

**IN THE COURT OF APPEAL OF ALBERTA**  
IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*,  
RSC 1985, c C-36, AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF UBG BUILDERS INC., ALBERTA BUILDERS CAPITAL INC., ALPINE HOMES (2006) INC., AMERICAN BUILDERS CAPITAL (US) INC., EDGEWATER AT GRIESBACH INC., ELITE HOMES (2006) LTD., EVOLUTION BY GREENBORO INC., GREENBORO COMMUNITIES (2006) INC., GREENBORO ESTATE HOMES (2006) LTD., GREENBORO HOMES (2006) LTD., GREENBORO LUXURY HOMES INC., HIGH POINTE INC., MOUNTAINEERS VILLAGE (2006) INC., MOUNTAINEERS VILLAGE II INC., ORIGINS AT CRANSTON INC., SOUTH TERWILLEGAR VILLAGE INC., THE BRIDGES MANAGEMENT INC., THE LEDGES INC., TIMBERLINE LODGES (2006) INC., TODAY'S COMMUNITIES (2006) INC., TODAY'S HOMES (2006) INC., TUSCANY DEVELOPMENTS (2006) INC., UBG ALBERTA BUILDERS (2006) INC., UBG ALPINE HOMES (2006) LTD., UBG BRIDGES INC., UBG BUILDERS (USA) INC., UBG COMMERCIAL INC., UBG LAND INC., UBG LOT DEPOSIT CORP., UBG 4500 CALGARY INC., UBG 75 CAN MORE INC., UBG 808 CALGARY INC., UNITY INVESTMENTS (2012) INC., VALMONT AT ASPEN STONE INC., VALOUR PARK AT CURRIE INC., VILLAGE AT THE HAMPTONS INC., VILLAGE ON THE PARK INC., WILDERNESS HOMES BY RIVERDALE INC., WILDERNESS RIDGE AT STEWART CREEK INC.

Respondents  
(Respondents)

STREETSIDE DEVELOPMENT CORPORATION

Applicant  
(Not a Party to the Chambers Application)

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**Memorandum of Argument  
of Streetside Development Corporation**

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**RELIEF SOUGHT:**

1. Streetside Development Corporation seeks:
  - (a) leave to appeal, on an expedited basis, the Order for Sale granted by Justice C.A. Kent in this action on August 30, 2013 (the "Order for Sale") pursuant to Section 13 of the *Companies' Creditors Arrangement Act*, RSC 1985, c C-36, as amended ("CCAA"); and
  - (b) a stay of the Order for Sale pending the hearing of the appeal and a decision rendered by this Honourable Court.

**STATEMENT OF FACTS:**

2. This matter relates to the sale of large multi-family residential project referred to as the "Valmont Project" in the Affidavit of Glynn Hendry sworn September 3, 2013 (in which certain terms are defined and those terms are used herein). The sale is made in the context of CCAA

proceedings for UBG. The sale of the Valmont Project has been the subject of a "Stalking Horse Process".

3. Streetside submitted a bid before closing on August 9, 2013 for \$13,500,000.00 in form of Asset Purchase Agreement required by the Monitor. The Stalking Horse (7711280 Alberta Ltd.) re-bid at \$13,509,000.00 (25% higher than the original Stalking Horse Bid); but as evidenced by the material submitted to the Court by UBG, 7711280's Second Offer in the form of the Asset Purchase Agreement is dated 3 days after the closing. The Monitor has not provided the Court with any evidence of 7711280's Second Offer as received by closing; however, has said that it was in substantially the same form as the Stalking Horse Bid.
4. Streetside disputes that 7711280's Second Offer submitted before closing was the substantially the same as the Asset Purchase Agreement because it did not require 7711280 to honour the previous sales to the third party purchasers of the individual units.
5. As evidenced in the Affidavit of Glynn Hendry, sworn September 3, 2013, the bid submitted to the Court for approval:
  - (a) was made by the Stalking Horse bidder which raised its original "fair and reasonable" bid by 25% to be just \$9,000.00, on its face, over the Streetside bid;
  - (b) the Court Order of July 10, 2013 requires the break fee to be paid to the Stalking Horse if the Stalking Horse Offer is not accepted, but now it is argued that the break fee does apply and the competitive bids will be accessed with a deduction for this amount, but not 7711280's Second Offer; and
  - (c) was made on a different form with different obligations before closing and amended twice after closing, once to match the conditions on which the other bidders were prepared to bid, and a second time to make further adjustments.

**PRINCIPLES UNDER WHICH THE APPLICATION IS MADE:**

6. Streetside recognises that courts will show deference to the decisions of Monitors because Monitors are required to make fast-paced decisions for the orderly resolution of estates. However, in this case there has been no orderly resolution and the circumstances giving rise to the sale of the Valmont Project are not transparent and bring into doubt the integrity and fairness of the Stalking Horse Process and the sale of the Valmont Project. While Courts of

Appeal will only grant leave to appeal sparingly and only where there are grounds that are of real and significant interest, Streetside submits that this case meets those parameters.

7. There is little case law regarding stalking horse bidding in Canada and yet this method of sale is becoming more and more widely used. The principle of stalking horse bids is to set a realistic and fair value for an asset that can be used either as a reasonable price for sale or a platform above which competing bidders to raise the ante. While there is scant case law on stalking horse bidding, the following principles apply:
  - (a) stalking horse bidding should appropriately balance protection for effort and compensation for risk and expense for the [stalking horse] bidder with the preservation of the ability of the [Monitor] to receive and consider superior offers;
  - (b) the solicitation process should be fair, open and efficient; and
  - (c) the process should be designed to ensure that prospective bidders are not deterred from submitting proposals by perceptions of bias or unfairness.

*Trident Exploration Corp (Re)* 2010 ABQB 88, at paragraph 16 – Tab 1

8. The stalking horse process is a call for and submission of tenders. Streetside submits that the law of tender applies as the parties intended to create contractual relations by this process that required bidders to follow through with their offer, if accepted. The law of tender implies "a term to be fair and consistent in the assessment of the tender bids" so as to "give efficacy to the tendering process". The law of tender also precludes the acceptance of non-compliant bids. In *Martel*, Iacobucci and Major J.J. made the observation, at paragraph 88, that:

Similarly, in light of the costs and effort associated with preparing and submitting a bid, we find it difficult to believe that the respondent in this case, or any of the other three tenderers, would have submitted a bid unless it was understood by those involved that all bidders would be treated fairly and equally. ... Implying an obligation to treat all bidders fairly and equally is consistent with the goal of protecting and promoting the integrity of the bidding process, and benefits all participants involved. Without this implied term, tenderers, whose fate could be pre-determined by some undisclosed standards, would either incur significant expenses in preparing futile bids or ultimately avoid participating in the tender process.

*Martel Building Ltd. v. R* 2000 SCC 60, at paragraphs 86 and 88 – Tab 2

9. The test for leave to appeal pursuant to Section 13 of the CCAA involves the single criterion that there must be serious and arguable grounds for the appeal. The four factors used to assess whether this criterion is achieved are as follows:

- (a) Whether the point on appeal is of significance to the practice: The applicability of the law of tender and the imposition of fairness and integrity into the stalking horse process is significant to the practice. Requiring fairness and integrity will bring certainty to the stalking horse process so that bidders are able to trust the process and participate in bidding rather than having the stalking horse process be so chilling as to freeze the potential bidders.
- (b) Whether the point raised is of significance to the action itself: The fairness and integrity of the bidding process is of significance to the action because it sets out parameters for the Monitor to follow and, by affecting the Stalking Horse Bidder and the competing bidders, it affects the creditors.
- (c) Whether the appeal is *prima facie* meritorious or, on the other hand, whether it is frivolous: This appeal is meritorious; it is based on the principles that transparency, fairness and integrity must be maintained in the bidding process. The appeal is not frivolous as Streetside is prepared to argue the appeal and, if successful, to purchase the Valmont Project on an expedited basis.
- (d) Whether the appeal will unduly hinder the progress of the action: Every party wants to see the sale occur quickly and Streetside, by asking to be treated fairly and equitably, cannot hinder the progress of the action which requires a sales process to be fair and reasonable. It has not been Streetside hindering this process so far, it has been the acceptance of a late and non-compliant offer that has hindered the process. To suggest that the correction of the errors made is a hindrance to the process is to mis-direct blame to the messenger and avoid the blame that the parties involved creating the circumstances must carry.

*Sandhu v. MEG Place LP Investment Corporation*, 2012 ABCA 91, at paragraph 19 – Tab 3  
*Royal Bank v. Soundair Corp.* (1991), 7 CBR (3d) 1 (Ont. C.A), at paragraphs 16, 39 to 43, 49 – Tab 4  
*Computershare Trust Co. of Canada v. Venti Investments Corp.* (2011), 86 CBR (5<sup>th</sup>) 71 (Alta. Q.B.), at paragraphs 4, 8 and 20  
-Tab-5

10. This case meets the test for a stay because:

- (a) there are serious issues to be tried/heard relative to the integrity and fairness of the sale process:
- (i) the permissibility of accepting an offer after closing on different grounds than other bidders;
  - (ii) the validity of an offer made after closing;
  - (iii) the appropriateness of permitting a stalking horse bidder to make a subsequent bid after establishing fair and reasonable price and in such close proximity to a competing bidders price; and
  - (iv) the method of comparative valuation of the offers.
- (b) Streetside will suffer irreparable harm without a stay as the Valmont Project will be sold and there is no comparable project on the market given the unique circumstances of the Valmont Project being a half completed large multi-residential project. Here the evidence shows how unique the Valmont Project is, both subjectively and objectively, and, it is respectfully submitted, that since there is no substitute property readily available Streetside has met the test for a stay.
- (c) The balance of convenience favours granting a stay as, notwithstanding that every party affected by this appeal wants an early resolution, including Streetside, ignoring the integrity and fairness of the process would only erode confidence in all court ordered sales giving rise to fewer bidders willing to take on the expense and risk of bidding when the rug can be pulled out from under their feet.

*Bhasin v. Hrynew*, 2013 ABCA 224, at paragraph 5, citing *RJR* [1994] 1 S.C.R. 311 – Tab 6  
*Semelhago v. Paramedevan*, [1996] 2 SCR 415, at paragraphs 21 and 22 – Tab 7  
*Fairways Project Ltd. v. Melander*, 2011 ABQB 6, at paragraphs 17,22 and 27 – Tab 8  
*Strategy Summit Ltd.v. Remington Development Corporation*, 2009 ABCA 30, at paragraph 7 – Tab 9  
*Covlin v. Minhas*, 2009 ABCA 404, at paragraph 14 – Tab 10

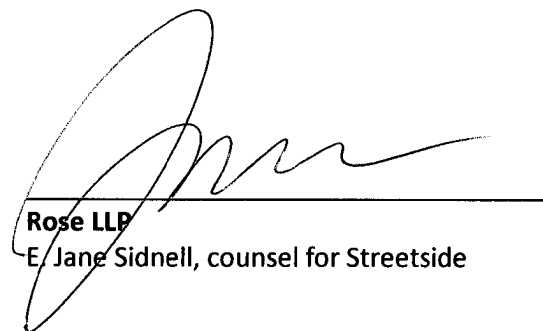
11. The Supreme Court of Canada has found that, in certain commercial dealings, the law imposes a duty of confidence so that misused confidential information cannot be used by one party to scoop to another's commercial opportunity. In this case, the Monitor should have taken a more critical look at the bids to ensure that integrity of the Stalking Horse Process was not spoiled by the selection of a bidder using the wrong documents to make a play that is highly irregular.

*Cadbury Schweppes v. FBI Foods*, [1999] 1 SCR 142, paragraphs 19, 20, 24 and 25 – Tab 11

**GROUND UPON WHICH RELIEF SOUGHT SHOULD BE GRANTED:**

12. Streetside seeks leave to appeal pursuant to Section 13 of the CCAA on an expedited basis and a stay of the Order for Sale because:
- (a) 7711280's Second Offer was not received until after closing on August 12, 2013, and if accepted would be to the detriment of the competing bidders and contrary to the fairness and procedural integrity required of court ordered sales;
  - (b) 7711280's Second Offer before closing was not in the correct form of Asset Purchase Agreement, or comparable, to the offer from Streetside and was only corrected after closing, thereby giving 7711280 an unfair advantage;
  - (c) the circumstances and amount of 7711280's Second Offer are incompatible with a conclusion that 7711280 did not have information regarding Streetside's Offer and equitable remedies are available to the court where there are breaches of confidentiality;
  - (d) the bids were not evaluated fairly because 7711280's Second Offer was not allocated a discount for the payment of the break fee of \$200,000.00 in accordance with the Stalking Horse Order of July 10, 2013, giving 7711280 an unfair advantage and applying a non-disclosed criterion to the evaluation of the bids; and
  - (e) the Stalking Horse Process did not contemplate 7711280 being a "Competitive Bidder" and there was no right of first refusal in the Stalking Horse Process as outlined in the Stalking Horse Order.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

  
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Rose LLP  
E. Jane Sidnell, counsel for Streetside

Estimate of time: 30 minutes

Appeal No. 1301-0244AC

Q.B. Action No.

**IN THE COURT OF APPEAL OF ALBERTA**

IN THE MATTER OF THE COMPANIES' CREDITORS  
ARRANGEMENT ACT, RSC 1985, c C-36, AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR  
ARRANGEMENT OF UBG BUILDERS INC., ALBERTA  
BUILDERS CAPITAL INC., ALPINE HOMES (2006) INC.,  
AMERICAN BUILDERS CAPITAL (US) INC., EDGEWATER  
AT GRIESBACH INC., ELITE HOMES (2006) LTD.,  
EVOLUTION BY GREENBORO INC., GREENBORO  
COMMUNITIES (2006) INC., GREENBORO ESTATE  
HOMES (2006) LTD., GREENBORO HOMES (2006) LTD.,  
GREENBORO LUXURY HOMES INC., HIGH POINTE INC.,  
MOUNTAINEERS VILLAGE (2006) INC., MOUNTAINEERS  
VILLAGE II INC., ORIGINS AT CRANSTON INC., SOUTH  
TERWILLEGAR VILLAGE INC., THE BRIDGES  
MANAGEMENT INC., THE LEDGES INC., TIMBERLINE  
LODGES (2006) INC., TODAY'S COMMUNITIES (2006)  
INC., TODAY'S HOMES (2006) INC., TUSCANY  
DEVELOPMENTS (2006) INC., UBG ALBERTA BUILDERS  
(2006) INC., UBG ALPINE HOMES (2006) LTD., UBG  
BRIDGES INC., UBG BUILDERS (USA) INC., UBG  
COMMERCIAL INC., UBG LAND INC., UBG LOT DEPOSIT  
CORP., UBG 4500 CALGARY INC., UBG 75 CAN MORE  
INC., UBG 808 CALGARY INC., UNITY INVESTMENTS  
(2012) INC., VALMONT AT ASPEN STONE INC., VALOUR  
PARK AT CURRIE INC., VILLAGE AT THE HAMPTONS INC.,  
VILLAGE ON THE PARK INC., WILDERNESS HOMES BY  
RIVERDALE INC., WILDERNESS RIDGE AT STEWART  
CREEK INC.

Respondents  
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STREETSIDE DEVELOPMENT CORPORATION

Applicant

(Not a Party to the Chambers Application)

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**MEMORANDUM OF ARGUMENT**

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Rose LLP

810, 333 - 5th Avenue S.W.

Calgary, Alberta T2P 3B6

Telephone: (403) 776-0515

Attention: E. Jane Sidnell

File No.: 10049-008

