COURT FILE NUMBER:	1201-05843
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JUDICIAL CENTRE:	CALGARY
	IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT, RSC 1985, c-36, AS AMENDED
	AND IN THE MATTER 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 CANMORE 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. (COLLECTIVELY, THE "UBG GROUP OF COMPANIES")
DOCUMENT	**REPLY BRIEF OF ARGUMENT OF ERNST & YOUNG INC. AS CCAA MONITOR OF THE UBG GROUP OF COMPANIES**

ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT

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Commercial List Application scheduled on December 16, 2015 at 2:00 p.m.
Before The Honourable Mr. Justice C. Jones

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I. INTRODUCTION

1. Ernst & Young Inc., the Court-appointed Monitor (the "Monitor") of the UBG Group of Companies ("UBG") files this written Reply Brief of Argument with respect to the application scheduled to be heard at 2:00 p.m. on December 16, 2015 regarding the claim of Square Foot Real Estate Corporation ("Square Foot") for "back-end commissions". The Monitor filed its initial Brief of Argument on May 29, 2015, prior to the adjournment of the hearing that was previously scheduled to be heard on June 3, 2015 (the "Monitor's First Brief"). Square Foot also filed and served an initial Brief on May 29, 2015 and has now filed and served a Supplemental Brief on December 7, 2015.

2. The limited purpose of this Reply Brief is to reply to the new issues raised in the Square Foot Supplemental Brief, and to briefly address the preference application set down by the Monitor to be heard concurrently with Square Foot's back-end commission application. Where capitalized terms are used but not defined in this Reply Brief, they are intended to bear their meanings as defined in the Monitor's First Brief.

3. Square Foot's application was originally set down to be heard on June 3, 2015. Square Foot applied to adjourn its application, after the Monitor served its Third Report and the Monitor's First Brief on May 29, 2015.

4. A lengthy delay followed, during which Square Foot questioned Mr. Scammell and Mr. Poirier, former employees of the UBG debtor companies. After that questioning was completed in July 2015, Square Foot showed no interest in moving forward with its application. The Monitor had to prompt Square Foot to reschedule this application for hearing (see the correspondence between counsel in October 2015 at **[TAB 1]**).

5. With respect, the questioning of Mr. Scammell and Mr. Poirier has not contributed any relevant evidence regarding the substantive merits of Square Foot's back-end commission claim. This may explain Square Foot's lack of interest in rescheduling its application. The new evidence is no more than an exercise in "oath-helping" Mr. Taylor's previous evidence, but on factual points that are at best tangentially related to the real issues in dispute, which points were never seriously disputed in any event.

6. Just as the new evidence offers no further support on the merits of Square Foot's claim, Square Foot has provided no new argument or case law in its Supplemental Brief, on the merits of its claim. Rather, the vast majority of the Supplemental Brief is devoted to attacking the veracity of certain of the Monitor's statements in the Third Report. With respect, this appears to be an effort to distract attention from the weak merits of Square Foot's claim.

7. The Monitor strongly objects to these spurious allegations. As an officer of this Honourable Court, the Monitor has absolutely no interest in suppressing evidence, submitting untruthful evidence or otherwise "skewing" the facts. The Monitor's only interest is ensuring that claims are adjudicated fairly. In the case of a claim like Square Foot's back-end commission claim, which the Monitor believes to have no merit, the Monitor has a duty to other creditors and to the integrity of the claims process, to advocate against the approval of the claim. However, the Monitor is not a party in interest, and has no personal stake in the outcome of the dispute. Its only interest is in the fairness and integrity of the claims process. The Monitor will respond below in this Reply Brief to each allegation of impropriety levelled against it by Square Foot.

8. The Monitor will also briefly address the preference application that it has set down at the same time as Square Foot's back-end commission claim. Square Foot has known since late May 2015 that the Monitor considers the payments by Valmont to Square Foot in March and April 2012 (less than two months before the CCAA proceedings were commenced) totalling $111,991.28, to be voidable preference payments, and that the Monitor would bring forward an application on this issue. In support of this application, the Monitor relies only on the evidence that was available when the original hearing was scheduled to proceed on June 3, 2015.

II. STATEMENT OF FACTS

A. Evidence

9. The relevant evidence on this application is the evidence that was listed at paragraph 6 of the Monitor's First Brief, plus these additional materials:

(a) the Transcript of Questioning of Mr. Scammell held on July 29, 2015, including the exhibits marked at that questioning (the "Scammell Transcript"); and

(b) the Transcript of Questioning of Mr. Poirier held on July 29, 2015 (the "Poirier Transcript").

B. Background Facts

1. Facts Relevant to the Substantive Merits of Square Foot's Back-end Commission Claim

10. The facts relevant to the merits of Square Foot's back-end commission claim are summarized at paras. 7 – 44 of the Monitor's First Brief. As noted above, the Scammell Transcript and the Poirier Transcript have proffered no additional evidence relevant to the merits of Square Foot's back-end commission claim.

2. Facts Relevant to the Preference Application

11. The facts relevant to the Monitor's preference application are summarized at paras. 45 – 47 of the Monitor's First Brief. Again, neither the Scammell Transcript nor the Poirier Transcript have provided any evidence relevant to the merits of the preference application.

3. Square Foot's Allegations of Impropriety Against the Monitor

12. In its Supplemental Brief, Square Foot advances three serious allegations against the Monitor:

(a) that the Monitor's statements in paragraph 25 of the Third Report regarding its knowledge of Square Foot's back-end commission claims, are "grossly in error" or are "disingenuous" and are "false" (Square Foot Supplemental Brief at paras. 76 and 84);

(b) that the Monitor's statements at paragraph 28 of the Third Report regarding its knowledge of the alleged preference payments are "completely without foundation" (Square Foot Supplemental Brief at para. 95); and

(c) that the Monitor failed to comply with the Consent Order dated June 3, 2015 (Square Foot Supplemental Brief at paras. 21 and 78 – 79).

(a) Paragraph 25 of the Third Report

13. The Third Report was filed by the Monitor on May 29, 2015, to provide the Court with the Monitor's evidence, after the Taylor Affidavit had been filed on April 8, 2015 and after Mr. Taylor was questioned on May 7, 2015.

14. Paragraph 25 of the Third Report stated, in its entirety:

> With respect to Mr. Taylor's affidavit, the Monitor never provided any assurance that back-end commissions would be paid and until the Monitor received the April 11, 2014 claim, it did not know that Square Foot was claiming these.

15. Therefore, paragraph 25 contained two very specific factual statements. With respect to the first statement, that the Monitor never made any assurance of payment, Square Foot does not seriously challenge that statement, nor does any of the evidence contradict that statement. The furthest the evidence goes is that **Mr. Scammell** assured Square Foot that the back-end commissions would be paid (but, as noted below in greater detail, he was very careful to clarify that he only did so when he believed Valmont would be the party that would close unit sales, before the entire project was sold to RDL. After that, his assurances ceased and his advice to Square Foot changed dramatically).

16. Because there is no evidence that the Monitor ever made any assurance of payment to Square Foot, what Square Foot does to try to somehow fix the Monitor with liability for Mr. Scammell's assurances, is to (incorrectly) label Mr. Scammell and Mr. Poirier as the Monitor's "agents" or "representatives" (*e.g.* Square Foot Supplemental Brief at heading 2 on page 16, paras. 86, 91 and heading 3 on page 19). That characterization is just plain wrong. Mr. Scammell was Vice President of Investments of UBG Builders Inc., one of the debtor companies (Scammell Transcript at page 3, lines 6 – 8) and Mr. Poirier was a project manager and later a construction manager with Unity Builders Group (Poirier Transcript at page 3, line 13 – page 4, line 6). They were employees of UBG. They were never agents or representatives of the Monitor.

17. With respect to the second part of the statement in paragraph 25 of the Third Report, regarding the Monitor's knowledge of Square Foot claiming back-end commissions, Square Foot has devoted a lengthy portion of its Supplemental Brief to arguing that this statement is "grossly in error" or "disingenuous". However, in advancing this argument, Square Foot has not attacked the very limited statement that was **actually made** by the Monitor. Rather, Square Foot has carelessly paraphrased the Monitor's statement and then attacked its own careless paraphrasing. Square Foot thus has set up a straw man (that does not exist), to try to knock it down.

18. For example, at paragraph 12 of its Supplemental Brief, Square Foot incorrectly states that the Monitor took the position that "**it had been completely unaware of the existence of Square Foot's "back-end" commission claim**" [emphasis added]. The Monitor never said any such thing. This careless and erroneous paraphrasing of what the Monitor actually said in paragraph 25 is taken up in numerous other places in the Square Foot Supplemental Brief, for example:

(a) Square Foot stated that "it seems incontrovertible that the Monitor indeed had full knowledge of the existence of the "back-end" commission claims at all material times..." (Square Foot Supplemental Brief at para. 25);

(b) Square Foot states that Mr. Scammell confirmed that "the existence of both the front-end commission claims and the back-end commission claims of Square Foot were communicated by him to the representatives of Ernst & Young (Square Foot Supplemental Brief at para. 30);

(c) Mr. Scammell told Square Foot that "he would pass along the amounts of the "back-end" commission claims to the Monitor...." (Square Foot Supplemental Brief at para. 35); and

(d) numerous other similar statements (e.g. Square Foot Supplemental Brief at paras. 37, 39, 40, 42, 58, 60, 61, 62).

19. As is apparent from the actual quotation from paragraph 25 of the Third Report, the Monitor never said that it did not have any knowledge of a potential back-end commission

claim by Square Foot, or calculations of potential back-end commissions. Rather, the Monitor said, very specifically, that until April 11, 2014 when Square Foot for the first time submitted a proof of claim for the back-end commissions (almost two years after the Claims Bar Date of July 31, 2012 and seven months after Valmont had sold the project and lost the ability to close unit sales), it did not know that Square Foot was "claiming" these amounts. In the context of a CCAA proceeding, where there is a formal Court-approved sale process and specific forms to be filled out and submitted to make a claim, how could the Monitor's statement be otherwise?

20. None of the evidence tendered by Square Foot, neither in the Taylor Affidavit, the Scammell Transcript nor the Poirier Transcript, contradicts the specific statements made by the Monitor. In fact, the evidence of Mr. Scammell and Mr. Poirier conclusively established the following two propositions with respect to the back-end commissions, and "assurances" to Square Foot:

(a) the industry standard in multi-family condominium projects like the Valmont project was that back-end commissions only become payable out of unit sale proceeds, and when the unit sale to a purchaser closes; and

(b) while Mr. Scammell and Mr. Poirier believed that Square Foot would be paid its back-end commissions **if** Valmont finished the project and completed unit sales to unit purchasers (and said that to Square Foot), they never assured Square Foot of that result after it became apparent in early 2013 that Valmont would not complete the project but would instead sell the project to a third party. At that time, they warned Square Foot to pursue arrangements with the project purchaser, because that is where Square Foot would have to look to obtain payment of any back-end commissions.

21. On the first of these two points, regarding when back-end commissions would become payable, Mr. Scammell gave the following evidence [emphasis added throughout]:

Q. Right. You knew that there was back-end commission that was being claimed by Square Foot?

A. I knew that was very typical in the industry for a certain percentage to be paid at the point of signing

Q. Right.

A. -- **and the balance paid at closing** or turnover.

- Scammell Transcript at page 24, lines 14 – 20

Q. There's a bunch of them there. What did you know about that and the payment of monies under a category of back-end commissions?

A. Again, in -- I'll speak in -- I'll speak to the concept of back-end commission. As it relates to this column, in particular, I don't know. **But back-end commissions are due at closing.**

- Scammell Transcript at page 26, lines 21 – 27

Q. Were you aware of the specific commission amounts that Square Foot had contracted to receive for effecting sales of units in Valmont?

A. I believe overall, it was three and a half percent.

Q. And were you aware how that was to be paid and when it was to be paid?

A. Without looking at the agreement to refresh myself, I believe it was 50 -- more or less 50 percent up front **and 50 percent at closing.**

- Scammell Transcript at page 41, line 20 – page 42, line 1

Q. MR. LALONDE: Did you have an understanding that there was something called a front-end commission?

A. I understood that the commission was split into front end and back end, yeah.

Q. Okay. And do you understand that the front end was to be paid following the removal of the conditions on the individual purchase and sale agreement to an individual purchaser?

A. Yes. Once the sale went firm, it was payable.

Q. The commission was payable?

A. Correct.

Q. And is that also true of the back-end commission?

A. **I understood back end to be when the unit was turned over to the purchaser.**

- Scammell Transcript at page 43, line 21 – page 44, line 7

22. Mr. Poirier's evidence on this point was similar [emphasis added throughout]:

A. Yeah. That's true. We definitely had a conversation about front-end and back-end commissions. This is as I'm starting to learn a little bit more about the relationship. I think there was some outstanding front-end commissions that were still from way back in -- before CCAA kind of really kicked off there, that we had talked about trying to get some payment out, invoices that were submitted for payment. I don't know if they were paid or not, I can't remember that. **We did talk about back-end commissions which, typically in the industry, is paid out at the end of the project, so we understood that.**

- Poirier Transcript at page 18, lines 9 – 20

Q. And were you aware -- if you look with me at the second page of that document, the tenth column in -- that the total amount of back-end commissions being claimed was as 444,492,39?

A. Yeah, I see the number there.

Q. Yeah. You recall being aware that the magnitude of the claim was in that range?

A. I recall the magnitude of the claim being substantial, because, **obviously, back-end commissions on the budgeting-wise are never included in a budget to a bank, because it gets paid from sales proceeds.**

- Poirier Transcript at page 21, line 22 – page 22, line 5

23. On the second point, Mr. Scammell was again very careful in his evidence to clarify that once it became clear that Valmont would not finish the project and sell the units, he never assured Square Foot it would receive its back-end commissions from Valmont, but instead told Square Foot that it should take steps with the purchaser of the project, because that was the party to whom Square Foot would have to look for any back-end commissions. Mr. Scammell's evidence on this point included the following [emphasis added throughout]:

Q. And you were discussing the particulars of that back-end commission with Square Foot?

A. Oh, yes.

Q. **And did you assure him -- "him," Square Foot, Tim Taylor, Simon Kowalkow -- that in the event of a sale of the project, those commissions would be paid?**

A. I would have discussed the prospects of -- sorry, you're talking about the project being sold?

Q. Yes.

A. When that entered the conversation, because we did have -- Don and I had conversations with Square Foot on that topic. **We had -- we had said that they should approach whomever the buyer was to get in with them to continue on with the sales, at which point their back-end commissions would be a lot safer, as in more attainable.**

On the prospect of getting paid that directly, I'm not sure what I would have said specifically. If the project was sold, I knew that the back-end commissions were there providing the sales which were already in place. **If the sales went with the new buyer, which I understood they were because there was a large amount of deposit money that was also involved there, I believe that the purchaser would choose to inherit the sales. They would also inherit the deposit obligations that were there. And I would have said the back-end commissions are going to be due if these sales close. That was my expectation of that transaction.**

Q. That's later when the project was actually sold, and maybe I went a little --

A. June, that's --

Q. -- too far too fast.

A. Yes.

Q. Back at this point in time --

A. We're talking January/February?

Q. Yeah. Well, when this was sent over late November, early December –

A. Right there would have been no --

Q. -- there was no contemplation of a sale --

A. No notion of a sale at that point.

Q. And in that context, did you assure that if it was billed out [*sic* – the question was "built out"] they would be paid their back-end commission?

A. Yes.

- Scammell Transcript at page 24, line 21 – page 26, line 10

Q. What discussions took place at that time regarding how they were to be paid for their continuing marketing efforts, i.e., post CCAA sales?

A. So between Square Foot, myself, and Don, we were – I recall being very candid with them into January and beyond stating that there was nothing left in the budget for payment of commissions, and that it would -- it would be -- I can't recall the exact words. But I would have said, "Listen, we're out of money. We're caught, because we have to keep selling. We -- Don and I are trying to find ways in which we can free up some cash to pay for sales. But, at this point, we have nothing."

Q. M-hm.

A. "We're working --" We would have said, "We're working with Dentons and the Monitor, and we're considering going to Scotia to ask if we can get an increase or, you know, alter the budget somewhat so we can get some cash, but, again, at this point, we have nothing. So we have to proceed on that understanding. And, essentially, we're caught."

- Scammell Transcript at page 45, line 18 – page 46, line 11

Q. Okay. I just want to go back to your understanding of what was told to Square Foot by yourself and Mr. Poirier when you engaged Square Foot to continue to market. **Are you trying to suggest -- I want to be clear, you tell me -- that they were supposed to be marketing and effecting new sales with no guarantee of payment, or was there discussion of payment to be provided through funding from the Bank of Nova Scotia?**

A. **Both.** Both. It was --

Q. Well, tell me about the latter piece.

A. Sorry, say it again?

Q. Funding by the Bank of Nova Scotia.

A. Funding by -- **any funding by the Bank of Nova Scotia would have been to the original budget which was in place, which clearly had nothing left for front-end commissions, which is typically what the**

> **sales or marketing component of a budget would include. It would not include the entire amount, because the back end would be taken at closing. So the budget for sales and commissions was spent. That was clear. And that was -- we made that clear into that time frame of January and beyond. It was also clear into February, March, April as we continued on that Bank of Nova Scotia was increasingly growing uneasy about the project and their position within it, and it was looking less and less likely that any additional funds were going to be made available for commissions.** Does that answer your question?
>
> - Scammell Transcript at page 48, line 19 – page 49, line 19

24. Thus, Mr. Scammell's and Mr. Poirier's evidence was clear. They always understood that back-end commissions would become payable from sale proceeds only when unit sales were closed. After it became clear that Valmont was selling the entire project to a third party who would be closing those unit sales instead of Valmont, they advised Square Foot that it would have to look to the third party purchaser of the project for its back-end commissions. Neither Mr. Scammell nor Mr. Poirier suggested in evidence that the Monitor had any other understanding and, importantly, neither of them suggested in any way that the Monitor ever made any assurances of payment of the back-end commissions to Square Foot.

25. With respect to the Monitor's second statement in paragraph 25 of the Third Report, that it was not aware that Square Foot was claiming its back-end commissions until it received Square Foot's proof of claim for those amounts on April 11, 2014, there is no evidence from Mr. Taylor, Mr. Scammell or Mr. Poirier to the contrary. The Monitor has never denied that it received spreadsheets (like the one at Exhibit "E" to the Taylor Affidavit) that contained calculations of what back-end commissions could become payable **if**, as per the Agreement, unit sales closed and Valmont received sales proceeds.

26. However, that is very different than knowing that Square Foot was formally asserting a claim for back-end commissions (especially after the project was sold by Valmont and it was obvious that Valmont would **never** close any unit sales and receive any unit sale proceeds). There is no way the Monitor could have known that fact, until Square Foot actually submitted its proof of claim.

27. The point suggested at para. 84 of the Square Foot Supplemental Brief, that the Monitor knew from an April 1, 2014 letter that Square Foot was claiming back-end commissions, does not contradict the Monitor's statement in the Third Report. On April 1, 2014, 10 days prior to its submission of its back-end commission proof of claim, Square Foot's counsel wrote a letter to the Monitor's counsel and UBG's counsel (see Taylor Affidavit, Exhibit "Z"). However, that letter was clearly **not** a demand that Valmont pay the back-end commissions, but rather, it suggested that RDL, the purchaser of the project, was liable for the back-end commissions. The letter said:

> Further, prior to the sale of the Valmont Project to RDL, UBG officers confirmed that this information had been passed along to **the new owners** of Valmont and that **RDL have been instructed to budget for back-end commissions owed to Square Foot at the time of the closings.** [emphasis added]

28. That statement is fully consistent with Mr. Scammell's and Mr. Poirier's evidence of how the industry worked and their warnings to Square Foot that after the project was sold to RDL, Square Foot would have to look to RDL for any back-end commissions.

29. The Monitor in CCAA proceedings is charged with supervising a formal, Court-authorized claims process, which requires formal proofs of claim to be submitted by a Claims Bar Date (including for any contingent claims existing as at that date). The Monitor, just like all creditors, has to rely on actual, filed proofs of claim. The Monitor cannot be expected to divine what a creditor is thinking about a potential claim for which it has not yet filed a proof of claim, especially where, as here, two years had passed since the Claims Bar Date (July 31, 2012), the creditor had not filed a proof of claim (on the advice of its counsel), and it was clear that the part of the contract under which its claim could potentially arise, could not be performed.

30. To demonstrate just how irrelevant is Square Foot's attack on the Monitor's statements in paragraph 25 of the Third Report, one can ask (and then answer) the following hypothetical question: "what if it **was** established on the evidence (which it is not) that the Monitor **did** know prior to Square Foot submitting its late proof of claim, that Square Foot was claiming these amounts against Valmont, even after the sale of the project to RDL?" The answer is that this information would be irrelevant, because it would not affect in any

way the determination of whether Square Foot's claim for back-end commissions is meritorious or not. That determination turns entirely on the interpretation of the Agreement, in the context of the Court-approved sale of the project to RDL. At best, such evidence might provide a partial excuse for Square Foot's grossly late submission of its proof of claim.

(b) Paragraph 28 of the Third Report

31. The second statement by the Monitor that is attacked by Square Foot is in paragraph 28 of the Third Report, which stated in full:

> As a result of the information obtained from the Valmont project purchaser, and the statement noted at paragraph 25 of the Taylor Affidavit, on May 27, 2015 the Monitor issued a Supplemental Notice of Revision and Disallowance (the "May 27, 2015 Notice of Revision") to Square Foot clarifying the disallowance in full of its claim for back-end commissions (based on information obtained from the Valmont project purchaser) and disallowing Square Foot's claim of $57,582 in respect of front-end commissions (which was previously accepted by the Monitor) as a result of Square Foot's receipt of $111,991.28, which was previously unknown by the Monitor. A copy of the May 27, 2015 Notice of Revision is attached as Appendix "G".

32. There is not and has never been any evidence that contradicts the statements in paragraph 28 of the Third Report. The Monitor does not contest that it would have received the spreadsheet contained in Exhibit "E" to the Taylor Affidavit in late 2012, nor that the spreadsheet records that $111,991.28 of back-end commissions on Valmont had been paid. However, the payments were made before the CCAA proceedings began, and before the Monitor was appointed. Further, Square Foot provided no explanation of the nature of the payments, nor did it explain the consideration provided by Square Foot for the payments, until the explanation given by Mr. Taylor on April 7, 2015 in paragraph 25 and Exhibit "F" of the Taylor Affidavit. It was only then that Square Foot admitted that Valmont had made these payments and that Square Foot had recorded them as back-end commission payments but they were no such thing, and in fact the only consideration provided by Square Foot for the payments was to a totally different UBG entity.

33. The statement made in paragraph 28 of the Third Report refers to the Monitor's May 27, 2015 Notice of Revision (which is attached under Tab "A" of the Square Foot Supplemental Brief). Among other things, in that Notice of Revision, the Monitor stated:

> The Monitor understands based on paragraph 25 of the affidavit of Tim Taylor dated April 7, 2015 (the "Taylor Affidavit") that Square Foot was advanced $111,991.28 (the "Advance") by Valmont in respect of back-end commissions and that this advance was used to finance up-front costs related to a different project known as the STEPS Bridges project. The Monitor has reviewed the Valmont project bank accounts as well as numerous other UBG bank accounts. No funds were ever paid by Bridges to Valmont in respect of the $111,991.28 payment Square Foot received from Valmont. It is the Monitor's view that this payment to Square Foot was likely a fraudulent preference and the Monitor intends to bring an application to deal with this matter in the near future.

34. Thus, it was the evidence of Mr. Taylor in April 2015 that caused the Monitor to review UBG bank accounts to determine if Valmont had ever received repayment of the payments, from the other UBG entity that had gotten the entire benefit from Valmont's payment to Square Foot. This is further evidence that the Monitor did not understand the nature of these payments until after it saw Mr. Taylor's explanation in the Taylor Affidavit.

35. In attacking the Monitor's statement, Square Foot again carelessly paraphrases what the Monitor actually said in paragraph 28 of the Third Report and in the Notice of Revision and Disallowance, claiming it was surprised by the Monitor taking the position that "it was unaware of a payment of $111,991.28 made to it by UBG some many months prior" (Square Foot Supplemental Brief at para. 12). As noted above, the Monitor never said it was unaware of the payment, but rather that it was unaware of the nature of the payment, the reason for the payment and that the only consideration that Square Foot provided for the payment was to a third party, not to Valmont (all as described in detail in the Notice of Revision and Disallowance).

36. Again, to gauge the relevance of Square Foot's attack on the Monitor, one must ask "what if it was established that the Monitor **did** know prior to April 2015 that Valmont had made this payment to Square Foot for consideration Square Foot provided to a third party"? It would make no difference. Such knowledge on the part of the Monitor would not change the analysis of whether the payments to Square Foot were, on their merits, voidable preferences that should to be set aside for the benefit of Valmont's other creditors.

(c) The Allegation that the Monitor has Refused to Produce Relevant Documents

37. At paras. 17 – 23 of the Square Foot Supplemental Brief, Square Foot alleges that the Monitor failed to comply with the June 3, 2015 Consent Order (which is attached at Tab "E" of the Square Foot Supplemental Brief) and at paras. 74 – 84, Square Foot suggests that an adverse inference should be drawn because of the Monitor's alleged failure to do so.

38. This allegation is completely misguided. The Monitor fully complied with the Consent Order. That process set out in the Court Order was:

(a) Mr. Scammell and Mr. Poirier had to produce all records in their possession of communications regarding the back-end commission claims;

(b) if any of those produced documents were communications with UBG or its counsel, they would first be passed to UBG's counsel to be vetted for privilege before they were produced; and

(c) if any of those produced documents had been passed by UBG to the Monitor, then both UBG and the Monitor would produce them, first vetting those documents for privilege before they were produced.

39. This process was followed. Mr. Scammell provided documents to UBG's counsel, who vetted them for privilege, then produced them (Tab "G" of the Square Foot Supplemental Brief). The Monitor's counsel then provided the Monitor's knowledge of the produced records (Tab "J" of the Square Foot Supplemental Brief). Mr. Poirier never produced any records.

40. Notably, although Square Foot subsequently alleged that **UBG** had an obligation to seek additional records from third parties and produce them (although Square Foot never advanced that allegation by making a court application to compel such production – see Tabs "I" and "J" of the Square Foot Supplemental Brief), Square Foot **never** alleged that the **Monitor** had to produce any further documents.

41. There is no merit to the allegation that the Monitor failed to observe the terms of the Consent Order.

III. ISSUES

42. There are two issues for determination on this application:

(a) is Square Foot entitled to the claim it has asserted, in whole or in part, regarding back-end commissions; and

(b) were the payments to Square Foot totalling $111,991.28 voidable preferences.

IV. POINTS OF LAW

A. Back-End Commissions

43. The Monitor's argument on the merits of Square Foot's claim is fully set out at paras. 49 – 77 of the Monitor's First Brief. As no new evidence has been tendered that is relevant to the merits of Square Foot's claim, the Monitor submits no additional argument on this point.

B. The Preference Claim Against Square Foot

1. The Applicable Legislation

44. The Monitor filed and served its preference application on December 11, 2015.

45. The Court's authority to set aside voidable preferences in CCAA proceedings derives from Section 95 of the *Bankruptcy and Insolvency Act*, RSC 1985, c. B-3 ("BIA") and Section 36.1 of the *Companies' Creditors Arrangement Act*, RSC 1985, c. C-36 ("CCAA"). Section 95(1) and (2) of the BIA reads as follows:

> 95. (1) A transfer of property made, a provision of services made, a charge on property made, a payment made, an obligation incurred or a judicial proceeding taken or suffered by an insolvent person
>
> (a) in favour of a creditor who is dealing at arm's length with the insolvent person, or a person in trust for that creditor, with a view to giving that creditor a preference over another creditor is void as against — or, in Quebec, may not be set up against — the trustee if it is made, incurred, taken or suffered, as the case may be, during the period beginning on the day that is three months before the date of the initial bankruptcy event and ending on the date of the bankruptcy; and
>
> (b) in favour of a creditor who is not dealing at arm's length with the insolvent person, or a person in trust for that creditor, that

has the effect of giving that creditor a preference over another creditor is void as against — or, in Quebec, may not be set up against — the trustee if it is made, incurred, taken or suffered, as the case may be, during the period beginning on the day that is 12 months before the date of the initial bankruptcy event and ending on the date of the bankruptcy.

(2) If the transfer, charge, payment, obligation or judicial proceeding referred to in paragraph (1)(*a*) has the effect of giving the creditor a preference, it is, in the absence of evidence to the contrary, presumed to have been made, incurred, taken or suffered with a view to giving the creditor the preference — even if it was made, incurred, taken or suffered, as the case may be, under pressure — and evidence of pressure is not admissible to support the transaction.

- BIA, Section 95(1) and 95(2) **[TAB 2]**

46. Section 36.1 of the CCAA reads as follows:

36.1(1) Sections 38 and 95 to 101 of the Bankruptcy and Insolvency Act apply, with any modifications that the circumstances require, in respect of a compromise or arrangement unless the compromise or arrangement provides otherwise.

(2) For the purposes of subsection (1), a reference in sections 38 and 95 to 101 of the Bankruptcy and Insolvency Act

(a) to "date of the bankruptcy" is to be read as a reference to "day on which proceedings commence under this Act";

(b) to "trustee" is to be read as a reference to "monitor"; and

(c) to "bankrupt", "insolvent person" or "debtor" is to be read as a reference to "debtor company".

- CCAA, Section 36.1(1) and (2) **[TAB 3]**

47. Accordingly, in CCAA proceedings, the two sections are to be read together as follows [with emphasis added to demonstrate the CCAA insertions]:

95. (1) A transfer of property made, a provision of services made, a charge on property made, a payment made, an obligation incurred or a judicial proceeding taken or suffered by a **debtor company**

(a) in favour of a creditor who is dealing at arm's length with the **debtor company**, or a person in trust for that creditor, with a view to giving that creditor a preference over another creditor

is void as against — or, in Quebec, may not be set up against — the **monitor** if it is made, incurred, taken or suffered, as the case may be, during the period beginning on the day that is three months before the date of the initial bankruptcy event and ending on the **day on which proceedings commence under this Act**; and

(b) in favour of a creditor who is not dealing at arm's length with the **debtor company**, or a person in trust for that creditor, that has the effect of giving that creditor a preference over another creditor is void as against — or, in Quebec, may not be set up against — the **monitor** if it is made, incurred, taken or suffered, as the case may be, during the period beginning on the day that is 12 months before the date of the initial bankruptcy event and ending on **the day on which proceedings commence under this Act**.

(2) If the transfer, charge, payment, obligation or judicial proceeding referred to in paragraph (1)(*a*) has the effect of giving the creditor a preference, it is, in the absence of evidence to the contrary, presumed to have been made, incurred, taken or suffered with a view to giving the creditor the preference — even if it was made, incurred, taken or suffered, as the case may be, under pressure — and evidence of pressure is not admissible to support the transaction.

2. The Legal Test

48. Thus, the elements that must be proven to establish that the payments to Square Foot should be set aside as preferences are:

(a) the payments were "a transfer of property made, a provision of services made, a charge on property made, a payment made, an obligation incurred or a judicial proceeding taken or suffered";

(b) the payments were made by the debtor company, Valmont;

(c) [because Square Foot is arm's length to Valmont] the payments were made within three months prior to the commencement of the CCAA proceedings;

(d) Square Foot was a creditor of Valmont when the payments were made; and

(e) the payments were made with a view to giving Square Foot a preference over other creditors of Valmont (or that fact is presumed, where the payments had

the effect of preferring Square Foot over other creditors of Valmont and Square Foot fails to rebut that presumption).

(a) The Payments Were "a Payment Made"

49. There is no question that the first requirement is satisfied. Mr. Taylor admitted in questioning that the payments totalling $111,991.28 that are set out in the Exhibit "E" to the Taylor Affidavit were in fact paid to Square Foot.

- Taylor Transcript at page 64, lines 16 – 22

(b) The Payments Were Made by Valmont

50. Mr. Taylor also admitted this fact in questioning.

- Taylor Transcript at page 64, lines 23 – 24

(c) The Payments Were Made Within the Relevant Time

51. As recorded in Exhibit "E" to the Taylor Affidavit, the payments were made on two dates: March 16, 2012 and April 5, 2012. These CCAA proceedings commenced when the Initial Order was granted on May 9, 2012. Therefore, it is clear that the payments were made within the reviewable time period.

(d) Square Foot was a Creditor of Valmont when the Payments Were Made

52. This fact is also not contested. The entire thrust of Square Foot's application is that (although it never filed a proof of claim until two years later), it was a contingent creditor for all its potential back-end commissions as soon as the unit sale agreements "went firm" with purchasers. This was the case (as detailed on Exhibit "E" to the Taylor Affidavit) from July 12, 2011.

(e) The Payments had the Effect of Preferring Square Foot Over Other Creditors of Valmont and Square Foot has not Rebutted the Presumption

53. There is no question that the payments to Square Foot preferred Square Foot over other creditors of Valmont. Among other things, the first secured lender, Scotiabank, was owed approximately $4.3 million by Valmont (Third Report of the Monitor dated July 9,

2012 **[TAB 4]**). This preferential effect raises the presumption that the payments by Valmont to Square Foot were made "with a view" to preferring Square Foot over other creditors of Valmont. The presumption is rebuttable, and the onus to rebut the presumption is on Square Foot, the creditor who received the payment:

- *St. Anne-Nackawic Pope Co. (Trustee of) v. Logistec Stevedoring (Atlantic) Inc.*, 2005 NBCA 55 at para. 5 **[TAB 5]**

54. In considering the "intent" element of the rebuttable presumption, the Court is to look at the intent of the debtor company who made the payment, not at the intent of the preferred creditor: *Re Titan Investments Ltd. Partnership*, 2005 ABQB 637 at paras. 25 and 26 **[TAB 6]**.

55. Square Foot has submitted evidence of Valmont's intention in making the payments to Square Foot. Mr. Taylor made the following statements in the Taylor Affidavit:

(a) the payments were recorded as back-end commissions on the Valmont project "as a convenience to UBG, who owed Square Foot this amount under an entirely separate agreement"; and

- Taylor Affidavit at para. 25

(b) this "somewhat unique arrangement (being paid out of Valmont cash flow for Bridges Management Inc.'s obligation to Square Foot under a separate agreement), was done at UBG's request and solely as an accommodation to UBG, and to assist it in effectively marshalling its cash flow throughout its entire family of companies".

- Taylor Affidavit at para. 27

56. Square Foot's counsel also asked Mr. Scammell if he knew why the payments had been made and his answers were as follows:

Q. Right. But these had already been paid. Did you have an understanding as to why that was so?

A. These ones here?

Q. Yes.

A. It may have had to do with -- I recall there being an advance on some back-end commissions, and I can't recall -- I think this may be relating to the other sales centre.

Q. At Bridgeland?

A. For the Bridgeland projects.

Q. The Bridges project?

A. Yes.

Q. Right. Would you take a look at paragraph --

A. If -- I'll say it another way. If this amount totals 100,000 --

Q. Yes, it is.

A. -- I don't know if it was 96 or 100,000, something like that --

Q. Approximately.

A. Yes. That would make sense that that's what they were disclosed as.

Q. Would you take a look at paragraph 25 of Mr. Taylor's affidavit, please.

A. Okay.

Q. Sir, you've had a chance to read paragraph 25 of Mr. Tim Taylor's affidavit?

A. Yes.

Q. What do you know about that?

A. About the paragraph, or about the other --

Q. About what he says to the paragraph, The Bridges agreement and monies being advanced as a convenience to UBG?

A. I understand that there was -- there was another project down in Bridgeland that needed or had a sales centre that was initiated, and in order to get some startup capital for that sales centre, monies were taken from -- as I understand it, monies were taken from Valmont, paid to Square Foot for the purpose of getting that sales centre open and disclosed as an advance,

essentially, an advance on back-end commissions to that amount.

Q. What you're characterizing as an advance, they were building a sales centre for Bridges?

A. Correct.

Q. Right.

A. Which, as I understand --

Q. UBG was supposed to pay the funds for the building of that sales centre?

A. Yes.

Q. They didn't have the money?

A. Correct.

Q. Right. So Square Foot received the money from Valmont instead of from Bridges so that it could spend that money building the Bridges centre?

A. Correct.

Q. And it was paid for as an advance of back-end commission on Valmont?

A. That's my understanding, yes.

Q. But it wasn't because they were getting paid the Valmont back-end commission, this was a way of getting money in their pockets to build the Bridges sales centre?

A. Yes.

Q. Because Bridges itself, a separate legal entity, didn't have the money?

A. Correct.

Q. Thank you.

- Scammell Transcript at page 27, line 1 – page 29, line 13

57. Square Foot's counsel also asked Mr. Poirier about his knowledge of that matter and he disclaimed any knowledge.

- Poirier Transcript at page 28, lines 13 – 22

58. Thus, after Square Foot was made aware in late May 2015 that the Monitor would be challenging the payments as preferences, Square Foot marshalled additional evidence from UBG employees to answer that allegation. It is submitted that the additional evidence does not rebut the presumption that Valmont intended to prefer Square Foot, but instead corroborates that presumption. It is clear that Square Foot had no entitlement to receive the payments from Valmont, because it had provided no consideration to Valmont for those payments. Rather, the party that was getting consideration for the payments, The Bridges Management Inc., simply did not have any cash to pay Valmont for those services. The fact that Square Foot had to record the payments as "advance payments" for back-end commissions for which it had a contingent claim at the time but which were not yet due and owing, and the fact that Square Foot actually issued premature back-end commissions (invoices VAL-016 and VAL-017, both contained in Exhibit "H" to the Taylor Affidavit), are determinative. Square Foot had to create a paper trail to account for its receipt of the payments, but the paper trail was a fiction because it relied on back-end commission claims that were not yet due and owing, but were only contingent claims at the time.

3. Conclusion on the Preference Application

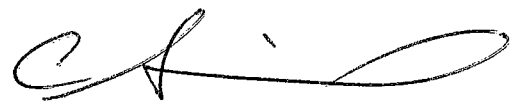
59. The Monitor submits that all the elements required to establish that the payments made to Square Foot in March and April 2012 were voidable preferences that ought to be set aside, have been proven. As a result, the Monitor submits that the Court can and should rule on this issue at the same time that it rules on Square Foot's back-end commission claim. While the Monitor only filed its application on December 11, 2015, Square Foot has had notice that the application would be coming for over six months. Square Foot has also had in its possession all the evidence on which the application is based for that entire time. In fact, one of the very purposes of the lengthy adjournment of Square Foot's application was so that it could marshall further evidence to respond to the allegation that the payments were voidable preferences.

V. RELIEF SOUGHT

60. The Monitor respectfully requests that Square Foot's application be dismissed and that the Monitor's preference application be granted, with costs.

ALL OF WHICH IS RESPECTFULLY SUBMITTED at Calgary, Alberta this 11th day of December, 2015.

BENNETT JONES LLP

Per: 

Chris Simard
Counsel for Ernst & Young Inc. as CCAA
Monitor of The UBG Group of Companies

VI. TABLE OF AUTHORITIES

1. Correspondence between counsel in October 2015
2. *Bankruptcy and Insolvency Act*, RSC 1985, c. B-3
3. *Companies' Creditors Arrangement Act*, RSC 1985, c. C-36
4. Third Report of the Monitor dated July 9, 2012
5. *St. Anne-Nackawic Pope Co. (Trustee of) v. Logistec Stevedoring (Atlantic) Inc.*, 2005 NBCA 55
6. *Re Titan Investments Ltd. Partnership*, 2005 ABQB 637