COURT FILE NUMBER:	1501-0095
COURT:	COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE:	CALGARY
	IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT, RSC 1985, c. C-36, as amended
APPLICANTS:	LUTHERAN CHURCH – CANDA, THE ALBERTA – BRITISH COLUMBIA DISTRICT ("ABC DISTRICT"), ENCHARIS COMMUNITY HOUSING AND SERVICES, ENCHARIS MANAGEMENT AND SUPPORT SERVICES, AND LUTHERAN CHURCH – CANADA, THE ALBERTA – BRITISH COLUMBIA DISTRICT INVESTMENTS LTD. ("DIL")
DOCUMENT:	**BRIEF OF THE RESPONDENTS ELVIRA KROEGER AND RANDALL KELLEN IN REPLY TO THE SUBMISSIONS OF THE MONITOR AND THE ABC DISTRICT ON THE APPLICATION TO REMOVE AND REPLACE THE MONITOR**

ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT

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Attention: Errin A. Poyner

SCHEDULED TO BE HEARD BEFORE THE HONOURABLE MADAM JUSTICE ROMAINE AT 9:00 AM ON FRIDAY, JULY 15, 2016

1. District Depositors Elvira Kroeger and Randy Kellen make the following submissions in reply to the submissions of the Monitor and the District with respect to the application to remove and replace the Monitor.

A. Reply to Monitor's Brief

2. At para. 41 of its brief, the Monitor takes issue with the Kroeger/Kellen submission that the Monitor failed to adequately advise Depositors who wished to change their vote following disclosure of the Master Site Development Plan, Conrich Area Structure Plan and related Appeals. The Monitor says that the First Report to District Creditors contained blank copies of the Election Letter and the Proxy (both as schedules to the Report and as schedules to the Plan) which depositors could have used to change their vote. Monitor also says that it would have provided new documents to anyone who asked for them.

3. This is not an adequate answer. Having advised the District Depositors of their right to change their votes following consideration of information which it had intentionally withheld from them, the Monitor had a duty to advise the Depositors how to change their votes. Instead, the Monitor was silent on the issue. It is not reasonable for the Monitor to expect that Depositors would know to dig through the hundreds of pages of information contained in the District Report and the Plan to find the one piece of paper they needed to change their vote if they felt it necessary to do so.

4. At para. 43(a) of its brief, the Monitor does not acknowledge a disqualifying conflict of interest now, but says that it will recuse itself from completing any tasks in relation to the Representative Action in respect of which it or the Subcommittee identifies a conflict of interest.

5. A fiduciary owes a duty of loyalty "unequalled elsewhere in the law". Subsumed in the fiduciary's duty of good faith is a duty to avoid conflict of interest. The fiduciary must not only avoid a direct conflict of interest, but also the appearance of a possible or potential conflict of interest. The Representative Action provisions of the Plan clearly involve the Monitor in the processes of the Action, in which its related entity Deloitte LLP is a potential defendant. The Monitor cannot continue to act in those circumstances.

Monitor's Brief, Tab 4 - *Moffat v. Wetstein* (1996), CarswellOnt 2148
at paras. 55 - 56

6. Para. 48(a) of the Monitor's brief addresses counsel's May 19, 2016 letter concerning the inadequacy of the information provided to Depositors in the Monitor's April 29, 2016 Subdivision Q & A. The Monitor says that, contrary to the allegations in the letter to the contrary, it is its "understanding" that subdivision can be accomplished without the Conrich Tie-in (which would deliver potable water from the municipal water supply to the Prince of Peace Properties, at a cost of $6 – 7.5 million) as long as the subdivision did not occur in the context of new development and increased water demand. The Monitor fails to identify any basis for its understanding. There is no evidence which would assist the Court to decide the issue.

7. However, the Court need not decide whether subdivision can take place with or without the Conrich Tie-In and the associated expense. The point is that subdivision approval is a matter within the sole authority of Rocky View MD, and therefore refusal of subdivision approval constitutes a risk factor for investors. That risk factor should have been disclosed to the Depositors, so that they could make their own inquiries with Rocky View MD planning officials and draw their own conclusions about the subdivision potential of the Prince of Peace Properties adverted to in the Monitor's First Report to District Creditors.

Respondents' Brief, Tab B3, para. 40.4, 43

8. At para. 48(b) of its brief, the Monitor states that the other impediments to development identified in the May 19 letter as being absent from its Subdivision Q & A (ie. the requirement to upgrade the sanitary sewer lift station and the Langdon sanitary sewer treatment plant, the disposal of storm water and the Appeals) are "typical of what would be encountered by a developer in considering any new development" and therefore the Monitor had no obligation to disclose them.

9. The point is not that these impediments to development are "typical". The point is that they were relevant to the Depositors considering the Plan. The Monitor knew about these matters, and contrary to its fiduciary duty the Monitor failed to disclose them to the Depositors.

10. At para. 49 of its Brief, the Monitor states that during the period in 2014 when it provided consulting services to the District, it did not act in a management capacity or prepare or issue correspondence on behalf of District, including the November 28, 2014 letter wherein District falsely advised its CEF depositors that it had accumulated "too much money" without projects to invest it in, and for that reason would no longer be taking deposits, and its December 2014 entreaties to depositors to renew their term investments.

Respondents' Tab C10 – Affidavit of Lorraine Giese sworn June 17, 2016, Ex. "A"
Respondents' Tab C5 – Affidavit of Marilyn Huber, sworn February 24, 2016, Ex. "B"

11. What the Monitor does not disclose is if or when it became aware of these communications, or whether it had in the course of advising District on its evaluation of the CEF debt structure and on restructuring gave District advice about its communications with depositors that led to these letters. If it had, then the Monitor is equally culpable for the District's dishonest conduct. If it had not, and only became aware of these communications after they were sent, then the Monitor should have been vigilant to ensure that depositors were not misled again during the course of these CCAA proceedings. The Monitor failed in that duty.

12. At paras. 56 – 66 of its brief, the Monitor advances the argument that the application to remove and replace it should have been brought at an earlier date, and that the timing of the application and of allegations of professional negligence against Deloitte & Touche LLP appears to reveal "tactical considerations".

13. That is simply not the case. Mrs. Kroeger and Mr. Kellen have at all times advanced these issues in a manner that was transparent, conservative, and provided substantial notice to all parties of the applications and positions that they intended to advance.

14. Mrs. Kroeger and Mr. Kellen first raised the Monitor's conflict of interest in relation to the Representative Action at the hearing of the DIL Meeting Order application, and subsequently at the DIL Creditors' Meeting, and the DIL sanction order application. During the DIL sanction order hearing, counsel for the DIL Creditors' Committee advanced the argument that in the absence of any allegations of wrongdoing that could lead to liability, Deloitte & Touche LLP's prior status as auditor for the District did not raise a conflict. In response to that argument, Mrs. Kroeger and Mr. Kellen issued the Demand Letter to District the following day, demanding that proceedings be commenced against Deloitte & Touche LLP.

15. The Monitor's conflict of interest does not arise from the Demand Letter. The Demand Letter simply identifies the facts and matters giving rise to potential liability on the part of Deloitte & Touche LLP giving rise to the conflict of interest, such that the Court may evaluate whether an actual or potential conflict of interest exists.

16. Despite the Monitor's conflict of interest, Mrs. Kroeger and Mr. Kellen did not consider it necessary to bring an application to remove the Monitor at that time. Rather, they were content to await the outcome of the District Creditors' vote, and if necessary to bring their application for the appointment of a Limited Purpose Monitor to review the

Representative Action provisions of the District Plan and provide a neutral and objective opinion to the Court as to its fairness and reasonableness. Mrs. Kroeger and Mr. Kellen gave notice of their intention to bring on that application to all parties and to the Court on April 29, 2016, and on June 2, 2016 the Court determined that it would hear this application and the judicial sanction application together. No complaint was raised by the Monitor or the District at that time about the timing or the appropriateness of the application.

Affidavit of Courtney Clark sworn July 13, 2016, Exs. "A" – "C"

17. It was not until it was revealed at the May 14, 2016 District Creditors' Meeting that the Monitor knew about and failed to disclose the impediments to development of the Prince of Peace Properties contained in the MSDP, the Conrich ASP and the Appeals that it became apparent that the Monitor had breached its fiduciary duty of disclosure to the Depositors. Accordingly, after the results of the District Creditors' vote were reported on June 17, 2016 and it was clear that the Plan had passed and the Monitor would have a ongoing role at least through the judicial sanction proceedings, Mrs. Kroger and Mr. Kellen gave notice through counsel that they intended to expand the scope of relief sought in their application and seek the removal of the Monitor for all purposes. The Monitor's failure to disclose the MSDP, the Conrich ASP and the Appeals was cited as the basis for that application.

Affidavit of Courtney Clark sworn July 13, 2016, Exhibit "D"

18. At para. 69 – 72 of its brief, the Monitor advances the argument that it relied upon the advice of counsel, and not upon its business judgment, in formulating its opinion on the Representative Action, and therefore its opinion cannot be motivated by self-interest.

19. That submission cannot be countenanced. The fact that the Monitor obtained legal advice on the Representative Action does not exclude the possibility that its opinion to the Court is tainted by self-interest. Further, if the Representative Action provisions of the Plan place the Monitor in a conflict of interest, that conflict exists regardless of whether it has been identified by its counsel.

20. At para. 71 of its brief, the Monitor advances the argument that the District Creditors' Committee has been represented by counsel and has endorsed the Plan. That is not a full answer to Mrs. Kroeger and Mr. Kellen's concerns. It appears that the Creditors' Committee has attempted to negotiate what they consider to be the best "business deal" that they could with the District. However, that "business deal" does not advance the

restructuring goals of the District, and accordingly this Court has no authority to impose it upon the minority creditors who oppose the Plan.

21. At para. 71 of its brief, the Monitor advances the argument that the Representative Action is a matter of law, not business, and therefore the Court is able to determine its fairness and reasonableness without resort to the opinion of the Monitor. While it is for the Court to decide the issues with respect to which it requires the assistance of the Monitor, the District has in the past advanced the argument that the Representative Action provisions of the Plan are intended to protect its business operations by limiting the number of actions commenced. The Monitor has echoed that position, although it has characterized the "streamlining" of litigation as a benefit to Depositors. Should the Court be inclined to give weight to the District's and Monitor's submissions in that regard, it may require a neutral and objective opinion on the issue.

Respondents' Tab B3 – Monitors First Report to District Creditors, para. 60.1

22. At para. 73 of its brief, the Monitor advances the argument that no conflict of interest can arise because it is unlikely that the Subcommittee, acting in its fiduciary capacity, would decline to advance a worthwhile claim against Deloitte LLP.

23. The Subcommittee acts as fiduciary to the Representative Action Class. It is not bound to carry out the instructions of any particular class member. In the event that the Subcommittee determines that its duty to the class, for reasons financial, legal or practical, require it to decline to commence a derivative claim against Deloitte LLP, no action will proceed. By virtue of the "sole recourse" clause of the Plan, individual members of the class who take a different view of the law or who have a different financial interest in pursuing that action, will be unable to take up that cause on their own behalf.

24. At para. 74 of its brief, the Monitor advances the submission that the appointment of a replacement monitor will result in additional costs to the District. Those additional costs may be adjusted for when this Monitor passes its accounts.

25. At para. 76 – 81 of its brief, the Monitor advances the argument that relevance (with respect to disclosure of information) is a matter of its own judgment and in the absence of a compelling reason no to do so, the Monitor's judgment should be accepted.

26. There is a compelling reason to question the Monitor's judgment with respect to the adequacy of disclosure of the MSDP, the Conrich ASP and the Appeals. The Monitor endorsed the District Plan on the basis of "potential upside opportunities" including

development. Having endorsed the Plan on that basis, the Monitor had a duty to disclose all of the information in its possession concerning the development potential of the Prince of Peace Properties. The Court, like the Depositors, the District Creditors' Committee and their counsel, was not aware that the Monitor had this information in its possession when it approved the First Report to the District Creditors.

Respondents' Brief, Tab B3 – Monitor's First Report to District Creditors, para. 40.4

B. Reply to District's Brief

27. At para. 24 of its brief, the District cites *Can-Pacific Farms Inc. (Re)*, (2012) BCSC 760 for the proposition that it is appropriate for a financial advisor who provided consulting services to the debtor company in contemplation of CCAA proceedings to be appointed Monitor. In fact, Burnyeat J. found that the advisor in that case was not independent of the parties and therefore was not a suitable monitor. However, in order to avoid further delay and cost, the appointment was made. However, the Court held (at para. 27)

> Without laying down a general rule that it is inappropriate for a petitioner to see the appointment as monitor of a financial advisor that has been working with a petitioner to prepare proceedings under the Act, such an appointment should not be made as a general rule.

28. At para. 44 of its brief, the District cites *United Used Auto & Truck Parts Ltd.*, (1999) 12 C.B.R. (4th) 144 at para. 14 for the proposition that their disclosure in the proceedings must be "reasonable". Where the debtor company's most significant asset is a piece of development property which its plan of arrangement proposes to transfer to its creditors, and the plan is promoted on the basis of "potential upside opportunities" including development of that property, it is entirely reasonable to expect the debtor company to disclose all of the information in its possession concerning the development potential of that property. That did not occur in this case, and is evidence of lack of good faith in these proceedings by the District.

Respondents' Tab B3 – Monitor's First Report to District Creditors, para. 40.4

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

DATED: July 14, 2016

Errin A. Poyner
Counsel for Elvira Kroeger and Randall Kellen