

**IN THE SUPREME COURT OF VICTORIA AT MELBOURNE
COMMERCIAL & EQUITY DIVISION
COMMERCIAL COURT**

LIST A

No 9299 of 2009

**IN THE MATTER OF TIMBERCORP SECURITIES LIMITED
(IN LIQUIDATION)**

ACN 092 311 469

**TIMBERCORP SECURITIES LIMITED (IN LIQUIDATION) (ACN 092 311 469)
IN ITS CAPACITY AS RESPONSIBLE ENTITY OF EACH OF THE
MANAGED INVESTMENTS SCHEMES LISTED IN SCHEDULE 1
AND IN ITS CAPACITY AS MANAGER OF THE UNREGISTERED
MANAGED INVESTMENTS SCHEME LISTED IN
SCHEDULE 2 OF THE ORIGINATING PROCESS
First Plaintiff**

**MARK ANTHONY KORDA
Second Plaintiff**

**LEANNE KYLIE CHESSER
Third Plaintiff**

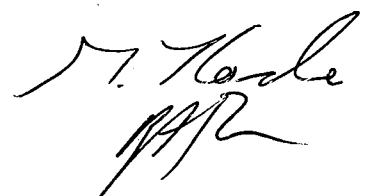
FIRST AFFIDAVIT OF MARK ANTHONY KORDA

Date of document: 29 September 2009
Filed on behalf of: the Plaintiffs

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- 1 I am the liquidator of the First Plaintiff, Timbercorp Securities Limited (TSL), and of the Second Plaintiff, Timbercorp Limited (TL), with Leanne Kylie Chesser.
 - 2 Except where I otherwise indicate, I make this affidavit from my own knowledge. Where I depose to matters from information or belief, I believe those matters to be



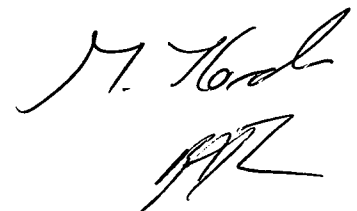
true. I am authorised by Ms Chesser to make this affidavit on her behalf. References in this affidavit to "we", "us", "our" or "ourselves" are references to Ms Chesser and me.

General background

- 3 I am a chartered accountant and a partner of the firm KordaMentha. I am a Registered Liquidator and an Official Liquidator of the Court. I am a member of the Insolvency Practitioners Association of Australia and a member of the Institute of Chartered Accountants. Before founding KordaMentha in 2002, I had a 24-year career with the firm Arthur Andersen, during which I held the positions of Director of Corporate Finance, Managing Partner Asia Pacific Corporate Recovery Services Practice and Managing Partner Australia Accounting and Audit Practice. I was also a Member of the Australian Executive Committee and Board of Partners. I have been practising in the area of corporate insolvency and financial reconstructions for 20 years.
- 4 On 23 April 2009, we were appointed as voluntary administrators of TL and TSL. Also on 23 April 2009, the respective directors of thirty nine (39) of TL's wholly owned subsidiaries (together **Timbercorp Group Companies**) appointed us and three other KordaMentha partners, namely Mark Francis Xavier Mentha, Craig Peter Shepard and Clifford Stuart Rocke, as administrators of those companies. All of the appointments were made pursuant to section 436A of the Corporations Act.
- 5 On 29 June 2009, at a meeting of the creditors of TL and the Timbercorp Group Companies and a separate meeting of the creditors of TSL, the creditors resolved to wind up the TL and Timbercorp Group Companies, and TSL respectively. We are therefore now the liquidators of TSL and TL.

Timbercorp schemes

- 6 TSL is currently the responsible entity of 11 forestry schemes which are registered managed investment schemes under Part 5C of the Act. In addition, there is one forestry scheme administered by the Timbercorp Group Companies which is not, and was not required to be, registered under Part 5C of the Act. I refer to these together as the "**Forestry Schemes**". Now produced and shown to me marked **MAK-1** is a list of the Forestry Schemes.

Handwritten signature of M. Korda in black ink, consisting of a stylized 'M' followed by 'Korda' and a flourish below.

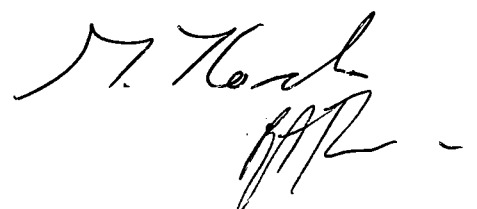
- 7 Each of the Forestry Schemes is governed by a complex suite of documents including a constitution and sub-leases. The members of the Forestry Schemes are referred to in the documents as "**Growers**" and I adopt that terminology here.
- 8 The purpose of the Forestry Schemes is the cultivation of Eucalyptus trees for commercial wood production. The Growers sublease from TL or TSL allotments of land, known in the Forestry Schemes variously as "Woodlots" (1 hectare) or Timberlots" (1/3 of a hectare) (**Lots**). The land is owned either freehold by a Timbercorp Group Company or is leased to TL or TSL by a third party landowner.

Purpose of Application

- 9 This affidavit is made in support of an application for a direction under section 511 of the *Corporations Act 2001* (Cth) (**Act**) that we are justified in procuring TSL to enter into and perform the sale and purchase deed (**SPD**) with the preferred bidder (**Buyer**), including terminating or surrendering the relevant Grower sub-leases in accordance with the SPD. The identity of the Buyer is confidential. However, I know that the Buyer is a viable company, which is respectable and solvent and will be capitalised in an amount exceeding \$500 million. The Buyer is also a global forestry operator. I believe the Buyer has the financial capacity to complete the purchase of the Forestry Assets, and to manage them.

Sale and Purchase Deed

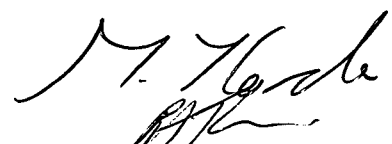
- 10 The SPD between:
- (a) TL
 - (b) TSL (in its capacity as responsible entity of the Forestry Schemes and in its personal capacity);
 - (c) Timbercorp Plantations 2002 IAB Pty Limited (In Liquidation) (ACN 100 116 827) (**Timbercorp Plantations 2002**);
 - (d) Timbercorp Plantations Pty Ltd (In Liquidation) (ACN 0964 789 554) (**Timbercorp Plantations**);

A handwritten signature in black ink, appearing to read "M. North", with a stylized flourish underneath.

- (e) Timbercorp Lands Pty Ltd (In Liquidation) (ACN 085 886 835) (**Timbercorp Lands**);
 - (f) Timbercorp Properties Limited (In Liquidation) (ACN 074 825 675) (**Timbercorp Properties**);
 - (g) Timbercorp Forestry Pty Ltd (In Liquidation) (ACN 070 952 742);
 - (h) Timbercorp Lot Investments Pty Ltd (In Liquidation) (ACN 125 427 492);
 - (i) Us and our partners Mark Mentha and Cliff Rocke (in our personal capacity);
and
 - (j) The Buyer.
- 11 The parties are still negotiating the SPD and I intend to file a copy of the SPD as a confidential exhibit to a second affidavit I intend to swear before the hearing on 30 September 2009.
- 12 Our intention is that the SPD will be executed on or around 30 September 2009 with settlement on, or around, 2 November 2009.

Sale Process

- 13 Since early July 2009, a number of parties have contacted KordaMentha to express their interest in the possible acquisition or recapitalisation of the various assets which are the subject of the Forestry Schemes. Richard Forbes, a partner of KordaMentha, has had responsibility for coordinating the expressions of interest. Mr Forbes has informed me of the matters which I depose to below.
- 14 On 31 July 2009, we published an advertisement in the *Australian Financial Review* in which we sought expressions of interest for the possible acquisition or re-capitalisation of the assets the subject of the Forestry Schemes. Now produced and shown to me marked **MAK-2** is the advertisement that appeared in the 31 July 2009 edition of the *Australian Financial Review*.
- 15 A number of interested parties then executed a Confidentiality Agreement (**the Interested Parties**) and were subsequently given a copy of a Confidential Information Memorandum (**Information Memorandum**), and were granted access to an on-line Data Room. Now produced and shown to me marked **MAK-3** is an

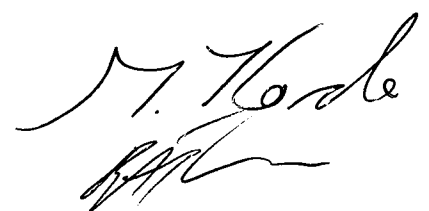


anonymous list of the Interested Parties which details the number of documents viewed, printed and downloaded from the Data Room as at 12 August 2009 by those Interested Parties who had accessed the Data Room. Now produced and shown to me marked **Confidential Exhibit MAK-4** is a copy of the Confidential Information Memorandum in respect of which we will seek a confidentiality order. The Information Memorandum contains information which is confidential to the Timbercorp group of companies, including commercially sensitive information which may be of interest and/or benefit to competitors.

16 In Federal Court of Australia proceedings VID 595 of 2009 and VID 541 of 2009, we asked the Court to order that the Information Memorandum (which was an exhibit to several affidavits) be kept confidential. The Court granted that order. The Federal Court also ordered that a redacted copy of the Information Memorandum be placed upon the Court file and be made available for inspection in accordance with the Federal Court Rules. Now produced and shown to me marked exhibit **MAK-5** is a redacted copy of the Information Memorandum which was filed in Federal Court of Australia proceedings VID 595 of 2009 and VID 541 of 2009 and the Court orders regarding the Information Memorandum.

17 The assets that we are offering for sale are described in the Information Memorandum as follows:

- (a) 97,500 hectares of high-yielding premium quality *Eucalyptus globulus* distributed across various age classes, and located close to seaports (**Trees**) (The Buyer does not seek to acquire rights over about 5,500 hectares);
- (b) 38,800 hectares of freehold land owned by Timbercorp Group Companies in the "Green Triangle" region in Victoria and South Australia, and in south-west Western Australia which has a total book value of \$238 million. These regions are regarded as amongst the best in the world for the cultivation of *Eucalyptus globulus*, with high average annual rainfall and premium quality soils (**Freehold Land**);
- (c) 58,700 hectares of land leased by Timbercorp group companies in the Green Triangle region and in south-west Western Australia (however, the sale of the leasehold land rights is conditional upon the Liquidators determining to retain and assign those leases in connection with the liquidations or the sale process



and obtaining the consent of the relevant landlord if necessary) (**Leased Land**);

- (d) a dedicated and highly skilled forestry management business, including seed-to-port management and harvesting capacity at maturity of up to 1.8 million GMT and EBITDA exceeding \$20 million per annum; and
- (e) part ownership of the Albany Chip Terminal which has a load capacity of 1.3 million GMT per annum. [50 percent interest in Plantation Pulpwood Terminals

(together "**Forestry Assets**")

Communication with the Growers

- 18 Throughout the liquidation and sale or recapitalisation process of the Forestry Assets, we have communicated with the key stakeholders including the Growers representatives. Our staff maintain a website at www.kordamentha.com.au with press releases, documents and court proceedings which is updated frequently. Our solicitors, Arnold Bloch Leibler, also maintain a website of all the Timbercorp Court proceedings that they have carriage of at www.abl.com.au.
- 19 A number of the Growers are part of the Timbercorp Growers Group (**TGG**) and the Timbercorp Growers Reference Group (**GRG**). Richard Forbes, another partner of KordaMentha and I, have been in regular contact with the TGG and GRG to inform them of progress throughout the sale and recapitalisation process.

Surrender of Sub Leases and Proprietary Interest in the Trees

- 20 In order for the sale or recapitalisation process to achieve the best outcome for the creditors of the Timbercorp Group Companies, including Growers, we believe that any purchaser needs to be satisfied that they can buy the Trees with clear title. If the potential bidders were not so satisfied, we expected that any bids for the Forestry Assets would be made at a large discount to the price which could be achieved if the Trees were offered with clear title. (Prior to the voluntary administration the Timbercorp Group Companies attempted to sell some Forestry Assets, but the



process failed in part because of the complexity of the structure and the inability to give clear title).

21 On 7 August 2009 we held an informal Meeting of Growers of the Forestry Schemes (**Meeting**) chaired by independent chair Matthew Walsh of Gadens Lawyers. The purpose of the Meeting was to:

- (a) provide Growers with an update on key issues facing the Forestry Schemes; and
- (b) put a non-binding resolution to the Growers to request their approval for us to seek a power of sale. The non-binding resolution was:

That the Liquidators' of TSL request the Federal Court of Australia to grant the Liquidators a power of sale to enable the implementation of the sale/recapitalisation strategy.

22 The results of the voting were recorded on a scheme by scheme basis. Voting was 1 vote per Lot. More than 90% of the Growers who voted, voted in favour of the non-binding resolution. Now produced and shown to me marked **MAK-6** are the results of the voting on the non-binding resolution on a scheme by scheme basis.

23 Following the meeting we applied to the Federal Court for a direction regarding TSL's power to sell the Trees. Now produced and shown to me marked **MAK-7** is the originating process and my supporting affidavits (without the exhibits) for that application, Federal Court Proceeding VID 595 of 2009.

24 Under the Sub-Leases and/or at common law, TSL arguably does not have legal title to the Trees. The Growers may own the Trees and also have a right to harvest them. The sub-leases also state that the Grower is granted an independent proprietary interest in the relevant Lots, to establish tend and manage the Trees and to harvest the Trees and remove and sell the products derived from the Trees. While there are differences between the Sub-leases for each of the Forestry Schemes, the clauses setting out these rights are common to all the sub-leases. Now produced and shown to me marked exhibit **MAK-8** is, by way of example, a sub-lease for the 2001 Timbercorp Eucalypts Project (ARSN 094 392 000). One way in which TSL can obtain clear title to the Trees is by terminating the Grower Sub-Leases. There is no express power to do so under the Grower Sub-Leases but I was provided with legal

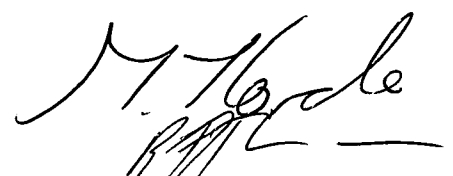


advice that under the constitutions, TSL has a right or power to terminate the Grower Sub-Leases, or that it is at least arguable that TSL has such a right or power.

- 25 To put the issue beyond doubt however, we sought and Finkelstein J ordered, on 18 August 2009 in Federal Court proceeding VID 595 of 2009, that we were justified in procuring TSL as responsible entity to amend the constitutions of the Forestry Schemes pursuant to section 601GC(1)(b) of the Act by executing a deed in the form contained in a schedule to the order for each of the constitutions. Now produced and shown to me marked exhibit **MAK-9** is the order of Finkelstein J of 18 August 2009.
- 26 On 1 September 2009 I filed the amendments to the Constitution in the form of the schedule attached to the order with the Australian Securities and Investment Commission (**ASIC**). TSL is therefore entitled to surrender the Grower sub-leases for consideration on behalf of the Growers. Now produced and shown to me marked exhibit **MAK-10** are the deeds amending the Forestry Scheme constitutions.

Bids for Forestry Assets

- 27 The Information Memorandum set out a timetable for the sale or recapitalisation process and stipulates that the closing date for first and final binding offers was 5:00pm AEST on Friday, 18 September 2009. (This timetable was communicated to the TGG and GRG).
- 28 The final binding offer had to include a completed Purchase Price Allocation schedule which required each bidder to ascribe a dollar value to the Trees and the Freehold and Leasehold Land in each of the Forestry Schemes. This was included to assist us in determining apportionment of sale proceeds between the various assets and various creditor groups. The issue was also discussed between counsel and Finkelstein J in Federal Court Proceedings VID 595 of 2009 and between counsel and Robson J in Supreme Court Proceeding VID 7114 of 2009. Now produced and shown to me marked exhibit **MAK-11** are the extracts of the transcripts from those discussions between Court and counsel.
- 29 We received seven bids for the Forestry Assets. The main terms of the bids, including allocation of price between the Forestry Assets and important conditions are summarised in the schedule of bids now produced and shown to me marked **confidential exhibit MAK-12**. It is information that has been kept confidential to KordaMentha and its advisers. I consider that the exhibit should remain confidential



as if bidders or the market are able to see the bids other parties have made, and the agreement with the Buyer does not reach completion, it will prejudice the stakeholder's interests as new bids will be altered based on this information.

- 30 The Buyer was selected as the preferred purchaser as the terms and conditions the Buyer offered were clearly the most favourable to the stakeholders, including the Growers and the secured creditors.

Conditions Precedent

- 31 The conditions precedent of the SPD are set out in SPD (clause 3.1 as drafted at the time of swearing this affidavit).
- 32 One of the conditions precedent is the release of all Forestry Assets encumbered by charges and discharges of the mortgages over the Freehold Land on terms and conditions acceptable to us and to the Buyer.

CBA Facilities and Securities

- 33 The Commonwealth Bank of Australia (**CBA**) has a facility with Timbercorp Lands (**CBA Forestry Facility**). CBA holds securities over Forestry Assets including mortgages over land used in the Forestry Schemes and owned by various Timbercorp Group Companies (**CBA Forestry Securities**). The CBA Forestry Facility will be approximately \$91.5m as at 1 November 2009.
- 34 CBA also has a loan facility with Olivecorp Land Pty Ltd (ACN 090 141 512)(In Liquidation) (**Olivecorp Land**) and Olivecorp Processing Facility Pty Ltd (ACN 098 581 081)(In Liquidation) (**Olivecorp Processing**) (**CBA Olive Facility**) secured over land used for four Timbercorp managed investment schemes for the cultivation of olives (**CBA Olive Securities**). The CBA Olive Facility will be approximately \$54m.
- 35 There is a approximately a further \$6.5m to be paid to the CBA for funding agreement establishment fees (\$37,000), Timbercorp treasury (\$5m), Forestry leased assets (\$1.2m), accrual for advisor fees (\$200,000).
- 36 The Timbercorp Group Companies have cross collateralised the debt totalling approximately \$152m as at 1 November 2009 and correspondingly the securities held by CBA over the Timbercorp Group Companies and assets.



M. Horde
MTH

CBA Requires Payment in Full

- 37 The Information Memorandum contains a condition precedent to that effect that unless the CBA releases the securities the agreement with the Buyer can not be completed. The CBA has told me throughout the sale process that the CBA will require full repayment of approximately \$152m for the CBA to discharge its securities.

Buyer's Apportionment

- 38 The Buyer's bid allocates \$123,585,797 net of costs of realisation to CBA's securities. This amount is not sufficient for the CBA to release their securities, leaving a shortfall of \$25,748,913.37 shortfall (**Shortfall**).
- 39 I believe that the Buyer's offer is so much better than the next best offer capable of acceptance, that even if we could not recover the Shortfall from Olivecorp Land, it would be in the best interests of the Growers to accept it. However I currently intend to try and recover the Shortfall in the following way, provided that it is lawful for me to do so.
- 40 From the proceeds of sale, TSL or special purpose vehicle (**SPV**) beneficially owned by Forestry Growers, will advance to Olivecorp Land, \$25,748,913.37 (an amount equivalent to the Shortfall) on a super-priority secured basis, with the consent of the CBA as security holder. Olivecorp Land will use the \$25,748,913.37 to repay the CBA Facility and CBA will assign the CBA Securities to TSL or the SPV to be dealt with by agreement between all the stakeholders or by Court order if an agreement cannot be reached.

Communication with the Stakeholders and Growers regarding the Buyer's offer

- 41 Since selecting the Buyer as the preferred bidder we have continued to maintain communication with the TGG, led by Chris Garnaut and the GRG led by Tom Weir, as well as the TSL Committee of Inspection. I believe Tom Weir is currently representing both TGG and GRG in the discussions about the Forestry Asset sale as Chris Garnaut has given Tom Weir his proxy.
- 42 Richard Forbes spoke to Tom Weir on 25 September 2009 and explained the options regarding the Buyer's proposal and the requirement that CBA's securities be released. He told Tom Weir of the proposal to assign the securities outlined in paragraph 38-40 above. He also discussed with him the possibility of using the sale

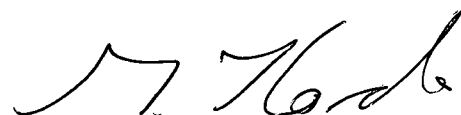


proceeds apportioned to the Trees to meet the Shortfall without any assignment of securities or the alternative of the Growers not consenting to the use of proceeds apportioned to the Trees. His preference was the proposal to assign the securities outlined in paragraph 38-40 above.

- 43 At 5:30 pm today we held a meeting of the TSL committee of inspection (**Committee**) to notify them of the latest developments in the process with the Buyer. The meeting was to update the Committee on short notice and we did not ask the Committee to pass any resolutions. The Committee generally accepted that the price to be paid by the Buyer for the Forestry Assets is reasonable. Some member^s of the committee of inspection expressed their concern that CBA is being paid the Shortfall from the sale proceeds attributed to Trees. One Grower said that he opposed the transaction. Another said that she wanted more time to consider the issues. Four or five members said they supported the transaction. The TGG and TRG have not made a final decision on whether or not to instruct counsel to appear at this application. I have agreed to fund the legal costs of the TGG/TRG's representative for this application whether the TGG/TRG consent, oppose or remain neutral to this application.

Disclaimer of Leases by 30 September 2009

- 44 On 1 July 2009, approximately \$7.2 million of rental payments became due and payable by TSL for three months' rent to 30 September 2009 in relation to properties relevant to the Forestry Schemes (**the Forestry Properties**). The total annual rental liability for the Forestry Properties is approximately \$27 million.
- 45 TSL is hopelessly insolvent and is unable to make these rental payments.
- 46 On 6 July 2009, TSL obtained a judgment from Finkelstein J in the Federal Court of Australia that TSL was not using or occupying the Forestry Properties. On 27 August 2009 and 1 September 2009 we obtained orders extending the period we have to decide whether to disclaim the leases for the relevant properties to 4:15 pm on Wednesday 30 September 2009.
- 47 Tomorrow morning, 30 September 2009, we are applying for a further extension of the period to decide whether or not to disclaim the leases. The basis of this application is that we will use the deposit money paid by the Buyer pursuant to the SPD to pay the quarterly rent that fell due on 30 June 2009 and the rent from 1 October to settlement at 2 November 2009 (on a per diem basis). The notice of



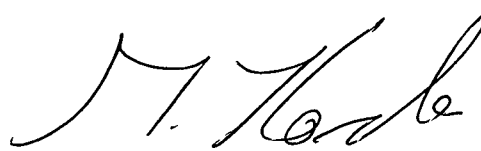
motion and supporting affidavit for that application are now produced and shown to me marked **MAK-13**.

Notice of these Proceedings

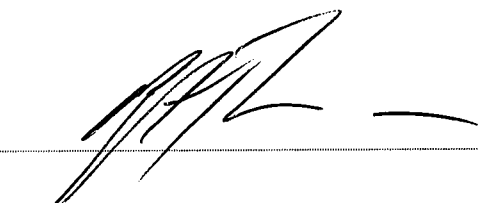
48 My solicitors gave informal notice of these proceedings to ASIC by telephone, to the TGG by e-mail and to the CBA by e-mail and telephone on Monday 27 September 2009.

49 The TGG's solicitors, ASIC and the secured creditors were provided with copies of the originating process and draft orders by the same e-mail that these documents were sent to Pagone J's associate.

SWORN at)
in the State of Victoria)
by **MARK ANTHONY KORDA** this 29 day)
of September 2009)



Before me:



BRIDGETTE AILSA TOY-CRONIN
Arnold Bloch Leibler
Level 21, 333 Collins Street
Melbourne 3000
An Australian Legal Practitioner within the
meaning of the Legal Profession Act 2004