group that controls the other entity.

Question of fact

4(4) It is a question of fact whether persons not related to one another were at a particular time dealing with each other at arm's length.

Presumptions

4(5) Persons who are related to each other are deemed not to deal with each other at arm's length while so related. For the purpose of paragraph 95(1)(b) or 96(1)(b), the persons are, in the absence of evidence to the contrary, deemed not to deal with each other at arm's length.

Establishing values

96(2) In making the application referred to in this section, the trustee shall state what, in the trustee's opinion, was the fair market value of the property or services and what, in the trustee's opinion, was the value of the actual consideration given or received by the debtor, and the values on which the court makes any finding under this section are, in the absence of evidence to the contrary, the values stated by the trustee.

Fraudulent Conveyances Act, R.S.O. 1990, c F.29**Definitions**

1. In this Act,

“conveyance” includes gift, grant, alienation, bargain, charge, encumbrance, limitation of use or uses of, in, to or out of real property or personal property by writing or otherwise; (“cession”)

“personal property” includes goods, chattels, effects, bills, bonds, notes and securities, and shares, dividends, premiums and bonuses in a bank, company or corporation, and any interest therein; (“biens meubles”)

“real property” includes lands, tenements, hereditaments and any estate or interest therein. (“biens immeubles”).

Where conveyances void as against creditors

2. Every conveyance of real property or personal property and every bond, suit, judgment and execution heretofore or hereafter made with intent to defeat, hinder, delay or defraud creditors or others of their just and lawful actions, suits, debts, accounts, damages, penalties or forfeitures are void as against such persons and their assigns.

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. URBANCORP (BRIDLEPATH) INC., THE TOWNHOUSES OF HOGG'S HOLLOW INC., KING TOWNS INC., NEWTOWNS AT KING TOWNS INC. AND DEAJA PARTNER (BAY) INC. (COLLECTIVELY, THE "APPLICANTS")

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

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

ONTARIO
**SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)**

Proceedings commenced at **Toronto**

**FACTUM OF THE MOVING PARTY,
TERRA FIRMA CAPITAL CORPORATION**

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