Court File No. CV-23-00707839-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

B E T W E E N:

KEB HANA BANK as trustee of IGIS GLOBAL PRIVATE PLACEMENT REAL ESTATE FUND NO. 301 and as trustee of IGIS GLOBAL PRIVATE PLACEMENT REAL ESTATE FUND NO. 434

Applicant

- and -

MIZRAHI COMMERCIAL (THE ONE) LP, MIZRAHI DEVELOPMENT GROUP (THE ONE) INC., and MIZRAHI COMMERCIAL (THE ONE) GP INC.

Respondents

IN THE MATTER OF AN APPLICATION PURSUANT TO SECTION 243 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

WRITTEN SUBMISSIONS OF THE SENIOR SECURED LENDERS

(SISP Approval Order, returnable June 6, 2024)

June 5, 2024

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PART I - OVERVIEW

1. The Senior Secured Lenders[1] provide these submissions: (a) in support of the motion by the Receiver for the approval of a proposed sale and investment solicitation process (the "**SISP**") in connection with the project known as "The One" (the "**Project**") and (b) in response to a "Notice of Objection" filed by the "Coco Parties", defined in the Notice of Objection to consist of Coco International Inc. and 12823543 Canada Ltd.[2] Notably, the Notice of Objection is not accompanied by any sworn evidence, nor does it contain any citations to evidence in the record or case law to support the bald and unsupported propositions asserted in it.

2. The Senior Secured Lenders have first-ranking security over the assets, undertakings and property (the "**Property**") of the Borrower and GP Inc. acquired for or used in relation to a business carried on by the Borrower, including the Project.[3] As of the date of the Receivership Order, the Senior Secured Lenders were owed over $1.2 billion in matured debt. Since that time, that amount has risen to approximately $1.5 billion including amounts advanced by the RFCA Lender pursuant to the Receivership Order. The Borrower is in default under the Credit Agreement. This was expressly recognized by this Court in appointing the Receiver. The Project

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[1] The Senior Secured Lenders consist of KEB Hana Bank in its capacity as trustee of (i) IGIS Global Private Placement Real Estate Fund No. 301 (the "**Term Lender**"), (ii) IGIS Global Private Placement Real Estate Fund No. 434 (the "**Standby Lender**"), and (iii) IGIS Global Private Placement Real Estate Fund No. 530 (the "**RFCA Lender**").

[2] Capitalized terms in these submissions have the same meaning as in the Affidavit of Joo Sung Yoon, sworn October 17, 2023 [Receivership Affidavit], unless otherwise specified.

[3] Subject to certain exceptions not relevant here. In the Second Report of The Receiver Alvarez & Marsal Canada Inc., dated May 28, 2024 [Second Report], the Receiver notes that it has confirmed the validity and enforceability of the security held by the Senior Secured Lenders: para. 6.17.

is not complete, and material additional costs and time are needed to complete it.[4] These facts cannot be changed, disputed, or denied by the Coco Parties and they do not attempt to do so.

3. Tellingly, the Notice of Objection omits the pertinent facts regarding the status of the Coco Parties in this proceeding. These are:

(a) Coco International Inc. is a subordinate lender to the Project (the "**Subordinate Lender**"). The Notice of Objection is a clear breach of the contractual obligations the Subordinate Lender agreed to in the Coco Priority Agreements[5] with the Senior Secured Lenders and the Borrower (described more fully below). The execution of the Priority Agreement was a condition precedent to funding under the Credit Agreement and, as amended, remains valid and binding between the parties. Moreover, the Subordinate Lender expressly acknowledges in the Notice of Objection that it believes it is out of the money, and by the terms of the Coco Priority Agreements, cannot recover any amounts until the Senior Secured Lenders have been repaid in full.

(b) 12823543 Canada Ltd. is a limited partner in and a 50% equity holder of the corporate general partner of Mizrahi Commercial (The One) LP, one of the Borrowers under the Credit Agreement.[6] The legal interest of this entity in objecting to the SISP is not specified in the Notice of Objection. It is well-

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4 Endorsement of Osborne J., dated October 18, 2023.

5 The Coco Priority Agreements consist of an initial priority agreement executed on August 30, 2019 (the "**Priority Agreement**"), together with several subsequent amendments, referred to collectively as the "**Coco Priority Agreements**". See the Affidavit of Mark Sheeley, made June 5, 2024 ("**Sheeley Affidavit")**, Exhibits "D", "E", "F" and "G".

6 Receivership Affidavit, para. 18.

established that an equity holder has no entitlement to recover on its investment in an insolvency proceeding unless and until all secured and unsecured creditors are paid in full. No stakeholder in this proceeding has suggested that there is even a slight possibility that this could occur, given the large quantum of secured and unsecured debt that is subordinate to the Senior Secured Lenders. Given its complete lack of economic interest in this proceeding, this party has no standing or, at a minimum, its objections should be given little or no weight.

(c) The Notice of Objection does not purport to be filed on behalf of Jenny Coco personally. Yet it can be readily inferred that the objection is strongly motivated by Ms. Coco's interests as a personal guarantor both of all amounts owing to the Senior Secured Lenders and of the completion of the Project. While Ms. Coco is no doubt concerned at her very significant exposure in this capacity, the Guarantees (as described more fully below) are unlimited, unconditional and unqualified. They also contain express comprehensive waivers of any and all guarantor defences. It was on the strength of the Guarantees, among other protections, that the Senior Secured Lenders agreed to lend the very substantial sum of money to the Borrower, in which Ms. Coco is a significant investor through 12823543 Canada Ltd. The fact that the "Coco Parties'" Notice of Objection does not even refer to the Guarantees is misleading and does not paint an accurate picture of the Coco Parties' position in this proceeding and this motion.

4. The only means by which the current exposure of the Subordinate Lender could improve is if the SISP generates a transaction that would provide for recoveries in excess of the Minimum Bid Threshold, an amount that is approximately $300 million <u>less than</u> the full amount owed to

the Senior Secured Lenders but that they have indicated they are prepared to accept. There is no legal basis under the Coco Priority Agreements or otherwise for requiring the Senior Secured Lenders to bid in the SISP or to accept less than the full amount they are owed. The Coco Parties cite none. Both propositions would be antithetical to legal principles regarding the priority status and the accompanying rights of secured creditors.

5. The Senior Secured Lenders support the Receiver's position that the SISP is flexible and transparent, typical of many other similar processes approved by this Court in insolvency proceedings, and designed to thoroughly canvass the market for a wide variety of possible value-maximizing transactions. Contrary to the submissions of the Coco Parties, there is no pre-determined outcome of the SISP. There are a number of potential outcomes of the SISP that may be viable for the Senior Secured Lenders, none of which can be determined at this stage. The SISP could result in the sale of the Project, or a component of the Project (a "**Transaction Proposal**"), and/or in go-forward arrangements with developers or others (a "**Development Proposal**") to allow the construction and development of the Project to proceed without disruption. Any challenge to the Receiver's determination that a sale process is appropriate at this time, or to the SISP itself, would require this Court to second-guess the Receiver's business judgment as its Court Officer, which is entitled to a very high degree of deference.

6. Contrary to the Notice of Objection, there is no sense in which the SISP is a "sham", or a manufactured device engineered by the Receiver or the Senior Secured Lenders to generate no bids. To suggest otherwise is to imply that the Receiver is not sufficiently independent, which is baseless. Equally, the Notice of Objection aggressively impugns the Senior Secured Lenders for exercising rights that they clearly bargained for, with sophisticated counterparties, in exchange for their very substantial funding of the Project. The Senior Secured Lenders have no hidden agenda

in supporting the SISP. Their goal is to obtain what they bargained for – repayment of the very substantial indebtedness owed to them. Ms. Coco and the Coco Parties stood to benefit substantially if the Project had been successful; now that it has proved not to be, in part through their own actions, they seek to resile from the bargains that they made.

7. Approval of the SISP is in the interests of all stakeholders, including the Coco Parties and Ms. Coco, as guarantor. It is only through a process designed to fully and fairly test the market that the extent of stakeholder recoveries can be ascertained. This will also determine the extent to which recoveries for subordinate creditors might be achievable. The objections raised by the Coco Parties in the Notice of Objection should be summarily dismissed and the SISP, as proposed by the Receiver, should be approved.

PART II - SUBMISSIONS

A. Objections of the Coco Parties Should Be Disregarded

(a) Coco International Inc.

8. Coco International Inc. is one of the "Coco Parties" that purports to bring the Notice of Objection, but without specifying its role in this proceeding. Coco International Inc., defined above as the "**Subordinate Lender**", is a corporation controlled by Ms. Coco (or other related persons or entities). The Subordinate Lender is a party to a credit agreement dated August 5, 2015, and subsequently amended, pursuant to which the Beneficial Owner borrowed a principal amount of $75 million on a secured basis. The Subordinate Lender is a party to the Coco Priority Agreements with the Administrative Agent on behalf of the Senior Secured Lenders, as well as the Borrower.[7]

[7] Receivership Affidavit, paras. 72 to 73. See also Sheeley Affidavit, Exhibits "D", "E", "F" and "G". Defined terms in this section have the same meaning as in the Priority Agreement unless otherwise specified.

9. The purpose of the Coco Priority Agreements is to give effect to the first-ranking security interest of the Senior Secured Lenders. The initial Priority Agreement, which was executed on August 30, 2019, was a condition required by the Senior Secured Lenders before advancing the Senior Indebtedness. Key terms of the Priority Agreement are as follows:

(a) The Priority Agreement is entered into to induce the Senior Secured Lenders to provide the Senior Loan to the Owner of the Project, despite the existence of the Subordinated Indebtedness and Subordinate Security (Recital H).

(b) The Subordinate Lender acknowledges and consents to Senior Indebtedness, the entering into of the Senior Credit Agreement and the other Loan Documents, as well as the granting of the Senior Security (Clause 2).

(c) No consent of the Subordinate Lender is required for the Owner to complete a Commercial Sale or to enter into a Commercial Loan or grant any Commercial Security (Clause 2).

(d) The Senior Security and all advances or other extensions of credit made from time to time under the Senior Credit Agreement or in respect of the Project constitute a first-priority charge and security interest against the Collateral (subject to certain exceptions not relevant here). The Subordinate Security granted in favour of the Subordinate Lender constitutes a third priority charge and security interest against the Collateral (Clause 4).

(e) The Subordinate Lender subordinates and postpones the Subordinate Security and Subordinate Indebtedness in all respects to the Senior Security and Senior Indebtedness. The Senior Indebtedness secured by the Senior Security must be paid in full before the Subordinate Lender is entitled to be paid or receive anything with respect to the Subordinate Indebtedness (Clause 6).

(f) The subordination and postponement of the Subordinate Indebtedness is effective notwithstanding (among other things):

(i) The commencement of any Enforcement Action or Insolvency Proceeding in respect of the Registered Owner, the Beneficial Owner or the Collateral;

(ii) The respective dates or timing of any advances or defaults under the Senior Indebtedness, including all advances or other extensions of credit made by the Senior Lender and Lenders from time to time, whether such advances or extensions of credit occurred before, during or after the occurrence of any default under the Senior Security or Senior Credit Agreement;

(iii) Whether any or all of the loan advances or other extensions of credit made by the Senior Lender reflect or comprise monies advanced to fund overruns in the cost of constructing the Project, to service debt or to fund cash shortfalls attributable to the Project;

(iv) Whether loan advances or other extensions of credit have been made by the Senior Lender in excess of the facilities provided for in the Senior Credit Agreement or the Senior Security (Clause 9).

10. Additionally, under Clause 13, the Subordinate Lender agreed that, in the event that the Senior Credit Agreement or the Senior Security is in default, no actions, steps or proceedings can be taken by or on behalf of the Subordinate Lender that might negatively or detrimentally impact upon the Senior Secured Lenders' ability to expeditiously complete the development, construction and management of the Project and/or which might restrict, inhibit, hinder or delay the sale and closing of any portion of the Commercial Property or the individual condominium unit sale transactions in respect of the Condominium Project by or on behalf of the Senior Lender.

11. Further, under clause 14 of the Priority Agreement, the Subordinate Lender has agreed not to take any step or action whatsoever directed at delaying, defeating, impairing or diminishing the priority, validity or enforceability of the Senior Credit Agreement, the Senior Security or the rights

of the Senior Lender, including any Enforcement Action. Moreover, the Subordinate Lender, has expressly agreed not to challenge, object to, compete with or impede in any manner any Enforcement Action commenced or taken by the Senior Lender in connection with the Senior Indebtedness, the Senior Credit Agreement, the Senior Security or any part of the Collateral.

12. "Enforcement Action" is defined in clause 1(d) to mean:

> the exercise of <u>any remedy</u> available to … the Senior Lender and shall include the commencement of power of sale, foreclosure or other judicial or private sale proceedings, appointing or applying for, or obtaining or consenting to the appointment of a receiver … or the exercise of any other rights or remedies available to a creditor under its security or otherwise at law or in equity, including any bankruptcy or insolvency proceedings, or any participation in or any actions in furtherance of the foregoing. (emphasis added)

13. Finally, pursuant to clause 23 of the Priority Agreement, in the context of an insolvency involving the Registered Owner, the Beneficial Owner and the Collateral, until the Senior Indebtedness is paid in full, the Subordinate Lender will not seek any relief or file any motion, application or other action in respect of the Collateral or the Registered or Beneficial Owner without the prior written consent of the Senior Secured Lenders.

14. The objections raised in the Notice of Objection by the Subordinate Lender to the SISP fall squarely within these prohibitions, not to mention that they are fundamentally inconsistent with the deeply subordinated position of the Subordinate Lender. Moreover, unless and until all of the Senior Indebtedness owed to the Senior Secured Lenders has been repaid, the Subordinate Lender has no economic stake in this proceeding that would support its status to raise objections to the SISP or any other step taken by the Receiver or the Senior Secured Lenders to generate recoveries from the Project.

15. Ironically, despite the objections of the Subordinate Lender to the SISP and the Coco Parties' submissions that suggest that it would be preferable not to incur the costs of the SISP at all,[8] it is only through the SISP that there is any hope at all that recoveries might exceed the value of the indebtedness owed to the Senior Secured Lenders. Without the SISP, the Subordinate Lender is simply an "out of the money" creditor seeking to drive the bus from the back seat, contrary to the commitments it freely made to the Senior Secured Lenders and contrary to the business judgment of the Court-appointed Receiver.

(b) 12823543 Canada Ltd. Has No Status

16. 12823543 Canada Ltd. also purports to join in the Notice of Objection in its capacity as a "Coco Party" but without indicating its role in this proceeding.

17. Based on the evidence already in the record, 12823543 Canada Ltd. is merely an equity holder. It is a limited partner in Mizrahi Commercial (The One) LP, one of the Borrowers under the Credit Facility (also referred to as the Beneficial Owner). It is also a 50% equity holder of the corporate general partner of the Beneficial Owner.[9]

18. It is a fundamental principle that, in an insolvency, equity holders are not entitled to any recovery in circumstances where all creditors are not being paid in full.[10] In the current circumstances, it is anticipated that all secured creditors will not be paid in full, let alone unsecured

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[8] Notice of Objection, paras. 7 and 29.

[9] Receivership Affidavit, paras. 17-18.

[10] This principle applies both under statute (see ss. 2, 60(1.7) and 140.1 of the *Bankruptcy and Insolvency Act*, RSC 1985, c. B-3, as amended) and at common law. See, for example, *All Canadian Investment Corporation (Re)*, 2020 BCSC 855 at paras. 45-47, citing *Bul River Mineral Corp. (Re)*, 2014 BCSC 1732 at para. 65.

creditors, given the amount of subordinate secured indebtedness ranking behind the indebtedness owed to the Senior Secured Lenders.

19. The legal basis on which 12823543 Canada Ltd., in its capacity as equity holder of one of the Borrowers, purports to object to the SISP, which is designed to determine whether any recovery will be available to creditors other than the Senior Secured Lenders and can have no impact whatsoever on the interests of equity holders, is not specified in the Notice of Objection. There is no such basis.

(c) Disguised Objection by the Guarantor

20. Both Ms. Coco and Mr. Sam Mizrahi are personal guarantors (the "**Guarantors**") of all amounts owing to the Senior Secured Lenders pursuant to the debt guarantee (the "**Debt Guarantee**"). Each of the Guarantors has also agreed to guarantee the completion of the Project pursuant to a cost overrun and completion guarantee (the "**Completion Guarantee**") (together, the "**Guarantees**").[11]

21. Although Ms. Coco, in her capacity as Guarantor, is not specifically identified as a party to the Notice of Objection, the failure to include her as one of the "Coco Parties" is disingenuous. Many of the unsupported objections raised by the Coco Parties in the Notice of Objection – such as suggesting that the Senior Secured Lenders are required to credit bid in the SISP, or to immediately sell the Project to a third party without "floor price" and without incurring further construction costs or to otherwise refrain from asserting rights in their capacity as priority-ranking secured creditor – are designed to require the Senior Secured Lenders to accept less than the full

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[11] Sheeley Affidavit, Exhibits "B" and "C".

amount owing to them and to exit this proceeding. This is a thinly disguised attempt to cap the liability owed by Ms. Coco in her capacity as Guarantor under the Guarantees and is contrary to the terms of those Guarantees.

22. The Guarantees are, by their terms, unlimited, unqualified and unconditional. If the Guarantors had intended liability to be capped at a certain level of indebtedness, the Guarantors could have sought to negotiate such a cap and to the extent that such a cap was not available, could have refused to enter into both Guarantees. They did not do so, presumably because the execution of the Guarantees was one of the conditions required by the Senior Secured Lenders before they incurred the credit risk associated with funding the Project and because both Guarantors stood to benefit personally if the Project was successful.

23. Specifically, key provisions of the Debt Guarantee are as follows:[12]

(a) The Debt Guarantee was granted by the Guarantors "in order to induce the Lenders…to enter into the Credit Agreement" (Recital B).

(b) The obligations of each of the Guarantors are as principal debtor and not as surety (Clause 1.3).

(c) Each of the Guarantors "unconditionally and irrevocably guarantees … the due and punctual payment and performance when due of <u>all debts, liabilities and obligations of or owing by the Borrower to the Secured Parties at any time and from time to time</u> … arising from all agreements, undertakings and contracts from time to time in force between the Borrower and the Secured Parties, in respect of or contained

[12] Sheeley Affidavit, Exhibit "B".

in the Credit Agreement and all other Loan Documents…" (Clause 2.1 (emphasis added)).

(d) On a Borrower default, the Guarantors shall "unconditionally render any such payment or performance upon demand…" (Clause 2.2(a)).

(e) Nothing but payment and satisfaction in full of the Guaranteed Obligations shall release the Guarantors from their obligations under the Guarantee (Clause 2.2(b)).

(f) The only condition necessary for the Guarantors to honour their obligations under the Guarantee shall be written demand to the Guarantors following the occurrence or continuation of an Event of Default. "This Guarantee shall be a continuing guarantee, <u>shall cover all the Guaranteed Obligations, and shall apply to and secure any ultimate balance due or remaining unpaid to the Secured Parties</u>" (Clause 2.3(a) (emphasis added)).

(g) The liability of the Guarantors shall continue and be binding on the Guarantors until all the Guaranteed Obligations are fully paid and satisfied and regardless of (among other things): (i) any amendment, supplement, restatement, extension, renewal or replacement of this Guarantee or any other Loan Document (Clause 2.3(b)(i)).

(h) The Guarantee is not terminated or affected, or any rights of any Secured Party prejudiced by (among other things) the bankruptcy, insolvency, winding-up, liquidation or dissolution of the Borrower (Clause 2.4(a)).

(i) The Guarantors agree that the manner in which the Secured Parties have dealt with the Borrower, the Guarantors or any other Credit Party will have no effect on the

Guarantors' continuing liability under the Guarantee and the Guarantors waive any rights to allege otherwise (Clause 2.4(c)).

(j) All moneys, advances, renewals and credits actually borrowed or obtained from the Administrative Agent and the other Secured Parties by the Borrower pursuant to the Credit Agreement shall be deemed to form part of the Guaranteed Obligations notwithstanding any lack or limitation of status or power of the Borrower or of its directors, or any irregularity, defect or informality in the borrowing or obtaining of such moneys, whether known to the Secured Parties or not (Clause 3.1).

(k) The Guarantors also expressly waive numerous defences, to the fullest extent permitted by law, including:

(i) Any defence based on the lack of authority of the Borrower (Clause 6.1(a));

(ii) Any defence based on any Secured Party's present or future method of dealing with the Borrower (Clause 6.1(a));

(iii) All suretyship defences and rights of any nature otherwise available under Ontario law and the laws of any other jurisdiction (Clause 6.1(e)); and

(iv) All other rights and defences (legal or equitable) the assertion or exercise of which would in any way diminish the liability of the Guarantors under the Guarantee (Clause 6.1(f)).

(l) The Administrative Agent, on instructions of the Required Lenders, may take numerous steps as it may see fit, on such terms as it deems appropriate, without notice to the Guarantors and without affecting the liability under the Guarantee, including (among other things): (i) granting time, renewals, extensions, indulgences, etc.; and (ii) continuing to give credit or make loans or advances to the Borrower (Clause 6.3).

24. The Completion Guarantee is similarly broad, unlimited and unconditional. The Completion Guarantee was a condition precedent to any initial drawdown under the Credit Facility by the Borrower. Pursuant to the Completion Guarantee, the Guarantors agreed to do or cause to be done all things necessary to complete construction of the Project and to pay any Cost Overruns. All defences are expressly waived.[13] The Completion Guarantee remains in full force and effect until payment in full of all Obligations and completion of the Project[14].

25. It is well-established that such comprehensive waivers of defences by a guarantor – whether the guarantor is a commercial party or an individual – are legally effective in accordance with their terms.[15] The objections raised in the Notice of Objection seek to do indirectly what Ms. Coco is not entitled to do directly in her capacity as Guarantor – namely, limit the indebtedness owed to the Senior Secured Lenders (and therefore the exposure under the Guarantees) or otherwise cap liability under the Guarantees before the Project is completed.

B. The Notice of Objection is Antithetical to the Rights of Secured Creditors

26. The Senior Secured Lenders fully endorse the submissions of the Receiver in support of the SISP and in response to the Notice of Objection of the Coco Parties. The Senior Secured Lenders make the following additional submissions.

(a) The "Sham" Argument

27. All of the objections to the effect that the SISP is a "sham", a product of alleged collusion between the Receiver and the Senior Secured Lenders, and that it is deliberately engineered to

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13 Sheeley Affidavit, Exhibit "C", Recital C, clause 2.1, 3.2 and 3.6.

14 Sheeley Affidavit, Exhibit "C", clause 5.1.

15 *Manulife Bank of Canada v. Conlin*, [1996] 3 SCR 415 at para 4.

generate no bids are without merit. The Senior Secured Lenders bargained for their first-priority position and they lent a very substantial amount of money to the Project on the strength of those protections. Their principal objective in this proceeding is to be repaid, whether that is the result of a Transaction Proposal involving a sale to a third party, a Development Proposal that would result in the construction of the Project and the realization of value at the end of that process, or some other value-maximizing transaction.

28. In that regard, there is no obligation of the Senior Secured Lenders to credit bid in the SISP or to participate in the SISP as a bidder at all.[16] The Coco Parties state baldly that "it is well accepted" that this is required, but they have pointed to no case law suggesting such a proposition because such a case does not exist. The Coco Parties have no status in this proceeding to dictate the manner in which the Senior Secured Lenders achieve repayment of their indebtedness or to dictate the manner in which the value of the Collateral is maximized in order to secure such repayment. Nor is there any basis to suggest that the Court-appointed Receiver, in exercising oversight over the Project and value maximization, is somehow a puppet of the Senior Secured Lenders in this process against its better judgment.

29. The Senior Secured Lenders are not seeking to block a sale of the Project. To the contrary, they would be happy to have another party acquire the Project and repay them. They would also be happy to have the Subordinate Lender buy out the Senior Secured Lenders' first-ranking debt, or to have the Guarantors satisfy their obligations under the Guarantees. However, they are not required under any of the relevant agreements to accept less than full repayment, particularly at the insistence of subordinate creditors, equity holders or guarantors seeking to cap their exposure

[16] Notice of Objection, para. 13-14.

despite the contractual terms they agreed to. Despite being under no obligation to do so, they are prepared to accept 20% less than their indebtedness at this stage in order for the SISP to be transparent to Potential Bidders (as discussed further below). In its business judgment, the Receiver has agreed, with the support of the Senior Secured Lenders, that it is appropriate to test the market on this basis.

30. Facilitating the construction of the Project through a Development Proposal and realizing on their Collateral in that manner is a viable option open to the Senior Secured Lenders, with the oversight of the Receiver. Again, the Coco Parties point to no authority suggesting otherwise. In this regard, it is noteworthy that the terms of the Security Documents expressly confer a wide variety of options to enforce their security on the Senior Secured Lenders, including a sale of the Collateral but also including the operation of the business.[17] It is equally well-accepted that a Receiver, where it is determined to be appropriate for the purpose of maximizing value, is entitled to operate the business of the debtor.[18] The Receivership Order expressly so provides.[19]

31. The Coco Parties suggest that there is something improper about treating the Senior Secured Lenders as the fulcrum creditor.[20] Yet they do not deny the very substantial indebtedness owed to the Senior Secured Lenders on a first priority basis, acknowledging at the same time their belief that the Coco Parties are out of the money.[21] It is well-accepted that, in a receivership of this

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[17] See *e.g.*, Receivership Affidavit, Exhibit "K", GSA, clause 3.3(f), and Exhibit "M", Demand Debenture, clauses 14(c), 14(k) and 19(a)(ii).

[18] *Halsbury's Laws of Canada* – Receivers and Other Court Officers, "Specific Powers of the Receiver – Operation of Business" (2021 Reissue), HRC-72.

[19] Receivership Order, para. 4(c).

[20] See *e.g.*, Notice of Objection, para. 29.

[21] Notice of Objection, para. 31.

nature, the senior secured creditor is entitled to have considerable input into the process, particularly where it is believed that subordinate creditors are out of the money. Moreover, this Court has very recently recognized the economic incentives of a fulcrum creditor to maximize value, as well as the great caution with which this Court should scrutinize the objections of out-of-the-money stakeholders.[22]

(b) Minimum Bid Threshold Is Helpful, Not Harmful

32. The Coco Parties argue that the Minimum Bid Threshold that applies to a Transaction Proposal is harmful and improper, stating that "it is a certainty" that this bid floor will result in no qualified bids.[23] However, it is common for a sale process to signal to bidders that a successful bid will have to be acceptable to a first-ranking secured creditor, and in some cases, pay out that creditor, given that the debtor's assets are fully encumbered in favour of that creditor (and any subordinate secured creditors).[24] This ensures transparency to bidders who are considering whether to invest the time and money in preparing a bid.

33. The $1.2 billion Minimum Bid Threshold represents approximately 80% of the claims of the Senior Secured Lenders and already represents a material concession by the Senior Secured Lenders.[25] There is no entitlement by the Coco Parties to require the Senior Secured Lenders to accept less. If no Successful Bid in the form of a Transaction Proposal is received, the Secured

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22 *KingSett Mortgage Corporation v. 30 Roe Investments Corp.*, 2023 ONSC 3323 at para. 84.

23 Notice of Objection, paras. 4 and 8.

24 See *e.g.*, Sale and Investment Solicitation Process for Trichome Financial Corp. et al, approved by order dated January 9, 2023; Sale and Investment Solicitation Process for King Street Company, et al, clause 29, approved by order dated November 13, 2020. See also the examples cited in the Receiver's Factum.

25 Second Report, para. 6.18. The claims of the Senior Secured Lenders include both principal and interest under the Receivership Funding Credit Agreement, as well as amounts owing under the Credit Agreement (pre-receivership), as set out in more detail at para. 6.16 of the Second Report.

Lenders are committed to facilitating the continued construction of the Project to completion through a Senior Secured Creditor Transaction.[26]

34. This reserve bid mechanism is, in the current circumstances, helpful to the process as it signals to potential bidders that the Senior Secured Lenders are prepared to consent to a Transaction Proposal that does not fully repay the amounts owing to them. This ensures that bidders are not frightened off by the potential for the Senior Secured Lenders to credit-bid the full amount of the Senior Secured Indebtedness, as the Receiver has noted in its Second Report.[27] At the same time, it does not mislead potential bidders who might otherwise invest the time and money to submit a much lower bid in the hope that the Senior Secured Lenders are prepared to negotiate to receive such lower amount.

35. Whether the Minimum Bid Threshold is expressly signalled to bidders or not, the Senior Secured Lenders cannot be required at this stage to take less than that amount in repayment of their indebtedness. Unless a purchase price is received by the Senior Secured Lenders for the full amount of their indebtedness, there can be no recovery for any subordinate creditors, including the Subordinate Lender. Nor is there any legal basis for a release of the Guarantees. Thus, the Minimum Bid Threshold has no impact on either the recovery of the Subordinate Lender or the exposure of the Guarantors.

36. In addition and in any event, the Receiver, after consultation with the Senior Secured Lenders and JLL, has the right to modify the existing terms, conditions or requirements for the SISP, or adopt such other terms, conditions or requirements for the SISP that in the Receiver's

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[26] Second Report, para. 6.19.

[27] Second Report, para. 6.28(iii).

reasonable business judgment will better promote the SISP. Material deviations from the SISP require the consent of the Senior Secured Lenders or an order of the Court.[28] Thus, if any term of the SISP requires adjustment based on the response of the market, the Receiver has the flexibility to do so, subject to consultation and, where required, consent of the Senior Secured Lenders.

37. For all of the reasons above, the Senior Secured Lenders submit that the objections of the Coco Parties should be dismissed. The Notice of Objection is a clear play for leverage from an out-of-the money creditor, an equity holder and a guarantor. Giving effect to these objections would be to sanction a violation of contractual commitments made by these parties when they stood to gain from the credit risks assumed by the Senior Secured Lenders. Doing so would also turn bedrock principles of secured creditor rights on their head.

38. The SISP is not a sham; it is an appropriately designed mechanism to test the market and to determine whether any stakeholder in this proceeding, other than the Senior Secured Lenders, has an economic stake in its outcome. Even if the SISP establishes that the Senior Secured Lendres are the only stakeholders with an economic interest, it is also possible that it identifies a transaction that provides incremental value or benefits to the Senior Secured Lenders, and potentially other stakeholders. Regardless of the outcome of the SISP, any transaction or other solution will be implemented under the full oversight of the Receiver and this Court. The SISP should therefore be approved on the terms proposed by the Receiver.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 5th day of June, 2024.

Osler, Hoskin & Harcourt LLP

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28 Second Report, para. 6.25(ii).

SCHEDULE A – LIST OF AUTHORITIES

A. Jurisprudence

1. *All Canadian Investment Corporation (Re)*, 2020 BCSC 855

2. *Bul River Mineral Corp. (Re)*, 2014 BCSC 1732

3. *KingSett Mortgage Corporation v. 30 Roe Investments Corp.*, 2023 ONSC 3323

4. *Manulife Bank of Canada v. Conlin*, [1996] 3 SCR 415

B. Orders

5. *King Street Company Inc. (Re)* (13 November 2020), Ont Sup Ct J [Commercial List] CV-20-00650945-00CL (Order (Sale Process Approval))

6. *Trichome Financial Corp (Re)* (9 January 2023), Ont Sup Ct J [Commercial List] CV-22-00689857-00CL (Stalking Horse and SISP Approval Order)

C. Secondary Sources

7. *Halsbury's Laws of Canada* – Receivers and Other Court Officers, "Specific Powers of the Receiver – Operation of Business" (2021 Reissue), HRC-72.

SCHEDULE B – LEGISLATION

***Bankruptcy and Insolvency Act*, RSC 1985, c. B-3, as amended**

Definitions

2 In this Act,

equity claim means a claim that is in respect of an equity interest, including a claim for, among others,

(a) a dividend or similar payment,

(b) a return of capital,

(c) a redemption or retraction obligation,

(d) a monetary loss resulting from the ownership, purchase or sale of an equity interest or from the rescission, or, in Quebec, the annulment, of a purchase or sale of an equity interest, or

(e) contribution or indemnity in respect of a claim referred to in any of paragraphs (a) to (d);

equity interest means

(a) in the case of a corporation other than an income trust, a share in the corporation — or a warrant or option or another right to acquire a share in the corporation — other than one that is derived from a convertible debt, and

(b) in the case of an income trust, a unit in the income trust — or a warrant or option or another right to acquire a unit in the income trust — other than one that is derived from a convertible debt;

Payment — equity claims

60(1.7) No proposal that provides for the payment of an equity claim is to be approved by the court unless the proposal provides that all claims that are not equity claims are to be paid in full before the equity claim is to be paid.

Postponement of equity claims

140.1 A creditor is not entitled to a dividend in respect of an equity claim until all claims that are not equity claims have been satisfied.

KEB HANA BANK as trustee of IGIS GLOBAL PRIVATE PLACEMENT REAL ESTATE FUND NO. 301 and as trustee of IGIS GLOBAL PRIVATE PLACEMENT REAL ESTATE FUND NO. 434 Applicant	and	**MIZRAHI COMMERCIAL (THE ONE) LP, et al.** Respondents	Court File No: CV-23-00707839-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

PROCEEDING COMMENCED AT TORONTO

WRITTEN SUBMISSIONS OF THE SENIOR SECURED LENDERS (SISP Approval Order)

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