

**ONTARIO  
SUPERIOR COURT OF JUSTICE  
COMMERCIAL LIST**

**B E T W E E N:**

**MERIDIAN CREDIT UNION LIMITED**

Applicant

- and -

**ADELAIDE STREET LOFTS INC.**

Respondent

**APPLICATION UNDER SUBSECTION 243(1) OF THE *BANKRUPTCY AND  
INSOLVENCY ACT, R.S.C. 1985, c. B-3, AS AMENDED* AND SECTION 101 OF THE  
*COURTS OF JUSTICE ACT, R.S.O. 1990, c. C.43, AS AMENDED***

**BRIEF OF ARGUMENT**

**PART I: OVERVIEW**

1. On March 23, 2019, this Court granted an order pursuant to which the wheels were set in motion to approve a transaction in respect of a parcel of real property municipally known as 263 Adelaide Street West, Toronto, Ontario (the “**Real Property**”). After significant efforts by the stakeholders, a comprehensive settlement was reached in December 2019 which would see the Real Property sold for the purchase price of \$69 million, the senior secured lender repaid in full, and the subordinate syndicated mortgage holders receiving returns depending on the nature of their investment. Due to the complexity of the proceeding, different parties entered into various interrelated agreements, including an agreement of purchase of sale (the “**APS**”), minutes of settlement (the “**Minutes of Settlement**”), and a forbearance agreement (the “**Forbearance Agreement**”).

2. The prospective purchaser, Lanterra Developments Ltd., now seeks court approval to unilaterally alter the terms of the APS and the Minutes of Settlement, over the objection of, or without the support of, any of the parties thereto. The accommodation sought is on the basis that the COVID-19 pandemic has made closing on May 14, 2020 “commercially unfeasible.” No evidence as to lack of feasibility has been given.

3. The alteration proposed also triggers an “Intervening Event” under the Forbearance Agreement, pursuant to which Meridian may exercise its rights, including its rights to appoint a receiver under the *Bankruptcy and Insolvency Act*. An application to appoint a receiver has been before the court on this matter, which was adjourned *sine die* once the settlement was reached.

4. Various iterations of the transaction now before the Court have been proposed for over a year. The Lanterra proposal has a very real prospect of further delaying any transaction until the end of the year, or longer, without certainty of closure.

5. Meridian Credit Union (“**Meridian**”) supports the motion brought by High Rise Capital Ltd. (“**Hi-Rise**”) to, inter alia, **approve the settlements on the terms agreed to among the stakeholders**. The uncertainty, delay and erosion of value resulting from the judicial decree sought by Lanterra is not supportable at law, even in a pandemic. If Lanterra is not willing or able to close the purchase transaction as agreed to in accordance with the Minutes of Settlement and the APS, it is just and convenient to appoint a receiver over the Real Property, which receiver will be in a position to market and sell the property with greater certainty regarding cost and timing than the revised proposed Lanterra transaction might offer.

6. Meridian’s preference is for the negotiated transaction to conclude on the terms agreed to in December 2019. In the alternative, Meridian expressed, on a with prejudice basis, its willing

to withdraw its objection to the Lanterra Order provided the status quo is maintained and certain safeguards are put in place to mitigate against the uncertainty cause by the proposed delay in closing. However, this offer was rejected by Lanterra and without these protections, Meridian has no choice but to seek the return of the receivership application, which is the only clear path to recovery for the stakeholders at this point, and which relief should be granted in law and equity.

## **PART II: FACTS**

7. The facts regarding Meridian's position are set out in the affidavit of Bernie Huber sworn April 20, 2020 ("**Huber Affidavit**") and are not repeated herein other than as necessary. Capitalized terms used herein but not otherwise defined have the meaning attributed to them in the Huber Affidavit.

## **PART III: ARGUMENT**

### **Private Agreements Should Not Be Lightly Altered by the Court**

8. Lanterra is seeking the court's assistance to unilaterally alter the terms of private agreements between various parties. No party to those agreements support the Lanterra relief, and multiple parties have objected to such relief.

9. Meridian was approached by Lanterra on April 8, 2020 regarding extending the closing date. After consideration, Meridian indicated it was open to an extension provided certain safeguards were put in place to ensure Meridian was not prejudiced during the delayed closing. Lanterra did not respond to Meridian's proposal impliedly rejecting it by serving motion materials for the relief being sought on the cross-motion.

10. The APS, Minutes of Settlement and Forbearance Agreement are part of a comprehensive settlement that involved the delicate balancing of the rights of various stakeholders. Each of these documents, whether directly or indirectly, reference the Closing Date of May 14, 2020. Meridian agreed to the adjournment to the Receivership Application, the Sale and the Forbearance Agreement with the explicit expectation that it would be finally repaid by May 22, 2020. Meridian has rightly relied on the Closing Date as stipulated in these documents.

11. The Intercreditor Agreement is also being sought to be indirectly amended under the Lanterra Order. Pursuant to the Intercreditor Agreement, **Lanterra is prohibited from amending or agreeing to amend the APS without the written consent of Meridian in its sole, absolute and unfettered discretion, which consent was neither sought nor granted.**

**The Grounds for Seeking the Alteration of Private Agreements are Not Sufficiently Compelling**

12. The COVID-19 Pandemic does not provide Lanterra with the power to unilaterally alter the terms of extensively negotiated private agreements.

13. Lanterra asserts that closing the transaction is no longer “commercially feasible” due to the COVID-19 pandemic without providing any particulars or evidence to prove such an assertion. Even if Lanterra did present relevant evidence, the APS and related agreements were not negotiated for a closing on a “commercially feasible” basis. Similarly, the APS has neither a financing condition, a material adverse change clause, nor a force majeure provision.

14. Finally, a plea that the court grant accommodation due to the COVID-19 (even if there was a basis in law to do so, which Meridian asserts there is not) works both ways. Meridian, Meridian’s stakeholders, and the other stakeholders in this matter have all been impacted by

COVID-19. Relief granted to Lanterra prejudices those groups which are also dealing with financial uncertainty relating to the pandemic.

15. The APS was what Lanterra bargained for, and what Lanterra bargained for does not provide that it gets to close when and if convenient or when it is better positioned to do so.

**The Proposed Terms of the Lanterra Order are Prejudicial to the Stakeholders, Including Meridian**

16. In addition, the extended closing date is not a true closing date, and contemplates Meridian and certain of the syndicated mortgagees incurring additional fees and interest to the detriment of other syndicated mortgagees.. Of note:

- (a) **Additional costs:** Meridian and other stakeholders will incur additional costs if the Request for Extension is accommodated. Interest will continue to accrue, and compound. Further, there does not appear to be a provision made, or any availability of funds, for continued obligations such as insurance and property tax payments.
- (b) **No financial motivation for Lanterra to ultimately close:** Lanterra's current deposit is only \$10,000, and Meridian, as well as all stakeholders, would experience significant prejudice and exposure to additional losses if Lanterra is once again unable to complete the Sale after the Request for Extension is granted. This is the reason why Meridian requested as part of its willingness to extend the Closing that Lanterra put a meaningful deposit down. This would have the effect

of motivating a closing. This request, as with the rest of Meridian's offer, was rejected.

- (c) **Lack of certainty of timing:** though not relevant to the legal issue before the court, there is insufficient certainty as to what constitutes "8 weeks following the lifting of the Declaration of Emergency." For example, the Declaration of Emergency may be lifted in stages, or for certain industries. There is the potential for further court appearances to dispute whether the Closing Date has been reached.

17. Lanterra has noted that Meridian will be "made whole" via a lump sum payment upon the closing of the transaction (the "**Lanterra Offer**"). First, Meridian's payments are governed by the distribution set out in the Minutes of Settlement which already give Meridian the payment of its indebtedness, in full, on the closing of the transaction. Lanterra is "offering" what Meridian already has, and would have regardless of the date of the closing.

18. Second, this is a change to the original terms to the Minutes of Settlement and the Forbearance Agreement, and one which Lanterra has not sought consent to override. Meridian is concerned less about the timing of the interest payments as alleged by Representative Counsel, and more concerned about the fact that Lanterra has no basis to make such an offer. The distribution scheme upon closing of the transaction is dictated by the Minutes of Settlement.

### **Meridian Has Lost Confidence in the Lanterra Transaction Closing**

19. Lanterra has moved forward with its request for an extension without any accommodation, or any attempt to come to a compromise with Meridian or any other stakeholder.

20. Lanterra's unwillingness to provide an increased deposit is particularly troubling, as it can only be viewed as: (a) a lack of confidence in its own ability to complete the transaction; or (b) a lack of intention to complete the transaction.

21. Similarly, Lanterra has not made any provision to alter the terms of the Forbearance Agreement, counting on the court's continued indulgence to deny Meridian its contractual and legal rights and remedies under the Credit Agreement for up to 22 months from the original repayment date, or potentially more if Lanterra determines that additional time is needed.

22. As such, Meridian has lost confidence in the prospect of repayment in the current circumstances. Absent safeguards, this Court should deny Lanterra the order it seeks and should appoint a receiver over the property.

**It is Just and Equitable to Appoint a Receiver in the Circumstances**

23. The Credit Agreement came due in February 2019. Meridian's Receivership Application has now been twice adjourned. The Debtor's indebtedness to Meridian and others remains unpaid. As of today, there exists only an offer to close at some ill-defined future time. Meridian is once again asked to wait, until December 15, 2020 or otherwise, for repayment. While the efforts of the parties to close a transaction have been significant, there comes a point where the prospect of recovery under the chosen path becomes sufficiently uncertain that another path should be taken. That point is now reached.

24. A court-appointed receiver, through a robust, transparent and court-sanctioned sales process, will likely be able to consummate a transaction with significantly less delay and potentially less fees and costs.

25. For these reasons, it would be just and equitable to appoint a receiver in the circumstances.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 21<sup>st</sup> day of April, 2020.

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Court File No. CV-19-00628145-00CL

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**Proceedings commenced at Toronto**

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**BRIEF OF ARGUMENT**

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