

**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 URBANCORP CCAA ENTITIES

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PART I – OVERVIEW

1. Pursuant to the Order of the Honourable Justice Newbould dated May 18, 2016 (the “**Initial Order**”), the Applicants, along with certain affiliated entities (together, the “**Urbancorp CCAA Entities**”), were granted creditor protection pursuant to the *Companies Creditors’ Arrangement Act* (“**CCAA**”) and KSV Kofman Inc.¹ was appointed as Monitor of the Urbancorp CCAA Entities (the “**Monitor**”).
2. The Initial Order granted a stay of proceedings in favour of the Urbancorp CCAA Entities until and including June 17, 2016 or such later date as the Court may order (the “**Stay Period**”). The Stay Period was most recently extended on June 28, 2023 pursuant to the Order of the Honourable Chief Justice Morawetz until and including September 29, 2023.
3. The Urbancorp CCAA Entities seek an extension of the Stay Period until and including January 31, 2024. The Urbancorp CCAA Entities submit that the requested extension of the Stay Period should be granted as they have been acting in good faith and with due diligence in the conduct of the within CCAA proceeding.
4. The requested stay extension is appropriate and consistent with the objectives of the CCAA and will assist the Monitor as it continues to address certain outstanding administrative matters that must necessarily be dealt with before any final distributions can be made in the CCAA proceeding. The requested extension of the Stay Period is necessary in the circumstances and is supported by the Monitor.

PART II - FACTS

5. Given that the facts relevant to the request for the extension of the Stay Period are those more recent facts arising since the date of the aforementioned Order of June 28, 2023, the background facts in respect of the Urbancorp CCAA Entities are abbreviated and a more fulsome description of those facts can be found in the Monitor’s prior reports to the Court.
6. The Urbancorp Group of Companies, which included the Urbancorp CCAA Entities, was primarily engaged in the development, construction and sale of residential properties in the Greater Toronto Area.²

¹ Effective August 31, 2020, KSV Kofman Inc. changed its name to KSV Restructuring Inc.

² Fifty-Eighth Report of the Monitor dated September 25, 2023 at pg. 5.

7. Urbancorp Inc. (“**UCI**”) was incorporated on June 19, 2015 to raise debt in the Israeli public markets and pursuant to a Deed of Trust dated December 7, 2015, UCI made a public offering (the “**IPO**”) of debentures in Israel in the amount of NIS180,583,000 (approximately CDN \$64 million based on the exchange rate at the time of the IPO) (the “**Debentures**”).³
8. Using the funds raised through the IPO, UCI made unsecured loans totaling CDN \$46 million to certain of the Urbancorp CCAA Entities to assist those entities in repaying obligations owed by them at the time.⁴
9. During the course of the within CCAA proceeding, approximately CDN \$71 million has been distributed to UCI. While it is unclear whether Debentureholders will see a full recovery, the amounts repaid to UCI exceed the principal amount owing to the Debentureholders at the commencement of the CCAA proceeding.⁵
10. At the return of the Urbancorp CCAA Entities’ most recent stay extension motion on June 28, 2023, the Monitor advised the Court regarding the few remaining matters outstanding in the CCAA proceeding, the most significant being the status of the management fee dispute between Downsview Homes Inc. and Mattamy (Downsview) Limited (“**Mattamy**”) and the wind-down of those Urbancorp CCAA Entities that had an interest in certain geothermal assets.
11. The Court was advised that the Monitor and Guy Gissin as the functionary officer and foreign representative (the “**Foreign Representative**”) had brought a joint motion for leave to appeal the decision of the Honourable Madam Justice Kimmel dated May 19, 2023 pursuant to which the arbitration award of the Honourable Mr. Frank Newbould in favour of the Monitor on the management fee dispute had been set aside and a new arbitration before a new arbitrator was ordered.⁶
12. At the time of the most recent stay extension motion, the Court was advised that settlement discussions had begun between the Monitor, the Foreign Representative and Mattamy. Since then, settlement discussions progressed ultimately resulting in a settlement agreement pursuant to which CDN \$2,960,000 shall be paid to the Monitor, in trust, and which agreement is conditional upon the parties executing a mutual release, the abandonment of the joint

³ *Ibid.*

⁴ *Ibid.*

⁵ *Ibid.*

⁶ *Ibid.*, at pgs. 6-7.

motion for leave to appeal and approval by this Court and the Israeli Court (the “**Mattamy Settlement**”).⁷ The approval of the Mattamy Settlement by this Court is being sought by the Monitor on a separate motion.

13. With respect to the wind-down of the geothermal asset owners, those entities are solvent and all residual funds, net of professional fees, can be distributed to UCI. However, as the Court was advised at the return of the last stay extension motion, prior to distributing those funds, the Monitor must receive clearance certificates from Canada Revenue Agency (“**CRA**”) confirming that the geothermal asset owners are not indebted to CRA on account of taxes or HST.⁸
14. As part of the process of obtaining clearance certificates, the Monitor has had to file up to date tax returns for all of the geothermal asset owners and to obtain assessments or re-assessments from CRA for each of those entities. The timeline for obtaining the clearance certificates, however, is not within the control of the Monitor and while the Monitor has continued to make progress on the matter during the most recent extension of the Stay Period, there is no date certain by which the clearance certificates will be obtained.⁹

PART III - ISSUES

15. The issues before the Court are (i) whether the requested stay extension to January 31, 2024 and (ii) the fee and report approvals sought by the Urbancorp CCAA Entities, should be granted.

PART IV - LAW AND ARGUMENT

A. Extension of the Stay Period

16. Section 11.02(2) and (3) of the CCAA provides that, on an application other than an initial application, the Court may make a stay order for any period that the Court considers necessary if the applicant satisfies the Court that (a) the circumstances exist that make the order appropriate, and (b) the applicant has acted, and is acting, in good faith and with due diligence.¹⁰

⁷ *Ibid.*

⁸ *Ibid.*, at pgs. 10-11.

⁹ *Ibid.*, at pgs. 2 and 11.

¹⁰ [CCAA, s. 11.02\(2\) and \(3\)](#).

17. As such, provided that the two aforementioned conditions are met, the Court has the discretion to grant an extension of the stay of proceedings in whatever duration the Court considers necessary and appropriate given the circumstances.
18. Other factors that the Court will consider in granting a stay extension include the debtor's progress during the previous stay period toward a restructuring, whether creditors will be prejudiced if the Court grants the extension and the comparative prejudice to the debtor, creditors and other stakeholders if the extension is not granted.¹¹
19. The question of good faith relates to the conduct of the debtor during the CCAA proceeding.¹² In the instant case, the Urbancorp CCAA Entities have acted in good faith throughout this CCAA proceeding and continue to do so and there has been no assertion by any party to the contrary.
20. The Urbancorp CCAA Entities have also acted with and continue to act with due diligence. During the course of the most recent Stay Period, the Monitor engaged in discussions with the Foreign Representative and Mattamy and ultimately came to terms on the Mattamy Settlement. The resolution of the dispute with Mattamy (subject to the Mattamy Settlement's approval by this Court and the Israeli court) is a substantial milestone towards wrapping up this CCAA proceeding.
21. The only substantive issue that remains to be addressed is obtaining clearance certificates for the geothermal asset owners from CRA. As noted above, only once the clearance certificates are obtained can the net residual funds held by the Monitor be distributed. During the course of the last Stay Period, the Monitor continued to advance this matter working with its legal counsel and the Urbancorp Group's accountants on the various tax returns and amended tax returns that need to be filed. Given the complexity of the filings in light of the historical tax planning undertaken by the Urbancorp Group, it is unknown how long it will take CRA to assess or re-assess any filings. Although as noted above, the Monitor has no control over the timing to obtain the clearance certificates, the Monitor has acted and continues to act with due diligence to move the matter forward.
22. Lastly, in addition to the substantial progress that was made during the course of the last Stay Period evidenced by the Mattamy Settlement, no creditor will be prejudiced if the requested

¹¹ [Federal Gypsum Co. \(Re\)](#), 2007 NSSC 347 at paras. 24-29.

¹² [Muscletech Research & Development Inc. \(Re\)](#), 2006 CanLII 3282 (Ont.S.C.J. [Comm. List]) at para. 4.

extension of the Stay Period is granted and no party has voiced any opposition to the requested extension.

B. Fee and Report Approvals

23. As set out in *Nordstrom Canada Retail, Inc.*, the overarching test for assessing the fees and disbursements of the Monitor and its counsel is whether they are fair and reasonable in all of the circumstances and requires an overall assessment and consideration of the work done and the results achieved. In conducting that overall assessment and determining what is fair and reasonable, the predominant consideration for the Court should be the value provided.¹³
24. The Court shall consider the following factors in assessing the fees and disbursements: (i) the nature, extent and value of the assets being handled; (ii) the time spent and the complications and difficulties encountered; (iii) the Monitor’s knowledge, experience and skill; (iv) the diligence and thoroughness displayed by the Monitor; (v) the responsibilities the Monitor assumed; and (vi) the results of the Monitor’s efforts.¹⁴
25. The fees and disbursements of the Monitor and its counsel, Davies Ward Phillips & Vineberg LLP (“**Davies**”), as well as those of counsel to the Urbancorp CCAA Entities, DLA Piper (Canada) LLP (“**DLA**”), for the period June 1, 2023 to August 31, 2023, are set out in the fee affidavits of Noah Goldstein, Robin Schwill and Edmond Lamek, respectively (together, the “**Fee Affidavits**”), attached as appendices to the Monitor’s Fifty-Eighth Report dated September 25, 2023 (the “**Fifty-Eighth Report**”).
26. The Fifty-Eighth Report details the efforts undertaken by the Monitor and Davies during the period of the most recent Stay Extension to advance the few outstanding matters in the CCAA proceeding. In the instant case, the work done has been appropriately conducted in a timely and diligent manner by all parties and the fees and disbursements of the Monitor, Davies and DLA are both fair and reasonable in all of the circumstances.
27. With respect to the Urbancorp CCAA Entities’ request for approval of the Fifty-Eighth Report and the Monitor’s activities described therein, the Court in *Target Canada Co. (Re)* noted that there are both policy and practical reasons for the approval of the Monitor’s activities,

¹³ [Nordstrom Canada Retail, Inc., 2023 ONSC 4199 \(Ont. S.C.J. \[Comm. List\]\)](#) at para. 24..

¹⁴ *Ibid.*


including, among others, allowing the Monitor to move forward with the next steps in the CCAA proceeding, bringing the Monitor's activities before the Court, allowing an opportunity for the concerns of stakeholders to be addressed and any problems rectified, enabling the Court to satisfy itself that the Monitor's activities have been conducted in a prudent and diligent manner and providing the Monitor with protection not otherwise provided by the CCAA.¹⁵

28. The Court's approval of the Fifty-Eighth Report and the Monitor's activities fulfills the policy and practical purposes set out in the preceding paragraph and the other salutary effects noted by the Court in *Target*.
29. Finally, there has been no adverse comment about the fees and disbursements detailed in the Fee Affidavits nor the Fifty-Eighth Report and the Monitor's activities described therein.

PART V - CONCLUSION

30. For the reasons set forth herein, the Urbancorp CCAA Entities request that the Order extending the Stay Period until and including January 31, 2024 be granted, the fees and disbursements of the Monitor, Davies and DLA be approved and the Fifty-Eighth Report and the Monitor's activities detailed therein be approved, substantially in the form of the draft Order attached as Tab 3 to the Urbancorp CCAA Entities' Motion Record.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 27th day of September, 2023.

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¹⁵ [Target Canada Co. \(Re\), 2015 ONSC 7574 \(Ont S.C.J. \[Comm. List\]\)](#) at para. 23.

**SCHEDULE “A”
LIST OF AUTHORITIES**

1. [*Federal Gypsum Co. \(Re\)*, 2007 NSSC 347.](#)
2. [*Muscletech Research & Development Inc. \(Re\)*, 2006 CanLII 3282 \(Ont.S.C.J. \[Comm. List\]\).](#)
3. [*Nordstrom Canada Retail, Inc.*, 2023 ONSC 4199 \(Ont. S.C.J. \[Comm. List\]\).](#)
4. [*Target Canada Co. \(Re\)*, 2015 ONSC 7574 \(Ont S.C.J. \[Comm. List\]\).](#)

SCHEDULE “B”
TEXT OF STATUTES, REGULATIONS & BY-LAWS

Companies’ Creditors Arrangement Act, R.S.C., 1985, c. C-36

s. 11.02(2)

Stays, etc. — other than initial application

(2) A court may, on an application in respect of a debtor company other than an initial application, make an order, on any terms that it may impose,

(a) staying, until otherwise ordered by the court, for any period that the court considers necessary, all proceedings taken or that might be taken in respect of the company under an Act referred to in paragraph (1)(a);

(b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and

(c) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.

s. 11.02(3)

Burden of proof on application

(3) The court shall not make the order unless

(a) the applicant satisfies the court that circumstances exist that make the order appropriate; and

(b) in the case of an order under subsection (2), the applicant also satisfies the court that the applicant has acted, and is acting, in good faith and with due diligence.

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED

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