

**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 FUNCTIONARY AND TERRA FIRMA CAPITAL
CORPORATION**

February 15, 2019

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TO: THE SERVICE LIST

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

JOINT FACTUM OF THE FUNCTIONARY AND TERRA FIRMA CAPITAL CORPORATION

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**") of Urbancorp Inc. ("**UCI**") and Trustee of the claims of the holders of bonds issued by UCI (the "**Bondholders**") and Terra Firma Capital Corporation ("**TFCC**") for an Order: (a) Approving a settlement agreement between UCI, Terra Firma Capital Corporation ("**TFCC**") and KSV Kofman Inc. (the "**Monitor**") in its capacity as Monitor of TCC Urbancorp (Bay) Limited Partnership (the "**Minutes of Settlement**") with respect to the within proceeding; (b) Granting TFCC's motion to set aside the disallowance of proofs of claim it filed in respect of TCC Urbancorp (Bay) Limited Partnership ("**TCC Bay**") (the "**TFCC Claims**") pursuant to its motion record originally dated May 8, 2017 (the "**TFCC Motion**") (c) Directing the Monitor to distribute to UCI in respect of both the TFCC Claims and the allowed UCI unsecured claim all amounts to be distributed from the Applicants' estate, other than \$150,000 to be paid to Fuller Landau Group Inc. as proposal trustee for Alan Saskin and a reserve for the Monitor's remaining fees and expenses; and (d) Declaring that the requested Order is conditional upon approval of the

Minutes of Settlement by the Israeli District Court in Tel-Aviv-Yafo in case numbers 44348-04-16 and 12055-12-17 (collectively the “Israeli Courts”) and declaring that in the event that the Minutes of Settlement are not approved by the Israeli Courts, this Order, the Minutes of Settlement and the granting of the TFCC Motion shall be null and void and the parties shall be restored to their respective positions as they existed prior to the Minutes of Settlement.

2. The facts with respect to this motion are set out in the Twentieth Report to the Court of the Monitor dated February 14, 2018 (“**Twentieth Report**”).

3. Approval of the Minutes of Settlement and the granting of the requested Order will result in resolution of material litigation in respect of TFCC’s Claims, resolve on-going litigation between the Functionary and TFCC in Israel, resolve an outstanding reserved intercompany claim and result in the near term termination of these CCAA proceedings.

4. The litigation that these Minutes of Settlement would resolve is costly, time consuming and uncertain in outcome. In the event that the TFCC Motion was litigated to its conclusion and TFCC was successful, the Functionary would suffer a loss of approximately \$6 million, when compared to the outcome of the Minutes of Settlement. Alternatively, if TFCC were to succeed on its alternative unsecured claim (which it has advised it would assert if the TFCC motion was not successful), the recoveries to the Functionary would be reduced by approximately \$3.5 million.

5. If the Settlement Agreement is not approved, TFCC and Dov Meyer (“**Meyer**”) would also lose the benefit of the release that the Functionary has agreed to provide to them under the Minutes of Settlement.

6. The Monitor is party to and supports the Minutes of Settlement and believes the settlement to be commercially reasonable.

7. The only party which is theoretically adversely affected by the settlement is DS (Bay) Holdings Inc. (“**DS Bay**”), the principal of which is Doreen Saskin, the spouse of Alan Saskin. DS (Bay) is not a creditor of TCC Bay. Rather it has an equity interest. The only circumstance in which any portion of the funds currently being held by the Monitor could make their way to DS

(Bay) would be if the TFCC Motion and the TFCC alternative unsecured claim were both dismissed and any appeals therefrom were unsuccessful.

8. The Monitor notes that DS Bay has a liability to the Canada Revenue Agency. To the extent that it does and has insufficient assets to satisfy it, that situation does not arise from the Settlement Agreement. Rather, already existed as a function of TCC Bay complying with its contractual obligations and representations to both UCI and TFCC. Compliance with those obligations would have resulted in no money flowing to DS Bay in any event, but it would still have had the tax liability. This Court should not countenance a result that would ultimately allow Doreen Saskin to benefit from her husband's wrongful conduct at the expense of his company's creditors.

PART II – FACTS

A. UCI Allowed Claim

9. In May 2018, the Monitor accepted a proof of claim filed by the Functionary based on misrepresentations in the principal amount of \$8 million, plus interest and costs.

Twentieth Report, p.6 at para. 2.4.5.

10. 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.

11. The Functionary has commenced proceedings in the Israeli District Court, Tel-Aviv/Yafo against numerous parties, including Saskin, various family trusts, the Israeli accountants and underwriters who acted in respect of the bond raise. In addition, the Functionary commenced proceedings against TFCC and Meyer relating to their involvement in the bond raise.

Twentieth Report of KSV, p.6 at para. 2.4.6.

12. Since the granting of the Plan Approval Order the Functionary and TFCC have been working to resolve the remaining claims in the TCC Bay estate and which has now culminated in

the Minutes of Settlement. The Functionary has kept the Monitor apprised of the status of its dealings with TFCC concerning this matter.

13. The Functionary and TFCC initially entered into a settlement agreement in February 2018. In April 2018, the Court dismissed a motion brought jointly by the Functionary and TFCC to approve the settlement on the basis that neither had an allowed claim at that time. Subsequently, in May 2018, the UCI Claim was allowed in full.

Twentieth Report, p.3-4 at paras. 1.0.16-18.

B. Terra Firma Claim

14. 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**”).

Tenth Report, p.3 at para 1.0.9.

15. 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.

Twentieth Report, p. 7 at para. 2.5.1.

16. 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.

Twentieth Report, p. 7 at para. 2.5.2.

17. TFCC brought a motion to set aside the disallowance of its claims. The hearing of the TFCC Motion has been scheduled for February 21, 2019.

Twentieth Report, p.7 at para. 2.5.4.

C. The Minutes of Settlement

18. Minutes of Settlement were entered into on January 30, 2019. The Minutes of Settlement are conditional upon approval by both this Honourable Court, as well as the Israeli District Court and provide as follows:

- a) The Functionary and the Monitor will not oppose the TFCC Motion to set aside the disallowances of the TFCC Claims;
- b) TFCC will assign to UCI the TFCC Claims and security in relation to the Applicants, as well as Alan Saskin;
- c) UCI will receive (and TFCC authorizes and directs) all monies to be distributed in relation to both the TFCC Claims and the UCI Claim, other than \$150,000 on account of a proof of claim filed by Alan Saskin which will be paid to Fuller Landau in its capacity as proposal trustee of Alan Saskin and a \$200,000 reserve for the Monitor for its fees and expenses incurred in completing the CCAA;
- d) The Israeli litigation against TFCC and Meyer will be withdrawn and settled and the Functionary will provide a release in favour of TFCC and Meyer.

Twentieth Report, p. 8 at para. 3.0.1-2.

19. All proven claims of the debtors have been paid in full other than the UCI Claim. Upon completion of the settlement all Inter-Company Claims will be resolved and paid. The Inter-Company Claims consist of claims by Cumberland which will flow to UCI in the amount of \$362,000, \$346,000 by Alan Saskin (which has been resolved based on \$150,000 being paid to his Proposal Trustee and \$196,000 being paid to UCI), and \$57,000 by Edge (which is being set-off as Edge's contribution towards the prior settlement of certain employee claims which were funded by Cumberland).

Twentieth Report, p. 9 at para. 3.0.4.

20. Approval of the Minutes of Settlement and granting the TFCC Motion will result in UCI receiving a distribution from TCC Bay of approximately \$7 million on account of both its unsecured claim, as well as the TFCC Claims.

Twentieth Report, p. 9 at para. 3.0.5.

21. If the Minutes of Settlement are not approved and the TFCC Motion is successful, UCI would only receive \$820,000. If the Minutes of Settlement are not approved and the TFCC alternative unsecured claim succeeds, UCI would only receive \$3.549 million.

Twentieth Report, p. 9-10 at para. 3.0.5-6.

22. Other than UCI and TFCC, the only party with any potential financial interest in these proceedings and which is theoretically affected by the Minutes of Settlement is DS (Bay), an entity Doreen Saskin purportedly owns. For DS Bay to have any entitlement to funds from these debtors, the TFCC Claim, as well as its alternative claim would have to be disallowed in full and all appeals be unsuccessful. In that scenario, the Monitor estimates that DS (Bay) could potentially receive \$792,000. If that to occur, Doreen Saskin would be taking the benefit of her husband's wrongful conduct. In order to have any possible entitlement at all, significant and costly litigation would need to be undertaken which would materially erode available funds. Further, in this scenario, the Functionary would be incurring significant costs relating to his participation in the claims litigation with TFCC, as well as in respect of the Israeli litigation with TFCC which would proceed.

Twentieth Report, p. 9, para 3.0.5, p.11, para 3.1.1(c).

23. Approval of the Minutes of Settlement will avoid material litigation, enable these CCAA proceedings to be terminated in the near term and thereby save material further expense.

Twentieth Report, p. 11, para 3.1.1.

PART III - LAW AND ARGUMENT

A. Settlement Approval

24. 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.

25. 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.

26. In *Nortel*, Regional Senior 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.

27. 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.)

28. 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.

29. 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.

30. 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.

31. Similar circumstances arise in the case at hand. The Minutes of Settlement resolve the only material remaining claim of the Applicants and is supported by the Monitor.

32. Moreover, as in *Walter Energy*, the Minutes of Settlement: (i) have no impact on creditors with proven claims which have already been paid in full; (ii) removes a major impediment to the distribution of proceeds to remaining creditors; (iii) allows the Monitor to terminate the Bay CCAA Proceedings thereby reducing the cost thereof; (iv) avoids lengthy and costly litigation in respect of both the TFCC Claim, the alternative TFCC claim, as well as the Israeli litigation; (iv) represents a reasonable resolution of significant claims against the Applicants.

33. The fact that the Minutes of Settlement resolve significant claims and avoid 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.

34. For these reasons, the Minutes of Settlement are fair and reasonable, accord with the purpose and spirit of the CCAA and, having satisfied the requisite test, should be approved.

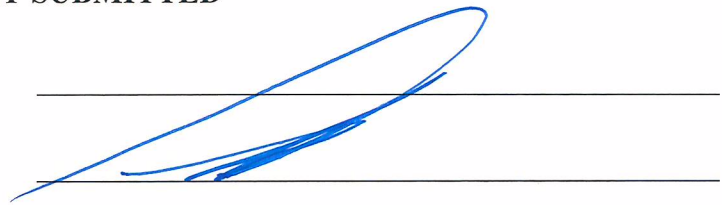
RELIEF REQUESTED

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

- (a) Approving the Minutes of Settlement;
- (b) Granting the TFCC Motion;
- (c) Directing the Monitor to distribute to UCI in respect of both the TFCC Claims and the allowed UCI unsecured claim all amounts to be distributed from the Applicants’ estate, other than \$150,000 to be paid to Fuller Landau and \$200,000 as a reserve for the Monitor’s remaining fees and expenses; and

(d) Declaring that the requested Order is conditional upon approval of the Minutes of Settlement by the Israeli District Court in Tel-Aviv-Yafo in case numbers 44348-04-16 and 12055-12-17 (collectively the "Israeli Courts") and declaring that in the event that the Minutes of Settlement are not approved by the Israeli Courts and the distributions contemplated under the Minutes of Settlement are not made, the requested Order, the Minutes of Settlement and the granting of the TFCC Motion shall be null and void and the parties shall be restored to their respective positions as they existed prior to the Minutes of Settlement

ALL OF WHICH IS RESPECTFULLY SUBMITTED



February 15, 2019

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TO: THE SERVICE LIST

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.

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