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 PLACEMEN 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

DOCUMENT BRIEF OF THE RECEIVER

(*Case Conference March 24,2025 re: MI Payment Motion and Receiver's Cross-Motion*)

March 20, 2025

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RESPONDING AFFIDAVIT OF SAM MIZRAHI

I, Sam Mizrahi, of the City of Toronto, in the Province of Ontario SOLEMNLY AFFIRM:

1. I have reviewed the Receiver's Fifth Report, dated October 11, 2024 (the "Fifth Report") and I have affirmed this affidavit to respond to the statements and positions of the Receiver therein. Capitalized terms used below are the same as those defined in my affidavit sworn February 27, 2024, or as defined in the Fifth Report, unless otherwise noted.

1. The Receiver's Interpretation of Paragraph 17 of the Receivership Order

2. This proceeding in part concerns the interpretation of paragraph 17 of the Receivership Order. While I understand that the interpretation of paragraph 17 is a matter for the Court to decide, I am very surprised by the interpretation of paragraph 17 proposed by the Receiver in the Fifth Report. The Receiver's proposed interpretation is entirely

inconsistent with the Receiver's communications to me during my many interactions with representatives of the Receiver. It is also inconsistent with the explicit statements of the Receiver's delivered to MI and third parties after the Receivership Order was granted and later in February 2024 when MI was terminated from the Project as general contractor.

3. I understand the Receiver to argue that paragraph 17 of the Receivership Order only restrains providers of services to the Project from discontinuing those services if the Receiver has paid the supplier in accordance the "normal payment practices", on the basis of some other agreement with the Receiver, or by order of the court. The Receiver calls these the "Payment Options". As noted, the option of discontinuing services was never communicated to MI; rather the interpretation now advanced by the Receiver is entirely inconsistent with the statements and communications made to me in person and in writing by the Receiver.

4. Following the granting of the Receivership Order, I had many meetings with representatives of the Receiver, including Josh Nevsky and Stephen Ferguson, and Andrew Sterling. I thought we had worked together well to ensure that construction on the Project continued despite the interruption caused by the Receivership. They would attend the MI office (often weekly) in November, December, January, February and March to meet with me and the MI team while they were getting up to speed on the Project.

5. In and around November and December 2023, I met with the Receiver to discuss and later negotiate MI's claim for payment at issue in this motion. During those meetings, the Receiver acknowledged what it refers to as the Payment Practices in the Fifth

Report being paid historically to MI. The Receiver was looking to reach agreement to reduce these payments.

6. In November 2023, I met with Josh Nevsky, Stephen Ferguson, and Andrew Sterling, and other representatives of the Receiver. During these meetings, I was explicitly told that the Receiver will refuse to pay MI's claim for time-based labour rates but will agree to pay MI a 5% CM Fee. They did in fact pay MI a 5% CM Fee. In addition, I was explicitly advised that MI was required to continue to provide services to the Project under the terms of the Receivership Order. While I am uncertain whether any reference to paragraph 17 was made, I am confident that the Receiver took the position that MI was obligated by court order to continue to provide services to the Project notwithstanding the dispute with respect to MI's payment and the negotiations to attempt to reach a compromise of what MI would be paid. The Receiver was clear MI was prohibited from terminating or ceasing to perform its contractual obligations on the Project. This communication was as memorialized in the Receiver's letters reviewed below and appended as **Exhibit A** and **Exhibit C** to my affidavit.

7. I believe this meeting is the same meeting referred to in paragraph 7.15 of the Receiver's Fifth Report. As noted in that paragraph, the Receiver took the position at that time that MI's involvement in the Project was important to ensure that construction continued. MI agreed with the Receiver on the importance of construction continuing and MI agreed to continue to provide services while the parties attempted to negotiate a resolution, and, failing agreement, have the issue determined by the Court.

8. At no time did the Receiver suggest that MI was free to discontinue services to the Project because the Receiver was looking to pay less than the historic and normal

payment practices of the Project. I understood, based upon the court order, the Receiver's letter (referred to below), and as advised by the Receiver that discontinuing services was not an option, as that would put MI (and other suppliers of goods and services) offside the language of the Receivership Order. In fact, I was specifically told by the Receiver and its counsel at Goodmans, Mr. Brendan O'Neill, that if MI brought a proceeding to enforce its entitlement to fees pursuant to paragraph 17 of the Receivership Order that MI would be terminated from the Project. Mr. O'Neill did not advise me that MI had the option of ceasing work on the Project due to the fee dispute.

9. Following the granting of the Receivership Order, the Receiver circulated a letter to all suppliers for the Project. Attached as **Exhibit A** is a copy of the letter dated October 20, 2023. The letter states the following with respect to the obligation to continue to provide services to the Project:

> **Pursuant to the Receivership Order**, **all persons having oral or written agreements are required to continue supplying goods and services** to The One Project, **and are prohibited from discontinuing or terminating the supply or any such goods and services.** All contractors and trades are required to continue providing goods and services **and will continue to be paid in the ordinary course. [emphasis added]**

10. This statement was entirely consistent with my understanding of the meaning of paragraph 17 of the Receivership Order and reflected what I was told in conversations with Messrs. Nevsky, Ferguson and Sterling. Not only was it my understanding that all suppliers of goods and services were restrained from discontinuing services to the Project and were entitled to be paid for those services in accordance with the Project's normal payment practices, but I had specifically negotiated for these protections in the

Receivership Order, which provided in paragraph 6 for payment to MI of its outstanding invoices at that time, which included a 5% CM Fee on Project hard costs.

11. Attached as **Exhibit B** is a copy of a draft Receivership Order, which I understand from MI's former counsel Mr. Roger Jaiparagas and verily believe, was provided to him by counsel for the Senior Secured Lender on or about October 13, 2022. The draft Receivership Order with tracked changes shows that paragraph 6 of the Receivership Order was specifically negotiated. It, along with paragraph 17, concerns MI's right to be continued to be paid.

12. MI cooperated with the Receiver to ensure an orderly transition throughout the Receivership. It actively engaged with the Receiver to ensure that the Project would be a success. The Receivership was needed because of a governance dispute between the beneficial owners of the Project caused by Coco's refusal to sign renewals for the Senior Secured Lender's loans. Given the assurances I received that MI would continue to be paid in the normal course so long as it continued to provide services to the Project, I supported the Receivership Order.

13. I note that my understanding of the meaning of paragraph 17 of the Receivership Order is also consistent with the findings of Justice Osborne in his Endorsement granting the application to create a receivership – an application that was supported by MI and me personally as a beneficial owner and guarantor to the Project. Justice Osborne held at paragraph 62 of his endorsement:

> Finally, the draft receivership order contemplates certain protections being extended to the Developer as set out in the motion materials. These include, for example, a limited stay, and an order that any supplier be restrained from

discontinuing goods or services during the receivership provided that, with respect to post-filing supplied, the Developer continues to pay for those goods or services.[1]

14. Taken together, I had understood that the Receivership Order required the Receiver to continue to pay all suppliers to the Project in accordance with the normal payment practices of the Project. The Receiver specifically told me that MI was obligated to continue to provide services to the Project. My lawyers specifically negotiated protections for MI in addition to paragraph 17 so that it would continue to get paid in accordance with the normal payment practices. After the Receivership Order was granted, Justice Osborne's Endorsement supported my understanding of the Receiver's obligation to pay in accordance with the normal payment practices (and MI's obligation to pay sub-trades as well). Finally, the Receiver never once told me or anyone at MI that MI would be free to cease or terminate its services because it was not being paid in accordance with the normal payment practices of the Project.

15. Given the Receiver's position that MI's claim to fees is not commercially reasonable, I do not understand what MI could have done in November 2023 when the payment dispute began. Had MI sought to discontinue its services at that time and simply stopped working because of the payment dispute, the Receiver would have claimed MI was in breach of the court order. In addition, the Project would have been thrown into turmoil. As noted, notwithstanding MI's payment dispute with the Receiver, I was explicitly told that MI was obligated to continue to provide services to the Project.

16. Obviously, MI and the Receiver did not resolve MI's claim to payment pursuant to paragraph 17 and I believe this was the reason why MI was terminated from the

[1] *KEB Hana et al v Mizrahi Commercial (The One) LP et al*, 2023 ONSC 5881 at para 62.

Project. I note that the interpretation of paragraph 17 of the Receivership Order as requiring MI to continue to provide services to the Project and requiring the Receiver to pay suppliers to the Project in accordance with normal payment practices is consistent with the interpretation of the Receivership Order communicated by the Receiver in its February 26, 2024 letter to Project suppliers. This letter was delivered when the Receiver decided to terminate MI from the Project. The Receiver and Goodmans made good on their threat to terminate MI after MI advised it would seek to enforce the Receivership Order. In the Receiver's February 26, 2024 letter it wrote:

> **Pursuant to paragraph 17 of the Receivership Order, all persons having oral or written agreements or mandates for the supply of goods and/or services to The One Project, are restrained form discontinuing or terminating the supply of any such goods and services. This means that all contractors, trades and other suppliers to The One Project, including those having contractual arrangements with Mizrahi Inc., are required to continue providing goods and services, and will continue to be paid in the normal course pursuant to the terms of the Receivership Order.**
>
> […]
>
> During the immediate period and before arrangements are made directly with SKYGRiD, the Receiver requires all contractors, trades, suppliers, and other persons to continue to perform under existing contracts in accordance with the terms of the Receivership Order.
>
> […]
>
> **Payments will continue to be funded by the Receiver on a monthly basis in the normal course pursuant to the terms of the Receivership Order.**
>
> […]
>
> **4. Can I terminate my contract with The One Project?**
> No. Pursuant to paragraph 16 of the Receivership Order, all contractors and trades are prohibited from terminating or ceasing to perform any contract in respect of The One Project. **Further, pursuant to paragraph 17 of the Receivership Order, all persons having oral or written agreements or mandates for the supply of goods and/or services relating to The One Project are restrained from**

discontinuing or terminating the supply of any such goods and services. [emphasis added]

A copy of the Receiver's letter dated February 26, 2024 is attached as **Exhibit C**.

17. The Receiver now takes the position contrary to its February 26, 2024 letter that paragraph 17 of the Receivership Order permitted MI to cease or terminate its involvement on the Project as of November 2023 because it was not paid in accordance with the normal payment practices of the Project. As noted, not only was this never communicated to MI, but I was told explicitly by the Receiver that MI had to continue to provide general contracting services to the Project. As a result, I negotiated in good faith to see if a compromise on MI's entitlement to fees could be reached or if recourse would have to be sought from the court.

18. Had the Receiver advised MI of its interpretation of paragraph 17 of the Receivership Order now advanced in its Fifth Report, MI would not have performed any services for the Project. Presumably other suppliers would not have provided any services to the Project as well. Instead of being forthright, I feel the Receiver manipulated me and MI. It mislead me on its intentions with respect to MI to induce MI to negotiate a compromise without the benefit of the knowledge that if a compromise was not reached, the Receiver would take the position MI was to be paid no more than what Receiver had unilaterally decided to pay because MI did not cease or terminate its services from the Project. In fact, now the Receiver claims that MI was overpaid, even during the Receivership when it had complete knowledge of the historical payment practices and underlying contractual documents.

19. To be clear, I acknowledge that the Receiver was well within its rights to terminate MI as general contractor. That is what it should have been done immediately upon realizing that it disagreed with the normal payment practices of the Project. Instead, it 'strung along' MI until it was in a position to install a replacement general contractor.

20. It was not until the delivery of the Fifth Report that I understood the unique interpretation of paragraph 17 proposed by the Receiver. I relied on its representations to me in our meetings and the statements set out in its letters that paragraph 17 required MI and other suppliers to continue to provide services to the Project.

21. Not only has the Receiver contradicted itself with this new interpretation of paragraph 17 of the Receivership Order, but it now advances incredibly broad, unjust, and spurious claims against MI, many of which have already been subject to litigation between me and my related companies (the "Mizrahi Parties") and the co-beneficial owner of the Project, Ms. Jenny Coco ("Coco" or the "Coco Parties").

22. It is true that the Mizrahi Parties and the Coco Parties had an acrimonious relationship which resulted in a lot of litigation through private arbitration. The Receiver's Fifth Report in many ways revisits old arguments advanced by Coco that were either rejected or abandoned in the course of the various private arbitrations.

23. The Receiver's Fifth Report has significantly and permanently damaged both MI's and my own reputation and interests. The claim that I self-dealt and overcharged the project more than $58 million has predictably attracted media attention. Yet the fact all of MI's charges to the Project were clearly invoiced and agreed to and paid for predictably does not garner attention.

24. MI is not a big company, but it is bigger than many of the suppliers to the Project. I am particularly disturbed by the Receiver's methods and actions in responding to MI's claim for the payment of its fees pursuant to paragraph 17 of the Receivership Order. Despite the Receiver having the undisputed power to terminate MI with 15 days' notice from the date of the Receivership, it effectively held MI hostage. It was only when MI sought to enforce its entitlement pursuant to paragraph 17 that MI was terminated and now faces a counterclaim for over $58 million for payments made to MI which were universally approved from the outset of the Project by all relevant parties up until August 2022, and at all times all payments were approved by the Senior Secured Lender, its Administrative Agent and Altus. The Receiver seeks to reach back years and undo what all parties agreed to do and did.

25. The Fifth Report in my estimation evidences what I believe to be unfair treatment by the Receiver throughout this proceeding.

2. All Parties Knew, Understood and Agreed that the Project was Operating on a Cost-Plus Basis

26. The Receiver wrongly claims that MI was overpaid by the Project for construction management fees and time-based labour and relies on the provisions of a May 14, 2019 CCDC2 Stipulated Price Contract (the "CCDC2 Contract"), which provided for total costs of the Project of $583,164,100, plus applicable taxes, and that MI would be paid for its work as general contractor based on the proportionate amount of completion of the Project on a monthly basis. The CCDC2 Contract is found at Exhibit

C to the affidavit of Mark Kilfoyle affirmed February 27, 2024 (the "2024 Kilfoyle Affidavit").

27. While MI acknowledges that the CCDC2 Contract purports to be a fixed price contract, which, if followed, specified MI's entitlement to fees to be based on a proportionate percentage of completion with a completion date of December 31, 2022, all parties knew, understood and agreed that the Project was being constructed and developed on a cost-plus basis. The Receiver appears to acknowledge in paragraph 9.25 of its Fifth Report that "the Debtors and MI do not appear to have followed [the CCDC2 Contract] payment terms". What the Receiver conveniently disregards is that the Coco Parties, the Senior Secured Lender, its Administrative Agent and Altus knew, understood and agreed that the Debtors' obligation to pay and MI's entitlement to fees were not based upon the CCDC2 Contract payment terms.

28. The "Payment Practices" as defined by the Receiver in its Fifth Report were not secret. They were understood by everyone and they were implemented without exception each and every month from the beginning of the Project.

29. As noted, the CCDC2 Contract was signed May 14, 2019. It is substantially similar to the first CCDC2 Stipulated Price Contract signed in 2014. It appointed Altus as the Consultant to the Senior Secured Lender. The CCDC2 Contract states that Altus was to verify MI's request for the payment of fees based on the percentage of completion of the building. Furthermore, the CCDC2 Contract states that MI was to provide the labour, products, and services for the completion of the Project as part of its compensation, i.e. MI was not to charge separately for labour.

30. This process never occurred – not once.

31. None of the parties followed the contract and it does not govern MI's entitlement to be paid by the Project at the fixed price. MI was never paid a construction management fee based on the percentage of completion of the Project. Altus never verified or was asked to verify the percentage of completion to determine MI's entitlement to a CM Fee. MI always charged and was paid a CM Fee based on the hard costs incurred by the Project. MI always charged the project for labour, whether it was labour provided by Clark Construction Management ("CCM") or by MI from October 2020 onwards.

32. As set out below, the relevant parties knew and understood that:

    a. MI was charging a CM Fee based upon the total hard costs incurred by the Project and these payments were reviewed and approved by the Coco Parties, the Senior Secured Lender, its Administrative Agent and Altus;

    b. The budget for the Project was continually increasing and evolving and was not the basis for MI's claim to a CM Fee; and

    c. The schedule for completion of the Project was continually evolving as circumstances out of everyone's control caused significant delays.

2A. MI was Paid a CM Fee based on the Project Hard Costs, Including Time-Based Labour Rates

33. The Receiver's Fifth Report completely ignores that the construction and development of this Project was not undertaken by MI alone. The payment practices were the Project's payment practices, reviewed and approved by the Senior Secured Lender, its Administrative Agent, the Coco Parties and Altus. The payment practices of the Project remained unchanged throughout the entire course of the Project. Nothing about these payment practices were "non-arm's length" and nothing about these payment practices

were commercially unreasonable, especially in the context of constructing and developing one of the most complex mixed-use supertall skyscrapers in the country.

34. It is obvious that all parties carried on this Project as a cost-plus project, not a fixed-price project.

35. For example, MI invoice C683 dated August 27, 2019, is the first MI invoice for construction management fees and Project hard costs under the CCDC2 Contract.

36. At this time, CCM continued to provide time-based labour services to the Project pursuant to a CCDC5A contract as set out in the 2024 Kilfoyle Affidavit.

37. MI Invoice C683 claimed and was paid a construction management fee of $34,837.30, being 5% of the Project Hard Costs totalling $696,745. A copy of MI invoice C683 is attached as **Exhibit D** (and also included in the collection of invoices attached as Exhibit L to the 2024 Kilfoyle Affidavit) and is excerpted below:

Description	Qty	Rate	Amount
PC Services, copier Lease, courier	1	14,864.55	14,864.55
Comp Equip, Cells, Software Licenses	1	4,714.61	4,714.61
Site Labour Jul 13 - Aug 16	1	465,216.72566	465,216.73
Container Monthly	1	21,400.00	21,400.00
Meeting, Travel, Dundonald cleanup	1	5,895.29	5,895.29
Staff Parking	1	10,881.19	10,881.19
Site Trucks	1	4,000.00	4,000.00
July 13- Aug 16 Crane Staff	1	169,772.97345	169,772.97
Total Reimbursable Expenses			696,745.34
Construction Management Fee - 5% on above		34,837.27	34,837.27
HST on Revenue		13.00%	95,105.74

38. The co-beneficial owner of the Project, Coco, signed the Construction Financing Request Notice, dated August 30, 2019, seeking funding for the Project's costs at that time, which included MI's invoice for a construction management fee of 5%. A copy of the August 30, 2019, Construction Financing Request Notice is attached as **Exhibit E**

(also found in the complete collection of the 2019 Construction Financing Request Notices attached as Exhibit G to the 2024 Kilfoyle Affidavit).

39. This was the first construction draw following the signing of the CCDC Contract. There was no evaluation by Altus of the percentage of completion of the Project before MI was paid its CM Fee. Instead, MI sought and was paid its CM Fee equal to 5% of the hard costs incurred by the Project, not on the basis of the percentage of completion of the Project under the terms of the CCDC2 Contract. MI was paid and received payment for labour services provided to the Project, again contrary to the language of the CCDC2 Contract. This process remained unchanged until the commencement of the Receivership except, as discussed below, in November 2020, MI started to provide labour to the Project, which had, up until that time, been provided by CCM.

40. In November 2020, Coco disputed MI's entitlement to be paid fees that had been paid to CCM in the time immediately following the termination of CCM in October 2020. The November 2020 invoices from MI sought a CM Fee of 3.5% (pursuant to the Mediator's Proposal, defined below) on all Project hard costs, including site and crane labour that had previously been provided by CCM. MI invoices C894 and C895 are attached hereto as **Exhibit F** and **Exhibit G** respectively (also found in the collection of invoices attached as Exhibit L to the 2024 Kilfoyle Affidavit).

41. The Receiver notes in paragraph 9.49 of the Fifth Report that Coco delivered written submissions dated November 6, 2020, complaining about the termination of CCM from the Project and objecting to the payment of fees charged by MI for staff working on the Project.

42. Coco's complaints about MI's entitlement to claim these fees are also found in an email chain from November 16, 2020, attached as **Exhibit H**. The email chain included Mr. Rod Davidge, counsel for the Senior Secured Lender, and representatives of the Senior Secured Lender and its Administrative Agent. In the email chain, a representative of the Senior Secured Lender's Administrative Agent acknowledged:

> 3. 5%, CM Fee, was initially included in the Altus CF, and construction budget.

43. In addition, counsel for the Senior Secured Lender's lawyers at Oslers confirms that at that time Coco was disputing the Project's "obligation to pay: (a) costs relating to salaries of employees hired to take over construction management activities that were done by CCM; (b) payment of fees to Mizrahi Inc. that previously flowed through to CCM and were paid to CCM; and (c) commissions to Mizrahi Inc. on unit sales to extent that commission is being applied to taxes applicable to the purchase price". In the same email chain counsel for the Senior Secured Lender provides representatives of the Administrative Agent and the Senior Secured Lender a copy of the CCM CCDC5A contract, which includes the labour rates charged by MI to the Project after the termination of CCM.

44. Finally, in the same email chain, counsel for the Senior Secured Lender confirmed that he had discussions with Coco's counsel and they "suggested that there is no issue with payments to third parties and potentially in respect of employee salaries, although they needed to look into that. They did suggest that Coco is disputing the payment of further fees to Mizrahi Inc, although they did not suggest a basis for that under the contract".

45. Coco also made her complaints explicit in an email from her designate, Ms. Maria Rico, dated November 18, 2020. I responded to Ms. Rico on November 19, 2020. Our email chain is attached as **Exhibit I**.

46. In her November 18, 2020 email, Ms. Rico raises a complaint about, among other things, that MI was charging a CM Fee that was previously to be paid to CCM, and that there was duplication of services between MI and CCM. I responded to indicate MI's position that it was entitled to terminate CCM. Most importantly for present purposes, the email sets out MI's position on its entitlement to charge the Project for fees and work and materials:

> c) The amounts the Project LP owes Mizrahi Inc. do not depend on whether or which subcontractors Mizrahi Inc. employes to construct the Project. Mizrahi Inc. is entitled to be paid:
>
> a. **Its management fee of 3.5% of hard construction costs,** and
>
> b. **For the work and materials to construct the Project.**
>
> d) The Project always paid for the work and materials incurred by CCM, which was billed through Mizrahi Inc. because CCM was a subcontractor. The Project's obligations do not change now that Mizrahi Inc. is no longer subcontracting the work to CCM. Mizrahi Inc. is still entitled to be paid for work and materials.
>
> e) This building cannot be built for free. As you know from our daily reports, Mizrahi Inc. has worked tirelessly since CCM's departure and we have been highly successful, not only in ensuring a smooth transition, but in advancing the construction schedule ahead of what CCM had planned. **[emphasis added]**

47. I do not have a record of receiving a substantive response to this position. I note that the position set out in this November 19, 2020 email with respect to MI's entitlement to fees reflects the payment practice of the Project.

48. The Receiver notes that Coco did not proceed with the arbitration with respect to these complaints because Coco's request for an urgent hearing by the arbitral panel was denied and the Coco Parties and Mizrahi Parties entered into negotiations relating to Coco's potential sale of their interest in the Project.

49. While it is true that there were subsequent attempts to negotiate a sale of Coco's interest in the Project, this sale did not proceed and there was a subsequent arbitration with Coco in 2023. Coco never revived her complaints about the payment of fees to MI or the termination of CCM.

50. In fact, despite these complaints about MI's entitlement to fees that had been paid to CCM and in the wake of the termination of CCM's role on the Project, MI's invoices were approved and Coco signed the Construction Financing Request Form dated December 16, 2020 requesting the Senior Secured Lender to pay these fees, a copy of which is attached as **Exhibit J**. Until the signing of the Control Agreement, Coco continued to sign the Construction Financing Request Forms each month under which MI sought and was ultimately paid a CM Fee of 5% on all Project hard costs, including the exact same time-based labour rates that had been charged by CCM up until October 2020.

51. All relevant parties knew and understood that MI was charging and being paid a CM Fee on the CCM time-based labour rates. Even the Altus Reports acknowledged that MI was assuming the role of CCM to provide construction labour and management to the Project. For example, Altus Report No. 15 issued November 4, 2020 (**Exhibit K15**) notes:

> **During the current period, we have been advised that Clark Construction Management Inc. has been terminated and the Borrower has been in discussions with all stakeholders about the termination. We understand that a 30 day transition plan is in place and the Borrower has met with each trade and principal individually to discuss the termination of the Clark Construction Management Inc, the transition plan, as well as on-going management of the site. We understand that the Borrower intends to continue to build an experienced construction management team during the transition and ultimately bring management of the project in-house. A full review of the construction schedule is in the process of being completed with trades and is expected to be completed within the next 30 days. We will review a copy of the schedule and transition plan, once received. We have been advised that construction on site continues. We will be monitoring the situation and comment accordingly.**

52. For the sake of completeness, I have enclosed as **Exhibit K** all Altus Reports for the Project in MI's possession from August 2019 onward.

53. The Payment Practices were not a "non-arm's length agreement" as stated by the Receiver. As noted in the 2024 Kilfoyle Affidavit, each and every construction draw request was the subject of intense scrutiny by the Coco Parties, the Senior Secured Lender, its Administrative Agency and Altus.

54. CCM recovered a CM Fee on its labour rates when it was providing construction management services and labour to the Project. During that period of time, MI also recovered a CM Fee equal to 3.5% on hard costs for the Project, including CCM's labour rates. Nothing changed when the CCM contract was terminated, and the Project did not incur any additional costs when MI began to provide the Project with construction management services and labour on the same terms as CCM.

55. The Receiver suggests that it is improper for a general contractor to earn profit by charging labour rates in excess of its actual costs while also charging a CM Fee on those grossed up labour rates. The Receiver provides no evidence to establish this alleged impropriety.

56. The record is clear that CCM grossed up its labour rates charged to the Project and recovered a CM Fee thereon.

57. When CCM's services to the Project were terminated, MI carried on this exact same practice and payments were approved by all the relevant parties.

58. Contrary to the Receiver's claim in the Fifth Report, all interested stakeholders had knowledge that MI was charging the exact same labour rates to the Project as CCM had pursuant to its CCDC5A contract with MI and that it was charging and receiving a CM Fee in addition to those time-based labour rates. This practice began immediately upon the termination of CCM in and around October 2020 up until the Receivership Order, although, as set out above, the quantum of the CM Fee to which MI was entitled changed over time.

59. For example, as noted above, attached as **Exhibit G** is invoice C895, a November 2020 site labour invoice from MI to the Project. This is the first site labour invoice following CCM's termination the month prior. The invoice identifies the work undertaken as "Site Labour" sets out the total value and the applicable construction management fee, which (at that time) was 3.5%.

Description	Qty	Rate	Amount
Site Labour - per attached summary		284,527.88	284,527.88
Construction Management Fee		9,958.48	9,958.48
HST on Revenue		13.00%	38,283.23

60. As noted in the invoice, a summary of labour is attached to the invoice, which clearly sets out the name of the labourer, the number of hours worked, the applicable hourly rate and the total. An excerpt is copied below:

Timesheet Summary
Mizrahi Inc.
Project: 1 Bloor
Site Labour
For the period from: 30-Oct-20 **To:** 21-Nov-20
**cut off on Saturdays*

		Total Period SUM		
Employee Name	**Type**	**Hours**	**Rate**	**Amount**
Abhinav M.	Total Reg Hrs	24.00	90.23	2,165.52
	Total OT Hrs	-	135.35	-
Ankit N.	Total Reg Hrs	61.00	90.23	5,504.03
	Total OT Hrs	-	135.35	-
Asarz Kojo	Total Reg Hrs	8.00	96.35	770.80
	Total OT Hrs	-	144.53	-

61. At the bottom of the summary is a total setting out the total number of regular and overtime hours and the total cost of that labour:

	Hours	**Amount**
Total Reg	2,478.75	232,421.23
Total OT	370.50	52,106.65
SUM	2,849.25	284,527.88

62. In addition, there is further information provided in the site labour invoice, which not only identifies the labourer's name, but also provides further detail on their occupation and hours worked. An excerpt of this detailed summary included in the site labour invoice is below:

Timesheet Summary
Mizrahi Inc.
Project: 1 Bloor
Site Labour
For the period from: 30-Oct-20 **To:** 21-Nov-20
**cut off on Saturdays*

			Week of				Total Period SUM		
			2020-10-31	2020-11-07	2020-11-14	2020-11-21			
Employee Name	**Occupation**	**Type**	**TTL Hours**	**TTL Hours**	**TTL Hours**	**TTL Hours**	**Hours**	**Rate**	**Amount**
Abhinav M.	Security	Total Reg Hrs	-	-	16.00	8.00	24.00	90.23	2,165.52
	Security	Total OT Hrs	-	-	-	-	-	135.35	-
		SUM	**0**	**0**	**16**	**8**	**24**		**2,165.52**
Ankit N.	Security	Total Reg Hrs	-	-	24.00	37.00	61.00	90.23	5,504.03
	Security	Total OT Hrs	-	-	-	-	-	135.35	-
		SUM	**0**	**0**	**24**	**37**	**61**		**5,504.03**

63. As set out in the 2024 Kilfoyle Affidavit, these rates are identical to the time based labour rates provided for in the CCM CCDC5A contract (the contract referred and attached to **Exhibit H,** the November 2020 email between the Senior Secured Lender, its Administrative Agent and their lawyer at Oslers). There is no doubt that Coco, the

Senior Secured Lender, its Administrative Agent and Altus were aware that MI was providing the Project with labour at the rates identical to the rates in the CCM contract and charging a CM Fee thereon. They reviewed these rate sheets every single month and approved these payments.

64. To my knowledge, this practice was followed each and every month with respect to MI's invoices for site labour.

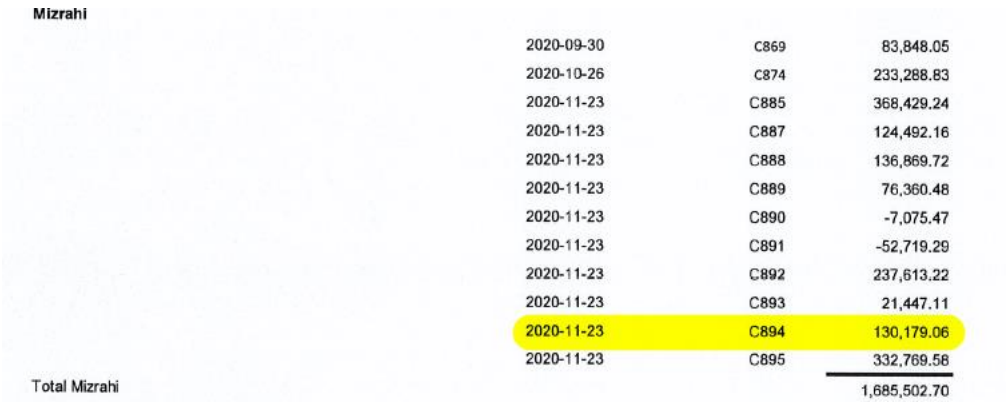
65. Attached as **Exhibit L** is site labour invoice C1395 from September 12, 2023, the last site labour invoice prior to the Receivership Order. The same form of summary is found therein as reviewed from site labour Invoice C895 (**Exhibit G**). A review of all of the site labour invoices delivered by MI from November 2020 to the Receivership Order shows that the same practice was followed each and every month. These invoices are found at Exhibit L of the 2024 Kilfoyle Affidavit.

66. All parties knew and understood that MI was entitled to a 5% CM Fee based on the initial CCDC2 Contract. This entitlement was amended by the Mediator's Proposal to 3.5% and later retroactively restored to 5% pursuant to the Control Agreement. The parties all acted on the shared understanding that MI was not only entitled to these CM Fees, but that the CM Fee was calculated on all hard costs for the Project, including the time-based labour rates.

67. As noted above, MI invoice C894 (**Exhibit F**) sought payment for crane labour provided in November 2020. This is the first crane labour invoice following the termination of CCM in October 2020. MI sought payment of $130,179.05 for crane labour services and a CM Fee of 3.5% consistent with the terms of the Mediator's Proposal. As noted

above, MI was subsequently paid a retroactive payment such that it received a CM Fee of 5% on this invoice pursuant to the Control Agreement.

68. As noted above, **Exhibit J** is the signed Construction Financing Request for the Construction Draw to pay the November 2020 Project costs. It is signed by me and Coco. It includes payment for MI invoice C894, i.e. it approves payment to MI for a CM Fee plus the time-based CCM labour rates:



Mizrahi

2020-09-30	C869	83,848.05
2020-10-26	C874	233,288.83
2020-11-23	C885	368,429.24
2020-11-23	C887	124,492.16
2020-11-23	C888	136,869.72
2020-11-23	C889	76,360.48
2020-11-23	C890	-7,075.47
2020-11-23	C891	-52,719.29
2020-11-23	C892	237,613.22
2020-11-23	C893	21,447.11
2020-11-23	C894	130,179.06
2020-11-23	C895	332,769.58
Total Mizrahi		1,685,502.70

69. This practice continued without exception other than the increase in the CM Fee to 5% pursuant to the Control Agreement until the appointment of the Receiver.

70. Furthermore, again as noted in the 2024 Kilfoyle Affidavit, MI's entitlement to a 5% CM Fee, while not explicitly stated, was provided for in the CCDC Contract. This is also consistent with the terms of the settlement of a 2019 arbitration with the Coco Parties set out in a proposal from the mediator and arbitrator Mr. Stephen Morrison (the "Mediator's Proposal") which provides, in part:

> The Construction Management Fee of 5% of the hard construction costs, currently estimated at approximately $560 million, will be reduced to 3.5%, of which 1.5% will continue to be paid to Mike Clark, and the remaining 2% will be paid to MI in respect of its ongoing, but reduced, construction management duties.

A copy of the Mediator's Proposal dated November 26, 2019, is attached as **Exhibit M**.

71. The Mediator's Proposal implicitly confirms the pre-existing agreement between MI and the Project that MI was entitled to receive a 5% CM Fee (of which 1.5% was paid to CCM at the relevant time) on Project hard construction costs, since it memorializes an agreement between the beneficial owners to reduce MI's entitlement to a CM Fee to 3.5%.

72. Note that the Mediator's Proposal refers to "estimated" hard costs of $560 million, as the parties knew and understood the fact that the Project was operating on a cost-plus basis, that MI's entitlement to charge a CM Fee was not limited to the stipulated price in the CCDC Contract. If that was the case, then the Mediator's Proposal would have said that.

73. Again, up until the Mediator's Proposal and after it, MI always charged and was paid a CM Fee on the time-based labour rates, just as CCM had done during its tenure, and these payments were approved by Coco, the Senior Secured Lender, its Administrative Agent and Altus (with the exception of payments from August 2022 onward when Coco would not approve payments to MI, but as reviewed below, for different reasons).

74. The Project, its beneficial owners, its Senior Secured Lenders, the lender's Administrative Agent and Altus were all aware of these payments for years, and MI continued to be paid on this basis every month. From November 2020 until the

Receivership, Coco and I engaged in two further arbitrations, yet no challenge to MI's claim to fees was ever brought.

75. The Receiver's motion essentially seeks to redo the entire payment history of this Project which stretches back to 2017. It entirely ignores that the "Payment Practices" were transparent and understood by all parties.

2B. The Parties Knew and Understood that the Budget for the Project was Increasing and that MI's Entitlement to Fees was Not Fixed by the Budget in the CCDC2 Contract

(i) Altus' Role in the Project as the Quantity Survey Consultant

76. The Project was closely monitored by Altus Group, an arm's-length third party consultant retained by the Senior Secured Lender. Altus is an established and well-respected real estate development and construction consulting firm with over 60 years of experience in Canada.

77. Altus reviewed every aspect of the Project, from funding, to sales, to permitting and construction, and provided monthly reports to the lenders on the status of the Project and its progress.

78. The Altus reports were prepared for the Senior Secured Lender and its Administrative Agent, IGIS. In addition to members of MI's team, Coco and her colleagues, such as Roy Booth and Elliot Kobulnik, were copied on the Altus reports.

79. As noted above, the CCDC2 Contract was executed in May 2019 and the first construction draw pursuant to that contract occurred in August 2019. Altus Preliminary Report and Report No. 1, dated August 28, 2019 (**Exhibit K1)**, is the first Altus Report prepared for the Senior Secured Lender and its Administrative Agent under the CCDC2 Contract.

80. Despite the language of the CCDC2 Contract, Altus Preliminary Report and Report No. 1 (**Exhibit K1**) confirms that the parties knew and agreed that the budget for the Project was not $583.2 million as stated in the CCDC2 Contract. In fact, the Altus Preliminary Report and Report No. 1 (**Exhibit K1**) confirms that by August 2019, the Project had already incurred more than $555 million in net costs. The report states there was an "agreed project budget of" $1.390 billion:

> ### 1.1 Budget
>
> Based on our review of documentation and our discussions with the Borrower and KEB Hana Bank as trustee of IGIS Global Private Placement Real Estate Fund No. 301, we have established an agreed project budget of $1,390,000,000. The project budget contains approximately $25,504,000 in project contingencies.
>
> Refer to Section 3 and 5 for budget commentary and further detail.
>
> ### 1.2 Costs Incurred
>
> We have calculated that the net cost to date is $555,051,590. Refer to Appendix A for budget details.
>
> We understand that advances from IGIS will occur on a quarterly basis based on the current cash flow projection and advance schedule. We will monitor the advances and overall cost to date and comment on the surplus/shortfall of funds on a quarterly basis. We understand that the cash flow projection and advance schedule will remain unchanged unless projected costs changes materially.

81. Altus representatives visited the site on a regular basis. They received and reviewed contract tenders, invoices, unit sales, commercial leases, and Project expenditures, among other things. Their reports are lengthy and updated monthly. On the basis of this extensive review process, Altus approved the release of funds from the lenders to the Project.

82. Altus also undertook two budget reviews, the first in August 2022 and the second in August 2023. In Altus' Interim Project Budget Review Letter at August 2022 (**Exhibit K38A**) Altus noted an increase in the budget from $1,539,058,278 to $1,668,498,278.

In the Altus Interim Project Budget Review Letter at May 31, 2023 (**Exhibit K47A**), Altus noted a budget increase from $1,668,498,278 to $2,142,649,214.

(ii) Jenny Coco, the Co-Owner of the Project, Had Complete Transparency into the Project Finances and Budget

83. From the date of the Mediator's Proposal to the time of the Control Agreement, and then again upon the termination of the Control Agreement in August 2022, Ms. Coco and her specially appointed financial controller, Ms. Maria Rico, had full and complete real time access into every aspect of the Project's finances. Ms. Rico, on behalf of Ms. Coco, was fully embedded in the Project finances with full and complete real time access to all books and records including the general ledger and bank accounts. It defies credulity to suggest that the Coco Parties had not acknowledged MI's entitlement to a CM Fee based on Project hard costs incurred including the CCM time-based labour rates, when they had full access to the Project banking and financials, the Project budget and the Project schedules.

84. The transition period to implement the terms of the Mediator's Proposal began in December 2019. It started with Ms. Rico preparing a proposed transition plan, which she delivered on December 16, 2019, and which confirmed, among other things:

(a) "Maria Rico assumes complete responsibility for the Finance Function of the Project, including all Financial Matters, with a target date of December 16";

(b) "Redirect all future communication to be received by [MI] which may have a financial impact to the Project, to Maria Rico, with a target date of December 18"; and

(c) “Financial Reporting for the period Dec. 1, 2019 & thereafter, including Year End Reporting for 2019, is Maria Rico’s responsibility, with a target date of December 16”.

85. A copy of the proposed Transition Plan and Ms. Rico’s covering email is attached as **Exhibit N.**

86. I directed the Mizrahi team to immediately begin delivering the requested financial information to Ms. Rico, both in electronic and paper form and they complied.

87. Throughout December 2019, Ms. Rico received the Project’s books, third-party financing documents, unit purchaser deposit reports, sales analyses, costs-to-date reports for Altus’ budget, cheques, wires and invoices for payment.

88. She was provided complete access to the books and records of the Project, including bank account statements, payment confirmations, contracts, purchase orders, and other accounting records.

89. The Mizrahi team spent a lot of time educating Ms. Rico about the Project. She attended the Mizrahi offices at a minimum weekly (and often daily) to review financial documents and discuss the financial status of the Project with the Chief Financial Officer, Mark Kilfoyle. I also regularly communicated and met with Ms. Rico about Project finances.

90. Ms. Rico’s involvement in the Project was a very time-consuming process for the Mizrahi team. Mizrahi staff diligently responded to all of Ms. Rico’s requests for information.

91. Ms. Rico had access to and visibility into the bank accounts related to the Project. There were four accounts:

(a) Two Project accounts – one at TD Bank and one at KEB/Hana Bank of Canada. Ms. Coco and I had joint signing authority over these accounts;

(b) Two Mizrahi Inc. accounts:

(i) A segregated account which is used to pay the Project's hard costs;

(ii) A non-segregated account into which CERIECO construction draws were deposited and used to pay invoices issued by MI for general contracting costs and CM Fees, including invoices issued by CCM, which worked directly for MI.

92. With respect to the non-segregated account:

(a) The deposit of construction draws into this account was a requirement of the CERIECO Loan Agreement. Once the draws were deposited into the non-segregated account, they were transferred into the Project account at KEB/Hana Bank of Canada;

(b) Invoices issued for payment from this account were reviewed and approved by Altus;

(c) There is no requirement in the Mediator's Proposal or in any other document that Ms. Coco or Ms. Rico have access to the non-segregated account. The reason for this is that it is used by MI for all of its business operations, not just the Project;

(d) Ms. Rico had full visibility into all Project-related transactions processed through this account. She approved in advance, and received confirmation of, deposits of construction draws. She received all invoices issued by MI and CCM, which were only processed after she approved

the invoices. She then received confirmations of payment after the invoices were processed and paid.

93. It was agreed by the parties that MI would set up a segregated account for the hard costs and maintain the non-segregated account to be used for the deposit of CERIECO draws and the corresponding payment of general contracting costs and CM Fees, which were owed to MI, as well as invoices issued by CCM, all as approved by Altus (who reported to the lenders).

94. With respect to the segregated account:

    (a) Ms. Rico received and reviewed monthly bank statements identifying all transactions flowing through that account;

    (b) She also received a summary listing of payments to be made and copies of all subcontractor invoices to be paid for review and approval prior to processing, and all confirmations of payment once EFTs and cheques were processed, which she then reconciled every month; and

    (c) Similarly, the Senior Secured Lender and its Administrative Agent received and reviewed the bank statements for this account identifying all transactions flowing through it.

95. The Mizrahi team introduced Ms. Rico to the Project's lawyers, suppliers, lenders, consultants, contractors and others so that she could build relationships with them.

96. Ms. Rico, as agent for Ms. Coco, was invited to and attended meetings related to financial aspects of the Project such as:

    (a) Meetings and tele-conferences with the Project's lenders and prospective lenders;

(b) Twice-monthly tele-conferences with Altus;

(c) Twice-weekly tele-conferences in April 2020 with the Project's auditors, Ernst & Young which prepared financial statements;

(d) Weekly meetings and tele-conferences with the Project's corporate counsel, Phil Rimer at Dentons, in respect of the financing issues for the Project which were subject of an arbitration with the Coco Parties in 2020;

(e) Weekly meetings and tele-conferences with the Project's land use and planning lawyer, Adam Brown at Sherman Brown LLP;

(f) Meetings with City officials;

(g) Regular meetings with the Project's construction manager, CCM, prior to the termination of CCM, including global construction review meetings, during which the entire construction process was reviewed from the beginning of the Project; and

(h) Meetings and tele-conferences with the Project's litigation counsel.

97. When Ms. Rico was unable to attend meetings, the Mizrahi team updated her on the outcome of those meetings to the extent of any financial impacts on the Project. She also had a direct line into the lawyers and other consultants who are critical to the Project. She regularly reached out to them.

98. The Coco Parties had complete visibility into the Project's finances, the status of construction, the fact that there were unavoidable construction delays and the increase in the Project's budget.

99. For example, Ms. Rico's complete visibility into the Project's finances is reflected in the memorandum she prepared regarding the budget in Altus Report No. 8, dated April 3,

2020, for the status of the Project as of February 29, 2020 (the "**Rico Memorandum**"). A copy of the Altus Report No 8 is attached as **Exhibit K8**. In addition a copy of the Rico Memorandum referable to the February 2020 Altus Report is attached as **Exhibit O**.

100. The Rico Memorandum sets out 17 separate items that Ms. Rico thought should be addressed in the February 2020 Altus report, most of which are not specific to that month's report, but apply equally to all of their reports.

101. Most important, for the purposes of this proceeding, is Ms. Rico's explicit acknowledgement that the budget for the Project as of February 2020 was for $1,405,570,103. In addition, Ms. Rico acknowledged that Altus had "not updated Budgeted Costs for nearing one year. The construction costs are **certainly outdated given the delays due to the Stop Work Order, COVID 19 and the lack of an above grade permit**" **[emphasis added].**

102. Ms. Rico was brought into the Project to handle financial administration and to provide financial transparency to Ms. Coco.

103. Together with Ms. Rico, the Mizrahi team worked with Altus on a regular basis, communicating Project status, costs incurred, and projected expenditures. Ms. Rico was involved in all of these communications.

104. Ms. Rico worked with Mr. Kilfoyle each month to review and sign off on Altus' reports. Altus would provide a draft report, Ms. Rico and Mr. Kilfoyle would review it and provide comments, following which they together approved the final report before Altus issued it.

105. The same process is followed each month and each month Ms. Rico reviewed and signed off on the report.

106. For example, Ms. Rico signed off on Altus Report 8 (**Exhibit K8**) on April 3, 2020. A copy of her email is attached as **Exhibit P**.

107. Prior to the memorandum, Ms. Rico did not raise any issues about Altus' role and reports. This is because:

(a) Altus does not work for the Project or take direction from the Project;

(b) Its role was to provide reporting to the Senior Secured Lender; and

(c) Altus took primary direction from the Senior Secured Lender and its reports were prepared according to the Senior Secured Lender's requirements.

108. Coco, the Senior Secured Lender and Altus all knew and were aware that the budget for the Project was continually increasing. In an affidavit sworn February 1, 2023, Coco recognized that the budget was increasing, writing:

> 80. What is more shocking to me is that the current Project budget as stated above has substantially increased from the original budget of December 21, 2017, in the amount of $1,200,000,000 which was prepared by Altus. It has repeatedly increased over the last number of years. In Altus Report #42, Altus states that the net cost to December 31, 2022, is $1,219,846.677 out of a budget of $1,668,498,278, and with only 19 floors constructed. I am concerned about the substantial budget increases given my current lack of control over the Project.

109. In her February 1, 2023 affidavit Coco also refers to Altus Report #42 wherein the Senior Secured Lender is reported to have requested an updated budget:

> 82. Altus Report #42 states that it has been asked to prepare an updated budget:
>
> **Subsequent to the issue of our Report No. 41 at November 30, 2022, we note that the Lender has requested that Altus Group prepare an update to the construction, finance, and soft cost budgets, to further review the sources of funds with respect to an updated construction schedule to be provided by the Borrower. Presently, we note that the Borrower has shared a draft copy of the updated schedule, however, we note that the Borrower with the consent of the Lender have advised that the update to the aforementioned budgets will occur in our subsequent report, upon receipt of the finalized updated schedule.**

110. The Rico commentary beginning in paragraph 99 above is instructive as the costs to build the Project that were not within MI's control skyrocketed and if any party had asserted as the Receiver does now that MI was bound to deliver the Project for the original fixed price in the CCDC Contract, MI would have terminated its work on the Project as it would be impossible to deliver the building for such a price.

2C. MI was not Bound by the Schedule for Completion in the CCDC2 Contract which was Also Inaccurate

111. Not only was the budget and payment terms under the CCDC2 Contract not followed, but the completion date of December 31, 2022 was ultimately not followed.

112. In May 16, 2019, two days after the execution of the CCDC2 Contract, the Project made an application for a conditional foundation permit, i.e. it applied for a permit to begin construction of the foundation of the building. The foundation permit was not issued until March 4, 2020. An unconditional building permit, required for the construction of the tower, was not received until August 4, 2022.

113. While MI made every effort to ensure the timely construction of the Project, these efforts were met with unavoidable and substantial delays, including delays caused by a plumber's strike that began on June 3, 2019, delays with the permitting process, and the COVID-19 pandemic, which not only caused a significant delay in construction, but also significantly increased Project costs. These are just some examples of causes of delays in this exceptionally complex Project.

114. In Altus Report No. 33 issued April 26, 2022 (**Exhibit K33**) the schedule for construction was updated from an anticipated completion date of December 2022 to

November 2023, but also noted that a revised construction schedule to incorporate the delay in construction as at that time was being prepared.

115. Altus Report No. 35 issued June 29, 2022 (**Exhibit K35**), estimates a completion date of July 30, 2024. In the Altus Interim Project Budget Review Letter at May 31, 2023 (**Exhibit K47A**) Altus noted then that this proposed completion date was “aggressive” and provided its own estimated completion date of July 2025, but noted that the schedule “could slip further into Q3 2025 or Q1 2026”.

116. Again similar to my evidence in paragraph 110 above, if any party had asserted what the Receiver does now that MI was obliged to meet the original completion date of December 31, 2022, given the delays in construction caused by a host of factors, and given that the unconditional building permit was only issued on August 4, 2022, MI would have terminated its work on the Project given the impossibility of building a supertall skyscraper in a period of less than 5 months. While Coco raised objections about the pace of construction, at no time was there ever a claim or even a suggestion that MI’s entitlement to CM Fees was limited to the budget and terms of the CCDC2 Contract or to be reduced or eliminated for not meeting the schedule for completion under that contract.

117. In all of the disputes with Coco, she did not claim MI was disentitled to fees because of an obligation to deliver the Project for the original fixed price by December 31, 2022.

118. As to MI’s entitlement to CM Fees, as reviewed below, these were settled at 5% with Coco under the terms of the Control Agreement. As to MI charging time-based labour rates at the same rates as charged by CCM, this was well known to Coco. As noted

above, she objected to the fees in and around November 2020, but did not pursue recourse notwithstanding she pursued a further arbitration.

119. Despite all parties knowing and understanding the delays and increased budget for the Project, the normal payment practices of the Project continued to be followed by all parties. MI would seek payment and was paid its CM Fee in the ordinary course, both before and after December 31, 2022. MI's entitlement to compensation for its general contracting services was based upon a CM Fee of 5% (later reduced to 3.5% for a period of time pursuant to the Mediator's Proposal and subsequently increased by the Control Agreement) on all hard costs for the Project. MI's entitlement to a CM Fee was not based upon the percentage of Project completion at a fixed price or the requirement to complete the Project by December 31, 2022. This is clear from the fact that all parties approved numerous payments in excess of the original Project budget long after December 31, 2022, approved fee invoices for MI that were calculated as a percentage of hard costs incurred by the Project, the conduct of the parties, and, in some cases, their explicit acknowledgement.

120. The Receiver's Fifth Report does not suggest or imply that MI was dishonest in implementing these payment practices. There was no impropriety in the payment practices. These were the Project's payment practices agreed to and carried out by all relevant parties.

121. The Receiver was entitled to terminate MI as general contractor for the Project. It should have done so immediately upon understanding that it disagreed with the historic and normal payment practices of the Project. Instead, it strung MI along so that it could extract maximum value and cooperation while refusing to pay MI its entitlement under

the Receivership Order, in yet another example of this Receiver's unfair treatment of MI.

2D. The May 2022 Amendment to the CCDC Contract was to Reflect the Understandings of the Parties on the Increasing Budget and Schedule

122. On May 4, 2022, I signed the Amending Agreement to the CCDC2 Contract (the "May 2022 Amendment"), a copy of which is attached as Exhibit E to the 2024 Kilfoyle Affidavit. I signed the May 2022 Amendment on behalf of the Project and on behalf of MI. During this time, Coco was not involved in the Project pursuant to the terms of the Control Agreement.

123. The intention of the May 2022 Amendment was to reflect and memorialize the agreement from the inception of the Project that it was proceeding on a cost-plus basis. The budget and schedule for the Project was being continually updated because of the impact of COVID-19 and other factors. The May 2022 Amendment reflected the fact that the CCDC2 Contract did not accord with the intentions and agreement of the parties. As set out above, Altus was periodically reviewing the budget and schedules and the very first Altus Report to follow the CCDC2 Contract included a budget in excess of the budget set out in the CCDC2 Contract.

124. The Receiver's reference to the May 2022 Amendment as a "Unilateral Amendment" is misleading. While I did sign the May 2022 Amendment myself, there was no one else to sign the agreement at that time given the terms of the Control Agreement. It simply reflects the reality of how the parties operated the Project at that time.

3. MI is Entitled to the 5% CM Fee Pursuant to the Control Agreement on All Project Hard Costs

125. Contrary to the position taken in the Receiver's Fifth Report and in addition to the basis of MI's entitlement to a 5% CM Fee as set out above and in the 2024 Kilfoyle Affidavit, the Control Agreement provides that MI was entitled to a 5% CM Fee on all hard costs incurred by the Project. Furthermore, the Control Agreement provides that MI was entitled to payment of a retroactive CM Fee from the date the agreement was executed to 'top up' the total payment to MI to 5% on all hard costs for the Project. The Control Agreement was signed in May 2021. A copy of the Control Agreement is attached as **Exhibit Q**.

126. The Control Agreement is an agreement between the beneficial owners of the Project. Section 3 outlines MI's entitlement to a 5% CM Fee as follows:

> 3. Upon execution of this Control Agreement, Mizrahi Inc. shall be paid a construction management fee of 5% of hard costs in accordance with the terms of the construction management agreement between Mizrahi Inc. and the GP. To the extent that any payments on account of construction management fees have been made to Mizrahi Inc. prior to the date of this Agreement at a rate less than 5% of the hard costs, the difference between such payments and 5% of the hard costs shall be paid to Mizrahi Inc. immediately upon execution of this Agreement.

127. The Control Agreement was entered into by the Mizrahi and Coco Parties in advance of an intended purchase by the Mizrahi Parties of the Coco interest in the Project. The Control Agreement set out various controls granted to the Mizrahi Parties during an "Escrow Period", which expired on August 30, 2022 owing to the non-completion of the sale.

128. Section 2 of the Control Agreement sets out the various controls afforded to the Mizrahi Parties during the Escrow Period, effectively giving the Mizrahi Parties control over the

Project until the sale of the Coco interest or the termination of the Agreement. The Control Agreement is clear that the controls afforded to the Mizrahi Parties only apply "during the Escrow Period".

129. Nothing in the Control Agreement provides that MI's entitlement to a 5% CM Fee ends upon the termination of the Escrow Period. That was not the agreement and was not the intention of the Control Agreement.

130. From the date the Control Agreement was signed until the disclaimer of MI's general contracting services to the Project, MI was paid a 5% CM Fee, including a 5% CM Fee on labour rates (although there is a dispute on the quantum of labour rates).

131. Following the execution of the Control Agreement in and around May 2021, on May 31, 2021 MI received payment of $725,214.74 (net of HST) as a retroactive payment of its entitlement to a CM Fee of 5% on all Project hard costs. This payment included a 5% CM Fee on the CCM time-based labour rates historically charged to the Project.

132. At the time of the execution of the Control Agreement, all parties, including Coco, knew and understood that MI was charging the CCM time-based labour rates to the Project on a monthly basis and recovering a CM Fee on those hard costs, among other hard costs.

133. For example, attached as **Exhibit R** is MI Invoice C962, dated April 14, 2021, for crane labour provided to the Project. As noted in the 2024 Kilfoyle Affidavit, MI charged the project for construction labour and construction management, including crane labour, at the same rates charged to the Project by CCM. Invoice C962 sought payment to MI by the Project for $189,078.24 for crane labour with a 3.5% CM Fee of $6,617.74. Included with the invoice are time sheets for the crane labour provided to the Project

from March 20, 2021 to April 17, 2021. This invoice, like the invoices that predate it from the time of the Mediator's Proposal, were paid by the Project. MI received a CM Fee of 3.5% on time-based labour rates, equal to the time-based labour rates that were paid to CCM under its CCDC5A contract.

134. The next month in May 2021, MI rendered invoice C985, dated May 19, 2021, for crane labour provided to the Project. A copy of this invoice is attached as **Exhibit S.** This invoice sought payment of $103,386.24 for crane labour provided to the Project. The invoice includes a summary of the time worked by the crane labourers and their rates. The invoice then seeks a 5% CM Fee of $5,159.31, consistent with MI's entitlement to a 5% CM Fee on all hard costs for the Project.

135. The same payment process is seen in MI's other May 2021 invoices and this practice was followed until the Receivership Order (all found at Exhibit L to the 2024 Kilfoyle Affidavit).

136. The Receiver takes the position that MI was not entitled to charge a 5% CM Fee after the termination of the Control Agreement in August 2022 and that MI was not entitled to charge a CM Fee on the time-based labour rates.

137. I disagree. Altus, the Senior Secured Lender and its Administrative Agent (and for a period of time the Coco interest) were in agreement with me. As noted above, the Project has always (until the Receivership) paid MI a CM Fee on the CCM time-based labour rates and those payments have always been approved by the Project's Senior Secured Lender, its administrative agent, Altus and, during the applicable period of time, Coco and/or Ms. Rico.

138. After the expiry of the Control Agreement, Coco resumed her involvement in the Project and refused to agree to the release of certain Project payments, including MI's claim to a CM Fee and invoices for site labour and construction costs. Coco provided a spreadsheet with her comments for the Project expenses at issue for that month's construction draw. For example, with respect to MI invoice C1231 for crane labour in August 2022, Coco provided the following comment:

Aft		08/16/2022	C1231			153,719.43		Approved subject to receipt of Contract	copy of the contract required to confirm rates paid.

139. Coco did not complain about the obvious calculation of a 5% CM Fee, nor did she complain that MI was charging a fee based on the time-based labour rates. Coco already had the CCDC5A contract that was the basis for the labour rates charged. A copy of the spreadsheet delivered by Ms. Coco is attached as **Exhibit T**.

140. A copy of MI invoice C1231, dated September 14, 2022 is attached as **Exhibit U.** It sought payment for a total of $153,719.43 for crane labour, a 5% CM Fee and HST. While Coco only provided provisional approval "subject to receipt of Contract", the invoice included the labour rates charged to the Project and Coco knew that MI had assumed the rates under the CCDC5A Contract with CCM in November 2020. Note that Coco did not object to the 5% CM Fee as being contrary to the expiry of the Control Agreement.

141. There was never any question or doubt that MI had been charging and receiving a CM Fee on the time-based labour rates from the inception of the Project. This practice was in place while CCM was provided labour to the project, after the Mediator's Proposal, and after the termination of CCM, until the commencement of the Receivership.

142. As also noted in the 2024 Kilfoyle Affidavit, the Receivership Order provided for payment to MI of a 5% CM Fee, including a 5% CM Fee on construction labour calculated based on time-based labour rates.

143. Even during the Receivership, the Receiver paid MI a CM Fee of 5% on Project hard costs, except that it did not pay MI a 5% CM Fee on the time-based labour rates. It was not until the receipt of the Receiver's Fifth Report that MI understood the Receiver was claiming that MI was not entitled to recover a 5% CM Fee on Project hard costs on the basis that the Control Agreement had expired. This is not only inconsistent with the terms of the Control Agreement, but is contrary to the language of the Receivership Order, the historical and normal payment practice of the Project and what the Receiver unilaterally decided to pay MI

144. The Receiver states that there is no evidence that the Coco Parties or the Senior Secured Lender knew the quantum of MI's profit on the time-based labour rates. This may be true, but it is also true that CCM had not disclosed its profit margin on the exact same time-based labour rates charged to the Project, for which it too was recovering a CM Fee. Similarly, not a single subcontractor paid on the Project has revealed its profits on the Project. I have hired and paid many lawyers over the years, and none have revealed their profits on the known hourly rates charged. I would be shocked if the Goodmans law firm has revealed to the Receiver or this court its profit for its legal services in this matter. Why MI is singled out for this treatment strikes me as another example of the Receiver's unfair treatment of MI.

145. The Control Agreement was negotiated in order to address the operation and control of the Project during the Escrow Period when the Mizrahi Parties attempted to finalize

the purchase of the Coco interest in the Project. The Control Agreement specifically granted the Mizrahi Parties certain control and operational powers that it did not have under the terms of the Shareholders Agreement and Partnership Agreement, which allowed for the construction of the Project without Coco's input.

146. MI's entitlement to a 5% CM Fee and its entitlement to a retroactive 5% CM Fee from the time of the Mediator's Proposal does not concern the operation and control of the GP and Partnership at issue in the Control Agreement. There was no intention to limit MI's entitlement to a 5% CM Fee to the termination of the Control Agreement and there is no language supporting the Receiver's position that MI's entitlement to a 5% CM Fee ended when the Control Agreement terminated. I was not asked and was under no obligation to repay the retroactive payment and there is nothing to support the Receiver's contention that the entitlement to the 5% CM Fee ended when the Control Agreement was terminated. I note that despite knowing of the terms of the Control Agreement and the CCDC2 Contract, the Receiver paid MI a 5% CM Fee on all Project hard costs (other than the CCM time-based labour rates) from the beginning of the Receivership until MI was terminated from the Project.

4. The Receiver's Bald Claims that a 5% CM Fee on Time-Based Labour Rates is Not Reasonable or Industry Standard

147. The Receiver, which has no expertise or experience in development, claims, without evidence, that a 5% CM Fee is not in keeping with industry standard and points to SKYGRiD's entitlement to a lower CM Fee. I disagree that a 5% CM Fee is not consistent with industry standard. It is the rate MI has charged on all of its projects. In addition, SKYGRiD's responsibilities to the Project were much less that the

responsibilities of MI. SKYGRiD did not have to get permits, traffic plans, work plans, subcontractors, concrete pumping stations, or determine how to construct the building, among many other things.

148. MI achieved many significant milestones for the Project, including:

a. Acquiring 1 Bloor Street West from the Stollery family who owned it for 117 years. The property was not for sale. It took nine months for me to convince Mr. Ed Whaley and the Stollery family to part with it. Mr. Whaley would only agree to sell the property to me because of my vision to construct the Project, despite offers from other developers;

b. Acquiring the properties adjacent to 1 Bloor West to assemble the minimum land mass required for the Project. None of these lands were for sale at the time;

c. Acquiring 760 Yonge Street, another off market property, to achieve the necessary density for the Project and meet required zoning criteria;

d. Gaining the support of the Rate Payers Association, local councilor, the Mayor, the City of Toronto planning department and the community to approve the development of what would be at that time the tallest building in Canada;

e. Convincing major institutional investors to finance the Project, such as CREIT, Fiera Capital, Firm Capital, Westmount Aviva Insurance, Meritz, CERIECO and others. I brought more than $1 billion in financing to the Project, including the largest investment ever made by Westmount Aviva Insurance in Canada for condominium deposit insurance;

f. Fully leasing the commercial retail component of the building at the highest recorded lease rates in Canada;

g. Selling over 75% of the residential units of the building, within a very short period of time, at the highest residential prices per square foot in Canada. This represents over $540 million in sales;

h. Obtaining demolition permits notwithstanding that Toronto Heritage wanted to designate Stollery's as a heritage site and removing the heritage overlay for the lands around 1 Bloor West, which would have otherwise halted the Project;

i. Negotiating the release of easement rights that Scotiabank and H&M had over 1 Bloor West;

j. Achieving multiple high profile development awards for the Project, including awards from the Ontario Home Builders Association, the Building Industry & Land Development Association, the Canadian Property Awards, and the prestigious BILD Pinnacle Award for best architectural design and best high-rise building design. In 2019, Mizrahi Developments was awarded the Par Excellence Award from the France-Canada Chamber of Commerce recognizing global-leading innovation in construction techniques; and

k. Most importantly, implementing a vision of designing and building the tallest structure in Canada by assembling a world-class team of consultants and experts to help execute the design.

149. The Receiver also ignores that the Project is the first supertall skyscraper in Canada. This development is one of a kind. MI was the only developer and general contractor

with the Tarion license that permitted the construction of the Project. It was the first to get approval to construct such a supertall building.

150. Finally, as the Receiver notes in the Fifth Report, MI's entitlement to a 5% CM Fee was contemplated by the first CCDC2 Contract signed in 2017. Whatever SKYGRiD agreed to be paid is irrelevant to what the parties here agreed MI was to be paid.

5. The "Assignment" of the CCDC5A Contract – The Project Assumed the Responsibility to Pay MI for Time-Based Labour Rates

151. It is difficult to understand the Receiver's position that MI seeks payment of its invoices for a 5% CM Fee and the time-based labour rates on the basis of a "non-arm's length" contract and payment practice. As noted above, there is nothing "non-arm's length" with respect to the contracts and payment practices for the Project. The Receiver notes a technical and legalistic position that MI could not "assign" the CCDC5A Contract to itself. I am not a lawyer and do not profess to know the legalities for the assignment of contracts, but as noted above, all parties knew and understood that MI had assumed the obligations of CCM under the CCDC5A Contract, was providing labour to the Project at the exact same time-based labour rates as set out in that contract, and the parties reviewed and approved those payments for years. The Project did not incur any additional cost as a result of MI assuming CCM's role in providing the Project labour.

152. The Receiver claims that MI has no entitlement to charge the time-based labour rates under the CCM CCDC5A contract, despite these rates having been paid to MI since November 2020.

153. The Receiver's position revisits Coco's argument made in a 2020 arbitration concerning the Project's obligation to pay for invoices rendered by the Project's architect Core Architects ("Core").

154. In 2021, the Mizrahi Parties and the Coco Parties conducted an arbitration concerning the non-payment of invoices rendered by Core.

155. In the Core arbitration, Coco argued that Core's invoices were too expensive, and were being performed pursuant to a series of contracts and contract extensions, none of which were signed on behalf of the Project (with one exception) and had neither been pre-approved by Coco nor properly reflected in the Project's budget. Coco argued that MI was the contracting party with Core and that MI was solely responsible for any amounts owing under those invoices, despite it being undisputed and obvious that Core only provided services to the Project. This is also reminiscent of the Receiver's position that MI was responsible for any costs to deliver the Project over and above the original budget as set out in the CCDC2 Contract – a position which entirely ignores what actually happened.

156. Coco's position in the Core arbitration was not accepted by the arbitral panel. Like the invoices at issue in this proceeding, Coco was aware of the Core contracts, and had been actively involved in reviewing and paying the invoices rendered by Core. All the Core invoices that were subject to the 2020 arbitration had been specifically reviewed by Coco or her designate Ms. Maria Rico. This occurred each month from the time the contracts were let with MI.

157. The arbitral panel upheld the validity of the Core contracts, directed that the Core contracts executed with MI be assigned to the Project because "that is the entity for

which the services are being performed, and it is responsible for their payment" (paragraph 32). In addition, the panel held, "Despite the lack of prior approval by Coco and any lack of formality in their execution, by virtue of their part performance and the repeated payments thereunder, the Project has ratified these agreements" (paragraph 32).

158. Furthermore, the Panel held at paragraph 33:

> The Panel finds, as a matter of fact, that Coco was aware that the architect was delivering services for the benefit of the Project. Given the quantum of the invoices approved over time, Coco was also aware that the fees for those services exceeded the original approved budget and that, in subsequent budget adjustments, the amount was increasing. Up to and including February 2020, Coco continued to approve invoices that made specific reference to specific contracts…without complaint or further inquiry.

A copy of the Panel's Reasons for Decision dated October 21, 2020 is attached as **Exhibit V**.

159. While not exactly analogous, the Receiver's arguments here are similar. The Project's normal payment practices have been in place for years. They have been subject to explicit agreement by the parties through the signing of the Construction Financing Request forms and the payment of those requests by the Senior Secured Lender.

160. It is MI's position that the Receiver is treading old ground already exhaustively covered throughout the years of private litigation between the Mizrahi Parties and the Coco Parties in order to excuse its unjustified decision to disregard the meaning of the Receivership Order and to deny payment to MI for the fees it earned and is owed by the Project.

6. The HST Reserve and the Set Off Agreement – MI is Not In Breach of the Mediator's Proposal

161. The Receiver claims MI owes the Project $1.2 million for an alleged failure to pay an HST reserve as provided for by the Mediator's Proposal (the "HST Reserve").

162. The Receiver's position is incorrect. The HST Reserve referred to in the Mediator's Proposal was subject to further agreement between the Mizrahi Parties and the Coco Parties. MI has no obligation to the project for the $1.2 million HST Reserve.

163. The HST Reserve was designed to address a potential tax liability for the Project pursuant to the *Excise Tax Act* (Canada) arising from the structure of the Project's agreements with a subordinate lender, CERIECO. The potential tax liability was estimated at approximately $1.2 million. In fact, the potential tax liability would be incurred by MI, which would then have to pass the expense onto the Project.

164. In June and July 2020, the Mizrahi and Coco Parties were scheduled to appear before an arbitral panel to address a number of issues outstanding between the parties (the "2020 Arbitration"). Two of the issues for the arbitration were: (1) the HST Reserve payment pursuant to the Mediator's Proposal; and (2) the payment of unit deposits for non-arm's length Agreements of Purchase and Sale between me and my family members pursuant to the Mediator's Proposal. Paragraphs 3 and 7 of the Mediator's Proposal (**Exhibit M**) states with respect to the HST Reserve and the deposits:

> 3. The HST reserve of approximately $1.2 million, which is currently held partly in the non-segregated MI account and partly in the segregated MI account, and which exists to protect MI against a potential CRA assessment associated with the structure of the Cerieco financing, will be paid into a joint trust account or used to purchase of a (sic) GIC, to be held pursuant to a simple trust agreement providing that, in the event of an adverse CRA assessment, the funds will be remitted to the CRA in accordance with the assessment. So long as the funds have been remitted, so that MI is not at risk, either party shall be free to challenge the assessment.

7. Each party will be entitled to reserve one unit of their choice with the benefit of a reduced deposit equal to 50% of the deposit payable by arm's length parties. All other units reserved must be on the standard terms and conditions regarding price and deposits.

165. On January 10, 2020, through my counsel, I proposed to credit the $1.2 million against the deposits owed for units in the Project set aside for me and members of my family, which were addressed in the Mediator's Proposal (the "Mizrahi Units"). If CRA assesses the full (or part of) the $1.2 million against MI (which was the entity at risk for the tax liability), then the $1.2 million (or a portion thereof) will be credited to the purchase price for the units and MI would not seek indemnity for the tax liability against the Project. If CRA does not assess the $1.2 million against MI, then no credit will be applied to the purchased price for the Mizrahi Units. A copy of my counsel's letter dated January 10, 2020 is attached as **Exhibit W**.

166. I do not believe that a response to this letter was received, and payments owed to me remained outstanding until approximately February 27, 2020 when the parties attended a meeting with the Mediator.

167. In an affidavit sworn and delivered by Ms. Coco on June 1, 2020 as part of the 2020 Arbitration, she acknowledged that there was agreement to set off the amounts owed as deposits for the Mizrahi Units, writing at paragraph 91:

> Although these non-arm's length sales were dealt with as part of the Mediator's Proposal, Sam refused to pay back any of the deposit amounts. It was only recently that he agreed to "set off" the deposit amounts owing by him against other fees owing to him. Although Sam has indirectly paid the Project back for these amounts he has, to date, failed to prepare the paperwork which demonstrates that the Project has received appropriate deposit amounts for each of the non-arm's length transactions.

168. I agree that I did agree to “set off the deposit amounts owing…against other fees”, but I disagree that the details of this agreement were not in place by June 2020 when the affidavit was sworn.

169. During a February 27, 2020 meeting referred to above in paragraph 166, the parties agreed that the unit deposits owed in respect of four units that I reserved for myself and members of my family would be, and were in fact, set off against other against fees and commissions owing to MI under the Mediator’s Proposal and the HST Reserve.

170. This agreement was confirmed on February 28, 2020 in an email from Mark Kilfoyle to Ms. Rico, a copy of which is attached as **Exhibit X**. In his email, Mr. Kilfoyle sets out the amounts owed to the Project in respect of the non-arm’s length units and the amounts owed to MI. Those resulted in a net amount owed to MI of $636,390, broken down as follows:

(i)	Net Residential Commissions:	$2,121,030
(ii)	HST deposit:	$1,220,000
(iii)	Unit Deposits Owed:	($2,704,640)

171. On March 6, 2020, Mr. Kilfoyle and Remy Del Bel met with Ms. Rico and agreed on the amounts set out in the February 28, 2020 email.

172. On March 20, 2020, Ms. Rico sent an email to me, Mr. Kilfoyle, Ms. Coco and others, a copy of which is attached as **Exhibit Y**. The email sets out Ms. Rico’s final accounting for the month of February and includes essentially the same amounts as set out in Mr. Kilfoyle’s email and acknowledges that the legal agreement was to be

drafted for the HST reserve set off. Ms. Rico subsequently submitted the Project's final February financials to Altus, which included the agreed amount of $636,390. Altus approved those financials and the amount of $636,390 was paid to MI, implementing the set-off agreement.

173. On June 17, 2020, the parties settled the 2020 Arbitration. A written resolution setting out the terms of the settlement was prepared and approved by the lawyers for the Mizrahi and Coco Parties. A copy of the Terms of Resolution is attached as **Exhibit Z** (The "2020 Resolution").

174. As part of a 2023 arbitration with the Mizrahi Parties, Coco acknowledged that the parties settled the 2020 Arbitration through the 2020 Resolution at paragraph 23 of an affidavit sworn February 1, 2023:

> Given Sam's agreement to buy out my family's interest, we entered into Terms of Resolution which dealt with several of the issues in dispute and included a provision for Sam to buy-out my family's interest in the Project… (the "Terms of Resolution").

175. The 2020 Resolution addresses a number of issues, including the agreement between the parties to negotiate the sale of the Coco Parties' interest in the Project (which ultimately resulted in the Control Agreement), in addition to formalizing the set off agreement with respect to the HST Reserve and the deposits owed on the Mizrahi Units. Paragraph 9 sets out the agreement on the HST Reserve as:

> 9. Sam will deliver the formal commercial documents by June 30 reflecting the set-off in the non-arm's length agreements of Purchase and Sale and HST tax reserve. These are being prepared by the real estate lawyers.

176. The "non-arm's length agreements of Purchase and Sale" in paragraph 9 of the 2020 Resolution refers to Agreements of Purchase and Sale for the Mizrahi Units. At the time

of the 2020 Resolution, approximately $2.7 million was owing as deposits pursuant to these Agreements of Purchase and Sale.

177. On June 26, 2020, my lawyers delivered a draft Set Off Agreement (the "Draft Set Off Agreement") and a draft purchase agreement to Coco's lawyers as required by the 2020 Resolution. A copy of this email from my lawyers to Coco's lawyers, dated June 26, 2020 is attached as **Exhibit AA**. The Draft Set Off Agreement formalized the agreement with respect to the outstanding deposits on the Mizrahi Units and the agreement on the HST Reserve. When no response was received from Coco's lawyers to the Draft Set Off Agreement, Ms. Lavallee followed up with Coco's counsel on October 22, 2020. A copy of this email dated October 22, 2020 is attached as **Exhibit BB**.

178. I understand that Coco's lawyers never responded to or provided comments on the Draft Set Off Agreement. No explanation for the failure to provide comments or to sign the Draft Set Off Agreement was ever provided by the Coco Parties.

179. On May 4, 2022, the Draft Set Off Agreement was ultimately signed, without Coco's involvement. The Mizrahi Parties rely upon their authority provided by the Control Agreement to execute this document in May 2022, although the Coco Parties were obligated to execute the Set Off Agreement as a term of the 2020 Resolution and, notwithstanding Coco's failure to sign the Draft Set Off Agreement, the parties had already implemented the terms of that agreement prior to the June 2020 Arbitration.

180. Given the agreement between the beneficial owners of the Project with respect to the HST Reserve, MI denies the Receiver's claim that it is obligated to pay $1.2 million to the Project for the HST Reserve.

7. Knightsbridge and SKYGRiD Statements are Unsupported

181. The Receiver has no expertise in development and construction. It has chosen not to retain an independent expert to deliver an affidavit or a Rule 53 expert report, concepts for which I am familiar given my experience in prior litigation. I understand from MI's lawyers and verily believe that any 'evidence' from Knightsbridge and SKYGRiD, particularly as it concerns criticisms of MI will be subject to a motion to strike.

182. Enclosed as **Exhibit CC** is an email exchange between MI's lawyers and lawyers for the Receiver, dated September 12, 2024. MI's lawyers were attempting to determine whether the Receiver intended to rely upon expert evidence, either by way of an affidavit or an expert report, on the issue of market rates or MI's performance. Counsel for the Receiver advised that it "may serve an expert report or factual affidavit that addresses market rates for general contractors working on condominium project [sic]". No such affidavit or expert report was delivered.

183. The Receiver suggests that MI is the cause for the delay and increased budget for the Project and notes, again without evidence, in paragraph 11.10 of the Fifth Report that while the COVID-19 pandemic and global supply chain issues adversely impacted the Project, it "does not believe" that these issues provide a complete explanation for the delays and cost overruns. Of course, there are more explanations for increased costs than the pandemic and the related supply chain issues, as reviewed above but I can state categorically MI and the entire construction industry in the GTA (and elsewhere) experienced huge increases in building costs due to COVID-19 supply chain issues. For the Receiver to vaguely suggest it "does not believe" what I know to be the case

and MI experienced, as did the construction industry in the GTA and throughout North America, defies experience and common knowledge.

184. It is common knowledge that COVID-19 had a significant impact on the cost of construction and construction scheduling. For example, attached as **Exhibit DD, Exhibit EE, and Exhibit FF** are trade publications and a Statistics Canada publication on the effect of COVID-19 on the construction industry.

185. While Altus did not specifically consider the extent of the delay caused by COVID-19, it did consistently note the following in its reports, including in Report No. 39 (**Exhibit K39**):

> **1.1 Covid Preamble**
>
> The COVID-19 pandemic has proven to have an unprecedented impact on municipal approvals, project costs, construction schedules, manpower availability and has disrupted global supply chains. Cost escalation, skilled trades and material availability remain a significant risk in the current environment. We will comment on any issues that arise throughout the course of construction.

186. It is my view, based on my experience in development and construction and knowledge of the Project, that the Receiver's actions have caused significant delays and subsequent increased costs to the Project.

187. For example, MI had recommended that the building be built from the "bottom-up", meaning that the interior of the building would be constructed concurrently with the tower. To do otherwise will cause an extraordinary delay in the completion of the Project. It prevents occupancy and registration of the units from proceeding in phases, thereby delaying the Project, the receipt of proceeds from the closing of the sale of the units, and increasing its interest costs. The height of the building and the complexity means that the vertical transportation takes a significant amount of time. In other

words, it is time consuming to simply move labourers and materials around the structure. Building the interior of the building concurrently with the tower reduces this delay. It also allows for the completion of the building in stages, so that the commercial component on the retail level, or the first few floors can be complete and occupied while work progresses on the top of the building. The Receiver's decision to abandon the concurrent construction of the interiors and to instead focus on building the tower alone as soon as possible will cost hundreds of millions of dollars in additional costs to the Project, as the interest expense for every day of delay is approximately $1 million.

8. MI's Entitlement to a Residential Management Fee

188. As noted in the Receiver's Fifth Report, MI claims entitlement to a Residential Management Fee, pursuant to the Mediator's Proposal, which provides:

> A Residential Management Fee will be paid to MI in respect of all existing and future residential sales equal to 2.0% of the selling price, including upgrades and extras. 50% of this fee will be payable upon entering into a firm agreement of purchase and sale with payment of the appropriate deposit, and the remaining 50% will be paid on closing of each unit. The second 50% will not, however, be earned and payable unless an application for an additional six floors is submitted to the City on or before December 31, 2020.
>
> This fee will include all efforts and services rendered associated with marketing and selling the remaining units, including all creative direction provided by Sam Mizrahi. It is intended to include everything save and except for services provided by arm's-length consultants and suppliers, save and except for the current real estate commission structure, which as I have already said, remains the same. To be more specific, Sam will no longer mark up third-party marketing invoices.

189. The spreadsheet attached as **Exhibit GG** calculates MI's entitlement to a Residential Management Fee for sold units at $6,213,429.69. MI has been paid $719,121.49 towards its entitlement to the Residential Management Fee, plus a further $2.7 million

by way of $100,000 monthly marketing charges. MI, therefore, claims that it is entitled to $2,794,308.20 for its Residential Management Fee, plus the deferred entitled payable on the closing of units and sale of subsequent units. I also note that the Project will owe MI a payment of approximately $9.6 million upon the closing of the units as a commission owed to MI pursuant to the ELA (defined below).

190. In paragraph 15.6 of the Fifth Report, the Receiver argues that MI's entitlement to a Residential Management Fee should be reduced by the difference between the standard deposits payable under the Standard CSA and the deposits required for the Mizrahi Units. As noted above, the issue of the payment of deposits for the Mizrahi Units was settled between the parties as part of the 2020 Resolution. As such, no deduction concerning the deposits on the Mizrahi Units from the amount of the Residential Management Fee owed to MI is warranted.

9. MI was Paid the $100,000 Marketing Fee as a Component of the Residential Management Fee

191. The Receiver claims that MI was improperly paid $100,000 for a marketing fee and notes that MI was entitled to a Residential Marketing Fee under the Mediator's Proposal, which included all efforts and services with "marketing and selling the remaining units". All parties knew and agreed to the payment of the $100,000 per month to MI as a marketing fee. This amount is properly attributed to the Residential Marketing Fee that MI was entitled to receive under the terms of the Mediator's Proposal.

10. Payment to Third Party Real Estate Brokers Were Authorized and Property Project Expenses

192. The Receiver claims that MI is obligated to repay amounts paid to third-party real estate brokers, Magix and Royal LePage. MI disagrees.

193. Magix was retained to assist with overseas sales promotion. As the Receiver confirms in paragraph 13.31 of the Fifth Report, the retention of Magix was approved by the Senior Secured Lender. The retention of Magix was necessary to sell units in the Project overseas in Dubai in light of the stringent restrictions on travel caused by the COVID-19 Pandemic.

194. With respect to Royal LePage, the Listing Agreements were entered into between the Project and Royal LePage. While I signed the Listing Agreements on behalf of the Project, MI has no obligation under these agreements.

195. The payments to both Magix and Royal LePage, like all payments at issue in the Fifth Report, were reviewed and approved by Altus, the Senior Secured Lender and its Administrative Agent. They are Project expenses properly incurred and paid for by the Project.

196. In Paragraph 13.34 of the Fifth Report, the Receiver argues that MI is responsible for the payment of these third-party fees under the terms of the ELA and writes that under the terms of the ELA MI "shall be responsible and shall pay for…the advertising and sales promotion in connection with the sales of the Units inclusive of promotional material and displays". The Receiver also argues that "Neither the ELA nor any other agreement allows MI to charge third-party commissions and its own commissions on the same units".

197. I disagree.

198. First, I note that the quote from the ELA in paragraph 13.34 of the Fifth Report is inaccurate. The language quoted in the Receiver's quote relates to the Vendor, i.e. the Project, not MI. The Receiver appears to quote section 5 (ii) of the ELA. Section 5 of the ELA states in full:

> 5. OBLIGATION OF THE VENDOR
> The Vendor shall be responsible and shall pay for the following in accordance with the Budget prepared by Altus dated June 23, 2017, as may be amended from time to time:
>
> (i) All required legal documentation including Purchase Agreements and all condominium disclosures (if a condominium) and other documents;
> (ii) The advertising and sales promotion in connection with the sales of the Units inclusive of promotional material and displays;
> (iii) The provision and maintenance of the sales areas including model suites (if any), offices, office equipment, computer and modern stationary supplies, if and as required; and
> The provision of sales centre staff support (other than the sales agents) on the special event sales days and as required by the Agent and approved by the Vendor, together with a full-time receptionist/administrator.

199. The Project is defined as the "Vendor" in the ELA, while MI is defined as the "Agent". Therefore, under the terms of the ELA, the Project, not MI "shall be responsible and shall pay for…the advertising and sales promotion in connection with the sales of the Units inclusive of promotional material and displays." A copy of the ELA is attached hereto as **Exhibit HH.**

200. MI's obligation with respect to the cost of sales and promotional materials is set out in section 7 of the Agreement, which states that MI is "responsible for the cost and provision of all of **his or her own** advertising and sales promotion…" **[emphasis added]**.

201. Furthermore, the Mediator's Proposal confirmed that MI was entitled to retain third-party consultants and that the cost of these consultants would not reduce MI's entitlement to a Residential Management Fee. On this issue, the Mediator's Proposal (**Exhibit M**) states:

> This fee will include all efforts and services rendered associated with marketing and selling the remaining units, including all creative direction provided by Sam Mizrahi. It is intended to include everything save and except for services provided by arm's-length consultants and suppliers, save and except for the current real estate commission structure, which as I have already said, remains the same. To be more specific, Sam will no longer mark up third-party marketing invoices.

202. MI was entitled to retain third party consultants to assist in the sale of Project units. It did so with proper authority and with the approval of the Senior Secured Lender during the time when the Control Agreement was in place and under the authority of the Mediator's Proposal.

11. Payments to Subcontractors Identified by the Receiver in Section 14 of the Fifth Report

203. In section 14 of the Fifth Report the Receiver raises concerns over payments to subcontractors who, according to the Receiver, "did not actually perform" the work for which they received payment.

204. I provide evidence on this issue to reassure the court and the Receiver that there were no payments made to subcontractors who did not undertake work on the Project, even though the Receiver does not advance a claim against MI on this basis.

i. Irpinia Kitchens

205. Irpinia Kitchens was retained as a subcontractor to design and install the kitchens in the condominium units. The invoice attached as Appendix 49 to the Fifth Report indicates the invoice is for “Early Procurement of Materials”.

206. No kitchens have been installed given the state of construction on the Project. The Project paid the Irpinia invoice to secure the price for the kitchens that was originally negotiated between the Project and Irpinia. A payment of $555,555.56 was made to ‘lock in’ the cost of Irpinia’s installation of the kitchens and procurement of materials. Had this payment not been made, the cost of procuring the kitchen materials and installing the kitchens would be significantly higher today in 2025, versus the price originally negotiated. This is confirmed by the document signed by Irpinia found at Appendix 49 of the Fifth Report, which states, among other things, that the payment is made “for **future production of cabinetry**” **[emphasis added]**.

ii. Mar-Tec Woodworking Ltd

207. MI agrees that Mar-Tec Woodworking Ltd (“Mar-Tec”) was paid $111,870 (net of HST and 10% holdback) for shop drawings. MI understands that it did deliver drawings to the interior decorator for the Project, Michael London.

iii. Pereira Construction and Carpentry

208. The payment to Pereira Construction and Carpentry (“Pereira”) is similar to the payment to Irpinia. Pereira was paid to secure its contract price to provide its carpentry

services to the Project. Like the invoice for Irpinia discussed above, the reference to "deposit for materials" in the Pereira invoice is to secure the cost of material supply. Pereira had rented a mill shop to complete its work on the Project, but did not get the chance to use this space as its contract with the Project was cancelled. The cancellation of the contract with Pereira by the Receiver is, in my opinion, a significant mistake as MI had secured a very good price with Pereira, which was uniquely situated to provide carpentry services to the Project at a low cost because it had obtained a union exemption. The cancellation of the Periera contract by the Receiver will result in significant added Project costs.

iv. Royal Bedrock

209. Royal Bedrock was retained by the Project to source and install the considerable amount of granite required for the Project. MI received the money from the Project and paid Royal Bedrock for its invoice. I understand from the owner of Royal Bedrock, Mr. Anthony Guido, and verily believe that he was approached by the Receiver and SKYGRiD who questioned him about the state of the stone purchased. SKYGRiD inspected the granite and advised that it was not yet needed.

210. Royal Bedrock's invoice is more than was initially budgeted owing to an expanded scope. The initial budget did not include the cost of granite for the pool deck, the roof deck, the amenities areas and the penthouses. This additional volume of granite required significantly increased the cost.

211. In addition, the granite required to comply with the Bloor Street guidelines on the use of granite increases the cost, as granite must be of the very best quality. Finally,

additional costs for granite are incurred because the rock must match the rest of the building. The Receiver notes in paragraph 14.10 of the Fifth Report that MI's Vice President, Mr. Yanquelevech, expressed surprise about the cost of the stone to be supplied by Royal Bedrock in an email appended as Appendix 51 to the Fifth Report. I am advised by Mr. Yanquelevech and verily believe that this "surprise" was due to a misunderstanding about the increased scope of work for the granite supply.

212. Confirmation of payment of Royal Bedrock by MI and the related invoices are attached as **Exhibit II.** According to our records, MI has received from the Project and paid Royal Bedrock $2,788,600.01, inclusive of HST**.**

12. Response to the Criticisms of MI's Work

213. Many of the criticisms leveled by the Receiver against MI and its work on and management of the Project have the benefit of hindsight and do not appreciate or consider the unique complexity and difficulty of constructing this Project. I have reviewed the comments on the Knightsbridge Issues Log set out in the affidavit of Mr. Jeff Murva, affirmed January 20, 2025 and agree with his comments. I have addressed the issues that he did not address below.

214. Issue 1 in the Issues Log of Knightsbridge (Appendix 30 to the Fifth Report) concerns the procurement process for the project. Contracts were not always immediately let with subcontractors because of the increasing budget for the Project. Letters of Intent were used to secure the suppliers to the Project while the parties worked with Altus to review and revise the budget and Project schedule. I note that in all instances

payments to suppliers were reviewed and approved by Altus and the Senior Secured Lender.

215. Issue 3 in the Issues Log of Knighstbridge (Appendix 30 to the Fifth Report) concerns the management of uncommitted work for the Project. MI had a Vice President of Construction who was responsible for the determination of line-item amounts for uncommitted work and a Vice President of Accounting. When the budget was addressed with the parties and Altus, the Vice President of Construction would validate the scope of work for the uncommitted work because it was committed to and submitted to the Senior Secured Lender for Authorization.

216. Issue 4 in the Issues Log of Knighstbridge (Appendix 30 to the Fifth Report) concerns the Change Management process for the Project. Project managers would distribute design documents which could potentially change the contracted scope of work to the respective trade contractors and suppliers. These potential change documents would initiate quotations for a change in a contract, by the respective trade contractor or supplier. These quotations would be reported to the Vice President of Construction by the respective project manager. The Vice President of Construction would evaluate these quoted changes and either contest them or agree to the quoted amounts.

217. Issue 14 concerns change orders and the use of Procore. Only a few people had the power to approve change orders. There was a process for reviewing change orders as shown throughout the Altus Reports. These were done in management meetings and circulated and approved in that manner.

218. Issue 17 in the Issues Log of Knighstbridge (Appendix 30 to the Fifth Report) concerns instances where there were no holdbacks. The lack of holdbacks was to ensure the

best possible price for the Project. MI contracted with many small, highly specialized suppliers which were unable to accept holdbacks. These suppliers are often artisanal craftsman, such as Pereira. The lack of holdbacks on these contracts was essential to the negotiation with these suppliers.

219. Issue 18 in the Issues Log of Knightsbridge (Appendix 30 to the Fifth Report) concerns budget management and cost control measures. As noted above, budget management and cost control, along with accounting, was done by the Coco Parties, and Altus. The parties worked collaboratively on the budget.

220. Issue 20 in the Issues Log of Knightsbridge (Appendix 30 to the Fifth Report) concerns the formal procurement plan and strategy. There was no formal procurement plan in place owing to the ever-increasing costs of suppliers, mainly caused by supply chain issues in the pandemic. The cost of supplies was significantly higher due to COVID-19. The Project did not procure what it did not currently need with the intention of obtaining those supplies when necessary for the construction and when the market had regularized.

13. Additional MI Invoices

221. MI's claim for outstanding payment primarily concerns the non-payment of CM Fees and time-based labour rates, but MI is also owed $208,285.38 for the use of the sales presentation gallery, which remain unpaid. The invoices unpaid by the Receiver referable to the sales presentation gallery are attached as **Exhibit JJ**. The use of the sales presentation gallery and the employees therein were historically paid by the Project as they are a Project expense.

AFFIRMED before me by video conference at the City of Toronto, in the Province of Ontario, this 20 day of January 2025, in accordance with O. Reg. 431/20, Administering Oath or Declaration Remotely.

D Trafford

Commissioner of Oath

SAM MIZRAHI

2

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

Applicants

- and –

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

Respondents

AFFIDAVIT OF JEFF MURVA

I, Jeff Murva, of the City of Toronto in the Province of Ontario SOLEMNLY AFFIRM:

1. From October 2020 to March 2024, I was the Director of Project Management for Mizrahi Inc. ("MI") and worked on the construction and development of the Project. As such, I have knowledge of the facts set out in this affidavit. Defined terms used in this affidavit are as defined in the Receiver's Fifth Report, dated October 11, 2024 (the "Fifth Report"), unless otherwise noted.

2. I am currently the President of J Murva Consulting Ltd, which provides construction consulting services to Hi-Rise Residential Developments. From 2013 to 2018 I was the President of FirstCon Group Ltd, part of the Freed Group of Companies, and Vice President of Construction at Freed Developments. Prior to that I worked for CBRE as a Director in Project Management. I have over 35 years of experience in managing the development, design and construction of award winning commercial, institutional, and residential high-rise building projects, particularly in Toronto.

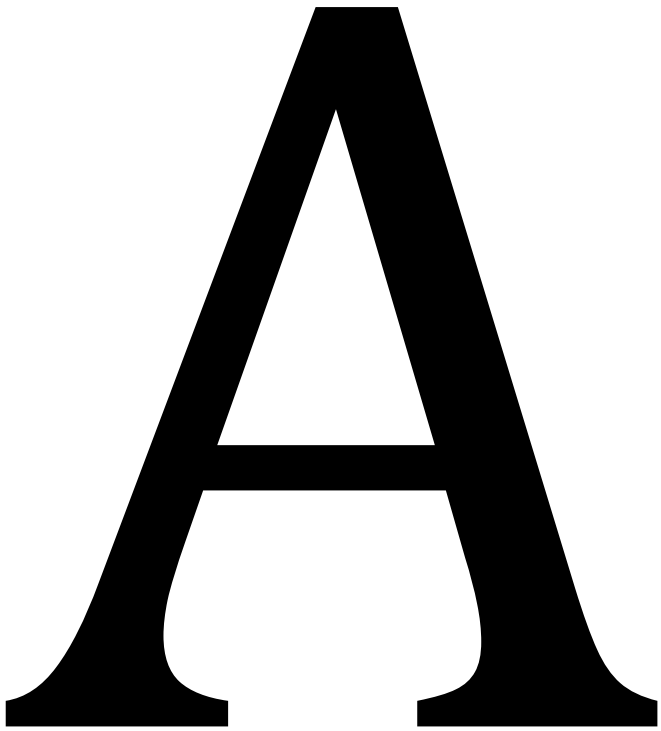
3. I have reviewed Appendix 30 to the Fifth Report. My response the issues raised in these documents is found in the chart attached as **Exhibit A**.

AFFIRMED before me by video conference at the City of Toronto, in the Province of Ontario, this 20th day of January 2025, in accordance with O. Reg. 431/20, Administering Oath or Declaration Remotely.

D Trafford

Commissioner of Oath

JEFF MURVA



The One - Issues Log

	Observation	Industry Standard Practice	Comments	MURVA RESPONSE
1	Procurement process is disjointed - Contracts are not immediately entered into and instead LOIs are issued while contracts continue to be negotiated and often modified from the boiler plate after award	Boilerplate is rolled up to the conditions of the CM contract, and completed after bid leveling and Owner approval and signed copies returned to the Owner within 10 business days	Demonstrates a lack of governance, control and fiscal responsibility by the CM Team	I was not involved in the award or negotiation of trade contracts nor the creation or management of the trades portion of the project budget nor the review / approval of trade extras or invoices.
2	Based on observations in the scheduling meeting there appears to be a disconnect, because of a lack of a single leader, with respect to the coordination of activities between the siloed Project Managers.	Standard practice is to have the SR. PM of Project Director be an umbrella over the PMs and a General Superintendent be the same over the Site Superintendents. This practice provides over all project direction and coordination and sequencing of the work.	Better high level management is required versus that date with a direct tie in of the Scheduler as well as trade buy-in on the scheduling.	The project managers were siloed. This organizational structure was adopted from Clark Construction's project organizational structure. There was a single project leader. That was the VP of Construction. Due to project manager personalities the coordination of some of them was challenging for the VP of Construction.
3	Based on our observations in the Uncommitted work meeting with Esteban it is evident he does not have a total understanding of the process in its fundamental terms. – No budget items listed within the document, with all left blank so there is no ability for comparative analysis against budget	Normally a project would have a Procurement Team (2-3 people) and a project accountant. This results in tighter controls and oversight as the Sr. PM or Project Director validates the work and the packages prior to the commitments being issued to the Owner for signature (creator and verifier are never the same person)	Team is not adequately structured and needs to be realigned and strengthened for a project of this size and complexity.	I was not responsible for the management of the budget line items nor the procurement of scopes of work.
4	No formal Change Management process appears to exist	Normally a commitments meeting is held every 1 or 2 weeks by the CM with the Owner to review change requests, RFIs requiring a change request, pending changes (including ones being priced) etc.	KDC and A&M are initiating this practice starting the week of November 20th however it requires the CM to be bound by it.	There was a Change Manage process. It was a modified version of the standard industry practice. The siloed project managers would distribute design documents which could potentially change the contracted scope of work to the respective trade contractors and suppliers. These potential change documents would initiate quotations for change in contract, by the respective trade contractor or supplier. These quotations would be reported to the VP of Construction by the respective project manager. The VP of Construction would evaluate these quoted changes and either contest them or agree to the quoted amounts. Because I was not involved in this process, but occasionally observed this process, I believe that the VP of Construction would advise Mr. Mizrahi of the recommended Change Order to seek authorization to issue the Change Order. I believe that, on some occasions, if a potential Change Order was associated with a Commitment that was not reported to the Lender, because there was not sufficient budget for the original commitment then the Change Order would not be disclosed to the Lender. If the original commitment has been previously approved by the Lender then the Change Order would be issued, subject to Mr. Mizrahi's prior approval. For most of all changes the above process was followed on this project. There were a few exception to this process. The duration of the processing of changes was often prolonged for various reasons. There was no regularly scheduled internal formal change review meeting.
5	Due to blurred lines between the Owner and the CM (result of the two being the same ownership structure) the consultants role has been diminished and there is less policing of the CM than expected	Standard practice is that the Consultants insulate the Owner from the CM on a day to day basis, regulate and instruct the CM, verify work underway and certify payments based on their observations	With the new structure and MI only being the CM and not the Owner, this is a perfect time to correct this as the consultants now are working for the Receiver. Suggest that certification of Payments be added to the Architects' (Core) scope of services.	The cited standard practice is not a reflection of how the high rise multi-family residential "self perform" industry practices. The large majority of the GTA high rise multi-family residential developers, who have their own in house Construction Management team, limit the project consultants involvement to providing design services and assist in the administration of the design as the project is being constructed. Frequently, in these types of projects, the consultants do not manage the contract or financial aspects of the project, nor do they oversee the Construction Manager. The consultants' involvement is limited to addressing design questions and clarification, which are through the instruments of RFIs and Site Instructions. The consultants will periodically review work on site to ensure conformance with the design drawings, review design issues, and, at the end of the project review the completed work for conformance and for the purposes of signing off on documents necessary for City authorized Occupancy. Often the consultants take direction from the Construction Manager, as agent of the Owner. This is a common practice by most well established developers in the GTA.

The One - Issues Log

	Observation	Industry Standard Practice	Comments	MURVA RESPONSE
6	Use of Procore is not to the potential of the software programs and the data was found to be not up to date with documents waiting to be uploaded into Procore. (Currently still a work in progress)	Procore is used by most CMs and during its set up there is a lot of customization done to create all the CM specific forms, contracts, POs and LOIs, etc. This results in all documents being created within Procore and distributed through Procore.	It is too late in the project for MI to correct the ability to do everything in Procore directly, however increased diligence needs to be practiced by MI when documents are created that there is a seamless process of uploading all files to Procure that form part of the document.	Procore was not used to its full capability. The financial process was not managed through Procore. Therefore, Commitments, and associated Change Orders, were not entered or tracked in the financial portion of Procore. Because there were several trade and supplier contracts that we committed to the vendor via LoI , but not contract, for reasons explained above, then these commitments could not be entered into Procore. Therefore, the contract / commitments portion of Procore was knowingly incomplete and not current.
7	Esteban in addition to running the construction project is also pricing suite modifications.	This is normally carried out by a separate team who interface as required with the main CM team	Esteban is already over burdened and is the bottleneck on many issues. There needs to be an overall redistribution of his areas of control and responsibility as he does delegate when left up to his discretion	The VP of Construction was also responsible for overseeing the suite modifications, both design and pricing. Frequently, the VP of Construction would meet with the purchasers of larger units to coordinate the upgrades.
8	The CM team and specifically Esteban consistently does not meet deliverable requests, such as update budget information for the cost log, template of the standard sub- trade contract, schedule updates, etc.	a CM on a project of this size would have had a system in place to provide all of items requested by an Owner, and all standard contracts would have been submitted for Owner's review and compliance that the sub- trade contracts roll up to the terms and conditions of the CM contract related to, but not limited to schedule. Once	There needs to be a clear understanding that the role of Owner is now the receiver and that all requests for information, updates, and reporting needs to be met.	The observation was correct, for the reasons explained above, pertaining to contracts/commitments, and contract issuances and recording within Procore.
9	Inaccurate and out of date scheduling as was demonstrated on November 15th when just before the scheduling meeting it had to be cancelled due to the schedule being flawed and inaccurate as a result of the task link errors.	Standard practice is to issue a schedule update monthly, where the schedule includes a current level of completion for each task in the schedule. The schedule is generally driven by the Superintendents working with the trades to obtain feed back on the schedule.	Altus should take the Primavera schedule when available next week and do a detailed scrub of the P6 file versus a PDF copy and prepare a report on the accuracy of the schedule and the proficiency of the scheduler to determine if there is a competency issue.	This occurrence was correct. This was due to challenges with the project scheduler at the time. For a prolonged period of time the schedule was not being updated monthly because we could not find a replacement for the previous scheduler who had left the company. When we did hire a replacement scheduler it took a while for the schedule to be updated. I cannot recall exactly when the scheduler started on the project. I believe that it was shortly before the Receiver was appointed.
10	CM fees charged on top of CM staff costs (and on top of mark-up on actual staff costs). Staff Cost to date (per Altus report 51) is	CM fees charged cover all CM staff and management costs for the Works	The current practices related to CM Fees and their lack of alignment to industry practices needs to addressed and adjusted	Industry practice, for the majority of Construction Management agreements for high rise multi-family residential projects is that project staff costs are charged, at prescribed rates identified the the Construction Management Agreement. These are defined as components of the Cost of the Work. Typically, CM Fees are applicable to all Cost of the Work. The Receiver's statement that CM fees include, or cover, project staff costs is incorrect. On some occasions, it may be agreed , between the Owner and the CM, that the CM Fee may cover senior project management individuals such as Project Director or higher. Also, it is common industry practice, for most Construction Management agreements, in the GTA, for both ICI and residential high rise multi-family projects, that the prescribed staff charge rates are greater than the actual costs, as they include for indirect staff overhead and some corporate overhead costs associated with providing the construction management services, of the Construction Management service provider. This is typically common knowledge of the buyers of Construction Management services, and of larger Cost Consultants, involved with residential multi-family high rise projects, in the GTA.

The One - Issues Log

	Observation	Industry Standard Practice	Comments	MURVA RESPONSE
11	A Project Controls Manager does not exist	A Project Controls Manager is appointed to report on cost metrics (cost incurred, cost to complete, CPI index, SPI, variances)	Staffing of the project needs to be adjusted to reflect the current phase of the project and the correct positions added as well as redundant positions eliminated.	The use of a Project Controls Manager, is not a common role in the residential multi-family high rise project industry in the GTA. Most sophisticated experienced Construction Management service providers have procurement, contracting, change management, invoicing, reporting processes and systems that preclude the need, and the cost, for a Project Controls Manager. I believe that the Receiver's replacement Construction Manager does not have a specific Project Controls Manager assigned to this project.
12	Project Status progress data is unrealistic and unsupported by facts. The October 2023 report shows 83% progress. Site tours by third parties including Altus and KDC show progress is between 20-30%	Schedule and progress status reports are provided in monthly reports and are reasonable, useful and reliable to assess project status	Monthly reports need to be re-designed to include a financial snapshot of the current project budget and projected cost to complete as well as a variance report from the previous month	The project status was reported based on the costs invoiced to date versus the budget at the time. Because the project budget was incorrect and lower than the eventual projected final cost the ratio of cost paid to date versus the budget at that time reflected a larger percent complete than what was observed on site. I had frequently pointed this out to the VP of Construction and the CFO. I was advised that this would be corrected when the project budget was augmented in the future.
13	Monthly reports issued by MI contain a section (1.2.1) in the monthly reports that have empty cells and no information on forecast start dates of finish dates for milestones	Milestone Tracking is performed on a monthly basis, reporting on root causes for delays and mitigation actions	The monthly reports need to include a monthly schedule update including any variances in the schedule from the previous month.	If this was an observation of the October 2023 monthly report, the observation statement is incorrect. See attached snapshot of the October 2023 Monthly Report section 1.2.1. As the Lender did not permit the commencement of the Hotel nor KSFC Fitouts, those forecasted start and end dates were reported as TBD. I have checked all Monthly Reports, section 1.2.1, from the time that the Receiver was appointed to the time that Mizrahi was removed from the project, considering that there was a 1 month lag for reporting progress after month end. In all those reports, section 1.2.1 did not have any empty cells that should have contained data. The reporting of root causes, for delays identified in this section, was not a requested reporting requirement of the Lender nor the loan monitor.
14	A list of Change Orders exists in Procore, however the column titled "Designated Reviewer" shows many "Unassigned" Designated Reviewers.	Change Orders for contracts are tracked against budget to ensure before a Change is approved the overall commitment is still within budget. There are assigned reviewers and approvers within the Project Management Team for reviewing costs and change orders.	The use of Procore needs to be addressed in terms of the features and reports available and the accuracy of reporting increased.	I was not involved in the management of awards, contracts, changes order, or invoices. Therefore, I did not review the contract commitments nor change orders in Procore, and as a result I cannot comment on this observation.
15	Section 1.3 of monthly report is not updated to show delays in 2023. There are multiple and accumulating delays in 2023, including delays by Gamma on the curtain wall work that are not reported	Status of delays and root causes of delays are analyzed on an ongoing basis by the Construction Manager and the Project Controls Manager. The delays caused by subtrades are quantified and subtrades are held accountable for delays, with cost of delays off-set from their invoices	The monthly report needs to include a risk registry as well as a summary oof any claims, delays (cause and impact) and documented back charges	If this was an observation of the October 2023 monthly report. The observation statement is correct. This section only reports on the information provided by the VP of Construction. For numerous reasons, this section did not report or quantify on the impact of ongoing delays experienced, at the time on the project. Any significant trade delays were reported in Section 6, Owner Issues, on the Monthly Report.

The One - Issues Log

	Observation	Industry Standard Practice	Comments	MURVA RESPONSE
16	No updates on level of progress for design activities by discipline in the monthly reports	Design status and progress is updated on a weekly and monthly basis	The weekly and monthly reports need to be expanded to include a detailed summary on current design issues and where there is a potential delay to the schedule associated with the issue it should also be included in the risk registry	If this was an observation of the October 2023 monthly report. The observation statement is incorrect. The design status and progress was reported, on a monthly basis, in Section 3 - Design Status, of the Monthly Reports. Albeit, sometimes the information reported, in a particular month, which was provided by Mizrahi Inc. support staff, was incorrect. However, it was almost always, corrected in the subsequent Monthly Report.
17	No holdback applied on key vendor invoices	Statutory Holdback of 10% applied per Construction Act in Ontario, in order to provide security over defects in the warranty period as well as an additional 3% hold back for deficient work	Hold back practices need to be adjusted to meet the industry standard including the additional 3% hold back as a separate hold back for repair of deficient work	I was not involved in the management of awards, contracts, changes order, or invoices. Therefore, I did not review the invoices, and as a result I cannot comment on this observation.
18	No budget management or cost control on the project. The accounting is done externally and the budgets are also done externally. As a result a project cost and financial management ERP system is not being used.	Cost accounting performed by project staff embedded in the project. The cost accounting (invoices and accruals incurred) informs quarterly and annual budgeting efforts by the project team. The Project Director and the Project CFO or Commercial Director are in charge of implementing standard cost	There is a need for an immediate change in reporting in terms of Cost Logs, Change Order Logs, FRI Logs, SI Logs, etc. al focusing on accuracy of reporting and up to date information	I was not involved in the management of awards, contracts, changes order, or invoices. Therefore, I cannot comment on this observation.
19	Micro-management of small supplies leading to lack of control and tracking as well as taking on unnecessary risk in the interface with the trades for late supplies	Supply of small tools and materials included in key trade subcontracts to benefit from buying power from trades and avoid micro- managing small items directly	This needs to be reviewed based on the sub-trade bidding, and in new sub-trade contracts it must be included to avoid double costs.	This practice, on this project, was adopted from Clark Construction's operational practice on this project.
20	No formal procurement plan and strategy documentation, no procurement dates in schedule, no consideration of procurement delay risk in schedule	A Commercial / Procurement Manager is appointed to prepare a Procurement Strategy and Plan, call for tenders, negotiate and execute contracts with all subtrades and suppliers	Staffing of the project needs to be adjusted to reflect the current phase of the project and the correct positions added as well as redundant positions eliminated, especially related to procurement and the creation of a procurement team	I was not involved in the management of awards, contracts, changes order, or invoices. Therefore, I cannot comment on this observation.
21	No quality management program, leading to risk of cost overruns	A Quality Assurance Manager is appointed to prepare a full QA/QC plan that includes inspection and test plans (ITP's) for all key materials, including concrete , rebar, curtain wall, steel, etc.	The need for a QA/QC Manager is a key part of the project controls as this person within a CM organization also tracks corrective measures and remedial work and assurance that all items noted as need resolution have been closed out to the satisfaction of the Owner (receiver in this case)	Mizrahi Inc. chose to rely on the project consultants to review workmanship Quality on site, in combination with Mizrahi Inc. site supervision staff to monitor and ensure quality. There was testing procedures and processes in place, to comply with Bulletin 19 requirements. These testing activities were conducted, and reported with the necessary frequency, by EXP. an industry leader in GTA.

3

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

AFFIDAVIT OF NIALL FINNEGAN
February 27, 2025

I, NIALL FINNEGAN, of the City of Toronto, in the Province of Ontario, MAKE OATH AND SAY:

A. BACKGROUND

1. I am a principal at Finnegan Marshall Inc. ("**FM**"), a multidisciplinary real estate and development cost consulting company that I co-founded in 2014. FM was retained as a cost

consultant for the Senior Secured Lenders[1] on the Project in February 2024. As such, I have knowledge of the matters to which I herein after depose.

2. I am providing this affidavit in response to the affidavit of Jeff Murva affirmed January 20, 2025 (the "**Murva Affidavit**"). The fact that I have not addressed a statement in the Murva Affidavit does not mean that I agree with it.

3. In his affidavit, Mr. Murva makes certain assertions about common practice in the GTA as it relates to CM Fees and Labour Rates. Mr. Murva specifically says that his statements are "common knowledge" with "larger Cost Consultants, involved with residential multi-family high-rise projects in the GTA." I disagree that those statements are common knowledge, as further discussed below.

B. EXPERIENCE

4. I have worked in the Canadian construction industry for over 43 years. Before founding FM, I was the president of the cost consulting group at Altus Group Limited ("**Altus**"). A copy of my *curriculum vitae* is attached as Exhibit "**A**".

5. FM has extensive experience providing cost consulting services to major construction projects, including mixed use and residential condominium buildings, in Toronto. We typically work on approximately 180 projects under construction at any given time. We are, therefore, very familiar with market rates for all aspects of construction and development at the time.

[1] For convenience, I have used certain defined terms from the Fifth Report of the Receiver dated October 11, 2024.

6. I understand that Altus worked as the Project's cost consultant from its inception until February 2024. Altus and FM are the two major cost consultants in the Toronto market. Either Altus or FM are retained on most major residential and mixed used construction projects in Toronto.

7. FM was retained as a cost consultant for the Senior Secured Lenders on the Project in February 2024. As part of FM's mandate on the Project, the Receiver consulted with FM about whether the fees charged by MI for its work on the Project were consistent with market rates. I advised the Receiver that MI's rates were higher than market rates. In the paragraphs below, I explain and elaborate on this conclusion.

C. AMOUNTS CHARGED BY MI

8. MI charged the following amounts to the Debtors for its work on the Project:

   (a) costs owed to subtrades working on the Project (the "**Hard Costs**");

   (b) out-of-pocket recoverable costs, including various equipment rentals, storage, materials, and other third party costs (the "**Recoverable Costs**");

   (c) labour rates in respect of MI's labour and site staff working on the Project (the "**Labour Rates**"). The Labour Rates included two components: MI's actual labour costs (the "**Labour Costs**") and a mark-up on the Labour Costs (the "**Labour Profits**"); and

   (d) a construction management fee equal to 5% on the sum of (i) Hard Costs, (ii) Recoverable Costs, and (iii) Labour Rates (the "**CM Fee**").

D. MR. MURVA'S CLAIM RELATING TO MI'S MARK-UP ON THE LABOUR RATES

9. In the Murva Affidavit, Mr. Murva states the following at Item 10 of Exhibit A:

> Also, it is common industry practice, for most Construction Management agreements, in the GTA, for both ICI and residential high rise multi-family projects, that the prescribed staff charge rates are greater than the actual costs, **as they include for indirect staff overhead and some corporate overhead costs associated with providing the construction management services**, of the Construction Management service provider. [Emphasis added]

10. I do not agree with Mr. Murva's statement.

11. In the present circumstances, the construction manager (MI) was related to the owners (the Debtors). It is, accordingly, "self-performing" the construction management work.

12. A self-performing owner does not mark-up its labour costs in order to earn a profit on the labour provided to the Project. Self-performing owners charge labour at cost inclusive of labour burdens (both site labour hired from third parties and site supervisors or management hired by the developer directly). This "burden" covers indirect labour costs, such as Canada Pension Plan contributions, employment insurance and other similar costs.

13. As such, industry standard practice is that MI should charge salary costs, without any mark-up other than labour burdens.

14. MI charged significant amounts over and above its actual Labour Costs. As described above, this is not consistent with market practices for self-performing owners. These amounts are described below:

(a) **Site labourers.** The bulk of the site labour on the Project was provided by Clonard Group Inc. ("**Clonard**"). Clonard is a major labour provider in the Toronto

construction market and FM is familiar with its rates from other projects. Clonard charged market hourly rates on the Project. MI charged the Debtors more than it paid Clonard. This is not consistent with market rates and practices.

(b) **Crane operators.** Crane operators on the Project were provided by Amherst Crane Rentals Ltd. ("**Amherst**"). Amherst charged rates that are consistent with market rates, but MI marked those rates up significantly. This is not consistent with market practices.

(c) **Site supervisory and management staff.** MI employed site supervisory and management staff and charged the Debtors for work performed by these individuals. MI's staff were paid rates that are consistent with industry rates, but MI marked up site supervisory staff rates significantly. This is not consistent with industry practices for self-performing owners, who do not markup salaries.

15. MI's mark-up on the rates discussed above are illustrated in the chart below based on actual amounts incurred in January 2024, billed on MI invoices C1470 and C1476. These invoices are examples from the period in which the Receiver has access to the full underlying labour invoices that MI paid. Based on my review, MI's billing practices in this respect extended both before and after the periods covered by the invoices:

	Actual Cost	**MI Cost**	**Markup (amount)**	**Markup (percentage)**
Crane Labour				
Regular time	$135.00/hr	$196.57/hr	$61.57/hr	45.61%

Travel time	$160.00/hr	$294.85/hr	$134.85/hr	84.28%
Overtime	$265.00/hr	$294.85/hr	$29.85/hr	11.26%
Site Labour				
Labourer	$57.50/hr	$106.31/hr	$48.81/hr	84.89%
Foremen	$65.00/hr	$112.29/hr	$47.29/hr	72.75%
Swamper[2]	$80.00/hr	$106.31/hr	$26.31/hr	32.89%
Security	$32.00/hr	$99.56/hr	$67.56/hr	211.13%
Security Super	$49.00/hr	$112.29/hr	$63.29/hr	129.16%
Fire Watch	$32.00/hr	$99.56/hr	$67.56/hr	211.13%
Traffic Watch	$30.50/hr	$99.56/hr	$69.06/hr	226.43%
MI Site Staff (Total Cost)	**$507,251**	**$1,020,093**	**$605,965**	**119.46%**
	Actual Cost	**MI Cost**	**Markup (amount)**	**Markup (percentage)**

16. The Labour Rates charged by MI are higher than industry standard, or the rates required to recover the "indirect staff overhead and some corporate overhead costs" referenced by Mr. Murva in his affidavit.

E. MR. MURVA AND MR. MIZRAHI'S STATEMENTS RELATING TO CM FEES

17. In addition, Mr. Murva's statement at Item 10 of Exhibit A is incomplete because he only addresses the categories of costs that MI has claimed (i.e. the Labour Rates). This is not fully responsive to KDC's comment, which criticized MI's decision to charge CM fees *on*

[2] A swamper assists the crane operator.

top of marking-up the Labour Rates. As such, consideration of whether this practice is "industry standard" also requires an analysis of the total CM Fee charged by MI.

18. In his affidavit, Mr. Mizrahi claims that MI has charged a 5% CM Fee on all of its projects. I do not know the details of MI's work on other Projects.

19. I note, however, that the 5% CM Fee charged by MI on the Project is higher than market CM Fees for Projects of comparable scale and quality. Based on the projects that FM is (or has been) engaged on, and our experience running requests for proposals on large mixed-use projects, the range of CM Fees in the market is between 2.75% and 3.5%. of construction costs. This market range is, in our experience, applicable to both third party construction managers and construction and development companies that perform their own construction management services.

Sworn remotely by Niall Finnegan at the City of Toronto in the Province of Ontario before me in the City of Toronto in the Province of Ontario, this 27th day of February, 2025 in accordance with O/ Reg. 431/20, *Administering Oath or Declaration Remotely*.

Brittni Tee

A Commissioner for taking affidavits
Name: Brittni Tee LSO #85001P

Niall Finnegan

NIALL FINNEGAN

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	- and -	MIZRAHI COMMERCIAL (THE ONE) LP, MIZRAHI DEVELOPMENT GROUP (THE ONE) INC. et al	Court File No.: CV-23-00707839-00CL
Applicant		Respondents	

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(Case Conference March 24, 2025)

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