Action No.: 1001-07852 E-File No.: CVQ11MEDICAN3 Appeal No.:

IN THE COURT OF QUEEN'S BENCH OF ALBERTA JUDICIAL CENTRE OF CALGARY

IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, c. C-36, AS AMENDED AND THE JUDICATURE ACT, R.S.A. 2000, c. J-2 AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF MEDICAN HOLDINGS LTD., MEDICAN DEVELOPMENTS INC., R7 INVESTMENTS LTD., MEDICAN CONSTRUCTION LTD., MEDICAN CONCRETE INC., 1090772 ALBERTA LTD., 1144233 ALBERTA LTD., 1344241 ALBERTA LTD., 9150-3755 QUEBEC INC., AXXESS (GRANDE PRAIRIE) DEVELOPMENTS LTD., AXXESS (SYLVAN LAKE) DEVELOPMENTS LTD., CANVAS (CALGARY) DEVELOPMENTS LTD., ELEMENTS (GRANDE PRAIRIE) DEVELOPMENTS LTD., HOMES BY KINGSLAND LTD., LAKE COUNTRY (SITARA) DEVELOPMENTS LTD., MEDICAN (EDMONTON TERWILLEGAR) DEVELOPMENTS LTD.. MEDICAN (GRANDE PRAIRIE) HOLDINGS LTD., MEDICAN (KELOWNA MOVE) DEVELOPMENTS LTD., MEDICAN (LETHBRIDGE- FAIRMONT PARK) DEVELOPMENTS LTD., MEDICAN (RED DEER-MICHENER HILL) DEVELOPMENTS LTD., MEDICAN (SYLVAN LAKE) DEVELOPMENTS LTD., MEDICAN (WEST BANK) DEVELOPMENTS LTD., MEDICAN (WESTBANK) LAND LTD., MEDICAN CONCRETE FORMING LTD., MEDICAN DEVELOPMENTS (MEDICINE HAT SOUTHWEST) INC., MEDICAN ENTERPRISES INC., LES ENTERPRISES MEDICAN INC., MEDICAN EQUIPMENT LTD., MEDICAN FRAMING LTD., MEDICAN GENERAL CONTRACTORS LTD., MEDICAN GENERAL CONTRACTORS 2010 LTD., RIVERSTONE (MEDICINE HAT) DEVELOPMENTS LTD., SANDERSON OF FISH CREEK (CALGARY) DEVELOPMENTS LTD.. SIERRAS OF EAUX CLAIRES (EDMONTON) DEVELOPMENTS LTD., SONATA RIDGE (KELOWNA) DEVELOPMENTS LTD., SYLVAN LAKE MARINA DEVELOPMENTS LTD.. ESTATES OF VALLEYDALE DEVELOPMENTS LTD., LEGEND (WINNIPEG) DEVELOPMENTS LTD. and WATERCREST (SYLVAN LAKE) DEVELOPMENTS LTD.

PROCEEDINGS

Calgary, Alberta June 10, 2011

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	June 10, 2011	Afternoon Session	
4			
	The Honourable	Court of Queen's Bench	
	Madam Justice Horner	of Alberta	
7	E.D. J	F. CIDC	
_	F. Dearlove	For CIBC	
	D. Legeyt	For Medican Holdings Ltd.	
	K. Barr	For Condominium Corneration	
	J. Pawlyk (by telephone)	For Condominium Corporation Court Clerk	
13	A. Doucet	Court Clerk	
13			
15	THE COURT:	Thank you, counsel. Please be seated.	
16	THE COOK!	Tham you, common theme of courts.	
17	Mr. Pawlyk, have we got you on line?		
18	<i>y</i> , <i>y</i> ,		
19	MR. PAWLYK:	I am here, My Lady.	
~ 20			
21	Reasons for Judgment		
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23	THE COURT:	Medican and its group of companies including	
24	Axxess (Grande Prairie) Developments	Ltd., hereinafter referred to as Axxess, are in a	
25	Companies' Creditors Arrangement Act stay pursuant to an initial stay order issued May		
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31	in the name of Axxess at the time of the Initial Order. These assets comprised all of the		
32	assets of Axxess.		
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34		t at the end of January 2008 for occupancy at the	
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37	•		
38	hereinafter refer to it as the Condominium	m Corporation.	
39	A MAINT LE	al a Cita manifest DOM Distraction and discourse	
40	Axxess, with the knowledge and approv	al of its monitor, RSM Richter Inc. and the first	

the CIBC, stopped paying the monthly condominium fees on the remaining units at the time of the Initial Order.

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Axxess advised Condominium Corporation that the fees would be paid in return for clear estoppel certificates on the closing of sales of each of the respective units once that occurred. This has, indeed, happened on at least one such sale. There remain seven units to be sold. Of these, three are under a contract of sale to close eminently, and four are listed for sale and being actively marketed.

Financing for the Axxess Development was obtained by Axxess from the CIBC, who holds a blanket mortgage registered against the titles in March 2006. As at May 2nd, 2011, owing under that mortgage to the CIBC is \$1,441,000 with an additional related debt owing by the Medican Group bringing the total debt secured by the mortgage to approximately \$8,623,793.20.

In July 2009, the Condominium Corporation received a report from Shahnaz (phonetic), Popik & Associates, hereinafter referred to as the Shahnaz report, that addresses certain structural issues, equipment issues, and maintenance issues that then existed at the Axxess development. Two further reports have been tendered, those being the Fritz report, and the Carver report dealing with some or all of these issues.

Mr. Yeo, an officer of Condominium Corporation, states that conservatively it would cost the Condominium Corporation \$2 million plus to address the issues outlined in the Shahnaz report. The Condominium Corporation asserts that Axxess is liable in tort or contract or both for some or a substantial portion of these items.

The Condominium Corporation purported to levy a special assessment in the amount of \$2,153,574.13 against Axxess and Axxess only and filed caveats in April 2011 against each Axxess unit claiming an interest in that unit pursuant to the special assessment.

The Condominium Corporation's position is that it will discharge its caveats only upon an undertaking from Medican or an order of this Court that the whole of the sale proceeds after closing costs are deducted be held in trust.

Axxess, the CIBC, and the monitor take the position that the CIBC mortgage takes priority to the claims of the Condominium Corporation and that the net sale proceeds after payment of ordinary condominium fees must be paid to the CIBC.

The applications before this Court were as follows: The Condominium Corporation originally applied to lift the stay of proceedings as it related to Axxess only, a direction that Axxess bring the condominium fees current and address the deficiencies or,

alternatively, that the net sale proceeds be held in trust pending an agreement between the parties or further order of the Court.

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At the hearing of the application, Condominium Corporation agreed that it was only seeking the latter relief.

CIBC has applied for an order holding Condominium Corporation in contempt for filing their caveat in the face of this Court's initial stay of proceedings as extended and for a declaration that any amounts owing to Condominium Corporation are subordinate to the secured claim of the CIBC and for an order declaring that Section 39(2)(b) of the Condominium Property Act, hereinafter referred to as CPA, is in violation of the federal provincial division of powers vis-a-vis claims of creditors dealt with in the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act and, therefore, Section 39(2)(b) of the CPA does not apply.

Axxess and the Medican group of companies seek declarations that: (1) Condominium Corporation be compelled to issue estoppel certificates upon payment to it of arrears of ordinary condominium fees and penalties thereon; (2) the special assessment against Axxess in the amount of \$2,153,574.13 be declared invalid and be vacated; (3) that Condominium Corporation be enjoined from levying any other assessment, special or otherwise, against Axxess related to the items arising out of the Shahnaz report or other alleged deficiencies.

Additionally, Axxess seeks a declaration to the registrar of the North Alberta Land Registration District to discharge the caveats registered by the Condominium Corporation.

At the hearing of these applications on May 27th, 2011, Condominium Corporation withdrew its application to lift the stay, agreed that the special assessment it had levied was invalid and agreed to discharge its caveats voluntarily. It maintains, however, its right to withhold the issuance of estoppel certificates pursuant to Section 14 of the CPA in the event of the sale of the Axxess units unless the whole of the net sale proceeds are held in trust and thus, the parties remain at an impasse.

The only issue before this Court, then, is whether Section 14 of the CPA applies to these facts such that Axxess, as the developer, is obligated to hold the net sale proceeds in trust. The relevant portions of Section 14 of the CPA read as follows:

Section 14(1)(c):

Developer includes any person who, on behalf of a developer, acts in respect to the sale of a unit or a proposed unit or receives money paid by or on behalf of a purchaser of a unit or a proposed unit pursuant to a purchase agreement.

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Section 14(1)(e):

Substantially completed means subject to the regulations: (I) in the case of a unit, when the unit is ready for its intended use; (ii) in the case of related common property, when the related common property is ready for its intended use.

Section 14(4) reads:

Notwithstanding subsection (3), if a unit is not substantially completed, the developer shall hold in trust money other than rents or security deposits paid by the purchaser of the unit so that the amount of money held in trust will be sufficient when combined with the unpaid portion of the purchase price of the unit, if any, to pay for the cost of substantially completing the construction of the unit as determined by a cost consultant.

And Section 14(5):

Notwithstanding subsection (3), if the related common property is not substantially completed, the developer shall hold in trust money other than rents or security deposits paid by the purchaser of the unit so that the amount of money held in trust will be sufficient when combined with the unpaid portion of the purchase price of the unit, if any, to pay for the proportionate cost of substantially completing the construction of the related common property as determined by a cost consultant based on the unit factors of the units sharing the same related common property.

Condominium Corporation's position is that Section 14 is consumer legislation enacted to protect condominium purchasers from the risk of their purchase price being used by the developer to pay other expenses prior to substantial completion of either the unit or the common area. It submits that the legislation creates an express trust in favour of the Condominium Corporation as representative of the purchasers. The precise extent of the trust can be ascertained by the appointment of a cost consultant.

As the subject matter of a trust, the purchase monies never form part of the estate of Axxess and, therefore, the Canadian Imperial Bank of Commerce mortgage has nothing to

attach to.

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Axxess asserts that the Axxess development is substantially complete within the meaning of Section 14 of the CPA and has been since January 2008 when it was judged substantially complete by the project architect and engineers. It appears that occupancy permits were issued sometime in late March 2008 as per answer to undertaking No. 4 on the cross-examination of Mr. Yeo.

As the project has long been substantially complete, CIBC takes the position that Sections 14(4) and (5) do not apply. Alternatively, the CIBC asserts that Section 14 is essentially a separate code within the CPA to protect an individual purchaser of a bare land condominium against paying the purchase price and receiving in return a property that is not substantially completed and as such is not applicable here.

Both Axxess and the monitor support the position of the CIBC. As an alternative position, rather than just the seven owned by Axxess, the monitor asserts that as some kind of compromise, perhaps the total approximate cost of the items outlined in the Shahnaz report be divided by the total number of units and a holdback of that amount be directed for each of the seven remaining units.

In order for Section 14 of the CPA to apply, it must be established that the project was not substantially complete. I believe the onus to establish substantial completion is on Axxess.

Axxess points to the Axxess (Phase 3) Grande Prairie, Alberta progress report of February 2008 as establishing substantial completion of the project by the architects and engineers. This was discussed in the cross-examination of Mr. Schneider on his affidavit.

Further, Axxess relies on the occupancy permits being issued in late March 2008, the sale of 170 units since January 2008, one such sale having taken place since the date of the Initial Order and three further such sales being under contract and pending eminent closing. These facts, they state, establish that the units and the common area are substantially completed as they are clearly being used for their intended use as per the definition of substantial completion in Section 14.

The Condominium Corporation argues that as a result of the Shahnaz report, the items to be addressed are such that the ability of the owners to use the units and common area for their intended use are negated and the Axxess Development, including the remaining seven units, cannot be said to be substantially complete.

However, when the proof of claim filed by the Condominium Corporation as an unsecured

creditor in the claims procedure established by this Court is carefully reviewed, it is clear that, by and large, the items the Condominium Corporation would like to hold Axxess legally liable for are almost totally deficiency items, having come to light long after the project was completed, sold, and largely occupied. These items include such matters as frozen heating lines, undervented HVAC units, water recirculation issues, and concrete settling. Those that are not deficiencies comprise what I would call a wish list of items that the Condominium Corporation would like Axxess, with hindsight, to have been legally obligated to provide. These include fencing, signage, and powered parking stalls.

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> In my view, the claim by the Condominium Corporation here is nothing more than an attempt to leverage its position as a plaintiff in a breach of contract and tort action into that of a trust beneficiary entitling it to what amounts to a prejudgment attachment order. Deficiencies do not change a substantially completed project into one that is not substantially completed.

14 15 16

17 18 On the evidence before me, I am satisfied that Section 14 of the Condominium Property Act does not apply as the Axxess Development is substantially complete and has been since at least late March 2008 when the occupancy permits were issued by the City of Grande Prairie.

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Having made this determination, it follows that the following relief is granted.

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In case it hasn't already been dealt with, counsel, is it required that an order be granted directing the registrar of the North Alberta Land Registration District to vacate the caveats filed by Condominium Corporation, or has that been accomplished?

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27 MR. PAWLYK:

It's Mr. Pawlyk, My Lady. It has not been done yet and it doesn't matter to me whether we have an order of not. They will be vacated.

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30 THE COURT:

It seems to me, Mr. Pawlyk, it's probably easier if we include that in the order, but I leave it to counsel's discretion as to what they require.

32 33

34 MR. DEARLOVE:

I think it should be, My Lady, just so that if something doesn't get done, there is a basis to rely on.

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37 THE COURT:

Yes. And to be clear, it's the caveats which were filed in April of 2011. It's not any caveats which the Condominium Corporation filed with respect to protection of ordinary fees and penalties.

39 40

41 MR. DEARLOVE:

Correct.

1 2 THE COURT: All right. Okay. The special assessment levied by the Condominium Corporation is vacated. That's the one in the amount of \$2,153,000 3 or so. I direct that the Condominium Corporation issue estoppel certificates once it has 4 5 been paid its ordinary fees and penalties on the sale of the remaining seven units. 6 7 Now, Mr. Dearlove, the Canadian Imperial Bank of Commerce asked for an injunction 8 enjoining the Condominium Corporation from issuing any further special levies. I'm not -- I don't think under the circumstances without further argument I would grant that. 9 10 I think, Mr. Pawlyk, my position is clear if -- I mean, I leave it to your client to 11 12 determine what their next step is. 13 14 MR. PAWLYK: Understood. 15 16 THE COURT: With respect to -- Mr. Pawlyk, the only other thing I thought might be entertained today would be an application by yourself for a stay 17 18 of my order pending an application for leave to appeal. 19 20 MR. PAWLYK: I don't have instructions, My Lady, and I think -21we'll leave it for today. 22 23 THE COURT: Okay. And then the only other matter, counsel. is the matter of approval of the sales of the three pending -- of the three condominium 24 units. I must confess my record keeping is not very good and I don't recall if I've 25 26 actually granted those orders or if they were pending. 27 28 I see I'm not the only one with poor record keeping. 29 30 MR. DEARLOVE: No, it's recollection, not record keeping, I 31 think, My Lady, is my problem anyway. 32 33 THE COURT: Well, okay. Let me -- sorry, Mr. Barr. 34 35 Submissions by Mr. Barr 36 37 MR. BARR: I was going to say, My Lady, I don't think there has been an approval, but what I recall asking you on not the last occasion but the 38 occasion before, is if we could simply, once we have the consent of parties, take it in 39 40 front of a justice in ordinary chambers to have --

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Yes, I think I do recall that, yes. 1 THE COURT: 2 -- to have them approved and you'd indicated 3 MR. BARR: that was fine with you so long as all counsel consented. So if that's still acceptable to the 4 Court, if they're not already approved, that's what we can do. 5 6 7 THE COURT: That is completely acceptable to me. Any objections from anybody on that, as long as it's with consent and/or on notice? Okay. 8 That's what will happen there. And I can freely confess, counsel, that's all I can -- that's 9 all I thought of that we might need to deal with it today as a result of my decision. 10 Mr. Dearlove? 11 12 13 Submissions by Mr. Dearlove 14 Only that I'd like to include in the order, and I 15 MR. DEARLOVE: think you've contemplated this, the right to argue -- leave open the issue should we have 16 to come back on the impact --17 18 Section 39? 19 THE COURT: .20 Yeah, well, on the impact of a new purchaser. 21 MR. DEARLOVE: If a new purchaser walks in tomorrow and then under that 39(2) gets nailed again, you 22 may say, "Well, that's fair game, or no, that's not the intention." 23 24 No, I have not decided that issue. Specifically, 25 THE COURT: Mr. Pawlyk, I did not get into the Section 39(2) argument. I did not think -- I thought 26 my recollection of our last hearing was that you were not exerting that, and I apologize if 27 28 you were. 29 30 Submissions by Mr. Pawlyk 31 Well, My Lady, the effect of your order is that 32 MR. PAWLYK: we must issue estoppel certificates and so I don't see any way that we could argue that in 33 34 any event after we've issued an estoppel certificate. 35 Oh, I think, Mr. Dearlove's worried about 36 THE COURT: special assessments, but again, if those are not outstanding at the time of the sale. 37 38 Exactly. 39 MR. PAWLYK: 40 Well, this is what --41 MR. DEARLOVE:

× 1 2 THE COURT: Under that section as I read it, Mr. Dearlove, if 3 there are no -- I think that catches purchasers who purchase in the face of levies that are 4 outstanding or in the face of unclear estoppel certificates. 5 6 MR. DEARLOVE: I don't know what --8 THE COURT: You're not sure it's that clear? 9 10 MR. DEARLOVE: I don't know what -- you'll recall you saying it wasn't that complicated what an estoppel certificate said, but I don't know what it does. 11 12 13 If the estoppel certificate -- I'm just trying to understand. Does the estoppel certificate 14 then give the purchaser -- and I shouldn't be asking you for legal advice, but I'm asking 15 this more rhetorically than anything, does the estoppel certificate say there are no 16 claims --17 18 THE COURT: It estops the Condominium Corporation from 19 claiming anything is outstanding except as listed in the certificate. That's my 20 understanding of it. That's why it's called estoppel. 21 22 MR. DEARLOVE: Okay. Okay. 23 The Condominium Corporation says for all time 24 THE COURT: here's what we're owed, and if they make a mistake or they fail to include something, 25 they've got a problem except if, of course, you know, it's always arguable, usually a 26 27 condominium purchase agreement, to my knowledge, will include a condition that the purchaser review all of the resolutions of the Board of the Condominium, the bylaws, and 28 29 that kind of thing. So if in the Board minutes or resolutions, it's disclosed that a special levy has passed and somehow the Condominium -- and you, the purchaser, reviews that, 30 and somehow the estoppel certificate is silent on that, there might be an issue. But I 31 32 think the estoppel certificate speaks, period. 33 34 Is that your -- Mr. Pawlyk, you're in the practice area, not myself. Is that more or less 35 your understanding as well? 36 37 MR. PAWLYK: That is exactly it, My Lady. 38 39 MR. DEARLOVE: Okay. The only other thing I'd ask that the order include is a reservation of the right to speak to the matter of costs. It's not our 40

intention to do so if the order isn't appealed, but if it is appealed, we may wish to --

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2	THE COURT:	Revisit.	
3	THE COOKT.	KC VISIC.	
	MR. DEARLOVE:	And here the only reason I'm asking is the	
5		irsue, but may be relevant on a costs application,	
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7	which, as I said, I don't expect to be seeking, but want to leave the option open.		
8	THE COURT:	I have no problem with that, Mr. Pawlyk,	
9		argument to the contrary. Mr. Dearlove's just	
10	looking for a reservation.		
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12	MR. PAWLYK:	I think that's fine, My Lady.	
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14	THE COURT:	Okay. Thank you. Mr. Barr?	
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16	MR. BARR:	Can we also have a provision in the order that	
17	simply indicates that we can approve of t	he order via facsimile and in counterpart, please?	
18			
19	THE COURT:	Yes, of course.	
- 20			
	MR. BARR:	Thank you.	
22			
	THE COURT:	Now, counsel, I am in the city until next	
24	-	order and then I'm not available for about a week	
25		cessary for me to sign it immediately, but in case	
26	just in that case.		
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29	•		
30			
31	Mr. Legeyt. That's the answers to under	takings of Mr. 1 eo.	
32	MD DAWI VV.	Yes, those I had sent by e-mail to you, My	
	MR. PAWLYK:	res, those I had sent by e-man to you, wry	
34 35	Lady.		
36	THE COURT:	Yes. And I had Mr. Legeyt's hard copy in	
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39	All right counsel. I think that's it until	our next scheduled attendance, which is 2:00 on	
40	-		
41	Jary Mount Amazine Jour 110 10 augustion.	•	

9 PROCEEDINGS CONCLUDED 10 11 12 13 14 15 16 17 18 19	1 MR. PAWLYK: 2	Thank you, My Lady.		
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