

**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 TORONTO
MANAGEMENT INC., URBANCORP (ST. CLAIR
VILLAGE) INC., URBANCORP (PATRICIA) INC.,
URBANCORP (MALLOW) INC., URBANCORP
(LAWRENCE) INC., URBANCORP DOWNSVIEW PARK
DEVELOPMENT INC., URBANCORP (952 QUEEN
WEST) INC., KING RESIDENTIAL INC., URBANCORP
60 ST. CLAIR INC., HIGH RES. INC., BRIDGE ON KING
INC. (Collectively the "Applicants") AND THE
AFFILIATED ENTITIES LISTED IN SCHEDULE "A"
HERETO**

**FACTUM
OF THE MONITOR
(Motion Returnable June 25, 2019 –
UNKI Settlement Approval and Vesting Order)**

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PART I ~ OVERVIEW

1. This motion deals with whether or not a sale agreement should be approved and vesting order granted in the circumstances of this case.

PART II ~ FACTS

2. The facts are set out in the Thirty Fourth Report of the Monitor dated June 19, 2019 (the "**Report**"). The salient facts pertaining to the motion are set out below. Capitalized terms used herein and not otherwise defined have the meaning ascribed to them in the Report.

3. On April 21, 2016, Urbancorp (St. Clair Village) Inc. ("St. Clair"), Urbancorp (Patricia) Inc. ("Patricia"), Urbancorp (Mallow) Inc. ("Mallow"), Urbancorp Downsview Park Development Inc. ("Downsview"), Urbancorp (Lawrence) Inc. ("Lawrence") and Urbancorp Toronto Management Inc. ("UTMI") each filed a Notice of Intention to Make a Proposal ("NOI") pursuant to Section 50.4(1) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended (collectively, St. Clair, Patricia, Mallow, Downsview, Lawrence and UTMI are referred to as the "NOI Entities"). KSV Kofman Inc. ("KSV") was appointed as the Proposal Trustee of each of the NOI Entities.

4. Pursuant to an Order made by the Ontario Superior Court of Justice (Commercial List) (the "Court") dated May 18, 2016 (the "Initial Order"), the NOI Entities, together with the entities listed on Schedule "A" attached (collectively, the "Cumberland CCAA Entities" and each a "Cumberland CCAA Entity") were granted protection under the *Companies' Creditors Arrangement Act* (the "CCAA") and KSV was appointed monitor of the Cumberland CCAA Entities (the "Monitor") (the "Cumberland CCAA Proceedings").

5. Certain Cumberland CCAA Entities¹ are known direct or indirect wholly-owned subsidiaries of Urbancorp Cumberland 1 LP (“Cumberland”). Collectively, Cumberland and its direct and indirect subsidiaries are the “Cumberland Entities” and each individually is a “Cumberland Entity”. Each Cumberland Entity is a nominee for Cumberland and, as such, the assets and liabilities of the Cumberland Entities are assets and liabilities of Cumberland. The remaining Cumberland CCAA Entities², other than UTMI, are directly or indirectly wholly owned by Urbancorp Inc. (“UCI”) (collectively, the “Non-Cumberland Entities” and each a “Non-Cumberland Entity”).

6. Cumberland is believed to be the sole shareholder of Urbancorp New Kings Inc. (“UNKI”). UNKI is believed to be a nominee for Cumberland. UNKI is not subject to the CCAA proceedings.

7. UNKI and King Liberty North Corporation (the “Purchaser”), an affiliate of First Capital (S.C.) Corporation (“FCSCC”), are co-owners of lands municipally described as 1100 King Street West, Toronto (the “Kingsclub Development”).³ The Kingsclub Development is a significant retail and residential development located in Liberty Village in Toronto. The project is scheduled to be completed this year. It has experienced several delays and cost-overruns.

¹ St. Clair., Patricia, Mallow, Lawrence, Urbancorp (952 Queen West) Inc., King Residential Inc., Urbancorp 60 St. Clair Inc., High Res. Inc., Urbancorp Partner (King South) Inc., Urbancorp (North Side) Inc. and Bridge on King Inc.

² Vestaco Homes Inc., Vestaco Investments Inc., Urbancorp Power Holdings Inc., UTMI, Downsview, 228 Queens Quay West Limited, Urbancorp Residential Inc., Urbancorp Realtyco Inc., Urbancorp Cumberland 1 GP Inc.

³ Kings Club Development Inc., a nominee entity, is the registered owner of the Kingsclub Development on behalf of its beneficial owners, UNKI and the Purchaser.

8. Pursuant to the Amended and Restated Co-owners Agreement dated February 1, 2012 (the "Ownership Agreement"), as amended, between UNKI and the Purchaser, the Purchaser has an option to purchase UNKI's interest in the commercial portion of the project at below market value.⁴

9. The residential component of the Kingsclub Development was originally owned by UNKI (50%) and the Purchaser (50%). On July 28, 2015, the Purchaser and UNKI entered into an agreement (the "CAPREIT Agreement") with CAPREIT Limited Partnership ("CAPREIT") to sell one-third of the residential component of the project to CAPREIT, such that the Purchaser, UNKI and CAPREIT would each have a one-third interest in that portion of the development upon closing of that transaction.

10. As of April 1, 2019, UNKI has borrowed the following amounts to finance construction of the Kingsclub Development:

- (a) approximately \$34.5 million from FCSCC (the "Early Works Loans");
and
- (b) approximately \$3.7 million from the Purchaser (the "Land Loan").

11. In addition to the above amounts, UNKI and the Purchaser are co-borrowers under a facility with Bank of Nova Scotia ("BNS"). The amount owing to BNS under this facility as at the date of the Report was approximately \$168 million.

⁴ The Ownership Agreement provides the Purchaser with the option of purchasing UNKI's commercial interest at a 5.5% cap rate. The Monitor understands the market capitalization rate for similar properties is less than this amount.

12. The Kingsclub Development has incurred significant cost overruns. FCSCC has funded UNKI's share of the cost overruns under credit facilities (the "Standstill Facilities") pursuant to the terms of a Court approved standstill agreement and a standstill amending agreement, each between FCSCC, the Purchaser, UNKI and the Monitor (the "Standstill Agreements"). The total principal amount advanced by FCSCC under the Standstill Agreements is approximately \$48.4 million, which continues to accrue interest and costs. There is insufficient availability under the Standstill Agreements to fund future projected cost overruns.

13. In late 2018, FCSCC requested that the Monitor enter into a further amendment to the Standstill Agreements in order to fund additional cost overruns. The Monitor advised FCSCC that it was not prepared to do so because it was unclear whether UNKI would be able to repay any such advances from its interest in the Kingsclub Development or otherwise. As such, UNKI defaulted on its obligation to make the additional co-owner contributions for the period December 1, 2018 to March 31, 2019, as required by the Ownership Agreement. Pursuant to the terms of the Ownership Agreement, the Purchaser has funded these obligations and UNKI is indebted to the Purchaser for these advances, which now total approximately \$13 million, before interest and costs which continue to accrue (the "Co-Owner Loan"). The Purchaser estimates that UNKI would be required to fund an additional \$19.9 million to complete the Kingsclub Development. The amounts advanced under the Co-Owner Loan are secured pursuant to a Co-Owner's Cross Charge granted by UNKI which secures UNKI's obligations under the Owner's Agreement.

14. Early in these proceedings, the Monitor requested that a real estate brokerage provide an estimate of the value of the Kingsclub Development. More recently, the Monitor's valuation group has performed this estimate.

15. The Monitor considered that UNKI may need to file for CCAA protection in order to realize on the UNKI Interest in a Court supervised sale process. To maximize value for the UNKI interest in the Kingsclub Development, the Monitor determined that it may be necessary for it to attempt to disclaim certain agreements, including the CAPREIT Agreement and the Ownership Agreement. The Monitor anticipates that attempts to disclaim these agreements would be vigorously contested by CAPREIT, the Purchaser and BNS. If the Monitor was successful in its efforts to disclaim these agreements, significant damage and other claims would likely result, which would impair the value of the UNKI Interest.

16. The Kingsclub Development is partially financed by a syndicate led by BNS. There is no certainty that BNS would be prepared to cooperate in a sale process. BNS, as a secured lender, has the right to appoint a receiver and to bring an application to have one appointed by the Court.

17. The Monitor is also cognizant that the professional costs and uncertainty resulting from a CCAA proceeding involving the Kingsclub Development could impair the value of the UNKI Interest.

18. Furthermore, the Purchaser, as a Co-Owner, would have the ability to influence the outcome of a sale process for the Kingsclub Development. Any bidder would need to be comfortable that it could work with the Purchaser and the

Purchaser is not obligated to deal consistently with prospective buyers – it may be prepared to provide superior deal terms to some parties over others.

19. The Monitor has kept the Foreign Representative apprised of its negotiations with FCSCC. The Foreign Representative has advised that it consents to the Transaction. There are no material conditions precedent to the Transaction other than Court approval.

20. In the Monitor's opinion, the consideration to be received for the UNKI Interest under the Transaction is fair and reasonable taking into account the considerations discussed above and accordingly the Monitor believes that the best approach to maximizing the realizable value of the UNKI Interest is to complete the Transaction.

PART III ~ ISSUES AND THE LAW

21. The issue on this motion is whether or not the Transaction should be approved and a vesting order granted.

22. The Transaction is between UNKI and KLNC. UNKI is not subject to these CCAA Proceedings. However, Cumberland is believed to be the sole shareholder of UNKI and UNKI is believed to be a nominee for Cumberland. Cumberland is subject to these CCAA proceedings.

23. The criteria for approval of the Transaction is set out in section 36(3) of the CCAA as follows:

In deciding whether to authorize the sale or disposal of assets outside the ordinary course of business, courts may consider, among other things:

- (a) whether the process leading to the proposed sale or disposition was reasonable in the circumstances;
- (b) whether the monitor approved the process leading to the proposed sale or disposition;
- (c) whether the monitor filed with the court a report stating that in their opinion the sale or disposition would be more beneficial to the creditors than a sale or disposition under bankruptcy;
- (d) the extent to which the creditors were consulted;
- (e) the effects of the proposed sale or disposition on the creditors and other interested parties; and
- (f) whether the consideration to be received for the assets is reasonable and fair, taking into account their market value.

24. The factors listed in section 36(3) are not intended to be exhaustive, nor are they intended to be a formulaic check-list that must be followed in every sale transaction under the CCAA.

Re Target Canada Co, 2015 ONSC 2066 [*Target*] at para. 15, Monitor's Book of Authorities, Tab 1.

25. A third-party sales process may not be required where such a process would be unreasonable under the circumstances.

Re Canwest Global Communications Corp., 2009 CarswellOnt 7169 [*Canwest*] at paras. 34-36, Monitor's Book of Authorities, Tab 2.

26. In this case, the Purchased Assets represent a 50% co-ownership interest in an ongoing, large real estate development project.

27. The UNKI Interest is subject to an Ownership Agreement, the CAPREIT Agreement and material third party project financing with a lending syndicate led by BNS.

28. Even if such agreements could be disclaimed, any purchaser of the 50% interest would have to be able to reach some form of consensual arrangement with the other Co-Owner.

29. Given the Monitor's assessment of the value of the UNKI Interest, it would have been unreasonable to have run a third party sales process under the circumstances and it was effectively impossible to do so without first effecting the disclaimer of the various agreements in question and contending with the significant adverse consequences of doing so.

30. Accordingly, pursuing a settlement with KLNC to buy out the UNKI Interest was the most reasonable process under the circumstances.

31. The only creditor of consequence standing to benefit from the sale of the UNKI Interest, the Foreign Representative, supports the Transaction.

32. The consideration to be received for the UNKI Interest under the proposed Transaction is reasonable and fair, taking into account its current estimated value.

33. The Transaction will also not adversely impact the ongoing interests of KLNC, FCSCC, CAPREIT and BNS and, therefore, is of significant benefit to such other significant interested parties.

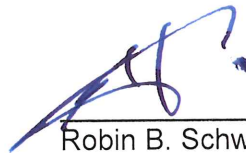
34. Section 36(6) of the CCAA permits the granting of a vesting order and, in this case, the creditors whose security is being vested out have, as part of the Transaction, consented to their interests being released and finally expunged as against UNKI such that the proceeds of the sale need not remain subject to such security interests.

35. As UNKI has no employees, section 36(7) is not applicable under the circumstances.

PART IV ~ RELIEF SOUGHT

36. Accordingly, the Transaction should be approved and the vesting order granted.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 24th day of June, 2019.



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SCHEDULE "A"
LIST OF AUTHORITIES

1. *Re Target Canada Co*, 2015 ONSC 2066.
2. *Re Canwest Global Communications Corp.*, 2009 CarswellOnt 7169.

SCHEDULE "B"
STATUTORY PROVISIONS

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, as amended

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Court File No. CV-16-11389-00CL

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Proceeding Commenced at Toronto

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