Court File No.: CV-24-00715326-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

B E T W E E N:

CONSTANTINE ENTERPRISES INC.

Applicant

- AND -

SAM M (180 SAW) LP INC. AND
SAM M (180 SAW) INC.

Respondents

IN THE MATTER OF AN APPLICATION UNDER SUBSECTION 243(1) OF THE *BANKRUPTCY AND INSOLVENCY ACT*, R.S.C. 1985, C. B-3, AS AMENDED, AND SECTION 101 OF *THE COURTS OF JUSTICE ACT*, R.S.O. 1990, C. C.43, AS AMENDED

REPLY FACTUM OF KSV RESTRUCTURING INC., IN ITS CAPACITY AS COURT-APPOINTED RECEIVER

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REPLY FACTUM OF KSV RESTRUCTURING INC., IN ITS CAPACITY AS COURT-APPOINTED RECEIVER

PART I - INTRODUCTION

1. This factum is filed by KSV Restructuring Inc. ("**KSV**"), in its capacity as the Court-appointed receiver and manager (in such capacity, the "**Receiver**") of the Property (as defined in the Receivership Order, as defined below), in connection with the "comeback" motion regarding the acceptance of an agreement of purchase and sale dated June 14, 2024 (the "**Stalking Horse APS**") between the Receiver and Constantine Enterprises Inc. ("**CEI**"), as purchaser, solely for the purpose of constituting the "stalking horse bid" in the sale process for the Property (the **"Sale Process**").

2. This factum is being filed in response to the factum filed by the Respondents and Sam Mizrahi (the "**Mizrahi Parties**") dated June 3, 2024.

PART II - SUMMARY OF FACTS

3. Further background related to the original motion seeking approval of the Sale Process and acceptance of the Stalking Horse APS to serve as a stalking horse is set out in the Receiver's first report to court dated June 14, 2024 and factum dated June 17, 2024 (the "**First Report**") and therefore not repeated herein. Capitalized terms used herein and not otherwise defined have the meaning given to them in the First Report or in the Supplement to the First Report dated July 7, 2024.

PART III - STATEMENT OF ISSUES, LAW & AUTHORITIES

4. On June 21, 2024, the Receiver sought and obtained an Order (the "**Sale Process Order**") approving the Sale Process (as outlined in the First Report) and accepting the Stalking Horse APS.[1] Counsel for the Respondents appeared at the June 21, 2024 hearing and requested an adjournment, which request was denied.[2]

5. The Court granted the Sale Process Order and provided a limited right for a "comeback" solely to allow the Mizrahi Parties to present an argument on the Stalking Horse APS. As such, the only issue subject to the "comeback" are matters related to the Stalking Horse APS itself, not the Sale Process.[3]

6. There have been no objections raised as to the terms or the substance of the Stalking Horse APS itself. Instead, the objections relate to the Sale Process and the inclusion of CEI as

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[1] *In the Matter of Constantine Enterprises Inc. v Sam M (180 SAW) LP Inc., et al.* [***180 SAW Receivership***] (June 21, 2024), Superior Court of Justice (Commercial List), Toronto, CV-24-00715326-00CL, (SAW Sale Process Order of Justice W.D. Black).
[2] *180 SAW Receivership,*(June 21, 2024), Superior Court of Justice (Commercial List), Toronto, CV-24-00715326-00CL Endorsement of Justice W.D. Black at para 19.
[3] *180 SAW Receivership,*(June 21, 2024), Superior Court of Justice (Commercial List), Toronto, CV-24-00715326-00CL Endorsement of Justice W.D. Black at para 17.

both a bidder as well as party whose consent must be sought for a new partner in the 180 SAW Project given, among other things, it is a 50% shareholder of the general partner.[4]

7. The Sale Process is structured to maximize value for stakeholders recognizing the rights of CEI in these proceedings as senior secured creditor of the Respondents, as well as the two-thirds partner of the Partnership and the 50% shareholder of the General Partner.[5]

8. The structure of the Sale Process also considers the size and scale of the 180 Steeles Project, being a multi-billion dollar development project. CEI's future partner will need to be well-capitalized, and it is likely that CEI will require its future partner to have significant real estate development experience. CEI will also need to know that it and its future partner have a similar vision for the project and that they can have a constructive working relationship.[6] The position taken by the Mizrahi Parties ignore this factual reality.

9. The structure of the Sale Process is not without precedent. In the CCAA proceedings of the Urbancorp Group of Companies ("**Urbancorp**"), KSV, who is also the Monitor in those proceedings, conducted a sale process in very similar circumstances where Mattamy (Downsview) Limited ("**Mattamy**"), its partner in the Downsview Project, was provided with "veto rights" on approved bidders as well as an eventual consent right regarding any bids.[7] The Court approved the sale process over the objection of other stakeholders, but directing the Monitor to advise interested parties of the consent right.[8]

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[4] Supplement to the First Report of KSV Restructuring Inc., as Receiver and Manager, (in such capacity, the "**Receiver**") dated July 8, 2024 (the "**Supplemental Report**") at para 2.0.2.
[5] Supplemental Report at para 2.0.2.
[6] Supplemental Report at para 2.0.4.
[7] Supplemental Report at para 2.0.8; *Urbancorp Toronto Management Inc*., 2021 ONSC 4262 (Commercial List) **[*Urbancorp* Decision]** at para 42, attached at Schedule C; Leave to appeal denied**,** *Urbancorp Toronto Management Inc. (Re)*, 2021 ONCA 613.
[8] *Urbancorp* Decision at para 45.

10. There is no indication that any of the concerns raised by the Mizrahi Parties have any merit. Among other things:[9]

(a) the Sale Process requires that CEI provide the Receiver with a list of CEI Acceptable Bidders;

(b) the marketing materials in the data room disclose the requirement for CEI's consent to the transaction;

(c) CEI, with the assistance of CBRE (the sales agent), has identified 36 Acceptable Bidders;

(d) CEI has already consented to the addition of a party who was not on the original list of CEI Acceptable Bidders (and has not refused to add to the list any potential purchaser suggested by the Receiver or CBRE);

(e) CEI has advised the Receiver that it will also consider additional prospective bidders who express an interest in this opportunity; and

(f) CBRE has advised the Receiver that it has contacted all 36 CEI Acceptable Bidders, none of whom have raised concerns with CEI's rights in the Sale Process or as a prospective partner in the 180 SAW Project.

11. Further,

(a) the objections of the Mizrahi Parties relate to the Sale Process and not the Stalking Horse APS, which is not subject to the comeback;

[9] Supplemental Report at para 2.0.5

(b) any transaction will be subject to approval of the Court and satisfaction of the applicable tests for transaction approval;[10]

(c) the Stalking Horse APS does not contain bid protections or other provisions which might otherwise serve to chill the Sale Process;[11]

(d) the consultation and consent rights of CEI are reflective of the realities of the situation and do not constitute a "delegation" of the Receiver's authority;[12]

(e) the Receiver does not have the authority to compel CEI to accept any party as its partner;

(f) it is common for senior lenders and other critical stakeholders to have consent rights in a court-supervised sale process;

(g) the allegations made in the pending litigation involving Mr. Mizrahi and CEI were rejected as evidence in connection with the receivership application and should be not be accepted as evidence in connection with this motion;[13]

(h) the Mizrahi Parties have not advanced any evidence that CEI has an incentive to be the "Successful Bidder" in the Sale Process rather than recover on its indebtedness and find a well-capitalized, experienced partner who can fund its share of the costs of the 180 SAW Project and meaningfully contribute to its development;

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[10] First Report of the Receiver dated June 14, 2024 (the "**First Report**") at para 4.1.2(f).
[11] First Report at para 4.4.1(b).
[12] First Report at para 4.4.1(h).
[13] *180 SAW Receivership,* (May 13, 2024), Superior Court of Justice (Commercial List), Toronto, CV-24-00715326-00CL (Endorsement of Justice Cavanagh) at para 74.

(i) Courts have held that the pre-consent of a creditor to acceptable bidders is acceptable;[14] and

(j) the Receiver, as a court officer, has given consideration to all of the circumstances and has recommended the acceptance of the Stalking Horse APS on the terms provided.[15]

PART IV - ORDER REQUESTED

12. For these and the other reasons noted above, the Receiver therefore requests that the objections of the Mizrahi Parties be dismissed.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 8th day of July, 2024.

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[14] *Urbancorp* Decision at para 60, attached at Schedule C.
[15] *Urbancorp* Decision at para 61, attached at Schedule C.

SCHEDULE "A"

LIST OF AUTHORITIES

1. *In the Matter of Constantine Enterprises Inc. v Sam M (180 SAW) LP Inc.*, et al. (June 21, 2024), Superior Court of Justice (Commercial List), Toronto, CV-24-00715326-00CL, (SAW Sale Process Order of Justice W.D. Black)

2. *In the Matter of Constantine Enterprises Inc. v Sam M (180 SAW) LP Inc., et al.,* Endorsement of Justice W.D. Black (June 21, 2024)

3. *Urbancorp Toronto Management Inc.*, 2021 ONSC 4262 (Commercial List); leave to appeal denied, *Urbancorp Toronto Management Inc. (Re)*, 2021 ONCA 613

4. *In the Matter of Constantine Enterprises Inc. v Sam M (180 SAW) LP Inc.*, et al., (June 21, 2024), Superior Court of Justice (Commercial List), Toronto, CV-24-00715326-00CL Endorsement of Justice W.D. Black

SCHEDULE “B”

TEXT OF STATUTES, REGULATIONS & BY - LAWS

N/A

SCHEDULE "C"

1. *Urbancorp Toronto Management Inc.*, 2021 ONSC 4262 (Commercial List)

CITATION: URBANCORP TORONTO MANAGEMENT INC., 2021 ONSC 4262
COURT FILE NO.: CV-16-11389-00CL
DATE: 2021-06-30

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: **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

BEFORE: Chief Justice G.B. Morawetz

COUNSEL: *Kenneth Kraft and Neil Rabinovitch,* for Guy Gissin, Israeli Court Appointed Functionary Officer and the Foreign Representative of Urbancorp Inc.

Robin Schwill and Robert Nicholls, for the Monitor, KSV Restructuring Inc.

Matthew Gottlieb, Sapna Thakker and Jane O. Dietrich, for Mattamy (Downsview) Limited

ENDORSEMENT

Background

[1] This endorsement addresses two motions.

[2] KSV Restructuring Inc. ("KSV"), in its capacity as 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 an order approving the sales process (the "Sales Process") for Urbancorp Downsview Park Development Inc.'s ("Downsview") interest in Downsview Homes Inc. ("DHI") and the related project agreements (the "Downsview Interest"), and sealing the confidential appendices (the "Confidential Appendices") to (i) the Forty-Fourth Report of the Monitor dated February 11, 2021 (the "Report") and (ii) the supplement to the Report dated March 8, 2021 (the "Supplement").

[3] The second motion is brought by Guy Gissin, in his capacity as foreign representative of Urbancorp Inc. ("UCI") (the "Foreign Representative") for an order that KSV deliver a Notice of Request to Arbitrate to Mattamy (Downsview) Limited, and related companies (collectively, "Mattamy") (with UCI as an interested party) (the "Notice to Arbitrate"). Alternatively, UCI is seeking an order permitting it to take an assignment of Downsview's rights to arbitrate the issues with Mattamy and adjourn the Sales Process motion until after the completion of the arbitration.

[4] The Downsview Interest is a 51% joint venture interest in a residential development project being managed and controlled by its co-owner, Mattamy. The Downsview Interest is subject to (i) transfer restrictions in favour of Mattamy; and (ii) related agreements governing the co-ownership of the Project (as defined below).

[5] Mattamy is also the DIP Lender to Downsview and is currently owed over $9 million. The DHI Facility (defined below) matured on February 3, 2021. Downsview does not have the ability to repay the DHI Facility. Mattamy takes the position that it is entitled to appoint a receiver over Downsview and has made approval of the Sales Process a condition precedent to extending the Maturity Date of the DHI Facility.

[6] There have been many disputes over the interpretation of the Project related agreements that date back almost to when Mattamy first became involved in the Project.

[7] UCI has been attempting to have two issues arbitrated, namely: (i) is Mattamy entitled to an additional payments in priority over Downsview in respect of future profits from DHI; and (ii) the quantum of management fees Mattamy received during Phase 1 of the Project.

[8] The Monitor is of the view that the Sales Process can be conducted without having to first arbitrate the issues, and even if there was a prior arbitration, a sales process may be required in any event to substantiate the market value of the Downsview interest. Further, the Sales Process may also illustrate that the issues to be arbitrated are of no practical relevance (and, therefore, need not be arbitrated).

[9] The Foreign Representative believes that the proposed Sales Process will materially impair value as potential purchasers may be dissuaded from doing due diligence or submitting bids while these issues remain outstanding.

The Facts

[10] The relevant facts with respect to the KSV motion are set out in the Report and the Supplement.

[11] DHI owns land located at 2995 Keele St. in Toronto, on the former Downsview airport lands. It is developing a residential construction project comprised of condominiums, townhomes, semi-detached homes and rental units (the "Project").

[12] Downsview holds a 51% ownership interest in DHI. The remaining 49% is held by Mattamy. Downsview has rights and obligations under a co-ownership agreement (the "Co-ownership Agreement") between Downsview and Mattamy, as amended by various related agreements (the "Agreements") which, among other things, impose certain transfer restrictions on Downsview's shares of DHI in favour of Mattamy. The Monitor has characterized these

restrictions as providing Mattamy with an effective veto on any potential purchaser of the Downsview Interest.

[13] On June 15, 2016, the court approved a debtor-in-possession facility (the "DHI Facility") in the amount of $8 million between Mattamy, as lender and Downsview as borrower, secured by a charge (the "DHI Facility Charge") in favour of Mattamy over Downsview's property, including the Downsview Interest (the "Mattamy DIP Order"). The DHI Facility was used by Downsview to fund its portion of the required equity injection in the Project to secure construction financing for Phase 1.

[14] The DHI Facility was subsequently amended and increased to $9.05 million, plus interest and costs. The DHI Facility matured on February 3, 2021 (the "Maturity Date").

[15] The Monitor reports that Downsview does not have the ability to repay the DHI Facility and Mattamy has advised the Monitor that is not prepared to further extend the Maturity Date unless a Sales Process is conducted for the Downsview Interest.

[16] Pursuant to the terms of the DHI Facility and the Mattamy DIP Order, Mattamy is entitled to seek the appointment of a receiver over the Downsview Interest upon a continuing event of default under the DHI Facility. Failing to repay the DHI Facility by the Maturity Date is an event of default.

[17] UCI raised approximately $64 million through public offering of debentures in Israel and made certain unsecured loans to certain of the CCAA Entities (the "Shareholder Loans"). One of the Shareholder Loans was advanced by UCI to Downsview the amount of $10,094,562 (the "Downsview Shareholder Loan"), which remains outstanding

[18] There is a disagreement between the Monitor, the Foreign Representative and Mattamy with respect to certain accounting matters related to the Project. As a result, on January 25, 2021, the Foreign Representative served its motion

[19] The central issues in the arbitration are whether Mattamy has already received payment as provided in s.8.4(d) and 8.5(d) of the Co-ownership Agreement or whether these amounts remain payable to Mattamy and an accounting of management fees.

Position of the Parties

[20] The Foreign Representative takes the position that Mattamy has paid itself all amounts that it claims to be entitled.

[21] The Foreign Representative also takes the position that the issues in dispute could be resolved expeditiously and this would then allow Downsview's interest to be properly marketed for sale in an open and transparent sales process or allow alternative financing to replace the DHI Facility.

[22] The Monitor, in consultation with Mattamy, has proposed a Sales Process. Mattamy has advised the Monitor that it consents to the terms of the Sales Process and, if the Sales Process is not approved, Mattamy intends to seek the appointment of a receiver over the Project.

[23] The proposed Sales Process provides that at the end of the sixth week, each bidder will be required to submit letters of intent ("LOIs"). If no LOIs are submitted, the Monitor shall be entitled

to terminate the Sales Process and convey the Downsview Interest to Mattamy in full satisfaction of all obligations of Downsview owing to Mattamy.

[24] The Monitor contends that the timelines in the Sales Process are intended to provide the Monitor with an appropriate amount of time to canvass prospective purchasers and to allow for due diligence. The Monitor will have the right to extend or amend the Sales Process timelines should it feel it is warranted.

[25] The Monitor further advised that Mattamy has agreed to pay the Monitor's fees and costs to conduct the Sales Process if the proceeds are insufficient to cover these costs.

[26] The Monitor is of the view that given the efficiencies and cost savings, no better, viable alternative to the proposed Sales Process in respect of the Downsview Interest is available or otherwise acceptable to Mattamy as DIP Lender.

[27] The Foreign Representative is of the view that it will be practically impossible for any interested bidder to properly assess or conduct due diligence on the likely outcome of the issues as between Downsview and Mattamy and it is unlikely any party will spend the time and funds and undertake due diligence for the Project when such uncertainty exists. The Foreign Representative contends that the magnitude is such that the outcome could determine whether there is any value in Downsview's interest in DHI. Further, resolving these issues is critical in the event a Sales Process is to be commenced so that potential purchasers have a clear understanding of whether Mattamy has payments outstanding under the Co-ownership Agreement and the status of the Project management fees, as well as full information regarding the financial condition of the Project.

[28] From the standpoint of the Foreign Representative, conducting a Sales Process in the absence of a determination of issues as between Downsview and Mattamy is likely to cause irreparable harm to UCI, as it will be nearly impossible to determine which potential bidders were dissuaded from conducting serious due diligence and potentially submitting offers as a result of the material uncertainty over this issue. If the payment issue is resolved in favour of Downsview, the calculations of both of Monitor and the Foreign Representative show positive value for Downsview's interest in the Project.

Issues

[29] From the standpoint of the Monitor, the issues are as follows:

(a) should the Sales Process be approved?;

(b) should the court grant a sealing order in respect of the Confidential Appendices to the Report and Supplement?

[30] From the standpoint of the Foreign Representative, the issues are as follows:

(a) should the Monitor be directed to assign to UCI the rights to proceed with arbitration?

(b) alternatively, should the Monitor be directed to initiate the Notice to Arbitrate with UCI as an interested party?

(c) should the Monitor's motion to initiate the Sales Process be adjourned pending the arbitration?

Analysis

[31] In my view, it is appropriate to first address the issues raised by the Foreign Representative.

[32] The creditors of Downsview have a vested interest in ensuring that there is a fair and transparent determination of the issues referenced in the Notice to Arbitrate.

[33] In most CCAA proceedings, it is the Monitor who is charged with reviewing issues of this type. However, if the Monitor, when requested, is unwilling to review the issues, the creditors should, in most circumstances, have the ability to ensure that a review can take place. A procedure that can be modified and adapted is similar to that set out in section 38 of the *Bankruptcy and Insolvency Act* (the "BIA").

[34] In a BIA proceeding, if a creditor requests the trustee to take a proceeding that would be of benefit to the estate and the trustee refuses or neglects to do so, the creditor may move under s. 38 of the BIA for an order permitting it to, in essence, step into the shoes of the trustee, and take the proceeding. The creditor must, of course, offer the opportunity to other creditors to participate in this venture.

[35] In the circumstances of this case, the Monitor has been requested to take the steps necessary to establish the value of Downsview's interest in UCI. In my view, this necessitates an examination of the issues involved in the arbitration. It could be, in the final analysis, that the interest may have no value, but that does not mean that the issue can be ignored, especially when creditors of Downsview want the issue determined. The Monitor has the option of either taking steps to proceed with an arbitration or, in the alternative, to assign to UCI the rights to proceed with an arbitration.

[36] Although this is a CCAA proceeding, I agree with the submission of counsel on behalf of the Foreign Representative, that there is no principled reason to distinguish between a trustee in bankruptcy and a Monitor, at least where the Monitor is itself in charge of the debtor's affairs. The trustee has obligations to maximize the assets in the estate, as does the Monitor in this case.

[37] Following the reasoning (*Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60 at para. 24), which states that, to the extent possible, aspects of insolvency law that are common to the BIA and CCAA should be harmonized, it seems to me that it is appropriate to provide for an equivalent process in CCAA proceedings.

[38] Accordingly, the Monitor is directed to issue the Notice to Arbitrate to Mattamy. However, if the Monitor determines that it is not willing to issue such notice, it should assign its right to do so to UCI, in a process that follows the structure as set out in s. 38 of the BIA.

[39] In this case, I am satisfied that the facts as alleged in the Notice to Arbitrate are such that there is threshold merit to the proceeding and that the proceeding could benefit the creditors of Downsview.

[40] The final issue to consider on the Foreign Representative's motion is whether the Monitor's motion should be adjourned until the arbitration has proceeded and an award granted (if the parties

settle), or in light of my conclusion on the arbitration issue, whether the Sales Process can be run concurrently with the arbitration.

[41] The Foreign Representative submits that the Sales Process contains significant uncertainty as a result of two material outstanding issues, referenced in the Notice to Arbitrate, which could have the effect of chilling or dooming the Sales Process. Further, if the Sales Process fails, Mattamy would simply take Downsview's interest in the Project in satisfaction of its DIP Loan. The Foreign Representative contends that the Monitor has not engaged any industry-specific advice to determine whether the outstanding material issue would likely chill or doom the Sales Process to fail.

[42] The Foreign Representative also points out that the Monitor has proposed to give Mattamy veto rights over who can sign a nondisclosure agreement and thereby access the data room. Mattamy says that this restriction is built into the Mattamy DIP Order. The Foreign Representative submits that the Mattamy DIP Order deals with the conveyance of the interest over which Mattamy appears to have veto rights and that Mattamy has no veto rights on who can participate in the Sales Process by signing a non-disclosure agreement.

[43] Paragraphs [4] and [5] of the Mattamy DIP Order read as follows:

> [4] **THIS COURT ORDERS** that UC Downsview shall be and is hereby restricted from transferring or attempting to transfer any of its shares or any economic, right, title or interest in Downsview Homes Inc. ("DHI") to any party prior to obtaining the prior written consent of MDL, which consent is not to be unreasonably withheld. For greater certainty, the restrictions contained in this paragraph 4 will survive the repayment of the DHI Facility.
>
> [5] **THIS COURT ORDERS** that the rights, remedies and recourses provided to and in favour of MDL under or pursuant to this Order and the DHI Term Sheet are in addition to, not in substitution for and without prejudice to, any rights, remedies or recourses provided to MDL under any other agreements with any of the Applicants, including, without limitation, UC Downsview.

[44] The provisions of paragraph [4] impose certain restrictions on Downsview, which in turn, impact the Monitor on any sales process relating to Downsview's interest in DHI. In conducting any sales process, the Monitor has to describe the assets being offered for sale and to do so in a transparent manner. In my view, this includes an obligation to fully describe any restrictions or potential restrictions that may affect the transfer of Downsview's interest in DHI. In my view, such disclosure is required as it falls within the phrase "attempting to transfer any of its shares …" as referenced in [4]. The failure to disclose these restrictions at the outset of the Sales Process, or to defer addressing the issues until the time of conveyance could result in an increased degree of uncertainty in the entire Sales Process, which is undesirable.

[45] In the circumstances of this case, I have concluded that the Monitor should inform potential purchasers of the requirement to obtain the prior written consent of Mattamy, which consent is not to be unreasonably withheld. Any party seeking such consent is directed to do so on a timely basis,

so as to minimize the time and expense of due diligence and, if necessary, a review of the issue by the court.

[46] In response to the argument that the Sales Process should be adjourned, the Monitor points out that the court has the power to approve a sale of assets in the CCAA proceeding as codified in s. 36 of the CCAA, which sets out the list of non-exhaustive factors for the court to consider in determining whether to approve the sale of the debtor's assets outside the ordinary course of business.

[47] The Monitor further points out that a distinction is drawn between the approval of the Sales Process and the approval of an actual sale. Section 36 of the CCAA is engaged when the court determines whether to approve a sale transaction arising as a result of the sales process. It does not address the factors the court should consider when deciding whether to approve a sales process.

[48] In *(Re) Brainhunter*, 2009 CarswellOnt 8207 at paragraphs 13 – 17, the court considered the criteria to be applied on a motion to approve a stalking horse process under the CCAA, citing *(Re) Nortel Networks Corp*., 2009 CarswellOnt 467 at para. 49 where the court determined the following four factors to be considered by the court in the exercise of its discretion to determine if the proposed Sales Process should be approved (the "Nortel Criteria"):

(a) is a sale transaction warranted at this time?

(b) will the sale benefit the whole "economic community"?

(c) do any of the debtor's creditors have a *bona fide* reason to object to a sale of the business? and

(d) is there a better viable alternative?

[49] The Monitor contends that the Sales Process is warranted at this time for number of reasons.

[50] First, Mattamy as the DIP Lender, is entitled to exercise its rights over the Downsview Interest in the event that the amounts owing under the DHI Facility are not repaid in full by the Maturity Date. Mattamy has consented to the Sales Process to be undertaken by the Monitor and, absent the commencement of the Sales Process, Mattamy intends to seek the appointment of a receiver to carry out a similar Sales Process.

[51] Second, Downsview's obligations under the DHI Facility continue to accrue. Phase 2 is not expected to be complete for several years and will require additional infusions of capital. If the Sales Process is not implemented, Mattamy's indebtedness will continue to increase, thereby decreasing potential recoveries, if any, for other creditors, including UCI.

[52] Third, the Sales Process can be conducted without requiring a determination of the arbitration in advance. The Sales Process contemplates that bidders will be required to submit two offers: one assuming that Mattamy has already received the payments contemplated by the Agreements and the other assuming Mattamy has not received such payments.

[53] The Monitor and Mattamy are in agreement that the Sales Process will benefit the whole of the economic community and the Sales Process could result in a sale transaction for the Downsview Interest, and Downsview's creditors may be provided with certain recoveries.

[54] The Monitor submits that conditions that have given rise to a concern of a "chilling effect" on the market usually involve (i) significant break fees in a stalking horse agreement, or (ii) significant restrictions in the future sale of the assets, by a right of first refusal or otherwise. (See *Brainhunter, supra*, at para 12; *Mecachrome Canada Inc*., 2009 Carswell 9963 at para. 35 (Sup. Ct.); *Re Quest University Canada*, 2020 Carswell BC 3091 (SC) at para 63; *(Re) Endurance Energy Limited*, 2016 Carswell Alta 1130 (QB). The Monitor submits that these issues are not present in this case. I agree.

[55] The Monitor is also the view that potential bidders are sufficiently sophisticated such that a requirement to provide two bids prices will not be confusing and thus will not have a "chilling effect" on the market for potential bidders for the Downsview Interest.

[56] The Monitor submits that no creditor has come forward with any *bona fide* concerns. The Monitor also addresses the concerns of the Foreign Representative to the effect that the Sales Process ought not to be initiated until after the arbitration and that to do so beforehand will impair the Sales Process. The Monitor submits that these are conclusory statements made by the Foreign Representative and that the Monitor, on the other hand, has articulated reasons for supporting the Sales Process in its Report. The Monitor's evidence is that, in its opinion, requesting interested parties to provide two bid prices will not be confusing to the market, will not be a disincentive to providing offers, and may illustrate that the issue of the Mattamy receivable and the management fee are of no practical relevance (and therefore need not be arbitrated). The Monitor submits that the Sales Process is an open and transparent process designed to thoroughly canvass the market with a view to accepting the best offer for the Downsview Interest.

[57] In addition, the Monitor submits that the concerns expressed by the Foreign Representative with respect to the accounting of the Project are not *bona fide* as they do not reflect steps taken by the Monitor to become reasonably comfortable with same. The Monitor, Pelican Woodcliffe Inc. and Altus Group have engaged in a review of the accounting of the Project and have not identified any material concerns.

[58] Finally, the Monitor submits that there is no better or viable alternative to the Sales Process.

[59] In its Reply Factum, the Monitor submits that many of the "facts" pertaining to the Project and the agreements as referenced in the Foreign Representative's Factum are simply direct references to the Foreign Representative's own characterizations contained in its own Notice to Arbitrate and, therefore, are not evidence of anything other than the statements made by the Foreign Representative and, accordingly, should be afforded no weight. I agree with this submission. The concerns raised by the Foreign Representative are, at best, speculative and accordingly I discount the statements referenced in the Foreign Representative's factum.

[60] I have been persuaded by the arguments of the Monitor that the Sales Process should be approved and proceed at this time. In considering this issue, I have taken into account the comments of Jamal J.A. in *Marchant Realty Partners Inc.* v. *2407553 Ontario Inc.*, 2021 ONCA 375 at para. 19.

> [19] As already noted, commercial court judges also give substantial deference to the decisions and recommendations of a receiver as an officer of the court. If the receiver's decisions are within the broad bounds of reasonableness and the receiver proceeded fairly, after considering the interests of all stakeholders, the court will

> not intervene: *Ravelston Corp. Ltd. (Re)*, 2007 ONCA 135, at para. 3; *Regal Constellation Hotel Ltd. (Re)* (2004), 71 O.R. (3d) 355 (C.A.), at para. 23. A court will "assume that the receiver is acting properly unless the contrary is clearly shown": *Regal Constellation Hotel*, at para. 23.

[61] I am satisfied that the Receiver has given due consideration to the issues relating to the proposed Sales Process and that its decisions and recommendations are reasonable in the circumstances. The Sales Process is approved.

Sealing Order

[62] Finally, the Monitor requests a sealing order in respect of the Confidential Appendices. The Monitor's submissions are set out in paragraphs 53 – 60 of the factum, which reads as follows:

> [53] Section 137(2) of the *Courts of Justice Act (Ontario)* provides courts with the discretion to order that any document filed in a civil proceeding be treated as confidential, sealed, and not form part of the public record, notwithstanding the general principle that court hearings should be open to the public.
>
> [54] In *Sierra Club of Canada* v. *Canada (Minister of Finance)*, the Supreme Court of Canada held that courts should exercise their discretion to grant sealing orders where:
>
> (a) the order is necessary to prevent serious risk to an important interest, including a commercial interest, because reasonable alternative measures will not prevent the risk and;
>
> (b) the salutary effects of the order outweigh its deleterious effects, including the effects on the right of free expression, which includes the public interest in open and accessible court proceedings.
>
> *Sierra Club of Canada v. Canada (Minister of Finance)*, [2002] 2 S.C.R. 522 at para. 53.
>
> [55] In the insolvency context, courts have applied this test and authorized sealing orders over confidential or commercially sensitive documents to protect the interests of debtors and other stakeholders.
>
> [56] The Monitor is seeking a sealing order in respect of the Confidential Appendices to the Report containing (i) the most recent budget provided by Mattamy to the Monitor as to the distribution of proceeds from the sale of the Downsview Interest as between Mattamy and Downsview; (ii) the Foreign Representative's estimate of the value of the Downsview Interest; and (iii) the Monitor's estimate of the value of the Downsview Interest.

> [57] The Monitor is also seeking a sealing order in respect of the Confidential Appendices to the Supplement containing (i) various iterations of the waterfalls reflecting the distribution of cash flows from the phases of the Project provided by the Foreign Representative on the one hand and the Monitor on the other; (ii) the decision from the prior confidential arbitration before the Honourable Frank Newbould in September 2019 (the "Prior Arbitration"); and (iii) an affidavit sworn by Chris Strzemiecz in the course of the Confidential Prior Arbitration.
>
> [58] The Confidential Appendices contain highly sensitive commercial information of Downsview and the Downsview Interest that could undermine the integrity of the Sale Process and the potential arbitration of the Provisions. The disclosure of the Confidential Appendices prior to the completion of a transaction (or multiple transactions) under the Sale Process would pose a serious risk to the Sale Process in the event that the transaction (or multiple transactions) does not close, as it could jeopardize dealings with any future prospective purchasers or liquidators of the Downsview Interest. With respect to the Confidential Appendices relating to the Prior Arbitration, their disclosure would breach the relevant confidentiality agreement.
>
> [59] If granted, the sealing order will protect the commercial interests of Downsview and its stakeholders. This salutary effect greatly outweighs the deleterious effects of not sealing the Confidential Appendices, namely the lack of immediate public access to all documents filed in these proceedings.
>
> [60] As a result, it is submitted that the test for a sealing order has been met and the Court should make an order that the Confidential Appendices be treated as confidential, sealed and not form part of the public record in the within proceedings pending the completion of these proposal proceedings.

[63] The considerations involved in the granting of a sealing order must take into account the recent Supreme Court decision in *Sherman Estate v. Donovan*, 2021 SCC 25 at paras. 37 – 38, where Kasirer J. wrote that:

> [37] Court proceedings are presumptively open to the public (*MacIntyre*, at p. 189; *A.B. v. Bragg Communications Inc.*, 2012 SCC 46, [2012] 2 S.C.R. 567, at para. 11).
>
> [38] The test for discretionary limits on presumptive court openness has been expressed as a two-step inquiry involving the necessity and proportionality of the proposed order (*Sierra Club*, at para. 53). Upon examination, however, this test rests upon three core prerequisites that a person seeking such a limit must show. Recasting the test around these three prerequisites, without altering its essence, helps to clarify the burden on an applicant seeking an exception to the open court principle. In order to succeed, the person asking a court to exercise discretion in a way that limits the open court presumption must establish that:

(1) court openness poses a serious risk to an important public interest;

(2) the order sought is necessary to prevent this serious risk to the identified interest because reasonably alternative measures will not prevent this risk; and

(3) as a matter of proportionality, the benefits of the order outweigh its negative effects.

Only where all three of these prerequisites have been met can a discretionary limit on openness – for example, a sealing order, a publication ban, an order excluding the public from a hearing, or redaction order – properly be ordered. This test applies to all discretionary limits on court openness, subject only to valid legislative enactments (*Toronto Star Newspaper Ltd. v. Ontario*, 2005, SCC 41, [2005] 2 S.C.R. 188, at paras. 7 and 22).

[64] Having reviewed the Confidential Appendices, I am satisfied that the three prerequisites have been satisfied. There is a public interest in ensuring the integrity of the Sales Process and any arbitration. There is no reasonable alternative measure to preserve the integrity of the Sales Process and any arbitration. Finally, as a matter of proportionality, I am satisfied that the benefits of the order outweigh its negative effects. As such, the Sealing Order should be granted, pending further order of the court.

Disposition

[65] In the result, the Foreign Representative's motion is granted, in part. The arbitration can proceed at this time. If the Monitor is not prepared to undertake steps necessary to initiate the arbitration, the Foreign Representative can request an assignment of the Monitor's rights to initiate such arbitration. The request of the Foreign Representative to adjourn the Sales Process motion until after the completion of the arbitration is dismissed.

[66] The Monitor's motion to approve the Sales Process and for a sealing order of the Confidential Appendices is granted.

Chief Justice G.B. Morawetz

Date: June 30, 2021

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 LF

URBANCORP CUMBERLAND 1 GP INC.

URBANCORP PARTNER (KING SOUTH) INC.

URBANCORP (NORTH SIDE) INC.

URBANCORP RESIDENTIAL INC.

URBANCORP REALTYCO INC.

CONSTANTINE ENTERPRISES INC.

Applicant

-and-

SAM M (180 SAW) LP INC. AND SAM M (180 SAW) INC.

Respondents

Court File No.: CV-24-00715326-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

PROCEEDING COMMENCED AT
TORONTO

**REPLY FACTUM OF KSV RESTRUCTURING INC.,
IN ITS CAPACITY AS COURT-APPOINTED RECEIVER**

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