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

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 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 for Sale Approval Returnable December 7, 2021)

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FACTUM OF THE MONITOR

PART I - OVERVIEW

1. On this motion, KSV Restructuring Inc. (formerly KSV Kofman Inc.) in its capacity as the Court-appointed monitor (the "**Monitor**") of the Applicants and the affiliated entities listed on Schedule "A" (collectively, the "**CCAA Entities**", and each individually a "**CCAA Entity**") pursuant to the *Companies' Creditors Arrangement* Act, R.S.C. 1985, c. c-36, as amended (the "**CCAA**") seeks, among other things, approval of the sale of certain assets (the "**Transaction**") contemplated by an agreement of purchase and sale (the "**Sale Agreement**") between the Monitor and Mattamy (Downsview) Limited ("**Mattamy**") dated November 17, 2021 and appended to the Forty-Ninth Report of the Monitor dated November 17, 2021 (the "**Report**"), and vesting in Mattamy, Urbancorp Downsview Park Development Inc.'s ("**Downsview**") right, title and interest in and to the assets described in the Sale Agreement (the "**Purchased Assets**").

2. There is no opposition to this motion. The Foreign Representative requests a carve-out in the approval and vesting order preserving Downsview's alleged entitlement

to any amounts awarded as part of the contemplated Arbitration. Pursuant to the Sale Process, all of Downsview's interests under the Agreements, including any benefit potentially obtained from the Arbitration, is to be transferred to Mattamy as the purchaser of the Purchased Assets. Accordingly, the proposed carve-out makes no commercial sense and runs contrary to the Sale Process approved by this Court over the Foreign Representative's various objections.

3. Pursuant to an order issued by the Court on June 30, 2021 (the "**Sale Process Order**"), the Monitor was authorized and directed to conduct a sale process (the "**Sale Process**") for the Purchased Assets.

> Report, Appendix C [*Sale Process Order*].

4. Pursuant to an endorsement released by this Court on June 30, 2021, the Sale Process was ordered to proceed concurrently with the Arbitration. The Foreign Representative's motion to adjourn the Sale Process until after the completion of the Arbitration was dismissed.

> *Urbancorp Toronto Management Inc.*, 2021 ONSC 4262, at para 61, Book of Authorities, Tab 1 [*Downsview Decision*].

5. In issuing the Downsview Decision, the Court concluded that (i) the conditions that typically give rise to a "chilling effect" on the market were not present in this case, and (ii) requiring bidders to provide two bid prices, based on the potential differing interpretations of the Provisions, would not be confusing to bidders and thus would not have a "chilling effect" on the market for potential bidders.

> *Downsview Decision*, *supra*, at paras 54-55.

6. Subsequently, the Foreign Representative sought (i) leave to appeal the Sale Process Order and (ii) a stay of the Sale Process pending such leave application. Both requests were denied by the Court of Appeal, confirming that the Sale Process should proceed and not be stalled by the Arbitration.

> *Urbancorp Toronto Management Inc. (Re)*, 2021 ONCA 613 at para 25, Book of Authorities, Tab 2 [*Stay Pending Leave Endorsement*].

Report, Appendix F [*Leave to Appeal Dismissal*].

7. The Monitor carried out the Sale Process on the basis approved by the Court. As of October 29, 2021 no letters of intent (each an "**LOI**") were received by the Monitor. The Sale Process provides that if no LOIs are submitted by such date the Monitor may bring a motion to terminate the Sale Process and convey the Purchased Assets to Mattamy.

Report, s. 2.4(1) and Appendix G, s. 1(c).

8. The Sale Process was conducted in accordance with its terms on a basis that the Court and Court of Appeal affirmed was reasonable in the circumstances. Such process resulted in no willing bidders.

9. The Monitor recommends that this Court approve the Transaction because:

(a) the Sale Process was conducted in accordance with its terms;

(b) the Transaction was specifically contemplated by the Sale Process if no LOIs were received;

(c) the DHI Facility matured on February 3, 2021 and became due and payable at that time. Downsview does not have the ability to repay the DHI Facility;

(d) Mattamy provided the Monitor with eight Mattamy Acceptable Buyers prior to the commencement of the Sale Process and agreed to two additional parties participating in the Sale Process. Mattamy worked cooperatively with the Monitor to carry out the Sale Process;

(e) the Mattamy Acceptable Buyers were all credible parties capable of fully participating in the Sale Process and closing any resulting transaction;

(f) Mattamy confirmed that it was prepared to renegotiate the Agreements, as required pursuant to the Sale Process. The Agreements address the economics of the Project, i.e. the sharing of profit and cash flow;

(g) the Foreign Representative did not request to be a Mattamy Acceptable Buyer;

(h) The Foreign Representative has received proceeds of at least $70 million since the commencement of these proceedings. To the extent that the Foreign Representative believes that there is value in the Project, it could have asked to participate as a Mattamy Acceptable Buyer or it could have repaid the DHI Facility;

(i) the fact that no LOIs were submitted for the DHI Interest reflects that the potential return to a purchaser does not justify the cost, time and risk associated with acquiring the DHI Interest, regardless of the outcome of the Arbitration;

(j) in accordance with the terms of the Sale Process Order, Mattamy has agreed to pay the Sale Process Costs. Accordingly, the Sale Process will not be funded by monies that would otherwise be distributable to UCI; and

(k) absent the Transaction, there will be ongoing professional fees and other costs for which there is no benefit to these CCAA Proceedings.

Report, s. 2.7(1).

PART II - THE FACTS

10. The background to this matter is set out in the Report. All capitalized terms used herein and not otherwise defined have the meanings ascribed to them in the Report. The following is a summary of the facts central to this motion.

(i) Background to Sale Process

11. At the commencement of these CCAA Proceedings, Downsview and Mattamy were required to make an equity injection in the Project to secure construction financing for Phase One. Downsview could not fund its portion of the required equity and Mattamy agreed to loan Downsview the funds it required.

Report, s. 2.0(4).

12. On June 15, 2016, the Court granted an Order that approved a debtor-in-possession facility (the "**DHI Facility**") in the amount of $8 million between Mattamy, as lender, and Downsview, as borrower, as well as a charge in favour of Mattamy over Downsview's property, assets and undertaking (the "**DHI Interest**") to secure repayment of the amounts borrowed by Downsview under the DHI Facility. Interest on the DHI Facility accrues at an annual rate of 15%.

Report, s. 2.0(4).

13. On November 3, 2020, the Court approved an amendment to the DHI Facility, which provided for a further advance by Mattamy to Downsview of approximately $6.5 million and extended the maturity date to February 3, 2021, on which date the DHI Facility became due and payable. The Foreign Representative negotiated for the February 3, 2021 maturity date despite Mattamy offering to extend the date to the completion of the Project.

Report, ss. 2.0(8), (10).

14. The current amount owing under the DHI Facility is approximately $10.1 million, plus interest and costs, which continue to accrue. Downsview does not have the ability to repay the DHI Facility.

Report, ss. 2.0(8)-(9).

15. On January 25, 2021, the Foreign Representative served a motion requiring the Monitor to deliver a notice of arbitration to Mattamy in connection with certain aspects of the Agreements, particularly the sharing of cash flow and profits in the Project between Downsview and Mattamy. As alternative relief, the Foreign Representative sought an order assigning the rights in the arbitration to UCI if the Monitor refused to deliver a notice of arbitration. The central issue in the Foreign Representative's arbitration request is to determine whether Mattamy has already received payments as provided in Sections 8.4(d) and 8.5(d) of the Co-Ownership Agreement (the "**Provisions**") or whether these amounts remain payable to Mattamy.

Report, s. 2.0(11).

16. On February 11, 2021, the Monitor served a motion to approve the Sale Process for the DHI Interest.

Report, s. 2.0(12).

17. The Monitor's and Foreign Representative's motions were heard by Chief Justice Morawetz on April 6, 2021. Chief Justice Morawetz released his reasons on June 30, 2021 (the "**Downsview Decision**"). The Downsview Decision approved the Sale Process and required that the arbitration (the "**Arbitration**") requested by the Foreign Representative be initiated. Chief Justice Morawetz dismissed the Foreign Representative's request to adjourn the Sale Process until after the completion of the Arbitration.

Report, s. 2.0(13).

18. In light of the Downsview Decision, on July 6, 2021, the Monitor informed the Foreign Representative that the Foreign Representative should take carriage of the Arbitration and that the Monitor would be proceeding with the Sale Process. The Arbitration is scheduled to be heard in February 2022 before the Honourable Frank Newbould, Q.C.

Report, s. 2.0(14).

19. On July 21, 2021, the Foreign Representative served a Notice of Motion for Leave to Appeal the Court's approval of the Downsview Sale Process (the "**Leave Motion**").

Report, s. 2.0(15).

20. On August 6, 2021, the Foreign Representative served a motion to stay the Downsview Decision pending the determination of the leave application (the "**Stay Motion**").

Report, s. 2.0(16).

21. On September 9, 2021, Justice Miller of the Court of Appeal for Ontario (the "**Court of Appeal**") issued an endorsement dismissing the Stay Motion.

Stay Pending Leave Endorsement, *supra*, at para 25.

22. On November 10, 2021, the Court of Appeal issued an order dismissing the Leave Motion and granting costs to the respondents in the amount of $5,000 each.

Leave to Appeal Dismissal, *supra*.

(ii) The Sale Process

23. The Monitor carried out the Sale Process on the basis approved by the Court. A detailed description of the steps taken by the Monitor is provided in the Report. Below is a summary of certain relevant steps.

24. From June 30, 2021 – the date of the Sale Process Order – until September 22, 2021, the Monitor carried out the pre-marketing process, which included: (i) assembling information to be made available to interested parties in a virtual data room ("**VDR**"); and (ii) preparing the Sale Process Materials which include a teaser (the "**Teaser**") summarizing the opportunity, a confidentiality agreement (the "**CA**") and a Confidential Information Memorandum (the "**CIM**").

Report, s. 2.2.

25. From September 23, 2021 to October 29, 2021 the Monitor marketed the assets by, among other things, (i) obtaining an initial list of Mattamy Acceptable Buyers from Mattamy; (ii) distributing the Teaser and CA to Mattamy Acceptable Buyers; (iii) providing a copy of the CIM and access to the VDR to interested parties who signed the CA; (iv) advertising the opportunity in *The Globe and Mail*, and (v) providing the Sale Process Materials to the Foreign Representative's financial advisor.

Report, s. 2.3.

26. Following the Monitor's advertisement in *The Globe and Mail*, two additional prospective buyers contacted the Monitor requesting further details concerning the Sale Process. Mattamy provided its consent to such parties participating in the Sale Process.

Report, s. 2.3(3).

27. The only request to become a Mattamy Acceptable Buyer for which Mattamy did not provide its consent was a request from Alan Saskin on behalf of Dig Developments Inc., an entity owned by a Saskin family trust.

Report, s. 2.3(4).

28. Eight Mattamy Acceptable Buyers executed CAs and were provided access to the VDR and a copy of the CIM. The Monitor facilitated diligence by the Mattamy Acceptable Buyers and followed up with each of these parties on several occasions to gauge their interest and to understand their views concerning the opportunity. None of the parties that performed due diligence raised the issue of submitting two offers as a concern.

Report, s. 2.3(7).

29. Letters of intent (each an "**LOI**") were to be submitted to the Monitor on October 29, 2021; however, none were received. As a result, pursuant to the Sale Process, the Monitor was permitted to bring a motion to terminate the Sale Process and to convey the DHI Interest to Mattamy in satisfaction of Downsview's obligations owing to Mattamy.

Report, s. 2.4(1) and Appendix G, s. 1(c).

(iii) The Purchase Agreement

30. After the Sale Process resulted in no LOIs being delivered, the Monitor began negotiating the Sale Agreement with Mattamy. The key terms of the Sale Agreement are provided in the Report and are reproduced below:

a) Purchased Assets: the right, title and interest of Downsview in and to the common shares in Downsview Homes Inc., all cash held by Downsview, all contracts to which Downsview is party which relate in any way to the Downsview project and all related proceeds;

b) Purchase Price: $10.1 million plus Mattamy's fees, costs and accruing interest to the date of Closing;

c) Management Fees: Mattamy acknowledges and agrees that the entitlement of UTMI to the Management Fees remains unresolved, that Mattamy is not providing consideration to UTMI as a part of the Transaction and as such UTMI retains whatever rights it may have, if any, to recover such amounts;

d) Representations and Warranties: consistent with standard terms of an insolvency transaction, i.e., on an "as is, where is" basis, with limited representations and warranties;

e) Closing: five days after the Court grants the Approval and Vesting Order (or such earlier day after the Court grants the Approval and Vesting Order that is agreed to by the parties), provided that if such day is not a business day, then the closing date will be the next following business day;

f) Material Conditions include:

i. the Court shall have issued an Approval and Vesting Order; and

ii. Mattamy shall have paid the Sale Process Costs.

Report, s. 2.5.

31. As required pursuant to the Sale Process, Mattamy has (i) confirmed that it was prepared to renegotiate the Agreements which address the economics of the Project, (ii) attested that it did not participate in any meetings with any interested parties regarding the Project and the Sale Process without the Monitor in attendance, and (iii) agreed to fund the Monitor's fees and costs to conduct the Sale Process, including the costs of its legal counsel.

Report, s. 2.2(3)(b), s. 2.4(3).

32. The Monitor is of the view that the Transaction is the best available in the circumstances and recommends this Court approve the Transaction as contemplated pursuant to the Sale Agreement.

Report, s. 2.7(1).

PART III - ISSUE

33. The Monitor's request for the Orders on this motion raises only one issue for this Court:

(a) Does the Transaction satisfy the legal test for approval?

PART IV - LAW AND ARGUMENT

A. Does the Transaction satisfy the legal test for approval?

34. Pursuant to the Sale Process Order, if no LOIs were received at the end of the sixth week of the Sale Process, the Monitor was given the express entitlement to bring this motion to terminate the Sale Process and to convey the DHI Interest to Mattamy in full satisfaction of all obligations of Downsview owing to Mattamy.

Report, Appendix G, s. 1(c).

35. Under Section 100 of the *Courts of Justice Act* (Ontario), this Court has the power to vest in any person an interest in real or personal property that the Court has authority to order be conveyed.

Courts of Justice Act, R.S.O. 1990, c. C-43, s.100.

36. Pursuant to Section 36(1) of the *Companies' Creditors Arrangement Act* (the "**CCAA**"), a debtor company may sell or otherwise dispose of assets outside the ordinary course of business if authorized by a Court.

CCAA, s. 36(1).

37. Section 36(3) of the CCAA provides a non-exhaustive list of factors (the "**Section 36 Factors**") that the Court should consider in determining whether to approve a sale of assets outside the ordinary course of business. Section 36(3) of the CCAA reads as follows:

> **Factors to be considered**
>
> (3) In deciding whether to grant the authorization, the court is to 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 a 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.
>
> CCAA, s. 36(3).

38. It is settled law that where a Court is asked to approve a sales process and transaction in a receivership context, the Court is to consider the following principles (collectively, the "***Soundair* Principles**"):

> (a) whether the party made a sufficient effort to obtain the best price and to not act improvidently;
>
> (b) the interests of all parties;
>
> (c) the efficacy and integrity of the process by which the party obtained offers; and
>
> (d) whether the working out of the process was unfair.
>
> *Royal Bank of Canada v. Soundair Corp*. (1991), 4 O.R. (3d) 1 (C.A.), at para. 16 [*Soundair*].

39. The Section 36 Factors largely overlap with the *Soundair* Principles. Indeed, the Court often considers a combination of the Section 36 Factors and the *Soundair* principles in determining whether to approve a particular sale transaction under the CCAA.

> *Re Canwest Publishing Inc.*, 2010 ONSC 2870, at para. 13 (Commercial List), Book of Authorities, Tab 3.
>
> *Re Terrace Bay Pulp Inc*., 2012 ONSC 4247, at para. 44 (Commercial List), Book of Authorities, Tab 4.
>
> *Re Nortel Networks Corp.*, [2009] O.J. No. 3169, at para. 53 (Sup. Ct. J. [Commercial List]), Book of Authorities, Tab 5.
>
> *Re Grant Forest Products Inc.*, 2010 ONSC 1846, at para. 31 (Commercial List), Book of Authorities, Tab 6.

40. Absent clear evidence that a proposed sale is improvident or that there was an abuse of process, a Court is to grant deference to the recommendation of its officer to

sell a debtor's assets. Only in such exceptional circumstances will a Court intervene and proceed contrary to the recommendation of its officer, in this case, the Monitor. This is true for both receivers selling assets on behalf of debtors and sales processes approved by monitors under the CCAA.

> *Soundair*, *supra*, at para. 21.
>
> *Marchant Realty Partners Inc. v 2407553 Ontario Inc.*, 2021 ONCA 375, at para 19, Book of Authorities Tab 7.
>
> *Re Eddie Bauer of Canada Inc.* (2009), 57 C.B.R. (5th) 241, at para. 22 (Ont. Sup. Ct. J. [Commercial List]), Book of Authorities, Tab 8.
>
> *Re AbitibiBowater Inc.*, 2010 QCCS 1742 at paras. 69-72, Book of Authorities, Tab 9.

41. In the present case, evidence has been presented in the Report to demonstrate that each of the *Soundair* Principles and the applicable Section 36 Factors has been satisfied, militating in favour of approval of the Transaction sought on this Motion.

(i) Efforts to Obtain the Best Price

42. In accordance with the Sale Process, and as detailed above, commencing on June 30, 2021, the Monitor engaged in a pre-marketing process (preparing the VDR, Teaser, CA and CIM) and marketing process to solicit interest in the DHI Interest from prospective purchasers who were previously qualified, or could be qualified, as Mattamy Acceptable Buyers. The Monitor is of the view that the pre-marketing and marketing processes were reasonable in the circumstances and adhered to the Sale Process Order.

> Report, ss. 2.2-2.3.

43. Following the Monitor's advertisement in *The Globe and Mail*, two additional prospective buyers contacted the Monitor requesting further details. Mattamy provided its consent to such parties participating in the Sale Process as Mattamy Acceptable Buyers. The Monitor, among other things, provided Mattamy Acceptable Buyers access to due diligence materials and followed up with them to gauge their interest and to understand their views. The Monitor believes that the Sale Process was commercially reasonable and conducted in accordance with the terms of the Sale Process Order.

Report, ss. 2.2-2.3, and s. 2.7.

44. The Monitor believes that all Mattamy Acceptable Buyers were given a reasonable opportunity to review the opportunity, conduct due diligence and make an offer. Mattamy also confirmed that it was prepared to renegotiate the Agreements which address the economics of the Project (as required by the Sale Process). None of the Mattamy Acceptable Buyers who performed due diligence raised the issue of submitting two offers as a concern.

Report, s. 2.3(7) and s. 2.7(f).

45. Despite these efforts, no LOIs were submitted by the bid deadline. The market having been canvassed in accordance with the Sale Process Order, it is apparent that prospective purchasers do not believe the potential return on the DHI Interest justifies the cost of repaying the DHI Facility. The best price for the Purchased Assets is thus the purchase price payable pursuant to the Transaction.

Report, s. 2.7(1)(h).

46. Further, this Court made a finding of fact that the market of potential purchasers would not be "chilled" by the Sale Process running in tandem with the Arbitration. The results of the Sale Process, whatever they may be, are thus the best the market has to offer for the DHI Interest.

Downsview Decision, supra, at para 54.

47. The Foreign Representative has received proceeds of at least $70 million since the commencement of these CCAA Proceedings. If the Foreign Representative believed that the DHI Interest has value, it could have requested to be a Mattamy Acceptable Buyer so that it could submit a bid for the DHI Interest. It did not make such a request.

Report, s. 2.7(g).

48. Similarly, if the Foreign Representative suspected there was equity in the DHI Interest, it could have repaid the DHI Facility and replaced Mattamy as DIP lender. It did not.

(ii) The interests of all parties

49. The Transaction provides the best possible outcome for all parties with an economic interest in these proceedings. This is evident from the following considerations:

(a) Mattamy is the only party with an economic interest in the Purchased Assets;

(b) the Foreign Representative did not request to be a Mattamy Acceptable Buyer, which would have enabled it to be considered a potential purchaser in the Sale Process. The Foreign Representative also had the opportunity to repay the DHI Facility, which it did not exercise;

(c) the Transaction provides for the greatest recovery available in the circumstances – the satisfaction of the DHI Facility;

(d) Mattamy has agreed to pay the Sale Process Costs. Accordingly, such amounts will not be funded by monies that would otherwise be distributable to UCI; and

(e) the Monitor does not believe that further time spent marketing the assets will result in a superior transaction. Absent the Transaction, there will be ongoing professional fees and other costs for which there is no benefit to these CCAA Proceedings.

Report, s. 2.7.

50. The Foreign Representative does not oppose this motion, but requests that any order approving the Transaction should expressly preserve the rights of Downsview, and the corresponding liability of Mattamy, for the amounts of any award made in the Arbitration in favour of Downsview.

Affidavit of Guy Gissin, affirmed November 24, 2021, at para 11.

51. This request makes no commercial sense and is unreasonable in the circumstances. The assets being sold to Mattamy include Downsview's rights under the

relevant Agreements. Such rights necessarily include any benefits flowing from a favourable interpretation of the Agreements determined in the Arbitration. To preserve an interest of the seller in the Agreements would be contrary to the terms of the Sale Process and Mattamy's rights to retain its collateral in full satisfaction of its debt.

52. The Court-approved Sale Process contemplated conveying the DHI Interest to Mattamy in full satisfaction of all obligations of Downsview owing to Mattamy if no LOIs were submitted. It did not contemplate preserving Downsview's rights under certain agreements pending the outcome of the Arbitration, which was specifically contemplated by the Court in ordering the Sale Process and Arbitration to proceed concurrently. The Foreign Representative's requested carve-out fundamentally alters the nature of the Transaction and deprives Mattamy of the benefits of its foreclosure rights.

Report, Appendix G, s. 1(c).

53. Downsview's actual equity interest in the Project could have been determined by permitting the Project to run to completion rather than putting the DHI Interest up for sale. At the Foreign Representative's election, that is no longer possible. Mattamy had offered, and the Monitor had recommended, to extend the Maturity Date of the DHI Facility to the completion of the Project to determine whether there was in fact any equity in the Project and whether the $21 million issue would have resulted in equity value held by Downsview. The Foreign Representative rejected that offer, resulting in the maturity date of the DHI Facility being extended to only February 3, 2021. At such date, Downsview was unable to repay the DHI Facility and Mattamy was permitted to seek the appointment of a receiver to realize on its collateral. The Foreign Representative now requests relief that would put itself back in the position it would otherwise have been had it not rejected Mattamy's offer to extend the maturity date of the DHI Facility to the completion of the Project.

Report, s. 2.0(10).

54. The Foreign Representative cannot now re-litigate the Sale Process Order after this Court and the Court of Appeal rejected its arguments on three separate occasions. Its requested relief must be denied.

(iii) The Efficacy and Integrity of the Process

55. The Sale Process was approved by this Court pursuant to the Sale Process Order. The Monitor followed the court-approved Sale Process.

56. The Sale Process has now run, and no LOIs were received. In accordance with the Sale Process Order, if no bids were received, the termination of the Sale Process and a transaction with Mattamy were specifically contemplated therein.

Report, Appendix G.

57. The Purchased Assets were marketed, in accordance with the Sale Process, to prospective purchasers in *The Globe and Mail*. Additionally, Mattamy provided the Monitor with eight Mattamy Acceptable Buyers prior to the commencement of the Sale Process and agreed to two additional parties participating (identified through *The Globe and Mail* notice). All interested parties were given the opportunity to be qualified as Mattamy Acceptable Buyers, who, upon being designated as Mattamy Acceptable Buyers, were provided with access to conduct due diligence after executing the necessary CA. The only request to become a Mattamy Acceptable Buyer that was not consented to by Mattamy was a request from Alan Saskin for Dig Developments Inc., an entity owned by a Saskin family trust.

Report, s. 2.2(4) and ss. 2.3(3)-(4).

58. Mattamy worked collaboratively with the Monitor to carry out the Sale Process and, among other things: (i) confirmed that it was prepared to renegotiate the Agreements which address the economics of the Project, (ii) attested that it did not participate in any meetings with any interested parties regarding the Project and the Sale Process without the Monitor in attendance, and (iii) agreed to fund the Sale Process Costs if there was no third party buyer for the DHI Interest.

Report, Appendix I, ss. 2.4(3)-(4).

59. The Sale Agreement was negotiated in good faith, is the best consideration that is possible under the circumstances and was specifically contemplated by the Sale Process Order.

(iv) Whether the Process was Unfair

60. As discussed above, the Sale Process was approved by this Court and leave to appeal such decision was dismissed by the Court of Appeal. This confirms that the Sale Process was fair and reasonable.

Downsview Decision, *supra*.

Leave to Appeal Dismissal, *supra*.

61. The Monitor took appropriate steps to (i) solicit prospective purchasers (by advertising in *The Globe and Mail*) to attract as many potential Mattamy Acceptable Buyers as possible, (ii) diligently prepare marketing materials to provide to Mattamy Acceptable Buyers and (iii) negotiate the best terms for the sale of the Purchased Assets with the eventual purchaser, all in accordance with the court-approved Sale Process.

62. The Monitor directly conducted good faith, arm's length negotiations with Mattamy regarding the terms and conditions of the Sale Agreement. The Monitor believes that the terms and conditions are fair and reasonable under the current circumstances and recommends the Court approve the Transaction.

63. Based on the foregoing, it is clear that the proposed Transaction satisfies the *Soundair* Principles and the applicable Section 36 Factors.

PART V - ORDER REQUESTED

64. For the reasons set forth herein and in the Report, the Monitor respectfully requests the granting of the Order in the form contained in the Monitor's motion record.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 1st day of December, 2021.

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SCHEDULE "A"

LIST OF NON APPLICANT AFFILIATES

Urbancorp Power Holdings Inc.
Vestaco Homes Inc.
Vestaco Investments Inc.
228 Queen’s Quay West Limited
Urbancorp Cumberland 1 LP
Urbancorp Cumberland 1 GP Inc.
Urbancorp Partner (King South) Inc.
Urbancorp (North Side) Inc.
Urbancorp Residential Inc.
Urbancorp Realtyco Inc.

SCHEDULE "B"
LIST OF AUTHORITIES

1. *Urbancorp Toronto Management Inc., 2021 ONSC 4262* (Commercial List)
2. *Urbancorp Toronto Management Inc. (Re)*, 2021 ONCA 613
3. *Re Canwest Publishing Inc.*, 2010 ONSC 2870 (Commercial List)
4. *Re Terrace Bay Pulp Inc*., 2012 ONSC 4247 (Commercial List)
5. *Re Nortel Networks Corp.*, [2009] O.J. No. 3169 (Sup. Ct. J. [Commercial List])
6. *Re Grant Forest Products Inc.*, 2010 ONSC 1846 (Commercial List)
7. *Marchant Realty Partners Inc. v 2407553 Ontario Inc.*, 2021 ONCA 375
8. *Re Eddie Bauer of Canada Inc.* (2009), 57 C.B.R. (5th) 241 (Ont. Sup. Ct. J. [Commercial List]).
9. *Re AbitibiBowater Inc.*, 2010 QCCS 1742.

SCHEDULE "C"
RELEVANT STATUTES

1. *Courts of Justice Act*, R.S.O. 1990, c. C-43, s. 100.

Vesting orders

100. A court may by order vest in any person an interest in real or personal property that the court has authority to order be disposed of, encumbered or conveyed.
Injunctions and receivers.

2. *Companies' Creditors Arrangement Act* (R.S.C., 1985, c. C-36), s. 36(1), s. 36(3).

Restriction on disposition of business assets

36 (1) A debtor company in respect of which an order has been made under this Act may not sell or otherwise dispose of assets outside the ordinary course of business unless authorized to do so by a court. Despite any requirement for shareholder approval, including one under federal or provincial law, the court may authorize the sale or disposition even if shareholder approval was not obtained.

Factors to be considered

(3) In deciding whether to grant the authorization, the court is to 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 a 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.

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., ET AL.

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

ONTARIO
SUPERIOR COURT OF JUSTICE
(Commercial List)

FACTUM OF THE MONITOR
(RETURNABLE December 7, 2021 – Sale Approval and Vesting Order)

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