Amended pursuant to Rule 16-1(19)(b)(i)
Original filed on August 13, 2021

No.VLC-S-S-215858
Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

RE: *THE OWNERS, STRATA PLAN VR456*
IN THE MATTER OF DIVISION 2 OF PART 16 OF THE STRATA PROPERTY ACT, SBC 1998, c. 43

AMENDED RESPONSE TO PETITION

Filed by: James Mok and Michelle Mok (the "**petition respondents**")

THIS IS A RESPONSE TO the petition filed June 17, 2021.

Part 1: ORDERS CONSENTED TO

The petition respondents consent to the granting of the orders set out in the following paragraphs of Part 1 of the petition: None.

Part 2: ORDERS OPPOSED

The petition respondents oppose the granting of the orders set out in paragraphs 1-13 of Part 1 of the petition.

Part 3: ORDERS ON WHICH NO POSITION IS TAKEN

The petition respondents take no position on the granting of the orders set out in paragraphs NIL of Part 1 of the petition.

Part 4: FACTUAL BASIS

A. Overview

1. For the reasons detailed below, the facts and law do not support the granting of the relief sought by the petitioner. The Petition should be dismissed.

2. As a preliminary matter, the administratorship through which this Petition has been brought came into existence through a consent order which was procured in breach of the requirements of the *Supreme Court Civil Rules* and basic principles of procedural fairness. That consent order should be set aside, with the result that this Petition should be summarily dismissed. The validity of the consent order (which was issued in a related petition proceeding) is the subject of a Notice of Application which should be heard contemporaneously with this Petition.

3. In any event, even if that consent order is valid (which is denied), this Petition should not succeed in view of the applicable facts and law.

4. The essential premise underlying the Petition is that the strata lands were properly marketed and fully exposed to the market, with the result that the proposed offer yields fair market value. However, the facts do not support that premise.

5. In particular, the facts show that the marketing process was, among other things:

   (a) Conducted at an unpropitious time, namely during a depressed period in the British Columbia real estate market (i.e. during the early throes of the COVID-19 pandemic);

   (b) Conducted in a summary manner and prematurely concluded after little more than a week of marketing, despite the fact that it was suggested that the marketing process should last 6-12 weeks in order to attract a breadth of prospective purchasers and create a competitive bidding environment;

   (c) Conducted in a manner that would have reasonably caused prospective purchasers to mistakenly believe that the building was already "under contract" and therefore no longer realistically open to offers; and

   (d) Conducted without the benefit of an appraisal which would have given the owners (and this Honorable Court) confidence that the proposed offer is reflective of fair market value.

6. In any event, even if the Court concluded that the marketing process was thorough and well-timed (which is denied), the fact is that nearly 1.5 years have passed since it was conducted. The real estate market in the area has improved significantly since that time, including as a result of positive developments:

   (a) In the Vancouver real estate market generally, as a result of recovery from the economic consequences of the pandemic; and

   (b) Specifically with respect to the area of the strata lands, which are in close proximity to the Broadway subway project.

7. The latter development is worth emphasizing. While the Broadway subway project was in its relative infancy 1.5 years ago, it has now made considerable strides. It is apparent that the area in which the strata lands are located will benefit from zoning changes which will permit considerable densification and real estate development.

8. Accordingly, even if the proposed offer reflected fair market value when it was made 1.5 years ago (which is denied), it is no longer reflective of fair value.

9. That conclusion is amply supported by the facts. The value reflected in the offer is significantly below assessed values, which are themselves typically below actual market values. The evidence led by the petition respondents also shows that, in

the opinion of a qualified and experienced appraiser, the current value of **only the bare land** of the property (excluding the structure, which has its own value) is significantly higher than the proposed offer which is urged upon this Court.

10. Put simply, this is not a case where the 'market has spoken'. Even if it has, it is 'old news' in view of the effluxion of time and new market developments. Nor is this a situation, which is common in the reported case law, where the proposed sale would permit owners to enjoy a healthy premium over assessed values. On the basis of the proposed offer, the owners here stand to suffer a loss.

11. If this Honourable Court permits the sale to proceed, it will forcibly deprive the petition respondents of a property which they have owned for decades in exchange for consideration which is significantly below fair market value. As the evidence shows, it would not be possible for the petition respondents to use that below-market consideration to purchase a comparable home in the area. This would deal considerable hardship to the petition respondents.

12. These concerns have more importance in the unique circumstances of this case. The strata community in this case is not a collection of 50+ owners, which is often the case with strata buildings in Vancouver. In this case there are six owners, including one owner who controls two votes. Four of the six owners (including the owner who controls two votes) voted in favour of the proposed sale, with the result that the 80% vote threshold has only been met by a slim margin of 3%.

13. Accordingly, the petition respondents are not one lone voice in a sea of owners all of whom support the sale. Rather, the petition respondents comprise a significant portion of the ownership group, and their concerns deserve commensurate weight.

14. In addition to the foregoing, the process has unfolded in a manner that is unfair to the petition respondents. In addition to the issues with the consent order, the petition respondents have been the subject of intimidation and threats in an attempt to subvert the democratic process by coercing them into submitting to the will of the majority. In addition, the petition respondents appear to have been unfairly excluded from discussions and meetings between the administrator and other owners. Further, the petition respondents, together with the other owners, have been misled and confused by the provision of incorrect information.

15. In addition, the Petition is premised on the suggestion that the strata lands' value is depressed due to existing building repair issues which have not yet been addressed. This is inaccurate. Many of the issues that the petitioner implicitly claims have depressed the value of the building have recently been addressed by the strata, at the owners' sole cost.

16. For these and the other reasons set out below, proceeding with the proposed offer would bestow a windfall on the buyer, deprive the owners of fair market value for the loss of their homes, and implicitly condone a process which has been significantly unfair to the petition respondents. The Petition should be dismissed.

B. Facts

Building

17. The petition respondents, Dr. James Mok and Michelle Mok, are the registered owners of strata lot 4 of Strata Plan VR456 (the "**Strata**"), which operates a building and lands (collectively, the "**Building**") located at 1089 West 13th Avenue, Vancouver, British Columbia and known as "Spruce West".

Affidavit #1 of James Mok made December 10, 2021 at para. 2 (the "**J. Mok Affidavit**")
Affidavit #1 of Michelle Mok made December 12, 2021 at para. 2 (the "**M. Mok Affidavit**")

18. The Building is a six-storey solid concrete prefabricated 5,738 square foot building with cement foundations built in or about August 1977. It is situated on a 6,247 square foot corner lot at West 13th Avenue and Spruce Street, which is approximately 1.5 blocks from the Vancouver General Hospital (the "**VGH**") and approximately 4.5 blocks from the Broadway Subway Line Oak-VGH Station, which is now under construction.

J. Mok Affidavit at para. 3

19. The Building is located within the RM3 Broadway Subway Plan zone, which contemplates significant new residential development density. The Building is in a walkable neighborhood close to Granville Island, the Granville and Broadway shopping areas and downtown Vancouver. From the Building's location, Dr. Mok can conveniently walk to work at a clinic nearby and Ms. Mok, who does not drive, can travel using the readily accessible bus and subway options located at Broadway Street, which will soon extend to UBC and Langley.

J. Mok Affidavit at para. 4, Exhibit A
M. Mok Affidavit at para. 3

20. Based on recent materials from the City of Vancouver in respect of the Broadway Plan (which were prepared in connection with a City of Vancouver virtual open house held in November 2021), the City of Vancouver will change the density in "Fairview South" (which is where the Building is located) to permit "building heights of 15-25 storeys" in areas with existing apartment buildings.

J. Mok Affidavit at para. 5, Exhibit A, p. 5

21. The Building's close proximity to the VGH became particularly important to Ms. Mok after she received two cancer diagnoses, first in 2015 and again in 2020. She would walk to her chemotherapy and radiation treatments at the nearby BC Cancer Agency. In addition, most of Ms. Mok's doctors and other health professionals are located within a few blocks of the Building.

M. Mok Affidavit at para. 4

22. The petition respondents have owned their strata lot in the Building since February 1997. The applicants chose to purchase strata lot 4 due to its location, the unique solid concrete building design, and the lot's size, which encompasses one full floor and has its own private elevator lobby.

J. Mok Affidavit at para. 6
M. Mok Affidavit at para. 5

23. The Building consists of six strata lots owned by six owners (collectively, the "**Owners**"). In particular:

(a) Strata lots 1 and 2 are owned by Ms. Agnes Mui;

(b) Strata lot 3 is owned by Mr. Petislav (Peter) Tovbis;

(c) Strata lot 4 is owned by the petition respondents, Dr. Mok and Ms. Mok;

(d) Strata lot 5 is owned by the estate of Mr. Colin MacKenzie MacLennan, who is deceased, of which Ms. Tracey Anne Maclennan and Suzanne Elise Foster are the executors (the "**Executors**"); and

(e) Strata lot 6 is owned by Mr. Dan Sonnenschein.

J. Mok Affidavit at para. 7

24. Each strata lot occupies a single floor of the Building. The Building includes six underground parking stalls and four above-ground stalls in the lot adjacent to the Building. Each of the strata lots is accessible by an elevator and two split stairways, also known as the 'scissor stairways'.

J. Mok Affidavit at para. 8

25. Strata lot 1 is operated as a rental property, while strata lots 2, 3, 4 and 6 are owner-occupied. Strata lot 5 is currently unoccupied.

J. Mok Affidavit at para. 9

26. The petition respondents' strata lot is 977 square feet. It has two bedrooms and bathrooms. The master bedroom has an ensuite bathroom, and the property includes large living and dining rooms with north-facing mountain views and a large balcony. The kitchen also has a second large balcony with south-facing views over a tree-lined street (i.e. Spruce Street). This strata lot, in addition to strata lots 5 and 6, has wrap-around views of the North Shore mountains, Vancouver City Hall and Mount Baker.

J. Mok Affidavit at para. 10

Appointment Petition

27. On January 10, 2020, the Executors filed a Petition (the "**Appointment Petition**") in this Court which sought an order, pursuant to s. 174 of the *Strata Property Act*, SBC 1998, c. 43 (the "***Act***"), appointing an administrator "to exercise the powers and duties" of the Strata in relation to the repair and maintenance of the Strata's common property as required under the *Act*. In particular, the Appointment Petition sought an order that an administrator "take all reasonable steps to investigate the condition of the [Strata's] common property", including:

    (a) "Hiring an independent engineering firm to prepare a written report, which describes the condition of the common property, identifies any repairs required to the common property, and establishes a reasonable timeline for the completion of the repairs";

    (b) "Hiring consultants or appraisers to evaluate whether it is in the best interests of owners to wind-up the Strata Corporation";

    (c) "Ensuring all owners have access to any report prepared or received by the Administrator";

    (d) "Recommend what work, if any, should be done to repair the Strata Corporation's common property ... and the estimated costs of the repairs"; and

    (e) "Raising sufficient funds by special levy to pay for the Repairs".

J. Mok Affidavit at para. 11, Exhibit B, p. 11-12

28. The Appointment Petition's legal basis was entirely focused on the Strata's duty to repair the common property as required by the *Act* and the asserted need to investigate and conduct repairs to the Building.

J. Mok Affidavit at para. 11, Exhibit B, p. 24-26

29. The Appointment Petition also made no reference to the concept of a voluntary winding-up with a liquidator under Division 2 of the *Act.*

J. Mok Affidavit at para. 11, Exhibit B

30. Moreover, the Appointment Petition did not seek an order pursuant to s. 174 of the *Act* that an administrator be appointed to exercise **all** powers and perform **all** duties of the Strata, which is customarily sought when a petitioner seeks the appointment of an administrator for unlimited purposes. Instead, the Appointment Petition, as noted above, particularized the powers and duties of the proposed administrator, which is customary when the appointment is for limited purposes.

British Columbia Strata Property Practice Manual at FP-79 and 80 ("***Strata Property Practice Manual***")

31. As discussed further below, it is well settled that the appointment of an administrator is "an exceptional remedy and one the Court is likely to grant only when absolutely necessary." This is because the appointment of an administrator "can result in the removal of some or all of the powers and duties of the strata corporation and strata council and represents a serious interference with the democratic governance of the strata community".

Strata Property Practice Manual at 20-1 and 20-2

32. By operation of the provisions of the *Act* and the *Supreme Court Civil Rules* ("***Rules***"), the Executors were required to serve by personal service "a copy of the filed petition and of each filed affidavit in support ... on all persons whose **interests may be affected** by the order sought" [emphasis added]. The *Rules* are clear that this is a mandatory requirement (the *Rules* expressly use the word "must").

Supreme Court Civil Rules, Rules 4-3(1)(b), 4-3(2)(a) and 16-1(3)

33. The Appointment Petition was not served on Ms. Mok, despite the fact that she, as an owner, is a person whose interests would be affected by the orders sought.

M. Mok Affidavit at para. 6

Notice of Hearing and Draft Order Made After Application

34. On March 18, 2020, counsel to the Executors sent an email to Dr. Mok (who was then unrepresented), counsel to Ms. Mui and Mr. Tovbis, and Mr. Sonnenschein.

J. Mok Affidavit at para. 12, Exhibit C

35. In that email, counsel to the Executors advised that the Executors "have instructed us to proceed with the hearing in Supreme Court on March 24, 2020 to appoint Mr. Garth Cambrey as Administrator for the Strata Corporation". They also stated that they were enclosing "the Notice of Hearing that was provided to you previously and the draft form of order we will be asking the Judge to approve."

J. Mok Affidavit at para. 12, Exhibit C

36. That email attached both a Notice of Hearing and a draft Order Made After Application. The Notice of Hearing was consistent with the email, in that it indicated that the Appointment Petition had been set for hearing before a judge on March 24, 2020. However, the email did not indicate that the draft Order Made After Application sought relief which was not contemplated in the Appointment Petition.

J. Mok Affidavit at para. 12, Exhibits D and E

37. In particular, the draft Order Made After Application did not seek an order that an administrator be appointed to "take all reasonable steps to investigate the condition of the [Strata's] common property", as the Appointment Petition did.

J. Mok Affidavit at para. 12, Exhibit D

38. Rather, the draft Order Made After Application sought a mandatory order that the Administrator "**shall** take all reasonable and necessary steps to investigate **and complete** a voluntary winding-up of the Strata Corporation with Liquidator in accordance with Part 16, Division 2 of the *Act* ..., which may include "[e]ntering into a listing contract, **without a vote of the owners** ... to list the building all strata lots and the common property ... for sale." [Emphasis added].

J. Mok Affidavit at para. 12, Exhibit D

39. That mandatory order does not appear in the Appointment Petition. In addition, as noted above, while the Appointment Petition did not seek the appointment of an administrator which would have "**all** of the powers and perform **all** the duties of the Strata Council and the Strata Corporation" [emphasis added], that broad language appeared (for the first time) in the draft Order Made After Application.

J. Mok Affidavit at para. 12, Exhibit D

40. That mandatory order also purported to deprive the Owners of their democratic right to vote on whether the Strata should enter into a listing agreement to list the strata complex for sale. As confirmed by this Court and affirmed by our Court of Appeal, a strata requires a majority vote of the owners before it can proceed to enter into a listing agreement for the sale of the strata complex. Moreover, s. 174 of the *Act* cannot empower an administrator to dispense with such voter approval.

Buckerfield v. The Owners of Strata Plan VR. 92, 2018 BCSC 839 at para. 19, aff'd *Dubas v. The Owners of Strata Plan VR. 92*, 2019 BCCA 196 at para. 35
Norenger Development (Canada) Inc. v. The Owners, Strata Plan NW 3271, 2016 BCCA 118 at paras. 59 and 62-63 ("***Norenger***")

41. As discussed further below, it was legally untenable for the Executors to seek expanded relief in the draft Order Made Application which was not sought in the Appointment Petition. The only way that the Executors could have sought that expanded relief was to file an amended petition which sought that relief and then serve it on all affected persons in accordance with the requirements of the *Rules*. However, even that would be no answer to the fact that the expanded relief purported to empower the administrator to enter into a listing agreement to sell the strata complex without a vote of the Owners.

42. In addition, the preamble of the draft Order Made After Application stated that no one was appearing for "the registered owners of Strata Plan VR 456, although duly notified in accordance with the *Supreme Court Civil Rules*". That was not true,

because, as noted above, Ms. Mok, who was a registered owner, was never served and therefore not properly notified.

J. Mok Affidavit at para. 12, Exhibit D
M. Mok Affidavit at para. 6

43. At the time that Dr. Mok received the email from the Executors' counsel enclosing the draft Order Made After Application (which was only three business days before the date that the Executors had set for the hearing of the Appointment Petition) he did not realize that the Executors were seeking expanded relief which was not sought in the Appointment Petition. Nor was he aware that that such a practice was impermissible from a legal perspective.

J. Mok Affidavit at para. 13

44. Further, Dr. Mok's understanding, based on the email from the Executors' counsel and the attached Notice of Hearing, is that the Executors had set the Appointment Petition for a hearing before a judge on March 24, 2020. This led Dr. Mok to understand that he could appear at that hearing and express concerns to the judge regarding the relief sought and the fact that the Appointment Petition made unsupported allegations against him as an elected officer of the Strata. Dr. Mok always intended to do so, and he booked off March 24, 2020 so that he could attend the hearing.

J. Mok Affidavit at para. 14

45. Although Dr. Mok did not file a Response to Petition, the Executors appear to have been aware that it is common for owners that have not filed a response to appear in court to support or oppose applications for the appointment of an administrator. This is the only reasonable explanation for why the Executors' counsel advised Dr. Mok that the matter would proceed to a hearing, advised him of the hearing date, and served him with the Notice of Hearing.

Strata Property Practice Manual at 20-5

46. On or around March 23, 2020, the day before the hearing of the Appointment Petition, Dr. Mok learned through the local news that the Supreme Court would be closed indefinitely the following day due to increasing concerns related to the COVID-19 pandemic. As a result, Dr. Mok did not attend the courthouse on March 24, 2020 and instead awaited further communications or directions from the Executors' counsel regarding the scheduling of the hearing.

J. Mok Affidavit at para. 15

Response to Appointment Petition

47. On April 6, 2020, then unbeknownst to Dr. Mok and Ms. Mok, counsel to Ms. Mui and Mr. Tovbis filed a Response to Petition in respect of the Appointment Petition.

J. Mok Affidavit at para. 16, Exhibit F
M. Mok Affidavit at para. 7

48. The Response to Petition was signed and filed by counsel nearly three weeks after the Executors' counsel circulated the draft Order Made After Application on March 18, 2020. Notwithstanding that, the Response to Petition took positions in respect of the orders sought in the Appointment Petition and made no reference to the significantly different relief sought in the draft Order Made After Application.

J. Mok Affidavit at para. 16, Exhibit F

49. However, somewhat curiously, the Response to Petition stated, in Part 3, that "[t]he petition respondents take no position on the granting of the orders set out in paragraphs 1 to 14 and 16 of Part 1 of the Petition, **subject to confirmation upon receipt of the form of order sought**" [emphasis added].

J. Mok Affidavit at para. 16, Exhibit F, p. 39

50. The underlined language in the paragraph above is an uncommon addition to Part 3 of a Response to Petition. That is because Part 3 of a Response to Petition is intended to provide notice of the responding persons' positions in respect of the orders **sought in the petition**. The meaning of this unusual addition to Part 3 of the Response to Petition becomes more clear when considered in the context of the subsequent events discussed below.

British Columbia Practice, McLachlin & Taylor (Third Edition), Rule 16-1(19)

Consent Order

51. Contrary to the statements in the email dated March 18, 2020 from counsel to the Executors and the Notice of Hearing attached thereto, the Executors never proceeded with a hearing of the Appointment Petition.

52. Instead, on April 15, 2020, without providing notice to Dr. Mok (or Ms. Mok, who, as noted above, had not even been served with the Appointment Petition), the Executors' counsel submitted a requisition to the court registry attaching a consent order (the "**Consent Order**") which they requested be entered by way of desk order. The Consent Order mirrored the draft Order Made After Application which, as noted above, sought relief which was not sought in the Appointment Petition.

J. Mok Affidavit at para. 17, Exhibit G

53. The Consent Order was signed by counsel to the Executors, counsel to Ms. Mui and Mr. Tovbis, and by Mr. Sonnenschein, who was unrepresented. The implication is that the Executors provided these owners, either directly or through their counsel, of notice of their intention to seek a consent order by way of desk order rather than proceed with the hearing.

J. Mok Affidavit at para. 17, Exhibit G

54. In view of the language in the Response to Petition filed by counsel to Ms. Mui and Mr. Tovbis (which noted that their positions were "subject to confirmation upon receipt of the form of order sought"), it appears that the Executors were engaged in discussions with other owners regarding the relief sought since at least early April 2020 (the Response to Petition was dated April 6, 2020).

J. Mok Affidavit at paras. 16-17, Exhibits F-G

55. However, the Executors' counsel never engaged in any such discussions with Dr. Mok or Ms. Mok. Nor did they provide Dr. Mok with notice that they would not be proceeding with the hearing and would instead be attempting to proceed by way of desk order. Nor did they provide him with a copy of the Consent Order which they intended to submit for entry. They could easily have done so: they had Dr. Mok's email address as well as his physical address, and they had corresponded with him repeatedly in the past via email. As a result, the first time that Dr. Mok and Ms. Mok learned of the Consent Order was nearly two weeks after it had been entered by the Court, as described further below.

J. Mok Affidavit at para. 18
M. Mok Affidavit at paras. 8-9

56. The Executors' counsel submitted the Consent Order with a requisition (the "**Requisition**"), as required. In accordance with legal and procedural requirements, the Executors' counsel certified in the requisition that "[e]ach **party affected** has consented to the order" [emphasis added]. Further, the documents were submitted to the Court together with a letter from the Executors' counsel in which they asserted that:

(a) They were "attaching a consent order signed by or on behalf of **5 of 6 strata lot owners** that comprise The Owners, Strata Plan VR 456"; and

(b) **"The parties have agreed** to the terms respecting the appointment of an administrator".

[Emphasis added]

J. Mok Affidavit at para. 19, Exhibit H

57. The certification in the Requisition and the statements in the accompanying letter were incorrect. It was not the case that each affected party had consented to the order. Nor was it the case that "5 of 6 strata lot owners" had agreed to the terms. Rather, the true circumstances were that:

(a) Ms. Mok, who was an affected party by virtue of being one of the six strata lot owners:

(i) Was never served with the Appointment Petition; and

(ii) Never consented to the relief sought in the Appointment Petition; and

(b) Dr. Mok, who was also an affected party by virtue of being one of the six strata lot owners, and who was also expressly named as a party respondent in the Consent Order:

(i) Never consented to the relief sought in the Appointment Petition;

(ii) Never consented to the significantly different relief which unexpectedly appeared, without proper notice to him, in the draft Order Made After Application;

(iii) Was advised by the Executors' counsel that the Executors would have the Appointment Petition heard by a judge;

(iv) Was never notified that the Executors no longer intended to have the Appointment Petition heard as previously advised and instead intended to submit the Consent Order to the court registry which sought relief which was not sought in the Appointment Petition; and

(v) Was never given an opportunity to review the Consent Order before submission to the Court, notwithstanding the fact that he was expressly named as a party respondent in the Consent Order.

58. Had the Appointment Petition been heard by a judge as the Executors' counsel had advised, Dr. Mok would have appeared and expressed concerns to the judge regarding, among other things, the relief sought. In addition, Ms. Mok would never have agreed to the Consent Order had she known of it.

J. Mok Affidavit at para. 20
M. Mok Affidavit at para. 9

59. On April 17, 2020, the Court, which had not been advised by the Executors of any of the above-noted legal and procedural issues, granted the Consent Order in the form sought by the Executors. The Consent Order purported to appoint Garth Cambrey as the administrator (the "**Administrator**") for one year commencing on April 17, 2021.

J. Mok Affidavit at para. 17, Exhibit G

60. Had the Court been made aware of the above-noted legal and procedural issues at the time of the Executors' submission of the Consent Order, the Court would very likely have concluded that the desk order process was not suited to this matter and that the Court should inquire about the positions of absent affected persons, including one person (Ms. Mok) who was never served with the Appointment Petition. This is particularly so given that, as noted above, the appointment of an

administrator is "an exceptional remedy and one the Court is likely to grant only when absolutely necessary" because it "represents a serious interference with the democratic governance of the strata community".

See e.g. *British Columbia (Director of Civil Forfeiture) v. Takhar*, 2016 BCSC 478
Strata Property Practice Manual at 20-1 and 20-2

Administrator Dismisses Applicants' Concerns

61. On May 2, 2020, more than two weeks after the issuance of the Consent Order, the Administrator sent an email to the Owners advising that:

    (a) He had been appointed as administrator;

    (b) "Some of you may not have received a copy of the Supreme Court order about my appointment"; and

    (c) "[T]he elected strata council no longer has any powers and cannot perform any duties pursuant to the consent order".

J. Mok Affidavit at para. 21, Exhibit I

62. Neither Dr. Mok nor Ms. Mok had any awareness of the Consent Order or the Administrator's appointment until shortly prior to receiving this email from the Administrator. This is notwithstanding the fact that the Administrator (according to the time narratives in his April 2020 invoice) engaged in communications with other owners, their counsel and strata service providers in the second half of April 2020. However, the Administrator does not appear to have made any attempt to communicate with Dr. Mok or Ms. Mok until May 2020.

J. Mok Affidavit at paras. 21-22, Exhibits I-J
M. Mok Affidavit at para. 9

63. Ms. Mok responded to the Administrator's email by asking why the Administrator had not previously provided her or Dr. Mok with a copy of the Consent Order, or the Requisition and associated correspondence to the Court. In response, the Administrator asserted that "[t]he legislation does not require me to forward all information and documents concerning the strata corporation to all owners."

J. Mok Affidavit at para. 23, Exhibit K

64. Although Dr. Mok and Ms. Mok were, as lay persons, unaware that the Consent Order was procured in a legally and procedurally flawed manner, they did raise concerns with the Administrator regarding the fact that Ms. Mok had not been served with the Appointment Petition. The Administrator dismissed that concern as invalid because "the Court accepted [the Consent Order]", the Consent Order "was valid", "the courts have asked me to wind this up" and the Court has "taken that

away from you; they've given me that authority." Similarly, the Administrator's counsel repeatedly advised Dr. Mok and Ms. Mok that there was no requirement for the Appointment Petition to have been served on Ms. Mok despite the fact that she was a registered owner. As a result, Dr. Mok and Ms. Mok were persuaded that the Consent Order had been properly issued.

J. Mok Affidavit at para. 24
M. Mok Affidavit at para. 10

Administrator Defers Appraisal of Building

65. Following the issuance of the Consent Order, the Administrator advised the Owners that he would proceed to enter into a listing agreement with a commercial real estate firm for the marketing and sale of the Building.

J. Mok Affidavit at para. 25

66. During a strata information meeting for the Owners held on June 3, 2020, a discussion took place between the Administrator and the Owners regarding whether to obtain an independent appraisal of the Building. The Administrator advised the Owners to "wait until a realtor was retained and the property is listed" before seeking an independent appraisal. The Administrator also stated that "we're going to want to have an appraisal done so that we know what a third party -- an independent third party views as the value of the property rather than somebody that's trying to market it."

J. Mok Affidavit at para. 26, Exhibit L, p. 79

Goodman Marketing Proposal

67. On June 9, 2020, Goodman Commercial Inc. ("**Goodman**") submitted a marketing proposal (the "**Goodman Marketing Proposal**") to the Administrator.

Affidavit of Garth Cambrey sworn June 14, 2021 ("**Cambrey Affidavit**") at para. 29, Exhibit Y

68. While the Administrator exhibited a portion of the Goodman Marketing Proposal to his affidavit, he omitted the portion in which Goodman stated as follows:

(a) "Strata wind-ups are great opportunities to create wealth through above average sale prices";

(b) "Our expert team will assist you through the complexities of the strata wind-up by ... [e]nsuring you understanding the value of your building as a strata in addition to its value as a development site";

(c) "...[O]wners have the opportunity for sale prices well above individual unit current market value"; and

(d) In general, Goodman's marketing process includes a 6-12 week marketing period consisting of the following steps:

(i) "Marketing, Property Tours and Bidding: 4 - 6 weeks"; and

(ii) "Negotiations, Enter into Purchase Agreement: 2 - 6 weeks".

J. Mok Affidavit at para. 27, Exhibit M

69. While the Administrator ultimately entered into an exclusive listing agreement with Goodman on behalf of the Strata (as detailed below), the Administrator also received and rejected proposals from other brokers, including the following:

(a) MacDonald Commercial Real Estate Services Ltd. ("**MacDonald**"), which submitted a proposal stating that MacDonald would operate a "12-week marketing program" including "6 weeks to actively market the property" which "is the most important element of our program";

(b) Colliers International, which indicated that the marketing and negotiation process would last 10 to 14 weeks and that Colliers International was of the opinion that the Building's value was $5,250,000; and

(c) Remax Commercial, which indicated that their "target transaction value" for the Building was $4,500,000.

Cambrey Affidavit at para. 29, Exhibits Z-BB, p. 210 and 216
J. Mok Affidavit at para. 28, Exhibits N-P, p. 99 and 105

70. Based on the time narratives in the Administrator's June 2020 invoices, it appears that he provided each prospective broker with information regarding repair costs for the Building. In particular, the Administrator's invoices states that on June 1, 2020, he "provide[d] plan to all potential realtors together with occupancy info and build repair costs". As a result, the value opinions reflected in the above-noted proposals appear to reflect that information.

J. Mok Affidavit at para. 29, Exhibit Q, p. 118

71. The Administrator advised the Owners that he disqualified Remax Commercial because its proposal was received by the Administrator four minutes past the noon deadline that he had imposed. The Administrator also disqualified Colliers International because its proposal was submitted approximately two hours after his noon deadline.

J. Mok Affidavit at para. 28, Exhibit N

72. The Administrator also advised the Owners that he spoke with Goodman and MacDonald and selected Goodman because of more favourable listing terms and

because the Administrator believed that Goodman has "a greater desire to market this property."

J. Mok Affidavit at para. 28, Exhibit N

73. The commission terms of Goodman and MacDonald were comparable. Goodman proposed 2% commission or 2.5% commission if another brokerage acted for the buyer. MacDonald proposed 3% commission.

J. Mok Affidavit at para. 28, Exhibits N and P

74. Although the Administrator rejected Remax Commercial and Colliers International because they did not strictly comply with the temporal requirements set out in his request for proposal, he did not disqualify Goodman for failing to comply with a different (and more substantive) requirement in his request for proposal. In particular, the request for proposal required that "[p]roponents should list at least two (2) projects that are substantially similar to this project as part of their written proposal." Goodman's proposal did not meet this requirement because it only made reference to one prior strata wind-up sale (5874 Vine Street). The other prior sales listed in Goodman's proposal involved co-ops, which are substantially different from strata sales because co-op owners do not own title. As a result, different considerations apply to strata wind-up sales, where owners generally have mortgages and their ability to repurchase is of utmost importance.

J. Mok Affidavit at para. 30, Exhibit R
Cambrey Affidavit at para. 29, Exhibit Y, p. 194-195

75. At the time of the Administrator's selection of Goodman, the Administrator provided a summary document to the Owners which identified that both Goodman and MacDonald estimated a "12 week marketing program".

J. Mok Affidavit at para. 28, Exhibit P

Goodman Exclusive Listing Agreement

76. On July 9, 2020, the Administrator entered into an exclusive listing agreement (the "**Goodman Agreement**") with Goodman which provided for a six month term during which Goodman would market and sell the Building for a real estate commission of 2% (or 2.5% commission if another brokerage acted for the buyer) plus applicable taxes.

Cambrey Affidavit at para. 32, Exhibit CC

77. The Goodman Agreement provides that its purpose includes to "facilitate" a "100% approved sale of all strata lots to a single purchaser", rather than a sale by court approval. This is inconsistent with the Consent Order which (even assuming it were valid) did not provide the Administrator with any such mandate.

Cambrey Affidavit, Exhibit CC, p. 243-244 and 248

78. In particular, the Goodman Agreement states that "the Strata Corporation hereby grants to Goodman the sole and exclusive authority to secure a purchaser acceptable to the Strata Corporation for the Property upon the following terms and conditions", which include that Goodman has the sole and exclusive authority to arrange for a "100% Approved Sale", which the Goodman Agreement defines as "a 100% approved sale of all strata lots to a single purchaser".

Cambrey Affidavit, Exhibit CC, p. 244-245

79. The Administrator had no legal authority to bind the Strata to any agreement which contemplated granting a real estate agent the "sole and exclusive authority" to arrange for a 100% approved sale of all strata lots to a single purchaser.

July 13, 2020 Meeting

80. Shortly thereafter, on July 13, 2020, the Administrator held an annual general meeting (the "**July 2020 AGM**") in order to, among other things, approve a special levy to pay the estimated costs to repair the exit stairs as required by the City of Vancouver work order (the "**City Work Order**"). During that meeting, the Strata approved a $50,000 special levy for that purpose.

Cambrey Affidavit, Exhibit I

81. In addition, during the first half of that meeting, Goodman, which was then in attendance via its representatives, Mr. Mark Goodman and Ms. Cynthia Jagger, emphasized the need for an independent appraisal of the Building but advised that they could not provide an appraisal because they were not licensed as appraisers.

J. Mok Affidavit at para. 31, Exhibit L, p. 80-82

82. After Mr Goodman and Ms. Jagger exited the meeting, Mr. Sonnenschein, the owner of strata lot 6, moved a motion to obtain an appraisal on the Building. As discussed above, the Administrator advised the Owners to "wait until a realtor was retained and the property is listed" before seeking an appraisal. Because the Building had not yet been listed, Dr. Mok and Ms. Mok were under the impression that, as per the Administrator's advice, it was not the right time to obtain an appraisal. As a result, Dr. Mok and Ms. Mok did not second the motion, and nor did any of the other Owners.

J. Mok Affidavit at para. 32
M. Affidavit at para. 11

Goodman's "Suggested Value"

83. On July 21, 2020, Goodman sent a document to the Administrator which stated that, as at that time (approximately 1.5 years ago), Goodman's "suggested value" of the Building was between $3,500,000 and $4,500,000. It also stated that Goodman recommended a list price of $4,750,000.

Cambrey Affidavit at para. 33, Exhibit DD

84. Goodman provided the Administrator with that document along with a covering letter which clarified that the "suggested value" "is not an appraisal" and that, "[a]s discussed, we recommend you complete an independent appraisal". This covering letter was not mentioned or included in the affidavits sworn by the Administrator and Mr. Goodman in support of the Petition.

J. Mok Affidavit at para. 34, Exhibit T

85. Based on those suggested values, Goodman stood to earn commission of between $70,000 and $90,000 plus applicable taxes.

86. On July 22, 2020, the Administrator sent an email to the Owners attaching the document from Goodman with its "suggested value" together with a copy of the Goodman Agreement, which the Administrator had entered into nearly two weeks prior. In that email, the Administrator offered to "coordinate a meeting next week" between the Owners and Goodman "to review how they arrived at the list price".

J. Mok Affidavit at para. 33, Exhibit S

87. Later that day, Ms. Mok sent a response to the Administrator which accepted his invitation to arrange a meeting with Goodman to review how Goodman arrived at its suggested listing price. Ms. Mok also provided her and Dr. Mok's available meeting times and also supplied potential items of discussion with Goodman, including "comparable square foot values for this neighborhood, the estimated square foot value of our building when the subway is completed, terms and incentives for the transitional needs of the owners, cost of comparable properties of same size unit in this neighborhood to purchase".

J. Mok Affidavit at para. 35, Exhibit U

88. However, after Ms. Mok raised those considerations, which were valid and worthy of consideration by the Owners, the Administrator stated that he did not think a meeting with Goodman would be worthwhile, notwithstanding that it was the Administrator himself who had invited such meeting only days earlier. In particular, the Administrator now stated that he felt that Goodman had justified its listing price and that he did not "feel there would be much benefit in conducting a meeting with [Goodman] about the listing price."

J. Mok Affidavit at para. 36, Exhibit U

89. In her email, Ms. Mok also expressed concern that Goodman's recommended list price was considerably lower than the list price suggested by Colliers International ($5,250,000), as described above. The Administrator responded by advising that he "put little weight on [Colliers'] valuation" because he had not provided it with information regarding the Building's repair costs. However, as discussed above, the time narratives in the Administrator's invoice indicate that he provided each prospective broker with information regarding repair costs for the Building. In particular, the Administrator's invoice states that on June 1, 2020, he "provide[d] plan to all potential realtors together with occupancy info and build repair costs".

J. Mok Affidavit, Exhibits Q and U

Goodman's Flawed Marketing Process

90. On July 27, 2020, the Administrator advised the Owners that Goodman had commenced its marketing process in respect of the Building.

J. Mok Affidavit at para. 37, Exhibit U

91. Goodman's marketing of the Building prominently made reference to a "life safety issue" and the City Work Order. However, it did not make reference to the fact that the Owners had, during the July 2020 AGM (as discussed above), approved a $50,000 special levy to address those issues. The "life safety issue" reference likely had a negative impact on the interest that prospective purchasers had in the Building. As discussed further below, the "life safety issue" and the City Work Order have since been addressed by way of permanent repairs at the considerable expense of the Owners (as discussed below, at a total estimated cost of approximately $80,000, consisting of the initial $50,000 special levy plus subsequent special levies).

First Affidavit of Mark Goodman dated June 21, 2021, Exhibit E, p. 51 ("**Goodman Affidavit**")

92. Goodman's sales process lasted a little more than a week (it commenced on July 27, 2020 and ended on August 5, 2020). This is despite the fact that:

(a) Goodman's listing term was for a period of six months;

(b) The Goodman Marketing Proposal indicated that the marketing process would span a period of 6-12 weeks, implicitly in order to attract a breadth of prospective purchasers and create a competitive bidding environment; and

(c) The Goodman Agreement contemplated that Goodman would be paid a high five-figure sum in commission for the sale of the Building.

93. On July 30, 2020, three days after the marketing process began on July 27, 2020, the first letter of intent was received from Butterscotch Holdings Inc.. That letter of intent is described in greater detail below.

Cambrey Affidavit at para. 34, Exhibit EE, p. 264

94. According to the Administrator's August 2020 invoice, the second letter of intent (the "**OpenForm LOI**") was received from OpenForm Properties Ltd. ("**OpenForm**") on the next day, being July 31, 2020.

J. Mok Affidavit at para. 38, Exhibit V

95. Incidentally, for reasons that are unclear, it appears that the Administrator instructed his counsel to draft and revise a letter of intent (at the Owners' sole cost) in late June 2020, well before the OpenForm LOI was apparently received. In particular, counsel's time entry dated June 26, 2020, which is associated with nearly 4 hours of billable time, states "[r]eview instructions and draft LOI from broker". However, as of June 26, 2020 the Administrator had not yet engaged any broker much less commenced a marketing process. As discussed above, the Administrator did not enter into the Goodman Agreement until July 9, 2020, which was nearly two weeks later.

J. Mok Affidavit, Exhibit Q, p. 122

96. For reasons that are also unclear, it appears that the OpenForm LOI underwent some modification which resulted in a version of the OpenForm LOI dated August 5, 2020. The next day, on August 6, 2020, a little more than a week after Goodman commenced its marketing process, the Administrator executed the OpenForm LOI without consulting the Owners.

Goodman Affidavit at para. 14(b), Exhibit M, p. 88-99
Cambrey Affidavit at para. 35, Exhibit FF

97. Mr. Goodman deposes that he received two letters of intent "**after** the marketing campaign" [emphasis added]. Because both letters of intent were received almost immediately, the campaign was clearly very short in duration.

Goodman Affidavit at para. 14

98. The OpenForm LOI offered a price of $4,350,000. By accepting the OpenForm LOI, the Administrator accepted an offer for the Building which represented a decrease of $400,000 (or approximately $67,000 per strata lot) from the listing price of $4,750,000. That significant drop came about in only 9 days. It also came about without any consultation with the Owners, even after Ms. Mok, in late July 2020, accepted the Administrator's offer to schedule a meeting between the Owners and Goodman regarding its list price, which meeting the Administrator ultimately refused to organize after he himself had proposed it.

99. In addition, the Administrator did not advise Dr. Mok or Ms. Mok that the Administrator had accepted the OpenForm LOI until approximately two weeks later, when they received notice of the September 2020 SGM (as defined below).

Nor did the Administrator provide any information to Dr. Mok and Ms. Mok during this period which justified that significant price reduction.

J. Mok Affidavit at para. 39
M. Mok Affidavit at para. 12

Goodman Applies "Under Contract" Banner to Listing

100. It appears that once the Administrator accepted the OpenForm LOI (and perhaps earlier), Goodman modified its marketing of the Building to prominently display a banner indicating that the Building was "under contract". In fact, most if not all of Goodman's marketing materials, as exhibited to the affidavit of Mr. Goodman, prominently display an "under contract" banner. It is common sense that the presence of this banner would very likely have had a significant impact on the interest that prospective buyers had in the Building and reduced the likelihood that prospective buyers would go to the trouble and expense of making offers.

Goodman Affidavit, Exhibits D-I, p. 37, 49, 59-62, 64-66, 76 and 79

101. It appears that the "under contract" banner was prominently added to Goodman's marketing material very early in the marketing process. For example, the August 2020 Mid-Year Review, which appears to be one of Goodman's primary marketing materials, indicated that the Building was already "under contract". The August 2020 date of that document is not clear in Mr. Goodman's affidavit, but it is clear in the copy included in the petition respondents' evidence.

Goodman Affidavit at para. 12(a), Exhibit D, p. 36
J. Mok Affidavit at para. 40, Exhibits W-X

102. Neither Goodman nor the Administrator were under any obligation to stifle and dampen the marketing campaign in that manner. The OpenForm LOI, at paragraph 14, clearly provided that it was a non-binding document and that there would be no firm agreement of purchase and sale until the parties had entered into one. Accordingly, it remained open for Goodman to continue to market the Building (as it was hired to do in exchange for high five-figure commission) and attract additional offers (and potentially improved offers) until a letter of intent was superseded by an executed agreement of purchase and sale, which, at best, did not happen until November 6, 2020, or three months later. At worst, it did not happen until the Owners voted to approve the Butterscotch Agreement (as defined below) in March 2021. Only at that point could it be properly said that the Building was "under contract".

Goodman Affidavit, Exhibit M, p. 97

103. In addition, as provided in paragraph 6(a) of the OpenForm LOI, and as Goodman acknowledged in contemporaneous correspondence with OpenForm, the Strata had 30 days to remove subjects, during which time efforts could have been made

to attempt to secure an improved offer (with marketing that did not state that the Building was "under contract" when it was not).

Goodman Affidavit, Exhibit M, p. 88-89 and 92

Administrator Provides Inaccurate Financial Information to Owners

104. Following the Administrator's acceptance of the OpenForm LOI, the Administrator scheduled a special general meeting with the Owners on September 2, 2020 (the "**September 2020 SGM**") for the purpose of, among other things, addressing next steps in the wind-up and sale.

J. Mok Affidavit at para. 41

105. Prior to and during the September 2020 SGM, the Administrator and his counsel provided inaccurate information to the Owners regarding the expense of the wind-up and sale which differs significantly from the information that the Administrator has now put before the Court.

106. In particular, on August 31, 2020, two days before the September 2020 SGM, the Administrator sent an email to the Owners which enclosed, in the Administrator's words, "additional information you may find helpful when considering the upcoming resolutions." That information included representations that the estimated expenses for the wind-up and sale were $337,000, consisting of "[l]iquidator fees and expenses" of $200,000, legal fees of $50,000, and sales commission of $87,000. In addition, the Administrator advised that "it might be possible to arrange the individual sale of all 6 strata lots to the potential purchaser to eliminate the costs of winding up the strata corporation" and that "[t]his would effectively save individual owners about $40,000 each".

J. Mok Affidavit at para. 42, Exhibit Y

107. In providing the Owners with these estimated costs (which, as discussed below, were grossly inaccurate), the Administrator was presumably attempting to encourage the Owners to proceed with a 100% private sale. However, this is inconsistent with the Consent Order which, even assuming it were valid, did not provide the Administrator with any such mandate.

108. Shortly thereafter, as reflected in the minutes of the September 2020 SGM, the Administrator advised the Owners that they "could save in excess of $40,000 per strata lot in legal and liquidator costs plus a significant amount of time through a 100% sale." The implication is that a wind-up with a liquidator would cost at least $40,000 in legal and liquidator costs. This was further reflected in the First Administrator's Report, where, at paragraph 46, the Administrator asserted that "liquidator expenses will be **at least** $200,000" [emphasis added].

Cambrey Affidavit at para. 36, Exhibit GG and Exhibit A, p. 11 (para. 46)

109. This information was provided to the Owners after the Administrator's counsel apparently had a discussion with a prospective liquidator. In particular, the Administrator's August 2020 invoice includes an invoice from the Administrator's counsel reflecting a discussion with a prospective liquidator on August 7, 2020.

J. Mok Affidavit at para. 44, Exhibit Z, p. 169

110. If that information is false, then the Administrator provided grossly inaccurate information to the Owners, even after his counsel had a discussion with a prospective liquidator. If that information is true, then the Petition significantly underestimates the amount of costs involved with the wind-up and sale.

111. In particular, paragraph 1(f) of Part 1 of the Petition seeks a court order confirming a resolution approving the "estimated costs of the winding up", including "[l]iquidator fees of $5,000 per strata lot, plus taxes and disbursements" and "legal fees of approximately $5,000 per strata lot, plus taxes and disbursements". The paragraph goes on to provide "that the actual costs of the winding up may vary from these estimates, and **any variation will not require a further meeting or vote approval of the Strata Corporation**" [emphasis added]. This gives rise to two significant concerns.

Petition, Part 1, para. 1(f)

112. The first concern is that the Administrator provided the Owners with grossly inaccurate information which created a misleading impression regarding the costs of a wind-up. That misleading impression persisted from August 2020 for a period of several months (until different estimates were provided in the lead up to the March 2021 meeting during which the wind-up vote occurred). This may well have caused some of the Owners to be unnecessarily fearful of a process which involved court approval and supervision. It may well have also had an impact on the manner in which the Owners exercised their votes, including by encouraging Owners to vote in favour of the proposed sale to avoid the need for court approval and supervision which they had been wrongly told would be extremely costly.

113. This is exemplified by a discussion between Ms. Mui (who controlled two votes) and the Administrator at the February 11, 2021 special general meeting. During that meeting, Ms. Mui noted that "I seem to remember that if we do away with the liquidator we could save us, oh, easily a couple of hundred thousand".

J. Mok Affidavit at para. 45, Exhibit AA, p. 22

114. The second concern is with the Administrator's request for an open-ended order permitting the actual costs to vary from the current estimate (of $10,000 per unit) without the express approval of the Owners. Given the history of grossly incorrect information provided by the Administrator to the Owners, it is respectfully submitted that the Court should not grant a 'blank cheque'.

Administrator Improperly Amends Resolution, Incorrectly Records Votes

115. During the September 2020 SGM, the Administrator sought to amend a resolution to add language providing for a 100% private sale which, as discussed above, was never part of the Administrator's mandate. The Administrator sought that amendment notwithstanding that s. 50(2) of the *Act* provides that the amendment could not be made if it changed the substance of the resolution, which it clearly did given that it contemplated a process which was beyond the Administrator's mandate and which would circumvent court supervision and approval.

J. Mok Affidavit at para. 46, Exhibit AA, p. 179-186

116. As this Court has held, in order for amendments to be properly made under s. 50(2) of the *Act*, the amendments must be of a "technical and relatively minor" nature. These amendments were neither technical nor minor.

Thiessen v. Strata Plan KAS2162, 2010 BCSC 464, at para. 17.

117. Dr. Mok objected to proceeding with the amendment, but the Administrator proceeded anyway. In addition, the Administrator's counsel, who was in attendance at the meeting, criticized Dr. Mok for getting "hung up on these procedural concerns that are really based on a lack of knowledge".

J. Mok Affidavit at paras. 45-46, Exhibit AA, p. 174- 178

118. In addition, during the September 2020 SGM, the Administrator conducted a vote to determine whether there was, in the words of the OpenForm LOI, "sufficient support among the Owners to proceed with the holding of a general meeting of the Strata Corporation for the purposes of passing the Winding Up Resolutions."

J. Mok Affidavit at para. 47.

119. This was an important vote, because the OpenForm LOI (at section 6(a)) contained the following condition precedent in favour of the Strata:

> First Vendor's Condition: The obligation of the Vendor to enter into the Agreement regarding the proposed sale of the Property to the Purchaser will be subject to the satisfaction or written waiver by the Vendor of the following condition within thirty (30) days of mutual acceptance of this LOI: **the holding of meeting(s) of the owners of the strata lots comprising the Property (the "Owners") to determine whether, in the sole discretion of the Administrator, there is sufficient support among the Owners to proceed with the holding of a general meeting of the Strata Corporation for the purposes of passing the Winding Up Resolutions** (the "First Vendor's Condition"). [Emphasis added].

120. Dr. Mok and Ms. Mok clearly exercised their vote against the proposed amendment to the majority vote resolution (shown as item 9(a) in the minutes) and then against the amended resolution, but the Administrator recorded both votes as abstentions, which were also later reflected in the First Administrator's Report. Although Dr. Mok later wrote to the Administrator advising of the error and requesting that it be corrected, the Administrator denied any error.

J. Mok Affidavit at para. 47, Exhibits AA, p. 186 and BB
Cambrey Affidavit, Exhibit A and GG, p. 282

OpenForm Withdraws Its Offer

121. Nearly three weeks later, on or around September 21, 2020, OpenForm advised Goodman that it was no longer interested in purchasing the Building at the price reflected in the OpenForm LOI.

Goodman Affidavit at para. 16, Exhibit O, p. 112-114

122. The Administrator, rather than direct Goodman to proceed to continue its marketing of the Building (without the "under contract" banner), as Goodman had been engaged to do (in exchange for high five-figure commission), instead "immediately asked" Goodman to approach a different party that previously submitted a significantly inferior letter of intent relative to the OpenForm LOI.

Cambrey Affidavit at para. 39

The Butterscotch LOI

123. Shortly thereafter, on September 23, 2020, the Administrator entered into a letter of intent (the "**Butterscotch LOI**") with Butterscotch Holdings Inc. ("**Butterscotch**"), which was the party that previously submitted a significantly inferior letter of intent relative to the OpenForm LOI. In particular, the Butterscotch LOI provided for a purchase price of $3,900,000, which was $450,000 less than the price reflected in the OpenForm LOI, which was in turn $400,000 less than the listing price. In effect, the price of the Building had fallen by $800,000, or approximately $133,000 per strata lot, in a period of only a few weeks.

Cambrey Affidavit at para. 39, Exhibit HH

124. Shortly after Dr. Mok and Ms. Mok learned that the Administrator had entered into the Butterscotch LOI, they conducted a Google search for "Butterscotch Holdings" to learn more about the buyer. One of the Google search results was stated to be an article published in The Province on February 8, 2008 entitled "Developer took advantage of me". The article details an account of a property owner whose property was ultimately sold to Butterscotch for $400,000 and then "flipped" for $2 million nine months later. In addition, Dr. Mok and Ms. Mok conducted a Google search for Butterscotch's principal, Rahoul Sharan, and discovered that he had

violated stock exchange laws and had been the subject of discipline by the BC Securities Commission. Upon reading these materials, Dr. Mok and Ms. Mok became increasingly concerned about the legitimacy of the offer from Butterscotch, the transparency of its intentions in respect of the contemplated purchase, and whether its offer reflected fair market value.

J. Mok Affidavit at para. 48, Exhibits CC-EE
M. Mok Affidavit at para. 13

125. Approximately two weeks later, on October 11, 2020, the Administrator advised the Owners that Butterscotch had said that it could not "make the numbers work" at its offered price of $3,900,000. Again, the Administrator, rather than proceed to direct Goodman to proceed to continue its marketing of the Building (without the "under contract" banners), as it had been engaged to do in exchange for high five-figure commission, instead yielded to the passive approach adopted by Goodman, which advised that it as "waiting for Butterscotch to come back with a revised sales price." At no point was there any suggestion by Goodman or the Administrator that further marketing efforts should be made to maximize value. Butterscotch, who was in the enviable position of being at liberty to "come back with a revised price" without fear of competition, came back with a further reduced purchase price of $3,300,000, reflecting a further decrease of $600,000.

J. Mok Affidavit at para. 49, Exhibit FF
Goodman Affidavit, Exhibit Q, p. 126

126. In the Administrator's email to the Owners, he advised that "it is Goodman's opinion that $3.3 million is a reasonable price based on the building's condition and current circumstances" and that the Administrator "agree[d] that a higher price is unlikely at this time considering other sale options available and the original pricing analysis provided by Goodman." No reference was made to the prior advice from both the Administrator and Goodman that the Owners should obtain an independent appraisal of the Building so that they (and, ultimately, this Court) could have confidence that the proposed price reflected fair market value.

J. Mok Affidavit at para. 49, Exhibit FF

127. On November 6, 2020, shortly after the Administrator's acceptance of the Butterscotch LOI, the Administrator entered into a purchase and sale agreement with Buterscotch (the "**Butterscotch Agreement**") in respect of the Building.

Goodman Affidavit, Exhibit R

128. The Butterscotch Agreement contemplated, among other things, a 100% private sale without court supervision or approval. As discussed above, this is inconsistent with the Consent Order which, even assuming it were valid, did not provide the Administrator with any such mandate.

129. As with the OpenForm LOI, the Butterscotch LOI also clearly provided that it was a non-binding document and that there would be no firm agreement of purchase and sale until the parties had entered into one. Accordingly, it remained open for Goodman to continue to market the Building and attract improved offers until a letter of intent was superseded by an executed agreement of purchase and sale. Only at that point could it be properly said that the Building was "under contract".

Goodman Affidavit, Exhibit P, p. 123

130. In addition, as provided in paragraph 6(a) of the Butterscotch LOI, the Strata had 30 days to remove subjects, during which time efforts could have been made to attempt to secure an improved offer (with marketing that did not incorrectly state that the Building was "under contract").

Goodman Affidavit, Exhibit P, p. 123
Cambrey Affidavit, Exhibit II, p. 298

Threats and Intimidation

131. On November 6, 2020, which was the same day that the Administrator entered into the Butterscotch Agreement, counsel to the Executors sent a letter addressed to both Dr. Mok and Ms. Mok which threatened litigation against Dr. Mok (and, indirectly, also Ms. Mok) unless Dr. Mok (and Ms. Mok) cast their vote to approve a 100% private sale of the Building to Butterscotch.

J. Mok Affidavit at para. 50, Exhibit GG

132. In particular, the letter asserted that the Estate had suffered losses attributable to certain alleged "unreasonable behaviour" on the part of Dr. Mok "over the years", which was asserted to include "the suppression of information regarding the building's condition and your failure to act in good faith regarding the City of Vancouver's work orders". The letter also asserted that "[y]our refusal to vote in favour of the [purchase and sale agreement] is a further example of your bad faith and intention to cause our clients to suffer additional financial losses."

J. Mok Affidavit at para. 50, Exhibit GG

133. The letter went on to advise that its purpose was to give Dr. Mok "one final opportunity" to "correct" his allegedly "unreasonable behaviour" by "consent[ing] to the [Butterscotch purchase and sale agreement] when a final version is presented to owners for approval." The letter went on to advise that the Estate reserved the right to "take legal action against [Dr. Mok] personally to cover all of their financial losses, including lost rental income, Administrator and Liquidator costs and expenses", that those losses were anticipated to "exceed $100,000", and that "we will ask the Court to transfer your share of sale proceeds from the wind-up to our clients as compensation for their losses".

J. Mok Affidavit at para. 50, Exhibit GG

134. The letter is extraordinary for a number of reasons.

135. First, it advances a meritless threat which the Executors likely knew was meritless. The Court could not simply deprive Dr. Mok (and Ms. Mok) of the proceeds of the sale of their home upon a wind-up. Any claim that the Estate might choose to advance against Dr. Mok would need to be the subject of proper and fair adjudication in the context of a separate court action. This is because there could be no basis to claim against their proceeds of the sale unless the Court issued a properly-adjudicated judgment against Dr. Mok.

136. Second, the threat was clearly made for the purpose of pressuring Dr. Mok and Ms. Mok to exercise the democratic vote provided to them by the *Act* in a manner that was inconsistent with the manner in which they wished to do so. It was, in simple terms, an attempt to influence a democratic vote by intimidation and coercion. The approach was tantamount to threatening a citizen with a lawsuit or other consequence unless they cast their vote for a particular political party. This is highly offensive conduct which strikes at the core of our societal values as well as the protections provided to owners under the *Act* which, as our Court of Appeal has recognized, are based on democratic principles.

Norenger at para. 63

137. Third, the assertions underlying the threat have no basis in fact. In particular, it was Mr. Colin MacLennan, the deceased owner of strata lot 5 (the father of the Executors), who had been the president of the Strata for nearly thirty years prior to his passing in November 2017. During his tenure as president, he led and oversaw all decisions related to the Strata and was responsible for various decisions regarding the maintenance and repair, or lack thereof, of the Building. After Mr. MacLennan passed away, Dr. Mok was asked to assume the role of president of the Strata. Dr. Mok, knowing that he would be acting on an unpaid, volunteer basis, agreed to do so as a courtesy to the other Owners of the Building. He was accordingly elected by the Owners. In addition, when Dr. Mok came up for re-election in June 2019, he was again elected as president by the Owners, including by an affirmative vote of the Estate.

J. Mok Affidavit at para. 51, Exhibit HH

138. Curiously, the threatening letter from counsel to the Executors did not also threaten Ms. Mui, who was an officer of the Strata and a past long-term treasurer of the Strata and who the Executors had previously blamed (in the Appointment Petition), along with Dr. Mok, for the same matters that were the subject of the threatening letter to Dr. Mok and Ms. Mok. It may be that Ms. Mui was not a recipient of the threatening letter because she had already agreed to cast her two votes in the manner desired by the Executors.

J. Mok Affidavit, Exhibit B, p. 21-23

Administrator Advises That Butterscotch Intends to Renovate Building

139. On February 8, 2021, the Administrator sent an email to the Owners advising that he had been informed that Butterscotch intended to renovate the Building and that the Owners were required to repair the Building at their cost:

> ...[A]t my request, Mark Goodman approached the representative for Butterscotch Holdings, the potential purchaser, about whether it intended to renovate or demolish the building after it acquired ownership. I am informed **the intention is to renovate the building**. Therefore, the stairs will need to be repaired. Either way, Butterscotch is aware of the stair repairs and the expected cost. **That means the strata corporation, or all of you as owners, will be responsible for the repair expense**.

[Emphasis added]

J. Mok Affidavit at para. 52, Exhibit II

140. The implication is that the Owners would need to incur substantial renovation costs. This is notwithstanding the fact that the Butterscotch Agreement contains no provision which adjusts the consideration payable to the Owners as a result of expenditures that benefit Butterscotch (if the proposed sale is approved) rather than the Owners. Instead, the Butterscotch Agreement provides (at Schedule C, paragraph 2(a)) that Butterscotch will "acquire the Property in substantially the same condition and sate of repair as of the date of this Agreement, subject to reasonable wear and tear". Accordingly, as a result of the repair costs borne by the Owners, Butterscotch is obtaining greater consideration than it bargained for.

Goodman Affidavit, Exhibit R, p. 158

141. In addition, as noted above, Goodman's marketing process prominently noted that the Building was subject to "life safety issues" and the City Work Order but made no indication that the Owners were addressing those issues at their sole cost. Goodman could have done so in an effort to make the Building more marketable. The omission of that information likely impacted the interest of prospective purchasers and may well have resulted in lower offers for the Building.

142. These facts also call into question another essential premise underlying the Petition: namely that the Building is beyond reasonable repair. If the Building were truly in so desperate and hopeless a condition as the Petition suggests, it seems unlikely that Butterscotch would ever have had an intention to renovate it post-purchase. This fact also suggests that the structure of the Building, apart from the bare land, has value.

Strata Approves Further Special Levy to Address Maintenance Issues

143. On February 11, 2021, the Administrator held a special general meeting during which the Owners considered a further resolution to assess a further special levy of $25,311 in order to complete permanent repairs to the exit stairs to address the City Work Order. The special levy was approved by the Owners.

Cambrey Affidavit at para. 26, Exhibit B, p. 19 (para. 23)

144. Following the meeting on February 11, 2021, the Administrator took the steps necessary to complete the work required by the City Work Order.

Cambrey Affidavit at para. 27, Exhibit B, p. 19 (para. 24)

Attempts to Obtain a Further Consent Order

145. The Consent Order provided that "[t]he Administrator shall be appointed for a term of one year with liberty to owners and the Administrator to apply for renewal or cancellation of his appointment". Because the Consent Order was issued on April 17, 2020, the Administrator's term was set to end in April 2021.

J. Mok Affidavit, Exhibit G

146. In his affidavit, the Administrator asserts that his appointment as administrator "was extended until November 30, 2021 by a consent order filed on April 15, 2020". That statement is not true.

Cambrey Affidavit at para. 9

147. On March 13, 2021, the Administrator sent an email to the Owners requesting that they enter into a further consent order in order to extend his purported appointment to November 30, 2021.

J. Mok Affidavit at para. 53, Exhibits JJ-KK

148. In the Administrator's Second Report dated April 14, 2021, he states, at paragraph 37, that he has "recently been advised by my legal counsel that consent has been given to extend my appointment as requested" and that "I understand that the consent order extending my appointment will soon be filed with the Supreme Court Registry." Similarly, in the Administrator's Third Report dated October 13, 2021, he states that he is "in the process of seeking an extension of my appointment by consent for a further 6 months to April 30, 2022."

Cambrey Affidavit, Exhibit B, p. 22 (para. 37)
J. Mok Affidavit, Exhibit PP , p. 257 (para. 21)

149. On a review of the court file in the Appointment Petition proceeding, it appears that the Administrator filed a requisition for a consent order on April 15, 2021, but it was rejected due to a technical defect.

J. Mok Affidavit at para. 54, Exhibit LL

150. The court file indicates that the Administrator filed a new requisition dated October 25, 2021 for a further consent order. Oddly, that consent order was modified to include Ms. Mok as a petition respondent, despite the fact that she was never served with the Appointment Petition. In addition, the consent order was modified to include language referring to the petition respondents' counsel. On its face, this suggests that the petition respondents were involved with the draft consent order through their counsel, which was not the case.

J. Mok Affidavit at para. 55, Exhibit MM

151. Although the time records of the Administrator's counsel indicate that 0.30 of an hour was spent to "distribute consent to owners for signature", no such document was ever provided to the petition respondents or to their counsel. The petition respondents discovered it for the first time upon their search of the court file.

J. Mok Affidavit at para. 55, Exhibits NN-OO, p. 249
M. Mok Affidavit at para. 14
Affidavit of Jessica Stuart dated December 13, 2021

Invalid Wind-Up Vote

152. On March 24, 2021, the Administrator held a special general meeting (the "**March 2021 SGM**") during which he sought to have the Owners approve a resolution to cancel the strata plan and appoint a liquidator in order to proceed with the Butterscotch Agreement.

J. Mok Affidavit at para. 59
Cambrey Affidavit at paras. 45-47

153. Prior to the March 2021 SGM, the Administrator, as he deposes in his affidavit, held an "owners info meeting", specifically on or around March 10, 2021. The petition respondents were not made aware of that meeting and appear to have been excluded from participating in it. There was also no mention of this meeting at the March 2021 SGM.

Cambrey Affidavit at para. 46
J. Mok Affidavit at para. 58
M. Mok Affidavit at para. 15

154. During the March 2021 SGM, the first resolution put to the Owners was a resolution to voluntarily wind-up the Strata with a liquidator in accordance with Division 2 of Part 16 of the *Act*. This included a resolution approving the disposition

by a liquidator of the strata lands in accordance with the Butterscotch Agreement and the Goodman Agreement. It also included a resolution approving certain "estimated costs of the winding up", including the "liquidator's fees", "legal fees", and "real estate agent's commission".

J. Mok Affidavit at para. 60
Cambrey Affidavit at paras. 45 and 47, Exhibits KK and LL

155. During the discussion of that resolution, the Administrator and his counsel repeatedly attempted to encourage the petition respondents to accept a 100% private sale, notwithstanding the fact that the Consent Order did not provide the Administrator with the power to facilitate a 100% private sale and the fact that the petition respondents had repeatedly advised the Administrator that they were not in favour of the proposed sale.

J. Mok Affiavit at para. 61

156. 83% of the votes were cast in favour of the resolution, representing a very slim majority of 3% above the statutory threshold. In any event, the resolution is invalid because it does not comply with the *Act* for the following reasons.

157. First, s. 282 of the *Act* requires that, "[b]efore any land or personal property is disposed of, **the liquidator** must obtain the approval of the disposition by a resolution passed by a 3/4 vote at an annual or specific general meeting, or the disposition is void" [emphasis added]. Accordingly, the resolution was invalid because it purported to approve a disposition without the involvement of a liquidator, which is a mandatory requirement of the *Act*.

The Owners, Strata Plan VR2122 v. Bradbury, 2018 BCCA 280 at para. 43 ("**Bradbury**")

158. Second, even if the involvement of a liquidator were not required (which is denied), the Owners could not ratify the Butterscotch Agreement and approve a disposition in accordance with it given that it was expressly recognized to be incomplete at the time of the vote. In particular, as the Administrator and his counsel acknowledged during the meeting, and as is reflected in the minutes of the March 2021 SGM, the Butterscotch Agreement was incomplete because it was missing certain essential information, namely lists of certain items of personal property, including upgrade materials, appliances, equipment, window coverings and other such items which were to remain the property of the Owners. While the Administrator proceeded on the basis "that it would be unlikely that Butterscotch would oppose amending the [Butterscotch Agreement]" at a later time, this manner of proceeding was legally untenable. The Owners could not ratify the Butterscotch Agreement and approve a disposition in accordance with it immediately after acknowledging that it was incomplete and would need to be amended after the vote. The amended agreement would require fresh approval.

J. Mok Affidavit at para. 62
Cambrey Affidavit at para. 47, Exhibit LL, p. 324-325

159. On March 28, 2021, four days after the March 2021 SGM, the Administrator wrote to the Owners advising that a list of excluded items and upgrades would be attached "as a schedule to the PSA." However, the addition of such a list was never the subject of a vote by the Owners.

J. Mok Affidavit at para. 63, Exhibit QQ

160. Third, s. 277(3) of the *Act* requires that the resolution to cancel the strata plan include approval of "an estimate of the costs of winding up". In this case, the resolution included estimates which (as discussed above) departed grossly from representations by the Administrator regarding the estimated liquidation and legal fees. It is submitted that in these unique circumstances it is inconsistent with s. 277(3) of the *Act* for the resolution to include language which provides that "the actual costs of the winding up may vary from these estimates, and any variation will not require a further meeting or vote approval of the Strata Corporation".

161. In particular, the purpose of s. 277(3) of the *Act* is to give owners comfort and reasonable certainty as to the expected costs of a wind-up. Where the surrounding circumstances indicate that the owners have been subjected to grossly incorrect information regarding the range of potential costs, and there is resulting potential for significant confusion, the purpose of s. 277(3) of the *Act* would be undermined by the inclusion of language which would permit the costs to depart significantly from the estimates without the approval of the Owners. As a result, the Owners did not validly approve a resolution as required by s. 277(3) of the *Act.*

162. Fourth, s. 278 of the *Act* provides that the resolution must approve an interest schedule which meets the requirements of the *Act* and associated regulations as to form and content. In this case, the interest schedule is fatally flawed. In particular, the interest schedule appended to the resolution at Schedule 1A contains misleading figures. In particular, the schedule states that the owner of strata lot 1 will have a share of the proceeds of distribution based upon interest upon destruction in the fractional amount of "171488323/1000000000". This figure is incorrect and misleading.

Cambrey Affidavit at paras. 45 and 47, Exhibit LL and KK, p. 318 and 330

Strata Completes Maintenance Work

163. On September 28, 2021, the Administrator held a special general meeting of the Owners for the purpose of, among other things, approving a special levy to pay for the final expenses of the exit stair repair. In particular, the total cost of the repairs was $78,958.11, or $3,647.11 more than the amount of funds that had been raised by way of special levy. Accordingly, a further levy of $3,647.11 was required to pay the costs. The Owners approved that special levy.

J. Mok Affidavit at para. 57 and 64, Exhibit PP, p. 257 (para. 19)

164. Accordingly, the Owners have now approved special levies totalling nearly $80,000 in order to address the City Work Order.

165. On August 5, 2021, an engineer at Read Jones Christofferson ("**RJC**") issued an Assurance of Professional Field Review confirming that the required work had been completed. That same day, the City of Vancouver issued a certificate of inspection which confirmed that the required work had been completed to its requirements and that the Building was therefore safe for occupation.

J. Mok Affidavit at para. 65, Exhibits RR-SS

166. These developments give rise to two concerns in respect of the proposed sale.

167. First, the Butterscotch Agreement contains no provision which adjusts the consideration payable to the Owners as a result of expenditures that would benefit Butterscotch (if the proposed sale is approved) rather than the Owners.

168. Second, Goodman's marketing process prominently noted that the Building was subject to "life safety issues" and the City Work Order but made no indication of the fact that the Owners would solely bear the considerable costs associated with addressing those issues. The omission of that crucial information very likely impacted the interest of prospective purchasers and may well have resulted in lower offers for the Building.

Real Estate Market Has Improved Significantly

169. The Administrator baldly asserts in the Petition, without providing any supporting evidence, that the Butterscotch Agreement reflects a sale price which "exceeds the most recent assessed values of the strata lots in the Spruce West complex multiplied by 6 as determined by the 2021 BC Assessment".

Petition, Part 3, para. 32(h)

170. This bald statement is simply incorrect, which is obvious based on even a cursory review of the content of the Administrator's own court materials.

Goodman Affidavit, Exhibits B and E, p. 10 and 53

171. According to BC Assessment figures as of July 1, 2020, the strata lots in the Building have a total value of $4,402,000, which consists of a bare land value of $3,486,000 and a building value of $916,000. In addition, strata lot 4 (the petition respondents' lot) has an assessed value of $768,000.

M. Mok Affidavit at para. 16, Exhibits A and B

172. Accordingly, the price reflected in the Butterscotch LOI ($3.3 million) is approximately 33% less than the Building's assessed value as of July 1, 2020, more than 1.5 years ago.

M. Mok Affidavit at para. 16, Exhibit C

173. Since that time, there have been various new developments within the Vancouver real estate market generally and the VGH-area market specifically, in large part due to greater certainty associated with the Broadway Subway Line and improved development prospects in the area.

Affidavit of Ken Hollett dated December 10, 2021 at para. 1, Exhibit A ("**Hollett Affidavit**")

174. This is reflected by the fact that BC Assessment has advised the petition respondents that the assessed value of strata lot 4, based on an assessment as of July 1, 2021 (more than 6 months ago) is approximately **15% higher than the previous assessment**. Accordingly, it appears that strata lot 4 has an assessed value of $883,000 up from $768,000 the previous year.

M. Mok Affidavit at para. 17, Exhibit D

175. Due to privacy issues, BC Assessment will not make the assessed values of the remainder of the strata lots available until January 2022. However, if the percentage increase in the value of strata lot 4 (15%) is extrapolated to the other strata lots, the Building's current assessed value is $5,062,300.

176. This is consistent with the opinion of a qualified and experienced appraiser who has appraised the Building and concluded that the current market value of **only the bare land** (that is, excluding the structure on the Building) is $3,750,000.

Hollett Affidavit at para. 1, Exhibit A

177. While that appraisal does not include the value of the structure of the Building, it clearly has some value. In fact, based on an appraisal dated February 16, 2021 obtained by the Administrator for the purposes of insuring the Building, the structure's insurable value is $3,000,000.

M. Mok Affidavit at para. 19, Exhibit E

178. Based on the appraisal of the Building's bare land value, proceeding with the proposed offer would deprive the Owners of value of, at a **minimum** (given that this appraisal reflects **only bare land value**) an amount of $450,000, or **$75,000 per strata lot**. If the value of the structure is factored into the equation, as it must be, the loss to the Owners is even higher.

179. Goodman's own commentary is consistent with the reality that the market has improved significantly. In particular, on July 29, 2021, approximately one year after

completing its brief marketing process in respect of the Building, Goodman issued its "2021 Mid-Year Review". In connection with that review, Goodman stated that:

(a) "[T]the real estate market astonished us with its record breaking performance in one of the most active periods in local history";

(b) "Following the difficult pandemic year of 2020, multifamily assets came out as a Metro Vancouver favourite";

(c) "Contrary to how today's real-estate market was expected to perform a year ago, Metro Vancouver has just experienced the highest total sales volume recorded during the first six months of any year since 2006, the year we first began publishing our mid-year Goodman Report";

(d) "At $1.64 billion in total sales, mid-year 2021 transactions were an astonishing 235% higher than the same period last year and 14% higher than the previous high in 2018";

(e) "Further cementing the insatiable demand for Metro Vancouver investment properties, the mid-year 2021 figure alone would equate to the third-highest annual sales volume ever recorded"; and

(f) "At mid-year 2021, Metro Vancouver witnessed a 248% rise in the number of apartment building transactions compared to the first half of 2020".

M. Mok Affidavit at para. 20, Exhibit F

180. The importance of **current** market value was emphasized by the Administrator on June 3, 2020, shortly after the commencement of his involvement with the Building. On that day, the Administrator held an information meeting with the Owners during which he advised the Owners, as reflected in an "information meeting agenda" that he provided to the Owners, that a petition to confirm a vote in favour of a windup will require the Court to "consider whether the offer received represents the 'best price' **given current market conditions**" [emphasis added]. It appears that this document was drafted by the Administrator's counsel at the Owners' considerable expense (see time entry of 3.10 hours on June 3, 2020). (Incidentally, the document also asserts that "[a] voluntary wind-up without a liquidator is required under the court order appointing the administrator for VR456", which is simply wrong and inconsistent with the Administrator's mandate).

M. Mok Affidavit at para. 21, Exhibits G-H
J. Mok Affidavit, Exhibit Q, p. 122

181. In addition, during that same meeting, the Administrator's counsel advised that:

(a) "[W]hen you're winding up, most people would like to see a premium that would allow them to buy a comparable property in the same area";

(b) That factor is "an important one in the lower mainland" because "it's very expensive to buy real estate here"; and

(c) "[C]ourts have generally approved windups even in the face of opposition from the owners as long as there is some evidence, for example, that comparably priced, similar properties to what people had before are available in the market".

J. Mok Affidavit, Exhibit L, p. 78

182. Notwithstanding the advice provided by the Administrator's own counsel, the Administrator has not put any evidence before this Court to establish that there are comparably priced properties available in the market. Nor has the Administrator established that the purchase price reflected in the Butterscotch Agreement, even assuming it represented fair market value in July 2020, still represents fair market value today, more than 1.5 years later.

183. Given the evidence adduced by the petition respondents, it is apparent that the market has changed sufficiently such that even if the Butterscotch Agreement reflected fair market value at the time it was made (which is denied) it would be financially improvident to proceed to sell the Building on that basis.

184. All the Administrator is left with is the assertion in the Petition that the proposed offer is "within the range of proposed marketplace values as determined by Goodman". However, even that does not help the Administrator.

Petition, Part 2, para. 19

185. As stated in the Petition, Butterscotch has provided incentives to the Owners involving Butterscotch's contemplated redevelopment of the site (although as described below, such incentives have never been extended to the petition respondents). Accordingly, it appears that Butterscotch's current intentions with the Building contemplate its demolition. However, as Mr. Goodman deposes in his affidavit, the range of value "on the assumption the building is demolished" is $3,396,263 to $4,095,515. As a result, the proposed offer does not even fall into Goodman's own range of values (established more than 1.5 years ago) based on the use to which the Building will now apparently be put.

Petition, Part 3, para. 32(h)
Goodman Affidavit at paras. 8-9

Inability to Repurchase in the Area

186. The reality that the Butterscotch Agreement reflects an improvident selling price would, if accepted, have consequences for all of the Owners. However, the consequences would be particularly pronounced for the petition respondents.

187. Of the six strata lots, only the petition respondents' strata lot has significant mortgage charges registered against it. The mortgages registered against strata lot 4 secure loans in the amount of approximately $300,000. Strata lots 1, 2, 3 and 6 have no mortgage charges registered against them. Although strata lot 5 has a mortgage charge registered against it, that charge secures a loan in the modest amount of approximately $100,000.

Petition, Schedule B - List of Chargeholders
M. Mok Affidavit at para. 22

188. As a result, if the petition respondents' home is forcibly taken from them and sold on the terms of the Butterscotch Agreement, they will be left with very limited proceeds after the payment of the various liquidation costs and their outstanding mortgages. Based on the evidence of a real estate agent who has conducted a search for available properties in the area, the petition respondents would be unable to use these limited sales proceeds to purchase any comparable home in the neighbourhood (which they very much wish to do). This is because there are no properties with two bedrooms and bathrooms and a comparable square footage available for $899,000 or less in the neighborhood.

Affidavit of Michael Lee dated December 10, 2021 ("**Lee Affidavit**")
M. Mok Affidavit at para. 24
J. Mok Affidavit at para. 66

189. The "cost" of selling the Building to Butterscotch for $3.3 million can be usefully compared against an alternative, which is repairing the building. In particular:

(a) If the Building is sold for $3.3 million, the Owners will leave **at least** $450,000 "on the table" (that figure does not include the value of the structure itself) and would be unable to use the limited proceeds of sale to purchase anything comparable in the neighbourhood; and

(b) If the Building is not sold and the Owners repair it, the expected cost of doing so would (on the basis of rough estimates made by RJC) be approximately $1.6 million but less the ~$80,000 that the Owners have already paid to address the City Work Order. However, repairing the Building is an investment which would increase the Building's value and, correspondingly, the Owners' equity.

Affidavit of Dan Jacob Sonnenschein at para. 23, Exhibit I, p. 97

190. Viewed from this perspective, repairing the Building is far less "costly" than selling the Building on the basis of the current proposed offer, which stands to "cost" the Owners **at least** hundreds of thousands of dollars in value.

191. Lastly, the Administrator asserts in the Petition that the Butterscotch Agreement "provides owners with an incentive to purchase into a new development to be

constructed on the VR456 Lands." While Butterscotch may have extended such an incentive to other Owners, the petition respondents have no awareness of any such incentive and no such incentive has ever been extended to them by Butterscotch or any other person. Nor does the Butterscotch Agreement make reference to any such incentives. If there are incentives, then the petition respondents have been unfairly excluded from them.

Petition, Part 3, para. 32(i)
J. Mok Affidavit at para. 67
M. Mok Affidavit at para. 25

1. On August 5, 2021, counsel to the petition respondents advised the petitioner's counsel that he had been retained in this matter, that he was in the process of investigating the matter and preparing responsive materials, and that his preliminary expectation is that a hearing would require "at least two days".

Affidavit #1 of James Mok dated August 12, 2021 at para. 2 and Exhibit A ("**Mok Affidavit**")

2. On August 6, 2021, the petitioner's counsel responded by advising that the petitioner insisted that the petition respondents serve their responsive materials by no later than August 13, 2021, which was five business days later. Counsel to the petitioner asserted that certain alleged "uncertainty over scheduling a 2-day hearing" made it "impossible" to allow service by a later date.

Mok Affidavit at para. 3 and Exhibit B

3. On August 9, 2021, the petition respondents' counsel advised the petitioner's counsel that:

   (a) The petition respondents' counsel could see no connection between the alleged "uncertainty over scheduling a 2-day hearing" and the timing of responsive materials;

   (b) Allowing service by a later date was not "impossible" as asserted, because counsel routinely book long chambers dates in advance of the filing of responsive materials;

   (c) On a cursory review of the petitioner's materials, which comprise nearly 900 pages, there are a number of factual and legal issues that must be fully addressed and briefed for the Court;

   (d) It was not feasible to file responsive materials by the end of that week, and there was no reason for the petitioner to insist on that given that the matter would require a long chambers hearing which must be booked in advance;

(e) The only effect of the petitioner insisting that responsive materials be served by the end of that week would be to prevent the issues from being fully addressed and briefed for the Court;

(f) The petition respondents' counsel was not available for a hearing in October 2021 but was available during the first two weeks of November 2021; and

(g) The preliminary time estimate of counsel to the petition respondents at this early stage was at least two days, that a definitive time estimate would be provided in due course, and, if the petitioner insisted on immediately booking long chambers dates, it would be safer to book three days.

Mok Affidavit at para. 3 and Exhibit B

4. Later in the day on August 9, 2021, counsel to the petitioner advised that he would try to book "three days in October". Later that day, counsel to the petition respondents again advised that he is not available in October 2021 and that the hearing should not be unilaterally set for dates during which he is not available.

Mok Affidavit at para. 3 and Exhibit B

5. On August 10, 2021, counsel to the petitioner advised that he:

(a) Was instructed "to set [the hearing] down next week, which would require you to appear and make your pitch for an adjournment";

(b) "[C]annot see how this is more than a 2-day hearing"; and

(c) Hoped that the petition respondents counsel "can give me dates for September and November" and that he would "try and get us a September date from the registry".

Mok Affidavit at para. 3 and Exhibit B

6. Later on August 10, 2021, counsel to the petition respondents advised that:

(a) He had already provided his availability for November 2021 and was not available in September 2021;

(b) Counsel should, as is customary, find a mutually acceptable long chambers hearing date and then "work backwards and agree to a reasonable schedule for the exchange of responsive and reply materials"; and

(c) If the petitioner's counsel insisted on booking the matter for two days despite previously agreeing to book three days, then the petitioner would bear the risk that the matter may not be able to be heard in two days alone.

~~Mok Affidavit at para. 3 and Exhibit B~~

~~7. Later on August 10, 2021, the petitioner's counsel advised that "[y]ou have my position" and, with reference to the hearing of this petition, stated that "I will let you know when we are going in" and that "I am going to try to go in next week".~~

~~Mok Affidavit at para. 3 and Exhibit B~~

~~8. On August 11, 2021, the petitioner sent an email to the owners of the building which is the subject matter of this proceeding stating, among other things, that "legal counsel for [the petition respondents] advised they are not available in October so we are now looking at November dates, which cannot be scheduled until September 10, 2021" [emphasis added].~~

~~Mok Affidavit at para. 4 and Exhibit C~~

~~9. In view of the assertion by the petitioner's counsel that he intends to set this petition for hearing in regular chambers next week (notwithstanding his prior agreement that the matter requires a long chambers date and the inconsistency between his current position and the above-noted correspondence from his own client), the petition respondents have filed this *pro forma* Response to Petition in order to secure and preserve their rights.~~

~~10. As noted above, the petitioner's materials comprise nearly 900 pages. Those materials give rise to a number of factual and legal issues that must be fully addressed and briefed for the Court. The petition respondents have identified a number of issues with the evidence upon which the petitioner relies and are in the process of gathering evidence in order to make a full response.~~

~~Mok Affidavit at para. 5~~

~~11. The petition respondents intend to file an Amended Response to Petition together with their supporting evidence well in advance of the hearing of this matter which, as acknowledged by the petitioner himself, cannot occur until November 2021.~~

~~Mok Affidavit at para. 6 and Exhibit C~~

Part 5: LEGAL BASIS

192. For the reasons set out below, the Court should dismiss this Petition with costs to the petition respondents.

Resolution Does Not Meet Requirements of *Act*

193. Section 278.1(1) of the *Act* provides that only "[a] strata corporation that passes a winding-up resolution in accordance with section 277" may bring a petition such as the one now before the Court. However, the Strata did not validly pass a

winding-up resolution in accordance with s. 277 of the *Act* so as to be entitled to bring this Petition. Accordingly, this Petition ought to be dismissed summarily.

The Owners, Strata Plan VR 1966, 2017 BCSC 1661 ("**VR 1966**") at paras. 29-30

194. First, the approval resolution does not meet the requirements of s. 277 and 278 of the *Act* because the figures in the interest schedule are incorrect. Section 278(1) of the *Act* is clear that the interest schedule **must** meet any requirements in the *Act* and regulations as to form and content.

See e.g. VR 1966

195. Second, the approval resolution does not meet the requirements of s. 277(3) of the *Act* because it does not validly provide "as estimate of the costs of winding up". As discussed above, the resolution included estimates which departed grossly from representations by the Administrator regarding the estimated liquidation and legal fees. In these unique circumstances it is inconsistent with s. 277(3) of the *Act* for the resolution to include language which provides that "the actual costs of the winding up may vary from these estimates, and any variation will not require a further meeting or vote approval of the Strata Corporation". Where the circumstances indicate that the owners have been subjected to grossly incorrect information regarding the range of potential costs, with the result that there is potential for significant confusion, the purpose of s. 277(3) of the *Act* would be undermined by the inclusion of language which would permit the costs to depart significantly from the estimates without the approval of the Owners. As a result, the Owners did not validly approve a resolution as required by s. 277(3) of the *Act*.

196. Third, the approval resolution is invalid because it purported to ratify the Butterscotch Agreement and approve a disposition. As discussed above, the Owners could not ratify the Butterscotch Agreement after recognizing that it was incomplete (as it was), or approve a disposition in accordance with it immediately after acknowledging that it was incomplete and would need to be amended after the vote. The amended agreement would require fresh approval. In addition, s. 282 of the *Act* requires that, "[b]efore any land or personal property is disposed of, **the liquidator** must obtain the approval of the disposition by a resolution passed by a 3/4 vote at an annual or specific general meeting, or the disposition is void" [emphasis added]. The Owners could not circumvent that requirement.

Bradbury at para. 43

Petition Seeks Improper Orders

197. In addition, the Petition improperly seeks orders appointing a liquidator and granting other relief ancillary to the liquidator's role.

198. As our Court of Appeal has recently held, "the *Act* requires **the liquidator** to apply for approval of his appointment and the vesting order" [emphasis added]. In that

case, the Court of Appeal held that it was an error for the judge to have made an order "appointing the liquidator, vesting the property and making orders ancillary to his role when the liquidator had not applied for that relief as required by the *Act.*"

Bradbury at para. 42 and 66

In Any Event, Legal Test Not Met

199. Even if the Petition can survive scrutiny in respect of the above-noted issues (which is denied), the applicable legal test is not met.

200. Section 278.1(5) of the *Act* provides that in determining whether to make an order confirming a winding-up resolution under s. 278.1(4) of the *Act*, the Court must consider the best interests of the owners and the probability and extent, if the winding-up resolution is confirmed or non confirmed, of (i) significant unfairness to one or more owners and (ii) significant confusion and uncertainty in the affairs of the strata corporation or of the owners.

201. In considering the best interests of the owners, a key factor is whether the property was fully marketed and the resulting sales price is financially provident. In considering this factor, the Court should ensure that the proposed sales price is the best price for the property obtainable in the prevailing circumstances, which requires consideration of the following factors:

    (a) Whether the property was marketed for a reasonable period of time to the largest number of potential purchasers in order to create the widest catchment of offers;

    (b) Whether the marketing process created competition between interested purchasers;

    (c) Whether the sales process involved obtaining independent expert advice on matters relevant to the decision to sell the property, such as an independent appraisal; and

    (d) Whether the sales process occurred during the most propitious timing for the sale in order to obtain the best price.

The Owners, Strata Plan VR2122 v. Wake, 2017 BCSC 2386 at para. 112 ("***Wake***")

202. The importance of current market conditions is supported by s. 278.1(1) of the *Act,* which provides that a petition such as this must be brought "within 60 days after the resolution is passed". In this case, the Administrator failed to meet this deadline. The resolution was passed on March 24, 2021, but this Petition was not filed until June 17, 2021, almost a full month after the deadline.

203. Although s. 278.1(2) of the *Act* provides that the failure of a strata corporation to meet the 60 day deadline does not prevent it from bringing the petition or affect the validity of the wind-up resolution, there must be some consequence to a failure to meet the 60 day deadline. It is a trite principle of law that the legislature does not 'speak' for no purpose. Accordingly, s. 278.1(1) of the *Act* is not superfluous and the Court must strive to give it some meaning.

204. While there has yet to be any judicial consideration of s. 278.1(1) of the *Act*, it is submitted that the purpose of the provision is to require the Court to consider a failure to meet the 60 day deadline as a factor in the assessment of whether to grant the requested confirmation order. By enacting this provision, the legislature has recognized that wind-up resolutions are time sensitive and dependent on the state of the real estate market at the time of the resolution. Where the evidence indicates that the real estate market has improved since the passing of the resolution, and the 60 day deadline has not been met, the Court should be particularly cautious about approving the resolution without first being satisfied that the proposed sale reflects **current fair market value** in order to ensure that the sale is financially provident and in the best interests of the owners.

205. In the cases upon which the petitioner relies, the proposed windup and sale generated a healthy premium for the benefit of the owners. For example, in *Wake* the Court was influenced by the fact that confirmation of the wind-up and sale would mean that each owner would receive "roughly two and a half times as much than if each owner sold his or her unit individually", with the result that "each opposing respondent [would] receive between $1,179,355 and $1,638,683, depending on the size and location of his or her unit." This weighed heavily in favour of confirming the wind-up and sale, because there were "comparable units for sale in the community, and with their sale proceeds, the owners and opposing respondents can remain in the community and the neighbourhood, if they wish, in comparable or better units." Similarly, in *Strata Plan VR2702* the Court was influenced by the fact that "the Minority Owners are to receive enormous premiums over the 2017 assessed values of their units". Moreover, in *Strata Plan NWS837* the proposed sale would provide owners with a 103% premium over their 2017 assessments and a 60% premium over their 2018 assessments.

Wake at paras. 18, 84, 88 and 135
The Owners, Strata Plan VR2702 (Re), 2018 BCSC 390 at para. 67 ("***Strata Plan VR2702***")
Strata Plan NWS837 (Re), 2018 BCSC 564 at para. 35 ("***Strata Plan NWS837***")

206. In *Wake,* the Court observed that the fundamental question involves a balancing of the interest of the majority in enjoying a "windfall profit" and the interest in the minority in retaining their homes, as they had reasonably expected:

> The role of the court is to ensure that the supermajority's interest and desire to take advantage of **this windfall profit** does not come at the

> expense of disregarding the protection to be afforded to the minority, particularly when each of them purchased their unit prior to Bill 40 and **expected that they could live in their unit for the rest of their lives, or as long as they wanted**. [Emphasis added]

Wake at para. 97

207. In *Wake,* the Court ultimately concluded that "it would be significantly unfair to the majority of the owners if the orders sought by the petition were not granted" because they "would suffer a significant financial loss: the opportunity to receive roughly two and a half times what they would receive if they were to sell their unit individually, and the opportunity to remain in the community."

Wake at para. 139

208. In addition, in the reported cases upon which the petitioner relies the marketing and sales process was robust and lasted for **several months**. For example, in *Wake* the marketing campaign was launched in November 2016 and it was not until February 2016, three months later, that the marketing firm met with the strata council to compare and discuss offers in order to select the best offer and proceed with a letter of intent. Similarly, in *Strata Plan NWS837* the realtor "marketed the complex between May and August 2017" and there was "no evidence to suggest that the price to be paid under the [purchase and sale agreement] is below market or that the marketing campaign ... was otherwise deficient." Moreover, in *Strata Plan NWS837* the marketing process spanned from December 2016 to June 2017.

Wake at para. 37
Strata Plan NWS837 at paras. 14 and 57
Strata Plan VR2702 at para. 66

209. The case at bar is profoundly different. Here, none of the Owners stand to enjoy a "windfall profit", or even a nominal profit in light of today's market conditions. The evidence shows that the proposed sale would provide owners with consideration far below fair market value.

210. This result is an unfortunate consequence of the marketing process:

(a) That process lasted little more than a week, and it did not create a wide catchment of offers. It was also conducted during a non-propitious time, namely in the early throes of the COVID-19 pandemic.

(b) The listing emphasized repair issues without noting that the Owners were in the process of addressing them (at their own cost).

(c) In addition, most of the marketing material contained an "under contract" banner which was not necessary or appropriate and which likely would have deterred prospective buyers.

(d) Although Goodman repeatedly recommended obtaining an appraisal and emphasized the importance of doing, the Administrator never did so.

(e) Moreover, when the top bidder (OpenForm) withdrew its bid, the Administrator did not direct Goodman to continue its marketing process (without an "under contract" banner) in order to create a competitive environment in order to generate further offers.

(f) Instead, the Administrator directed Goodman to approach the second-place bidder and see if a deal could be done with it.

(g) And, when that second-place bidder later suggested that it "could not make the numbers work", the Administrator did not direct Goodman to continue its marketing process in order to create a competitive environment in order to generate improved offers.

(h) Instead, the Administrator stood by while Goodman passively awaited a revised price from the buyer, which (unsurprisingly, given the lack of any competitive pressure) resulted in an even further decrease in the consideration by $600,000, or $100,000 per strata lot.

211. If the proposed sale is approved, the petition respondents will be left with very limited proceeds of sale after the payment of their existing mortgages. To purchase a comparable property in the neighbourhood, the petition respondents would need to marshal approximately $900,000, which is not achievable. As a result, if the proposed sale is approved, the petition respondents will be unable to use their limited sales proceeds to repurchase in the neighbourhood. This would result in very significant unfairness to the petition respondents.

212. In addition to the foregoing, the process has unfolded in a manner that is significantly unfair to the petition respondents. For example (leaving aside that the Consent Order was procured in a procedurally and legally flawed manner, which is the subject of an extant Notice of Application) the petition respondents have, among other things, been:

(a) Unfairly excluded from discussions and meetings between the Administrator and other Owners;

(b) Unfairly excluded from incentives that were extended by Butterscotch to the other Owners;

(c) Subjected to intimidation and threats in an offensive attempt to subvert the democratic process by coercing them into submitting to the will of the majority; and

(d) Misled and confused by the provision of incorrect information.

213. In *Wake* and some of the other cases canvassed above, the absence of the above-noted factors supported the proposed sale. For example, in *Wake* the Court noted that "[t]here is nothing on all of the evidence that suggests to me that the opposing respondents were coerced to vote yes (or no) by force, threats, or intimidation." But this did occur in the case at bar, and the Court should be very reluctant to condone such offensive and anti-democratic conduct by approving the proposed sale and implicitly approving the process that led to it.

Wake at para. 127

214. In all of the circumstances described above, the best interests of the owners, and the need to avoid significant unfairness to two of six owners, is not supported by confirming the wind-up resolution and proceeding with the proposed sale to Butterscotch. The Petition should be dismissed.

~~12. The petition respondents shall rely on such authorities as counsel may advise.~~

Part 6: MATERIAL TO BE RELIED ON

1. Affidavit of James Mok sworn August 12, 2021;
2. Petition to the Court dated June 17, 2021;
3. Affidavit #1 of Garth Cambrey dated June 14, 2021;
4. Affidavit #1 of Dan Sonnenschein dated June 14, 2021;
5. Affidavit #1 of Mark Goodman dated June 10, 2021;
6. Affidavit #1 of Derek Lai dated June 8, 2021; ~~and~~
7. Affidavit #2 of James Mok dated December 10, 2021;
8. Affidavit #1 of Michelle Mok dated December 12, 2021;
9. Affidavit #1 of Michael Lee dated December 10, 2021;
10. Affidavit #1 of Jessica Stuart dated December 13, 2021;
11. Affidavit #1 of Ken Hollett dated December 10, 2021; and
12. Such further and other materials as counsel may advise.

The petition respondents currently estimate that the petition hearing will take 2.5 ~~3~~ days.

Date: December 13, 2021

Signature of ☐ petition respondents
☒ Lawyer for petition respondents

Matthew Nied

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