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

FACTUM OF THE RECEIVER
(MI Payment Motion – Receiver's Cross-Motion)
Returnable June 17-19, 2025

May 19, 2025

Goodmans LLP
Barristers & Solicitors
Bay Adelaide Centre
333 Bay Street, Suite 3400
Toronto ON M5H 2S7

Brendan O'Neill LSO#: 43331J
boneill@goodmans.ca

Christopher Armstrong LSO#: 55148B
carmstrong@goodmans.ca

Mark Dunn LSO#: 55510L
mdunn@goodmans.ca

Jennifer Linde LSO#: 86996A
jlinde@goodmans.ca

Tel: 416.979.2211
Fax: 416.979.1234

Lawyers for the Receiver

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ADDENDA

SCHEDULE “A” - LIST OF AUTHORITIES

PART I – INTRODUCTION AND OVERVIEW

1. Sam Mizrahi is the owner and president of Mizrahi Inc. ("**MI**"). He was also the president and a 50% indirect owner of the Debtors,[1] three single-purpose entities that collectively own and undertake the development and construction of an 85 storey mixed-use tower located at the corner of Yonge and Bloor in Toronto (the "**Project**").[2] Prior to being terminated by the Receiver, MI was the developer, general contractor, and exclusive listing agent for the Project, and therefore Mr. Mizrahi sat on both sides of the various agreements between MI and the Debtors.

2. After it was appointed, the Receiver conducted a careful investigation into the relationship between MI and the Debtors. It concluded that MI owes at least $58.8 million to the Debtors. In contrast, and as will be further detailed in the Receiver's responding factum on MI's motion seeking payment of approximately $7.6 million (the "**MI Payment Motion**"), the Debtors do not owe any further amounts to MI.

3. **MI agreed to pay for its own labour, then charged the Debtors $49.3 million for its labour at marked up rates.** The history of the Project is complicated and contentious, but the core facts relevant to this aspect of the Receiver's motion (the "**Receiver's Cross-Motion**") are not seriously disputed. Specifically:

(a) Mr. Mizrahi executed a CCDC2 Stipulated Price Contract dated May 14, 2019 (the "**GC Agreement**"). As Mr. Mizrahi admitted, the GC Agreement did not allow MI

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[1] The Debtors are: One Bloor West Toronto Commercial (The One) LP (the "**Beneficial Owner**"), One Bloor West Toronto Group (The One) Inc. (the "**Nominee**") and One Bloor West Toronto Commercial (The One) GP Inc. ("**GP Inc.**", and, together with the Beneficial Owner and the Nominee, the "**Debtors**"), formerly known as Mizrahi Commercial (The One) LP, Mizrahi Development Group (The One) Inc. and Mizrahi Commercial (The One) GP Inc., respectively. The Debtors are referred to collectively in this factum, for convenience.

[2] Affidavit of M. Kilfoyle dated February 21, 2024 ("**Kilfoyle #1**") at paras. 2-3, Motion Record of Mizrahi Inc. ("**MI MR**") at Tab 2, pdf p. 12-13.

to "charge separately for labour" that it provided to the Project.[3] The parties amended the GC Agreement several times, but they *never* amended this prohibition;

(b) Beginning in November 2020, after terminating Clark Construction Management Inc. ("**CCM**"), the experienced construction manager that had been working on the Project since construction began in 2017, MI began to charge the Debtors separately for labour that it provided to the Project;

(c) MI ultimately charged the Debtors – and was paid – $49.3 million in respect of labour provided to the Project. These fees were enormously profitable for MI. They were specifically *prohibited* by the GC Agreement and were not authorized by any contract between MI and the Debtors.

4. MI freely admits that it breached the GC Agreement. Mr. Mizrahi deposes that MI did "not once" follow the payment terms of the GC Agreement.[4] MI argues, in effect, that it breached the GC Agreement so brazenly for so long that it created a new agreement. But this is both legally and factually incorrect.

5. MI's repeated breaches of the GC Agreement did not end the prohibition on charging separately for labour. Even where both sides ignore a contract (which did not happen in this case) the contract will only end if the parties enter into a *new* contract and agree to abandon the old one.[5] There must be, among other things, an intention to contract and a meeting of the minds. Yet there was no intention to abandon the GC Agreement. To the contrary, MI repeatedly *affirmed* the GC Agreement. It purported to amend the GC Agreement twice in writing.[6] It insisted that the

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[3] Affidavit of S. Mizrahi dated January 20, 2025 ("**Mizrahi #2**") at para. 30, MI Responding Motion Record ("**MI RMR**") Vol 1 at Tab 2, pdf p. 26.

[4] Mizrahi #2 at para. 30, MI RMR Vol 1 at Tab 2, pdf p. 26.

[5] *Jedfro Investments (U.S.A.) Ltd. v. Jacyk,* 2007 SCC 55 at para. 17 ("***Jedfro***").

[6] Amending Agreement dated September 27, 2019, MI MR at Tab 2(D), pdf p. 179; Amending Agreement dated May 4, 2022, MI MR at Tab 2(E), pdf p. 186.

Receivership Order allow the Receiver to pay amounts owed under the GC Agreement.[7] It *still* seeks payments under the GC Agreement in its Notice of Motion.[8]

6. In any event, the Debtors never agreed to pay MI separately for labour. Jenny Coco, and entities controlled by the Coco family (collectively "**Coco**") owned the other indirect 50% beneficial interest in the Debtors. The Debtors could not legally agree to any new contract with MI without Coco's consent. Coco *never* agreed that MI could charge separately for labour. Coco objected – immediately and repeatedly – as soon as MI started to charge the Project separately for its labour in November 2020. For a short period of time, Coco paused, but did not withdraw, its objections because Mizrahi agreed to purchase Coco's interest in the Project. As soon as the purchase fell through, Coco renewed its opposition to MI's fees.

7. MI claims that the Debtors had to pay it for labour because MI had charged the Debtors for labour provided by CCM. This is not correct. Even if the Debtors agreed to make payments to CCM, they had no obligation to make similar payments to MI after it unilaterally decided to terminate CCM. MI, unlike CCM, had *no* high rise construction experience and MI, unlike CCM, had specifically *agreed* that it would not charge separately for labour.

8. MI also claims that it is entitled to the disputed fees because the Senior Secured Lenders[9] and their independent cost consultant, Altus Group Limited ("**Altus**"), approved them. But this is both irrelevant and incorrect. First, the Senior Secured Lenders were not parties to the agreements between MI and the Debtors. They did not, and could not, change MI's prohibition on receiving payment for labour from the Debtors. Second, there is little evidence that the Senior Secured Lenders or Altus knew that MI was systematically breaching the terms of the GC Agreement. The

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[7] See Mizrahi #2 at para. 10 and Exhibit B at para. 6, MI RMR at Tabs 2 and 2(B), pdf pp. 19 and 88; Receivership Order at para. 6, Motion Record of the Receiver dated October 18, 2024 ("**Receiver's MR**") Vol 1 at Tab 2(1), pdf pp. 137-138.

[8] MI Notice of Motion dated February 22, 2024 at para. 1, MI MR at Tab 1, pdf pp. 3-4.

[9] The Senior Secured Lenders are KEB Hana Bank as trustee of IGIS Global Private Placement Real Estate Fund No. 301 and of IGIS Global Private Placement Real Estate Fund No. 434.

contemporaneous correspondence supports the conclusion that the Senior Secured Lenders believed, incorrectly as it turns out, that MI was complying with its contractual obligations.

9. MI advances a number of complicated and convoluted arguments in an attempt to justify its conduct, but the fundamental issue is straightforward. MI agreed that it would not charge separately for labour. It agreed to this prohibition freely and affirmed it repeatedly. The prohibition is binding. It necessarily follows that MI was overpaid by $49.3 million for labour that it improperly charged to the Debtors and is liable to the Debtors in this amount.

10. The GC Agreement is not the only contract that MI breached. The Receiver has also concluded that MI is liable to the Debtors for at least an additional $9,539,853.71 because it breached the other contracts that governed its work on the Project. These breaches are summarized below.

11. **MI refused to return sales commissions totalling $1.8 million that it was required to return.** MI was the exclusive listing agent responsible for selling all of the condominium units in the Project (the "**Units**") pursuant to an Exclusive Listing Agreement dated July 12, 2017 (the "**ELA**"). MI agreed in the ELA that if a Condominium Sales Agreement ("**CSA**") was terminated for purchaser default, then MI would promptly return any commissions paid in respect of that unit. A number of CSAs were terminated by the Receiver because the purchasers breached their obligation to pay deposits. Yet MI has refused to return the commissions, in breach of the ELA.

12. **MI improperly charged the Debtors for third party real estate agents' fees.** MI agreed that it would sell *all* the Units and pay for its own advertising and sales costs. Instead, it hired or caused the Debtors to hire third party brokers. MI then charged the Debtors its own commission *and* third party brokers' commissions totaling $891,778.60 in respect of certain Units. This, too, breached the ELA.

13. **MI breached its obligation to hold $1.2 million in trust.** MI is also liable to the Debtors for $1.2 million that it agreed to place in trust for the benefit of the Project. Under the terms of the

Mediator's Proposal agreed to by Coco and Mizrahi (as defined below) on November 26, 2019 (the "**Mediator's Proposal**"), MI agreed to transfer a $1.2 million reserve it held against a specific future potential liability to a trust fund or GIC. The liability did not arise, and so the funds ought to have been returned and made available to the Debtors. MI has refused to provide these funds to the Receiver or explain what happened to them. MI's failure to hold the funds in trust is a breach of the Mediator's Proposal.

14. **MI charged marketing fees of $100,000 per month that it was not entitled to charge.** For 27 months, MI charged the Debtors marketing fees of $100,000 per month, for a total of $2.7 million. These fees were not authorized by any agreement between MI and the Debtors.

PART II – FACTS

A. The Evidence on this Motion

15. **The Receiver's reports provide reliable evidence, primarily based on the contemporaneous documents.** The primary evidence supporting the Receiver's Cross-Motion is the Fifth Report of the Receiver dated October 18, 2024 (the "**Fifth Report**") and the Supplemental Report to the Fifth Report of the Receiver dated February 28, 2025 (the "**Supplemental Report**").[10] The Fifth Report and the Supplemental Report set out the Receiver's conclusions based on its extensive review of relevant contemporaneous documents, including the Debtors' e-mail database and the contracts entered into between the parties. They also contain direct evidence from the Receiver with respect to events that occurred after the Receiver's appointment. The Receiver respectfully submits that the Fifth Report and the Supplemental Report provide accurate and reliable information with respect to the history of the Project and the events at issue.

[10] Fifth Report of the Receiver dated October 11, 2024 ("**Fifth Report**"), Receiver's MR Vol 1 at Tab 2; Supplemental Report to the Fifth Report dated February 28, 2025 ("**Supplemental Report**"), Receiver's Reply Motion Record dated February 28, 2025 ("**Receiver's Reply MR**") at Tab 1.

16. **Jenny Coco provided reliable testimony.** The Receiver and MI also examined Jenny Coco pursuant to Rule 39.03. Ms. Coco provided evidence about the history of the Project, including the terms of the relevant contracts and the numerous disputes between Coco and Mizrahi. Ms. Coco testified that she tried to hold MI to its contractual obligations and repeatedly objected to the MI Payment Practices (as defined below).[11] Ms. Coco candidly conceded that she executed the documents required to fund project expenses, including payments to MI, in order to keep construction of the Project moving forward while she tried to address her issues with Mr. Mizrahi and Coco's proposed exit from the Project.[12] The Receiver respectfully submits that the evidence from Ms. Coco cited in this factum is credible and reliable. It should be accepted, especially where it conflicts with evidence from Mr. Mizrahi.

17. **Mark Kilfoyle's evidence should be approached with caution.** MI tendered affidavits from its Chief Financial Officer, Mark Kilfoyle, dated February 27, 2024 and January 20, 2025. The Receiver respectfully submits that Mr. Kilfoyle's testimony should be approached with some caution. Mr. Kilfoyle's testimony on key points, including with respect to whether Ms. Coco agreed to the MI Payment Practices (defined below), was undermined on cross-examination[13] and his answers on certain issues were confusing or evasive.[14]

18. **Sam Mizrahi was not a credible witness. His evidence should be given no weight.** Mr. Mizrahi swore affidavits dated February 27, 2024, January 20, 2025 and April 28, 2025.

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[11] Cross Transcript of J. Coco ("**Coco Cross**"), Q. 42, 83-85, 105, 108, 116-120, Cross-Examination Transcript Brief of the Receiver dated May 16, 2025 ("**Transcript Brief**") at Tab 1, pdf pp. 14, 19, 21-22.

[12] Coco Cross, Q. 53-54, 116-117, 120, Transcript Brief at Tab 1, pdf pp. 16, 21-22.

[13] See Cross Transcript of M. Kilfoyle ("**Kilfoyle Cross**"), Q. 224-225, Transcript Brief at Tab 2, pdf p. 229. Mr. Kilfoyle claimed that Ms. Coco agreed to proceed on a cost-plus basis, but then admitted he had never discussed the issue with her. See also Kilfoyle Cross, Q. 264-265, Transcript Brief at Tab 2, pdf p. 231. Mr. Kilfoyle acknowledged he knew that Coco objected to paying MI the Labour Rates at least as of August 2022.

[14] See for e.g., Kilfoyle Cross, Q. 104-105, Transcript Brief at Tab 2, pdf p. 222 in which Mr. Kilfoyle refused to answer whether his calculation of MI's damages claim in Exhibit T to his February 21, 2024 affidavit followed the terms of the GC Agreement, and counsel refused follow-up questions. See also Kilfoyle Cross, Q. 156-163, Transcript Brief at Tab 2, pdf p. 225-226 in which Mr. Kilfoyle insisted that both fixed price and cost-plus contracts require "directive from the owner" for changes to the amount owed to the contractor but then agreed that in a cost-plus contract, "the costs can be higher and it could be lower".

Mr. Mizrahi was MI's primary witness, and the only witness to give evidence on behalf of MI on a number of key points. Mr. Mizrahi was, with respect, not a credible witness. Mr. Mizrahi made an astonishing number of brand new claims during his cross-examination.[15] He even claimed that MI had obtained an arbitral "ruling" that it was entitled to the fees it claimed.[16] No such ruling exists. None of Mr. Mizrahi's new claims were referenced in, and many were contradicted by, his own affidavit and MI's motion material.[17] All of them were inconsistent with contemporaneous documents he executed or reviewed.

19. Even leaving aside Mr. Mizrahi's outlandish new allegations, he was not a credible or reliable witness. His cross-examination answers were evasive, non-responsive and internally inconsistent.[18] He repeatedly responded to simple questions with a prepared speech about how "everyone agreed" to pay MI what it wanted.[19] He frequently provided unresponsive answers reflecting his personal animus toward Ms. Coco.[20] He and his counsel refused to answer basic questions about documents that hurt MI's case.[21]

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[15] Mr. Mizrahi claimed, for example, that the Senior Secured Lenders told him to execute but then ignore the GC Agreement (Cross Transcript of S. Mizrahi ("**Mizrahi Cross**"), Q. 189, 296-301, Transcript Brief at Tab 3, pdf pp. 301, 310) and that the Receiver and its counsel specifically promised that he would be paid based on the MI Payment Practices (Mizrahi Cross, Q. 507-509, 517, 535-537, 550, Transcript Brief at Tab 4, pdf pp. 788-791). Neither of these allegations were in his affidavits or had otherwise previously been disclosed.

[16] Mizrahi Cross, Q. 929-932, Transcript Brief at Tab 4, pdf pp. 820-821.

[17] For example, Mr. Mizrahi claimed that Ms. Coco agreed that MI should terminate CCM and take over its role on the Project, but MI's own notice of motion states that MI took these steps with the "knowledge and approval" of the Senior Secured Lenders and merely the "knowledge" of Coco. (Mizrahi Cross, Q. 781-812, Transcript Brief at Tab 4, pdf pp. 810-812).

[18] For example, Mr. Mizrahi first insisted the GC Agreement was never followed (Mizrahi Cross, Q. 188-189, Transcript Brief at Tab 3, pdf p. 301) but later indicated "it was kind of yes and no": Mizrahi Cross, Q. 458, Transcript Brief at Tab 4, pdf p. 783. The following answers further illustrate the inconsistencies in Mr. Mizrahi's testimony: Q. 253-255, 265-289, 493, 625-628, Transcript Brief at Tabs 3 and 4, pdf pp. 306-310, 786, 798. See also for *e.g.*, Mizrahi Cross, Q. 306-312, 493, 581-582, 606-610, Transcript Brief at Tabs 3 and 4, pdf pp. 311, 786, 794, 796-797.

[19] See for *e.g.*, Mizrahi Cross, Q. 189, 463-464, 502-504, 575, 634, Transcript Brief at Tabs 3 and 4, pdf pp. 301, 783-784, 787-788, 794, 799.

[20] See for *e.g.*, Mizrahi Cross, Q. 595, 722, 745-747, Transcript Brief at Tab 4, pdf pp. 796, 805, 807.

[21] See for *e.g.*, Mizrahi Cross at Qs. 377-386, Transcript Brief at Tab 4, pdf pp. 777-778 (questions about Glaholt LLP memo), Qs. 556-563 (questions about MI's Notice of Motion), Transcript Brief at Tab 4, pdf pp. 792-793; Qs. 485-494, Transcript Brief at Tab 4, pdf pp. 785-786 (questions about Receivership Order).

20. With respect, Mr. Mizrahi's evidence should be given no weight, especially where it is contradicted by evidence from other witnesses and/or contemporaneous records.

B. Background to the Debtors' Claims

21. As described below, the parties agreed to the Mediator's Proposal in November 2019. The Mediator's Proposal included a release of any claims that preceded November 2019, and the Debtors do not claim damages for events that occurred prior to the Mediator's Proposal. The events described in this section provide relevant background for the Debtors' claims in the Receiver's Cross-Motion.

(i) The Project and the Debtors

22. The Project is, according to MI's website, Mr. Mizrahi's "singular vision".[22] It is, according to Mr. Mizrahi, "one of the most complex mixed-use supertall skyscrapers in the country"[23] and includes hotel, retail and residential components in an 85 storey tower.[24]

23. The Project would be a complex endeavour for any sophisticated and experienced high-rise builder and developer. But Mr. Mizrahi and MI are not sophisticated or experienced high-rise builders or developers. Before beginning the Project, Mr. Mizrahi and MI had never developed or built a high-rise building, let alone a mixed-use, supertall skyscraper. They had completed some single-family homes, and a six-unit townhouse complex.[25] Mr. Mizrahi and MI pursued the development of some other mid-rise projects in concurrence with the Project, but almost all of the projects that Mr. Mizrahi and MI commenced are now subject to insolvency proceedings.[26]

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[22] Fifth Report at para. 6.1, Receiver's MR Vol 1 at Tab 2, pdf p. 53.

[23] Affidavit of S. Mizrahi dated February 22, 2024 ("**Mizrahi #1**") at para. 3, MI MR at Tab 3, pdf p. 377.

[24] Fifth Report at para. 1.1, Receiver's MR Vol 1 at Tab 2, pdf p. 39.

[25] Mizrahi Cross, Qs. 10-15, Transcript Brief at Tab 3, pdf p. 289.

[26] Mizrahi Cross, Qs. 11-46, Transcript Brief at Tab 3, pdf p. 289-291.

(ii) Ownership and Control of the Debtors

24. Ownership and control of the Debtors was divided equally between Sam M Inc. (an entity controlled by Mr. Mizrahi and referred to collectively with Mr. Mizrahi as "**Mizrahi**") and entities owned directly or indirectly by Jenny Coco and Rocky Coco (defined above as "**Coco**"). Mr. Mizrahi and Ms. Coco were directors of the Debtors prior to the Receiver's appointment, and Ms. Coco remains a director.[27]

25. Coco invested in the Project in or around 2014, and the parties entered into a series of agreements dated December 17, 2014 to govern that investment. These agreements, together with subsequent agreements between Mizrahi and Coco, effectively divided control of the Debtors between Mizrahi and Coco. Importantly, the parties agreed in a Unanimous Shareholders' Agreement dated December 17, 2014 (the "**USA**")[28] and a board resolution dated November 2016[29] (the "**2016 Resolution**") that Coco had to agree to all contracts that the Debtors entered into. Mr. Kilfoyle agreed on cross-examination that a contract between the Debtors and MI was "something the Cocos had to approve".[30]

26. The relationship between Coco and Mizrahi was contentious and litigious. In simple terms, Coco accused Mizrahi of acting unilaterally and in breach of the applicable contracts. Coco also lost confidence in Mr. Mizrahi's judgment and ability to complete the Project on schedule and within budget.[31] Mizrahi accused Coco of interfering with the successful completion of the Project

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[27] Fifth Report at para. 5.2, Receiver's MR Vol 1 at Tab 2, pdf p. 53.

[28] USA at s. 3.7, Transcript Brief at Tab 3(1), pdf pp. 351-355.

[29] Fifth Report at para. 9.3, Receiver's MR Vol 1 at Tab 2, pdf pp. 67-68.

[30] Kilfoyle Cross, Q. 51, Transcript Brief at Tab 2, pdf p. 219.

[31] Fifth Report at para. 8.4, Receiver's MR Vol 1 at Tab 2, pdf p. 66.

by withholding approvals and challenging Mr. Mizrahi's judgment.[32] Mr. Mizrahi thought Ms. Coco was someone who tended to "create, rather than solve, problems".[33]

(iii) ***MI's Relationship with the Debtors***

27. MI is owned (directly or indirectly) and controlled by Mizrahi.[34] MI held various roles on the Project through a series of contracts entered into with the Debtors: it was the Project's development manager pursuant to a Commercial Development Management Agreement dated July 25, 2014; its general contractor pursuant to the GC Agreement; its construction manager upon terminating and acting in place of CCM as described below; and its exclusive residential listing agent pursuant to the ELA.

28. Mr. Mizrahi was also president of the Debtors. He exercised *de facto* and at times (during the Control Period, as defined below) unilateral legal control over the Debtors. The non-arms length nature of the relationship between the Debtors and MI is an important feature of the events that are described below.

(iv) ***The MI Payment Practices***

29. Notwithstanding the lack of a contract or agreement permitting such practice, as further described below, beginning in 2017, MI charged the Debtors a construction management fee (the "**CM Fee**") equal to 5% on the sum of: (i) costs in respect of subcontractors working on the Project (the "**Hard Costs**"); (ii) out-of-pocket recoverable costs, including various equipment rentals, storage, materials, and other third-party costs (the "**Recoverable Costs**"); and (iii) the labour rates charged by CCM.

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[32] Supplemental Report at para. 3.22, Receiver's Reply MR at Tab 1, pdf p. 34.

[33] Supplemental Report at para. 3.22, Receiver's Reply MR at Tab 1, pdf p. 34; Mizrahi Cross, Q. 121, Transcript Brief at Tab 3, pdf p. 297.

[34] Fifth Report at para. 6.1, Receiver's MR Vol 1 at Tab 2, pdf p. 53.

30. In November 2020, MI began to claim payments for time spent by staff and contractors MI itself hired at rates (the "**Labour Rates**") that significantly exceeded MI's actual labour costs (the "**Labour Costs**"), and a CM Fee on top of Hard Costs, Recoverable Costs and the Labour Rates. The Labour Rates and the CM Fee are referred to collectively below as the "**MI Payment Practices**".

(v) ***The Early History of the Project***

31. **MI entered into a CCDC 2 Stipulated Price Contract with the Debtors on July 14, 2014 (the "First GC Agreement").** The First GC Agreement was a fixed price contract that required payments based on progress, and did not allow MI to charge a CM Fee or for labour provided to the Project. Mr. Mizrahi claimed that MI never planned to follow the First GC Agreement.[35] But Mr. Mizrahi executed the First GC Agreement on behalf of both MI and the Debtors.[36] He could not provide a credible or coherent explanation with respect to why he executed a contract he did not plan to follow.[37]

32. **Beginning with construction in August 2017, MI ignored the terms of the First GC Agreement.** MI hired CCM, a firm led by individuals with significant experience in complex high-rise construction, as construction manager of the Project.[38] CCM contracted with MI, not the Debtors or the Project, as confirmed by Mr. Mizrahi in contemporaneous documents ("under our contract, Clark construction is contracted to Mizrahi Inc., not to the project or Jenny") and on cross examination.[39]

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[35] Mizrahi Cross, Q. 259-270, Transcript Brief at Tab 3, pdf pp. 306-308.

[36] First GC Agreement at p. 5, MI MR at Tab 2(B), pdf p. 115.

[37] Mizrahi Cross, Q. 263, Transcript Brief at Tab 3, pdf p. 307.

[38] Fifth Report at para. 9.5, Receiver's MR Vol 1 at Tab 2, pdf p. 68; See also Clark Construction Contract, Receiver's MR Vol 1 at Tab 2(7).

[39] Mizrahi Cross, Q. 825, Transcript Brief at Tab 4 pdf p. 813; Fifth Report, Appendix 14, Receiver's MR Vol 2 at Tab 2(14), pdf p. 34; Clark Construction Contract at p. 6, Receiver's MR Vol 1 at Tab 2(7), pdf p. 223.

33. Under the contract between MI and CCM (the "**CCM Contract**"), MI agreed to pay CCM a 1.5% CM Fee (out of the 5% CM Fee MI charged the Debtors) and costs based on the labour rates charged by CCM. Notwithstanding that the Debtors were not parties to the CCM Contract, MI charged the Debtors for the labour rates owed to CCM.[40]

34. Mr. Mizrahi claims in his January 2025 affidavit that the MI Payment Practices began in 2017,[41] but this is not accurate. MI did not charge for its *own* labour using the Labour Rates until November 2020. This is important, because the parties subsequently entered into two agreements (the Mediator's Proposal and Control Agreement) that allowed MI to charge a CM Fee. No agreement with the Debtors ever authorized MI to charge the Labour Rates.

35. **Coco objected to MI's conduct.** Shortly after construction began, Coco realized that MI was not following the payment terms in the First GC Agreement.[42] Ms. Coco objected to MI's conduct, including the fees it was charging. She wrote in November 2017 that Coco was "ONLY COMMITTING TO THE AGREEMENTS WE EXECUTED!".[43] In response, MI did not claim that the Debtors had agreed (or should agree) to ignore the GC Agreement. Mr. Kilfoyle claimed that MI was contractually entitled to the fees it was charging.[44] Mr. Kilfoyle admitted on cross-examination that this was untrue.[45]

36. MI's breaches of the First GC Agreement put Coco in a difficult position. During this period, CERIECO Canada Corp. ("**CERIECO**") was the Project's primary lender. Ms. Coco had to execute documents to secure funding from CERIECO. These documents included disputed payments to MI. Ms. Coco could have refused to execute the documents, and stop the payments to

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[40] Fifth Report at para. 9.7, Receiver's MR Vol 1 at Tab 2, pdf p. 68.

[41] Mizrahi #2 at para. 75, MI RMR Vol 1 at Tab 2, pdf p. 39.

[42] Coco Cross, Qs. 28-32, Transcript Brief at Tab 1, pdf p. 13.

[43] Email from J. Coco dated November 9, 2017 [Emphasis in original], Receiver's MR Vol 1 at Tab 2(8) at pdf p. 290.

[44] Email from M. Kilfoyle dated November 9, 2017, Receiver's MR Vol 1 at Tab 2(8), pdf pp. 289-290.

[45] Kilfoyle Cross, Q. 202-203, Transcript Brief at Tab 2, pdf p. 228.

MI, but this would also have prevented payments to all of the Project's other trades and suppliers, causing enormous harm to the Project.

37. Ms. Coco ultimately decided that executing the documents was the "lesser of two evils"[46] because it would prevent harmful liens on the Project while Coco and Mizrahi negotiated or arbitrated their dispute. Coco's signatures were accompanied by a statement that it "had no participation in the preparation of the [Bill of Quantities listing payments] and hereby authorize the same on the premise the allocation of the funding should be for the payables due and outstanding."[47]

38. **MI entered into the GC Agreement on May 15, 2019**. The GC Agreement is, like the First GC Agreement, a CCDC2 Stipulated Price Contract. MI agreed to complete construction on the Project by December 31, 2022 for a total fixed price of $583.2 million, plus HST.[48] MI did not fulfill these obligations.

39. Importantly, MI and the Debtors agreed in the GC Agreement that:

(a) payments to MI were to be made based on progress. By way of example, once MI had completed 20% of the work, it was entitled to 20% of the Contract Price;[49]

(b) MI was not entitled to charge separately for its labour;[50] and

(c) neither party could waive its rights under the GC Agreement, except by agreement in writing.[51]

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[46] Coco Cross, Q. 53-54, Transcript Brief at Tab 1, pdf p. 16.

[47] Coco Cross, Transcript Brief at Tab 1(2), pdf p. 70.

[48] GC Agreement at Article A-4, Receiver's MR Vol 1 at Tab 2(9), pdf p. 297.

[49] GC Agreement at Article A-5, Receiver's MR Vol 1, Tab 2(9), pdf p. 297; Kilfoyle Cross, Q. 96, Transcript Brief at Tab 2, pdf p. 221; Mizrahi Cross Q. 250-252, Transcript Brief at Tab 3, pdf pp. 305-306.

[50] GC Agreement at s. 1.1.1 and 3.8.1, Receiver's MR Vol 1 at Tab 2(9), pdf pp. 302 and 307.

[51] GC Agreement at s. 8.3.1, Receiver's MR, Vol 1 at Tab 2(9), pdf p. 317.

40. As with the First GC Agreement, the GC Agreement was, in simple terms, a fixed price contract that was completely inconsistent with the MI Payment Practices. MI *now* claims that the GC Agreement was "pretty much" a "fiction".[52] As described below, the contemporaneous documents are not consistent with this assertion.

41. **The Debtors and the Senior Secured Lenders (among others) executed the Credit Agreement.** The Debtors (and a number of other parties) entered into a Credit Agreement dated August 30, 2019 (the "**Credit Agreement**") with the Senior Secured Lenders.[53] The Credit Agreement is a comprehensive, carefully negotiated document. As part of the Credit Agreement, the Debtors represented that the GC Agreement was in "full force and effect" and "has not, except as disclosed to the SSL, been amended".[54] The Credit Agreement prohibited any amendment to the GC Agreement without written consent from the Senior Secured Lenders.[55]

42. The Credit Agreement required some minor amendments to the schedule and scope of work in the GC Agreement. Mr. Mizrahi executed an Amending Agreement dated September 27, 2019 to make these adjustments. The Amending Agreement provided that the balance of the GC Agreement was binding:

> **The Owner and the Contractor agree and confirm that the [GC Agreement] remains in full force and effect,** unamended and unmodified, save and except as the Contract is explicitly amended in accordance with the terms of this Agreement. **The Contract, as it is amended by this Agreement, is hereby ratified and confirmed by the Contractor and the Owner**.[56] [emphasis added]

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[52] Mizrahi Cross, Q. 293, Transcript Brief at Tab 3, pdf p. 310.

[53] Credit Agreement, Ex. G to Supplementary Affidavit of S. Mizrahi dated April 28, 2025 (**Mizrahi #3**).

[54] Credit Agreement at s. 9.01(29) and definition of "Material Agreements", Ex. G to Mizrahi #3, pdf pp. 68, 108.

[55] Credit Agreement at s. 10.06(15) and definition of "Material Agreements", Ex. G to Mizrahi #3, pdf pp. 68, 128.

[56] Amending Agreement at s. 2.1, MI MR at Tab 2(D), pdf p. 180.

43. **MI unilaterally ignored the GC Agreement, and no one agreed to or approved this conduct.** Notwithstanding the GC Agreement and the Credit Agreement, MI charged the Debtors the CM Fee and the labour rates charged by CCM.

44. On cross-examination, Mr. Mizrahi claimed (for the first time) that he signed the GC Agreement because Ms. Coco and the Senior Secured Lenders (who were engaged in due diligence on the Project) told him to, but that both Ms. Coco and the Senior Secured Lenders knew and agreed that MI would ignore the GC Agreement.[57] He also frequently asserted that "everyone agreed" to the MI Payment Practices.[58]

45. This, with respect, makes no legal or commercial sense and is entirely inconsistent with the Debtors' representation in the Credit Agreement noted above. Mr. Mizrahi did not – and could not – explain why everyone wanted him to sign a contract that he planned to ignore.[59] He was also forced to acknowledge that "it doesn't make sense to execute a contract you have no intention of following".[60]

46. With respect to Ms. Coco, Mr. Mizrahi was asked directly and repeatedly on cross-examination whether she specifically told him to execute but then ignore the GC Agreement. Other than his refrain that "everyone agreed", Mr. Mizrahi could not provide a direct answer.[61]

47. **The Payment Listings did not modify the contract between MI and the Debtors**. Pursuant to the Credit Agreement, the Senior Secured Lenders primarily advanced funds to the Debtors to fund specific construction costs for the Project. To secure funding under the Credit

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[57] Mizrahi Cross Q. 269-277, Transcript Brief at Tab 3, pdf pp. 307-308.

[58] See for e.g., Mizrahi Cross, Qs. 309-311, Transcript Brief at Tab 3, pdf p. 311.

[59] Mizrahi Cross, Q. 263, Transcript Brief at Tab 3, pdf p. 307.

[60] Mizrahi Cross, Q. 264, Transcript Brief at Tab 3, pdf p. 307.

[61] Mizrahi Cross, Qs. 305-316, Transcript Brief at Tab 3, pdf pp. 311-312.

Agreement, the Debtors submitted (among other documents) a Construction Financing Release Request (also referred to as a "**Payment Listing**") on a monthly basis.

48. MI relies heavily on the Payment Listings. It claims that they are written evidence that Coco (and, by extension, the Debtors) agreed that MI could ignore the payment terms in the GC Agreement. The opposite is true. Each Payment Listing included a specific confirmation by the Debtors that its representations in the Credit Agreement – including its representation that the GC Agreement was in full force and effect – remained accurate.[62]

49. **The Senior Secured Lenders did not (and could not) change the agreement between MI and the Debtors.** MI also relies heavily on the Senior Secured Lenders' alleged approval of the MI Payment Practices. The relevance of their alleged approval is unclear. The Senior Secured Lenders loaned funds to the Debtors. They were parties to the Credit Agreement, but not to any of the Debtors' agreements with MI, including the GC Agreement. Altus was appointed as the "Independent Cost Consultant" under the Credit Agreement. Altus prepared a report to the Senior Secured Lenders each month (the "**Altus Reports**"). The Altus Reports were prepared for the sole use of the Senior Secured Lenders, and each report specifically stated that no other party was entitled to rely on it.[63] The Altus Reports cannot be relied on by MI, and they did not and cannot change the terms of the GC Agreement or the contracts between MI and the Debtors.

50. Similarly, the Senior Secured Lenders only decided whether or not to advance the funds requested by the Debtors under the Credit Agreements. These decisions did not (and could not) change the GC Agreement or the contracts between MI and the Debtors. A satisfactory report from Altus was a condition precedent to the Senior Secured Lenders' *obligation* to advance funds to the

[62] Credit Agreement, Schedule C at s. 3, Ex. G to Mizrahi #3, pdf p. 168; Construction Financing Request Notice dated August 30, 2019 at s. 3, MI RMR Vol 1 at Tab 2(E), pdf p. 273.

[63] See e.g. Altus Preliminary Report dated July 31, 2019, Receiver's MR Vol 2 at Tab 2(10), pdf. p. 18.

Debtors. But the Senior Secured Lenders could waive that condition and advance funds without a satisfactory report.[64]

51. In addition, and as described below, there is little evidence that Altus or the Senior Secured Lenders actually knew that MI was systematically breaching the GC Agreement or approved of MI's conduct. MI alleges that the Senior Secured Lenders and Altus specifically approved its conduct. It also alleges that this approval is important.[65] But MI did nothing to secure direct evidence from either the Senior Secured Lenders or Altus.

52. Contemporaneous documentation reveals the Senior Secured Lenders were seeking, and were provided, reassurance that the Project would be completed based on the GC Agreement. Among other things, MI had its construction counsel prepare a detailed memorandum explaining, in detail, the benefits of fixed price construction contracts like the GC Agreement and representing that such a contract had been "selected" for the Project because of those benefits.[66] Mr. Kilfoyle told the Senior Secured Lenders that the cost of the Project could not increase without "direction" from the Debtors.[67] The Altus Reports similarly referred to the GC Agreement.[68] None of these facts is consistent with Mr. Mizrahi's testimony that all of these parties expected and agreed that MI would ignore the GC Agreement.

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[64] Credit Agreement at s. 3.01(k) and 3.02, Ex. G to Mizrahi #3, pdf p. 84, 91.

[65] See e.g. Mizrahi #2 at paras. 24, 27, 29-34, MI RMR Vol 1 at Tab 2, pdf pp. 25-28.

[66] Memorandum of Glaholt LLP dated May 14, 2019 ("**Glaholt Memo**") and Supplementary Memorandum of Glaholt LLP dated May 18, 2019 ("**Glaholt Supplementary Memo**"), Transcript Brief at Tabs 2(1) and 2(2); see also email from M. Kilfoyle dated August 7, 2019, Transcript Brief at Tab 2(3); Kilfoyle Cross, Q. 150-157, Transcript Brief at Tab 2, pdf p. 225.

[67] Email from M. Kilfoyle dated August 7, 2019, Transcript Brief at Tab 2(3); Kilfoyle Cross, Q. 150-157, Transcript Brief at Tab 2, pdf p. 225.

[68] See e.g. Preliminary Altus Report dated August 28, 2019 at s. 3.2.1, MI RMR Vol 2 at Tab 2(K1), pp. 9-10; Altus Report dated September 26, 2019, s. 3.2.1, Responding MI MR Vol 2 at Tab 2(K2), pp. 8-9; Altus Report dated October 25, 2019, s. 3.2.1, MI Responding MR Vol 2 at Tab K(3), pp. 7-8.

(vi) The Mediator's Proposal

53. As noted above, Coco objected to MI's conduct and the fees that it was charging shortly after construction began in 2017. During this period, Coco, Mizrahi and MI were engaged in an extended negotiation, mediation and arbitration process that lasted until November 2019. On November 26, 2019, the mediator, Stephen Morrison, made the Mediator's Proposal jointly to the parties. Both Mizrahi and Coco ultimately accepted the Mediator's Proposal.[69]

54. The Mediator's Proposal intended to "reset the relationship" between Coco and Mizrahi with respect to the Project.[70] As part of this effort, the Mediator's Proposal made significant changes to certain – but not all – aspects of the contractual relationship among MI, Mizrahi, Coco, and the Debtors, including those described below. As set out below, MI breached several of its obligations under the Mediator's Proposal.

55. **The Debtors agreed to pay a 3.5% CM Fee for both MI and CCM.** The Mediator's Proposal allowed MI to charge a 2% CM Fee for its "ongoing, but reduced, construction management duties."[71] The parties agreed that a 1.5% CM Fee would "continue to be paid to" CCM.[72]

56. MI claims that the Mediator's Proposal created a completely different "cost-plus" agreement between MI and the Debtors. It does not. While the Mediator's Proposal authorizes a total CM Fee of 3.5% for both MI and CCM, the other payment terms in the GC Agreement, including the prohibition on MI charging for its own labour, were not changed by the Mediator's Proposal.[73] MI was not charging for its own labour when the parties agreed to the Mediator's

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[69] Mediator's Proposal, Receiver's MR Vol 2 at Tab 2(11).

[70] Mediator's Proposal at p. 5, Receiver's MR Vol 2 at Tab 2(11), pdf p. 256.

[71] Mediator's Proposal at p. 1, Receiver's MR Vol 2 at Tab 2(11), pdf p. 252.

[72] Mediator's Proposal at s. 8, Receiver's MR Vol 2 at Tab 2(11), pdf p. 256-257.

[73] Indeed, in February 2020, Coco specifically objected to MI's attempt to charge the Project for its own staff. MI withdrew the charges "under protest". See Email from M. Kilfoyle dated February 28, 2020, Receiver's MR Vol 2 at Tab 2(12), pdf pp. 261-263.

Proposal and the Mediator's Proposal contemplated that CCM would continue to act as construction manager.[74]

57. **Maria Rico was appointed to provide transparency to Coco.** In order to address Coco's significant concerns about transparency and accounting, the Mediator's Proposal required that financial administration and management be transferred to a new employee, Maria Rico ("**Ms. Rico**"). Ms. Rico was to be given a position at MI, but she was to report primarily to Coco.[75] There is a significant dispute between Coco and Mizrahi about whether Ms. Rico ever received the transparency contemplated by the Mediator's Proposal, but that dispute need not be resolved in this proceeding.

58. **MI agreed to transfer $1.2 million to a joint trust account or use it to purchase a GIC.** The Mediator's Proposal also required that a $1.2 million reserve, being held in MI's bank accounts to satisfy a potential liability (the "**Reserve**"), be transferred to a joint trust account or be used to purchase a GIC.[76] This did not occur. The Reserve is further described below.

59. **The Debtors agreed to pay a Residential Management Fee to MI.** The Mediator's Proposal also provided that MI was entitled to a Residential Management Fee equal to 2% of the sale price for Units (the "**Residential Management Fee**"). MI was entitled to be paid half the Residential Management Fee (equal to 1% of the purchase price) when a purchaser signed an agreement and paid the "appropriate deposit."[77] The other half of the Residential Management Fee was due on closing of the sale of the condominium unit. MI now claims to be owed significant amounts pursuant to the Residential Management Fee. MI's claims are enormously overstated and

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[74] See, for example, Mediator's Proposal at p. 3, Receiver's MR Vol 2 at Tab 2(11), pdf p. 254 which contemplates that all payments will be "recommended for approval by [CCM]".

[75] Fifth Report at para. 9.37, Receiver's MR Vol 1 at Tab 2, pdf p. 76.

[76] Mediator's Proposal at s. 3, Receiver's MR Vol 2 at Tab 2(11), pdf p. 255.

[77] Mediator's Proposal at s. 8, Receiver's MR Vol 2 at Tab 2(11), pdf p. 256-257.

will be addressed (if necessary) in the Receiver's responding factum on the MI Payment Motion or its reply factum on this motion.

C. The MI Payment Practices Breach MI's Contracts with the Debtors

60. The facts directly relevant to the Debtors' claims against MI in connection with the MI Payment Practices are set out in this section. As described below, between November 2019 and March 2024 (when MI was terminated as general contractor on the Project), MI committed a number of breaches of contract that collectively caused the Debtors to suffer damages totalling at least approximately $49.3 million.

61. **MI's termination of CCM made the Project much more lucrative for MI**. By termination notice dated October 26, 2020 (the "**CCM Termination Notice**"), MI terminated CCM as construction manager for the Project and began charging the Debtors for amounts formerly charged by CCM. The CCM Termination Notice also purported to provide a notice of "Assignment of the Contract to [MI]".[78]

62. After terminating CCM, MI hired staff to complete the construction management tasks that were previously completed by CCM.[79] This was a fundamental change for the Project. CCM had managed construction on the Project since it began in 2017. CCM's principals had significant high rise construction experience. The Project's stakeholders asked MI to hire CCM because of that experience.[80]

63. Neither MI nor Mr. Mizrahi had any high-rise construction experience, but MI unilaterally appointed itself to be the sole construction manager for one of Canada's most complicated and

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[78] Termination Notice dated October 26, 2020, Receiver's MR Vol 2 at Tab 2(13), pdf p. 265.

[79] Fifth Report at para. 9.44, Receiver's MR Vol 1 at Tab 2, pdf p. 78.

[80] Mizrahi Cross, Q. 823, 833-834, Transcript Brief at Tab 4, pdf pp. 812-813.

ambitious high-rise projects. MI provided little explanation for its decision to terminate CCM, and no explanation for its failure to hire another experienced contractor to replace CCM.

64. MI earned enormous profits by charging the Labour Rates itself. In essence, MI hired some staff (for example, the project managers that supervised trades) and some contractors (for example, the firm providing security services and the firm providing crane operators) and paid them certain amounts (defined in the Fifth Report as the "**Labour Costs**"). MI then charged the Debtors the Labour Rates, which were significantly higher than the Labour Costs. MI charged mark-ups of up to 226% on its Labour Costs, and in January 2024 charged an *overall* markup of approximately 120%. MI also kept the 1.5% CM Fee previously paid to CM for itself.[81]

65. **Coco objected almost immediately after MI terminated CCM.** Mr. Mizrahi advised Ms. Coco that CCM had been terminated by e-mail dated October 26, 2020. Coco objected almost immediately to the termination of CCM and MI's expanded role. Ten days later, on November 6, 2020, Coco sought to commence an arbitration relating to, among other things, the termination of CCM. Specifically, Coco asked for a declaration that:

(a) MI breached the Mediator's Proposal by terminating CCM; and

(b) the Debtors were not required to pay the Labour Rates charged by MI for staff working on the Project.[82]

66. The arbitration did not proceed. After Stephen Morrison (the mediator who proposed the Mediator's Proposal, and a member of the arbitral panel) told Ms. Coco and Mr. Mizrahi that it was apparent they could not continue to work together,[83] Coco and Mizrahi began an extended

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[81] Affidavit of N. Finnegan Affidavit dated February 27, 2025 ("**Finnegan Affidavit**") at para. 15, Receiver's Reply MR at Tab 2, pdf pp. 184-185.

[82] Fifth Report at paras. 9.49, Receiver's MR Vol 1 at Tab 2, pdf p. 79; Written Submissions for Coco dated November 6, 2020 at para. 1(b) and (c), Receiver's MR Vol 2 at Tab 2(16), pdf p. 273.

[83] Coco Cross, Q. 88, Transcript Brief at Tab 1, pdf p. 19.

negotiation that culminated in an agreement by Coco to sell its interest in the Project to Mizrahi or a buyer secured by Mizrahi (the "**Sale**").[84]

67. **The Debtors never agreed that MI was entitled to charge the Labour Rates.** As noted, the Debtors could only agree to an amended contract with MI that allowed it to charge the Labour Rates if Coco agreed. Coco did not agree to any such contract. The Mediator's Proposal explicitly contemplated that CCM would continue as construction manager. The GC Agreement specifically contemplated that MI would pay its own labour costs.

68. Mr. Mizrahi asserted on cross-examination – for the very first time – that Coco actually agreed that MI could terminate CCM, assume its role as construction manager, and charge the Labour Rates.[85] Ms. Coco's evidence was the opposite.[86]

69. Mr. Mizrahi's evidence is, with respect, not credible. Mizrahi wrote to Coco, directly and through counsel, to claim that it did not *need* Coco's consent to replace CCM.[87] Mr. Mizrahi swore multiple detailed affidavits that do not mention Ms. Coco's alleged agreement.[88] Ms. Coco's initiation of an arbitration after MI terminated CCM is entirely inconsistent with the allegation that she agreed to the termination. Indeed, MI's *own* Notice of Motion essentially acknowledges that Coco did not approve MI's actions. It states that it took over construction management from CCM and charged the Labour Rates with the "knowledge and approval" of the Senior Secured Lenders but only "to the knowledge of" Coco.[89]

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[84] Coco Cross, Q. 108-109, Transcript Brief at Tab 1, pdf p. 21.

[85] Mizrahi Cross, Q. 780-786, Transcript Brief at Tab 4, pdf p. 810.

[86] Coco Cross, Q. 99-100, Transcript Brief at Tab 1, pdf p. 20.

[87] Letter from J. Lisus dated October 30, 2020, Mizrahi Cross, Transcript Brief at Tab 3(5), pdf pp. 442-443; see also email dated May 18, 2020, Receiver's MR Vol 2 at Tab 2(14), pdf p. 267.

[88] See Mizrahi #1, MI MR at Tab 3; Mizrahi #2, MI RMR Vol 1 at Tab 2; and Mizrahi #3.

[89] Amended Notice of Motion at para. 28, MI RMR Vol 1 at Tab 1, pdf p. 10.

70. **Ms. Coco executed Payment Listings to allow the Project to move forward pending the Sale. Coco never agreed MI could charge the Labour Rates if the Sale did not close.** MI began charging the Labour Rates for staff working on the Project beginning in November 2020. During the period from November 2020 to May 2021 (when the parties executed the Control Agreement, which is described below) both Mr. Mizrahi and Ms. Coco executed Payment Listings that requested funding from the Senior Secured Lenders for payments to MI.[90]

71. Ms. Coco testified that she signed the Payment Listings "on the premise that we thought we were going to be paid out"[91] and that Coco did not agree that MI was entitled to Labour Rates if the Sale did not close.[92] This makes sense. Coco wanted to sell its interest in the Project and it made sense to keep the Project moving forward so the Sale could proceed. In effect, Coco and Mizrahi paused their dispute while they pursued the Sale.[93] But Coco did not withdraw its objections to MI's actions, and the Payment Listings did not create any new agreement between MI and the Debtors.

72. **MI knew that the Senior Secured Lenders thought it was following the GC Agreement.** As noted above, MI asserts, repeatedly, that the Senior Secured Lenders "approved" payment of the Labour Rates. This is irrelevant and unsupported by the evidence.

73. Mr. Mizrahi's testimony on this point is contradicted by contemporaneous documents that he received after MI unilaterally took over CCM's construction management role and began paying itself the Labour Rates. After CCM was terminated, the Senior Secured Lenders sought advice from their lawyers with respect to whether MI could terminate CCM and take over its role. They were advised, by e-mail dated November 16, 2020, that the contract with MI was a "fixed

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[90] Fifth Report at para. 9.53, Receiver's MR Vol 1 at Tab 2, pdf p. 80; See e.g. Payment Listing dated January 2021, Receiver's MR Vol 2 at Tab 2(18), pdf pp. 306-312.

[91] Coco Cross, Q. 118, Transcript Brief at Tab 1, pdf p. 22.

[92] Coco Cross, Q. 119-120, Transcript Brief at Tab 1, pdf p. 22.

[93] Coco Cross, Q. 117, Transcript Brief at Tab 1, pdf pp. 21-22.

price contract" and that payments to MI were to be made "on the basis of the portion of the project that has been completed".[94] The e-mail refers to a CM Fee built into MI's fixed price contract but it does not reference any alternative cost-plus agreement.

74. The Senior Secured Lenders forwarded a copy of the advice received from their counsel to Mr. Mizrahi on November 16, 2020, and Mr. Mizrahi appended it to his January 2025 Mizrahi Affidavit. Mr. Mizrahi did not respond to clarify that MI was actually ignoring the GC Agreement or that the payments it claimed were entirely inconsistent with the GC Agreement.[95]

75. **The Control Agreement Temporarily Permitted MI to charge a 5% CM Fee.** In May 2021, Mizrahi and Coco, among others, entered into the Control Agreement to govern the operation of the Project pending completion of the anticipated Sale by August 30, 2022. The Debtors are not parties to the Control Agreement.[96]

76. The Control Agreement effectively provided Mr. Mizrahi with sole control and management of the Project, with certain limitations, until the Sale closed. Importantly, during this interim period, Mr. Mizrahi was entitled to execute most documents on behalf of the Debtors without Coco's approval.[97] This meant that, when the Control Agreement was in force (the "**Control Period**"), Coco did not have the right to dispute payments to MI.

77. The Control Agreement included a retroactive increase of the CM Fee to 5% (as compared to the 3.5% fee allowed by the Mediator's Proposal). Ms. Coco explained that Mizrahi wanted the

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[94] Email dated November 16, 2020, Exhibit H to Mizrahi #2, MI RMR Vol 1 at Tab 2(H), pdf p. 311; Mizrahi Cross Q. 614-639, Transcript Brief at Tab 4, pdf pp. 797-800.

[95] Email dated November 16, 2020, Exhibit H to Mizrahi #2, MI RMR Vol 1 at Tab 2(H); Mizrahi Cross Q. 614-639, Transcript Brief at Tab 4, pdf pp. 797-800.

[96] Control Agreement, Receiver's MR Vol 2 at Tab 2(20).

[97] Control Agreement at s. 2, Receiver's MR Vol 2 at Tab 2(20), pdf pp. 318-320.

CM Fee to be included in the Control Agreement because it was bringing in a new investor and wanted the new investor to agree to a 5% CM Fee.[98]

78. The Control Agreement was, on its face, intended to govern the operation of the Project until the contemplated Sale closed, or was terminated.[99] An arbitral panel convened to determine a dispute relating to the Control Resolution (defined and discussed below) described the Control Agreement as having been "entered into between the parties for a specific and limited purpose which was to provide Mr. Mizrahi with exclusive operational control of the Project during the defined Escrow Period."[100] It follows that MI's increased CM Fee expired when the Control Agreement expired on August 30, 2022.[101]

79. Importantly, the Control Agreement does not authorize MI to charge the Debtors based on the Labour Rates, or alter the prohibition in the GC Agreement on MI charging the Debtors separately for its own labour.

80. **Mr. Mizrahi purported to unilaterally amend the GC Agreement on May 4, 2022.** Mr. Mizrahi unilaterally executed an amendment to the GC Agreement dated May 4, 2022 (the "**Unilateral Amendment**") by signing for both MI and the Nominee.[102] The Unilateral Amendment purported to remove any contractual limit on the amount MI could charge for the Project, and confer on Altus the ability to set the budget and schedule for the Project. The Unilateral Amendment still does not amend the prohibition on MI charging for its own labour and so it does not assist MI's position on the Receiver's Cross-Motion. It is also likely invalid.[103]

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[98] Control Agreement at s. 3, Receiver's MR Vol 2 at Tab 2(20), pdf p. 320.

[99] Control Agreement at s. 1, Receiver's MR Vol 2 at Tab 2(20) pdf p. 318.

[100] Arbitral Award dated June 24, 2023 at para. 23, Receiver's MR Vol 2 at Tab 2(23), pdf pp. 385-386.

[101] Fifth Report at para. 9.72, Receiver's MR, Vol 1 at Tab 2, pdf p. 85.

[102] Fifth Report at para. 9.63, Receiver's MR Vol 1 at Tab 2, pdf p. 83; Unilateral Amendment dated May 4, 2022, Receiver's MR Vol 2 at Tab 2(21), pdf p. 327.

[103] Fifth Report at paras. 9.66-9.68, Receiver's MR Vol 1 at Tab 2, pdf p. 84.

81. **Mr. Mizrahi tried to permanently exclude Coco from the payment approval process.** The Control Period ended in August 2022, and the Sale was not completed. Mr. Mizrahi knew that Coco objected to MI's fees. He tried to avoid these objections by passing a resolution (the "**Control Resolution**") purporting to give himself indefinite control over the Debtors and the Project. Mr. Mizrahi relied on the (expiring) authority conferred by the Control Agreement to execute the Control Resolution.[104]

82. Coco immediately objected to the Control Resolution and commenced an arbitration to set it aside. The Control Resolution was declared void *ab initio* in June 2023.[105] But between August 2022 and June 2023, Mizrahi relied on the Control Resolution to pay MI based on the MI Payment Practices despite Coco's specific objection.

83. **MI received payments over Coco's objection from August 2022 until the Receiver was appointed in October 2023.** MI's counsel conceded that "it's obvious" that Coco did not approve payments based on the MI Payment Practices in the period after August 2022.[106] Mr. Kilfoyle candidly admitted that MI received all of the payments made after August 2022 with full knowledge that Coco objected to them.[107]

84. Mr. Mizrahi, for his part, claimed that MI "had a ruling" from Mr. Morrison that it was entitled to fees based on the MI Payment Practices.[108] No such ruling exists. Importantly, however, MI *could have* sought a ruling about its entitlement to fees on a summary basis in accordance with

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[104] Fifth Report at para. 9.70, Receiver's MR Vol 1 at Tab 2, pdf p. 85; Control Resolution dated August 6, 2022, Recitals, Receiver's MR Vol 2 at Tab 2(24), pdf pp. 390-391.

[105] Arbitral Award dated June 24, 2023, para. 28, Receiver's MR Vol 2 at Tab 2(23), pdf p. 387.

[106] Mizrahi Cross, Q. 921, Transcript Brief at Tab 4, pdf p. 820.

[107] Kilfoyle Cross, Q. 260-279, Transcript Brief at Tab 2, pdf pp. 230-232.

[108] Mizrahi Cross, Q. 929, Transcript Brief at Tab 4, pdf p. 820.

the terms of the Mediator's Proposal.[109] It did not do so. MI chose to take the risk that it was not entitled to the fees it was being paid and that it would have to return those fees.

D. The Receiver's Appointment and Attempt to Understand the MI Payment Practices

85. The Receiver was appointed pursuant to the Receivership Order on October 18, 2023.

86. MI consented to the Receivership Order and negotiated a clause specifically authorizing and directing the Receiver to pay amounts owed under the GC Agreement.[110] This is completely inconsistent with Mr. Mizrahi's claim that the GC Agreement was a fiction that never governed MI's right to payment. Importantly, the Receivership Order provides that payments to MI did not affirm any contract between MI and the Debtors.[111]

87. After it was appointed, the Receiver assessed the complex web of contracts that governed payments to MI to determine whether MI was entitled to payments based on the MI Payment Practices. On October 30, 2023, the Receiver advised MI that it would not pay certain fees claimed by MI until its review was complete.[112] On November 26, 2023, the Receiver wrote to MI to indicate that it saw "no basis" to pay both the 5% CM Fee claimed by MI and the Labour Rates. It also explicitly stated that its contractual review was ongoing and that its payments to MI did not constitute affirmation of any contract.[113]

88. At the same time, MI expressed significant concerns about its liquidity. In order to alleviate these concerns and to ensure construction continued during the early days of the receivership while

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[109] Mediator's Proposal at s. 12, Receiver's MR Vol 2 at Tab 2(11), pdf p. 258.

[110] Receivership Order dated October 18, 2023 ("**Receivership Order**") at para. 6, Receiver's MR Vol 1 at Tab 2(1), pdf pp. 137-138.

[111] Receivership Order at para. 6, Receiver's MR Vol 1 at Tab 2(1), pdf pp. 137-138.

[112] Supplemental Report at para. 2.15, Receiver's Reply MR at Tab 1, pdf p. 21; Email of J. Nevsky dated October 30, 2023, Receiver's Reply MR at Tab 1(1), pdf p. 57.

[113] Receiver's email dated November 26, 2023, Receiver's MR Vol 1 at Tab 2(3), pdf pp. 177-179.

the Project was stabilized, and without affirming any agreement, the Receiver agreed to pay MI a 5% CM Fee and its Labour Costs (i.e., MI's actual labour costs without a mark-up).[114]

89. The Receiver ultimately concluded its review of the contracts and the evidence relating to the parties' obligations. The Receiver concluded that MI was entitled to a 3.5% CM Fee after the Control Agreement expired (not the 5% CM Fee it had charged) and that MI was never entitled to charge the Labour Rates.

PART III – ISSUES, LAW & ANALYSIS

90. The core issue on this motion is whether MI breached the contracts governing its relationship with the Debtors by charging amounts that it was not entitled to charge, and failing to repay amounts it is obliged to repay. As set out below, MI's breaches caused damages totalling at least $58.8 million.

A. MI was Not Contractually Entitled to Charge the Labour Rates

91. MI had no right to charge the Debtors based on the Labour Rates. It received fees totalling approximately $49.3 million from the Debtors in respect of Labour Rates that it was not entitled to. MI argues, in essence, that because it *received* payments based on the Labour Rates it must have been *legally entitled* to receive these payments. But MI's evidence falls well short of proving that the Debtors agreed that MI could charge the Labour Rates. It follows that MI is liable to return the $49.3 million improperly paid to it.

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[114] Supplemental Report at paras. 2.20-2.24, Receiver's Reply MR at Tab 1, pdf pp. 22-23; Receiver's email dated November 26, 2023, Receiver's MR Vol 1 at Tab 2(3), pdf pp. 177-179; October 2023 and November 2023 Payment Letters and covering emails, Receiver's MR Vol 1 at Tab 2(5); December 2023 Payment Letter and covering emails, Receiver's MR Vol 1 at Tab 2(6).

(i) Failure to Follow the Contract Does Not Amend the Contract

92. MI proudly proclaims that it did not once follow the payment procedures it agreed to in the GC Agreement. MI argues, in essence, that it breached the contract so persistently that it created a new agreement. This is not correct.

93. MI's argument, stripped to its core, is that since it managed to *receive* payments based on the Labour Rates it must be *legally entitled* to payments based on the Labour Rates. But as the Supreme Court of Canada held in *Jedfro Investments (U.S.A.) Ltd. v. Jacyk*, ignoring a contract is not enough to bring it to an end. The contract continues unless there is a "new contract in which the parties agree to abandon the old one."[115] The ordinary principles of contract formation apply to this new contract. There must be a clear and unequivocal intention to create a new contract, and an agreement on the essential terms of the new contract.[116]

94. As described below, there was no intention (let alone a clear and unequivocal intention) to abandon the GC Agreement or enter into any new contract that allowed MI to charge the Labour Rates.

(ii) No Contract Allowed MI to Charge the Labour Rates

95. The parties entered into a series of agreements relating to MI's fees: the First GC Agreement, the GC Agreement, the Amending Agreement to the GC Agreement executed in September 2019, the Mediator's Proposal in November 2019 and the Control Agreement in May 2021. The Debtors did not enter into any contract with MI, before or after CCM's termination, that authorized MI to charge the Debtors the Labour Rates for work on the Project. The contract that governed MI's role as general contractor on the Project – the GC Agreement – specifically said that MI *could not* charge separately for labour, using the Labour Rates or otherwise.[117]

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[115] *Jedfro* at para. 17.

[116] *Jedfro* at para. 16; *Wolverton Pacific Partnership v. Trip F Investments Ltd.*, 2022 BCCA 262 at paras. 33 and 38.

[117] GC Agreement at s. 8.3.1, Receiver's MR, Vol 1 at Tab 2(9), pdf p. 317.

96. While the Mediator's Proposal, which Coco and Mizrahi accepted in November 2020, authorized MI to charge a 3.5% CM Fee thereafter and the Control Agreement temporarily increased the CM Fee to 5%, neither the Mediator's Proposal (nor the later Control Agreement) relieved MI of the obligation to pay its own labour costs.[118]

(iii) ***Coco's Consent was Required to Amend the Contract and Was Never Provided***

97. In his affidavit, and on cross-examination, Mr. Mizrahi claimed repeatedly that "everyone" agreed to the MI Payment Practices.[119] But the MI Payment Practices involved amounts paid to *MI* by the *Debtors*. In order to prove its entitlement to the Labour Rates, MI must prove that the *Debtors* agreed to alter their rights under the GC Agreement and agreed to a separate contract that permitted payments to MI based on the Labour Rates.

98. Both pursuant to the 2016 Resolution that governed decision-making by the Debtors, and the USA that governed the operation of the Debtors, Coco had to agree to any contract between MI and the Debtors.[120] Coco did not agree to any contract that that authorized MI to charge the Labour Rates.[121] This is, without more, sufficient to establish that no such contract existed.

99. MI claims that because Coco did not pursue its arbitration in 2020 and because Ms. Coco executed the Payment Listings after MI terminated CCM in November 2020, the Debtors should be taken to have agreed to a new or amended contract that authorized payments based on the Labour Rates. This is not correct. First, Coco did not ignore MI's breaches of contract. It tried to address them by completing the Sale and exiting the Project. Second, even if Coco did ignore MI's breaches of contract, that would not be enough to create a new contract.[122]

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[118] Mediator's Proposal at s. 8, Receiver's MR Vol 2 at Tab 2(11), pdf pp. 256-257.

[119] See for e.g., Mizrahi Cross, Q. 189, 463-464, 502-504, 575, 634, Transcript Brief at Tabs 3 and 4, pdf pp. 301, 783-784, 787-788, 794, 799.

[120] USA at s. 3.7, Transcript Brief at Tab 3(1), pdf pp. 351-355; Fifth Report at para. 9.3, Receiver's MR Vol 1 at Tab 2, pdf pp. 67-68.

[121] Coco Cross, Q. 114-120, Transcript Brief at Tab 1, pdf pp. 21-22.

[122] *Jedfro* at para. 17.

100. The evidence in this case does not establish Coco's intention to agree to a new contract, let alone an agreement to the essential terms of that contract. Specifically:

(a) There was no agreement allowing MI to charge the Labour Rates before November 2020. MI was not charging the Labour Rates, and the GC Agreement specifically prohibited MI to charge separately for its labour;

(b) In November 2020, Coco objected, immediately and aggressively, to MI replacing CCM and charging amounts based on the Labour Rates. Coco *never* withdrew these objections;[123]

(c) Ms. Coco testified that Coco did not proceed with its arbitration because it instead negotiated the Sale. She also testified that she executed Payment Listings while negotiating the Sale and trying to complete it in order to facilitate Coco's exit. Ms. Coco testified that her execution of Payment Listings was premised on the Sale and she never agreed that MI could charge the Labour Rates if the Sale did not proceed.[124] This testimony is credible and not consistent with an intention to form a new contract;

(d) The only contemporaneous documents that are alleged to establish a new agreement are the Payment Listings. But the Payment Listings do not assist MI as alleged, or at all. The Payment Listings were a mechanism to secure funding from the Senior Secured Lenders. They did not alter the contract between MI and the Debtors. To the contrary, Ms. Coco and Mr. Mizrahi confirmed in each Payment Listing they executed that the representations contemplated in the Credit Agreement remained

[123] Fifth Report at paras. 9.48-9.52, Receiver's MR Vol 1 at Tab 2, pdf pp. 79-80; Coco Cross, Q. 103-106, Transcript Brief at Tab 1, pdf pp. 20-21.

[124] Coco Cross, Q. 114-120, Transcript Brief at Tab 1, pdf pp. 21-22.

true and correct.[125] As noted, one of these representations was that the GC Agreement remained in force and had not been amended;[126]

(e) Once the Control Agreement expired and it became clear that Coco could not exit the Project, Coco immediately resumed its objections to the MI Payment Practices. This, too, is consistent with Ms. Coco's testimony that she only signed the Payment Listings to facilitate the proposed buy-out of Coco's interest in the Project.[127]

101. Coco and Mizrahi did not trust each other. Mr. Mizrahi claimed that Ms. Coco repeatedly changed her mind after agreeing to terms.[128] As a result, when Coco and Mizrahi *actually* intended to alter their contractual relationships, they did so in writing and through counsel. Coco and Mizrahi agreed to two separate contracts (the Mediator's Proposal and the Control Agreement) that specifically addressed payments from the Debtors to MI. Neither of these agreements amended the prohibition on MI charging for its own labour. MI's assertion that it charged $49.3 million based on an undocumented agreement approved by Coco, in the face of plainly contradictory documented agreements, contemporaneous documents, and Ms. Coco's evidence, is not credible.

102. Even Mr. Mizrahi's conduct was inconsistent with an intention to abandon the GC Agreement. MI negotiated for the right to receive payments owed under the GC Agreement in the Receivership Order.[129] MI's Notice of Motion served in February 2024 specifically sought payments owed under the GC Agreement.[130]

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[125] Credit Agreement, Schedule C at s. 3, Ex. G to Mizrahi #3, pdf p. 168;

[126] Credit Agreement at s. 9.01(29) and definition of "Material Agreements", Ex. G to Mizrahi #3, pdf pp. 108 and 68.

[127] Supplemental Report at paras. 3.24-3.34, Receiver's Reply MR at Tab 1, pdf pp. 35-38; Excerpts from Payment Listings, Receiver's Reply MR at Tab 1(F), pdf p. 123; Coco Cross, Q. 126-131, Transcript Brief at Tab 1, pdf pp. 22-23.

[128] Mizrahi Cross, Q. 781, Transcript Brief at Tab 4, pdf p. 810.

[129] See Fifth Report at paras. 2.5-2.12, Receiver's MR Vol 1 at Tab 2, pdf pp. 42-44; Mizrahi #2 at paras. 10-11, MI RMR Vol 1 at Tab 2, pdf pp. 19-20.

[130] MI Notice of Motion dated February 27, 2024 at para. 1, MI MR at Tab 1, pdf pp. 3-4.

(iv) MI's Breach of the GC Agreement Did Not Result in any Waiver or Amendment

103. MI suggests that the Debtors waived their rights under the GC Agreement by making payments based on the Labour Rates. This is not supported by the facts, and it is specifically foreclosed by the terms of the GC Agreement.

104. A party seeking to establish waiver by conduct must meet a high bar: a party must "unequivocally and consciously abandon his or her rights" to waive those rights by conduct.[131]

105. There was no "unequivocal" waiver in this case. To the contrary, Coco unequivocally *objected* to MI charging the Labour Rates and never withdrew that objection. The GC Agreement also forecloses waiver by conduct:

> 1.3.2 No action or failure to act by the Owner, Consultant or Contractor shall constitute a waiver of any right or duty afforded any of them under the Contract, nor shall any such action or failure to act constitute an approval of or acquiescence in any breach thereunder, except as may be specifically agreed in writing.[132]

106. As noted above, the Credit Agreement (which both MI and the Debtors were parties to) specifically required written approval from the Senior Secured Lenders for any waiver of, or amendment to, the parties' rights under the GC Agreement. The parties did not seek, or obtain, this approval.

107. Mr. Mizrahi signed the GC Agreement for both parties. He knew, or ought to have known, that a specific written agreement was required for the Debtors to waive their rights, including their right to require that MI pay its own labour costs. If, as MI now claims, "everyone agreed" to ignore the GC Agreement, then MI could and should have procured the specific written agreement required by the GC Agreement. It did not, because there was no such agreement.

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[131] *Saskatchewan River Bungalows Ltd and Maritime Life Assurance Co.*, 1994 CanLII 100 (SCC), [1994] 2 S.C.R. 49 at paras. 19-20, cited in *Telestat Canada and Juch-Tech, Inc.*, 2012 ONSC 2785 at para. 56.

[132] GC Agreement at s. 1.3.2, Receiver's MR Vol 1 at Tab 2(9), pdf p. 302.

(v) MI Did Not (and Could Not) Assign the CCM Contract to Itself

108. MI has asserted that it assigned the CCM Contract to itself and so it was entitled to charge the Labour Rates. MI is wrong. The CCM Contract could only be assigned with written consent from CCM, and MI did not seek or obtain that consent.[133]

109. More fundamentally, the CCM Contract was an agreement between MI and CCM. By purporting to assign CCM's rights under the CCM Contract to itself, MI tried to create an agreement with itself. This is a legal absurdity and, by operation of law, the CCM Contract would be discharged – "for a man cannot maintain an action against himself".[134] MI is a sophisticated party that was, at the time, represented by a veritable army of experienced lawyers.[135] It must have known that it could not create a contract with itself and then obligate the Debtors to pay millions of dollars in fees based on that "contract".

110. Even if MI had "assigned" the CCM Contract to itself, an agreement between MI and MI is not binding on the Debtors. The Debtors had no privity of contract with CCM and had no obligation to MI in its capacity as the unilaterally-appointed replacement construction manager.

111. MI also argues that, because MI charged CCM's labour rates to the Debtors, the Debtors were also obliged to pay the Labour Rates to MI after MI terminated CCM. Nothing in any of the applicable contracts or jurisprudence supports this argument. Even if the Debtors agreed to pay CCM its labour rates, that agreement would not require that they make similar payments to a different (and significantly less qualified) construction manager (*i.e.*, MI).

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[133] Clark Construction Management Contract dated July 2017 at s. 1.4.1, Receiver's MR Vol 1 at Tab 2(7), pdf p. 236.

[134] H.G. Beale et al., *Chitty on Contracts*, 34th ed., London, Sweet & Maxwell, 2021, volume I, par. 25-004

[135] Keith Bannon of Glaholt LLP (one of Canada's leading construction law firms), Jonathan Lisus and Nadia Campion of Lax O'Sullivan Scott Lisus LLP (one of Canada's leading boutique litigation law firms) and Avril Lavalee of McCarter Grespan LLP (a very experienced corporate and real estate lawyer). Mr. Mizrahi also had the ability to consult Project counsel at Dentons LLP.

(vi) The Senior Secured Lenders Were not the "Counterparty" to the CCM Contract

112. MI now claims (for the first time in its factum served on May 12, 2025) that the "counterparty" to the CCM Contract was "IGIS" because the CCM Contract was "assigned" to the Senior Secured Lenders pursuant to the terms of the Credit Agreement.[136] The Credit Agreement contemplates a standard assignment of all construction contracts for the Project as part of the security package given to the Senior Secured Lenders.[137] The Senior Secured Lenders could exercise their rights under these assignments if an event of default occurred.[138] There is no suggestion, let alone evidence, that the Senior Secured Lenders exercised these rights. Indeed, there is no evidence that the assignment contemplated by the Credit Agreement occurred and no evidence about the terms of that assignment.

113. In any event, MI's own conduct makes it clear that the CCM Contract was not assigned to the Senior Secured Lenders, nor was that ever something discussed or entertained by the Senior Secured Lenders. MI terminated CCM without prior notice to the Senior Secured Lenders and asserted the contract was its alone.[139] MI sought (and continues to seek) payment of the Labour Rates on the MI Payment Motion from the Debtors, not from the Senior Secured Lenders. MI could not take those steps if it had actually assigned the CCM Contract to the Senior Secured Lenders.

(vii) In the Alternative, Any Agreement or Waiver Allowing the Labour Rates Ended After the Control Agreement Expired

114. Even if MI's argument is correct that Coco (and, by extension, the Debtors), implicitly or by conduct, agreed to some payments by signing Payment Listings (which the Receiver denies), then that acceptance ended in August 2022 when the Control Agreement expired.

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[136] MI Factum at paras. 83 and 93.

[137] Credit Agreement at s. 7.01(p), Exhibit G to Mizrahi #3, pdf p. 101. Although not a borrower, MI is a "Credit Party" under the Credit Agreement.

[138] Credit Agreement at s. 11.02, Exhibit G to Mizrahi #3, pdf p. 132.

[139] Letter from J. Lisus dated October 30, 2020, Mizrahi Cross, Transcript Brief at Tab 3(5), pdf pp. 442-443.

115. Coco objected to the MI Payment Practices clearly, consistently and without exception after the Control Agreement expired after August 2022.[140] MI knew that it needed Coco's consent to bind the Debtors. It knew that it did not have that consent.[141]

(viii) ***MI's Unfairness Arguments are Without Merit***

116. Mr. Mizrahi argues in his affidavit that it is "technical and legalistic"[142] to claim that MI has no entitlement to charge the Labour Rates because the Labour Rates are not authorized by any express or implied contract between the parties. All that matters, according to Mr. Mizrahi, is that the Labour Rates were in fact paid between two companies that he controlled between November 2020 and October 2023.

117. There is, with respect, nothing technical or legalistic about applying the well-established law of contract to the facts of this case. There is also nothing unfair to MI. MI was represented by leading construction, litigation and corporate counsel.[143] It knew, or should have known, that it was bound by the agreements that it executed. It knew, or should have known, that it needed to negotiate a new contract in order to charge the Labour Rates. It could and should have negotiated a new contract or contractual amendment that Coco supported. Alternatively, the parties could have reached acceptable terms with a general contractor or construction manager that had high-rise construction experience as Coco repeatedly requested.[144]

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[140] See Fifth Report at paras. 3.24-3.34, Receiver's Reply MR at Tab 1, pdf pp. 35-38; Excerpt of Payment Listings Objections, Receiver's Reply MR at Tab 1(6).

[141] Kilfoyle Cross, Q. 260-279, Transcript Brief at Tab 2, pdf pp. 230-232; Mizrahi Cross, Q. 919-924, Transcript Brief at Tab 4, pdf pp. 820.

[142] Mizrahi #2 at para. 151, MI RMR Vol 1 at Tab 2, pdf p. 60.

[143] Mizrahi Cross, Qs. 56-59, 80-89, Transcript Brief at Tab 3, pdf pp. 292, 294.

[144] Coco Cross, Qs. 101-102, Transcript Brief at Tab 1, pdf p. 20; Coco Written Submissions dated November 6, 2020 at paras. 1(d), 46 and 64, Receiver's MR Vol 2 at Tab 2(16), pdf pp. 274, 294, 288.

118. The Debtors, by contrast, had much more limited options. The Debtors could not enforce their contractual rights against MI, because a claim could not be commenced without Mr. Mizrahi's consent and Mr. Mizrahi would not have consented.[145]

(ix) ***Evidence of Payment is Not Evidence of Entitlement***

119. MI's core argument is that it received payments and so it must be entitled to those payments. But a party (in this case, the Debtors) can knowingly make payments (in this case, the payments to MI based on the Labour Rates) and then recover any amount the recipient is not entitled to under the doctrine of practical compulsion. Recovery is available even if the payor knew it had no legal obligation to pay the funds, as long as the payor had no practical alternative to paying the funds.[146] This legal doctrine operates to protect parties that are forced to make payments they oppose because the alternative to payment is impractical[147] as long as the payments are made "under immediate necessity and with the intention of preserving the right to dispute the legality of the demand".[148]

120. In this case, Coco executed Payment Listings permitting payments based on the Labour Rates to protect the Project until the Sale could be completed. There was no practical alternative to the payments, because a refusal to execute the Payment Listings would stop *all* payments and bring the Project's construction to a halt. The payments to MI did not, on these facts, constitute an acknowledgement of their legality or foreclose recovery.

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[145] Mizrahi Cross, Qs. 324-325, Transcript Brief at Tab 3, pdf p. 312.

[146] *Barafield Realty Ltd v. Just Energy (BC) Limited Partnership*, 2017 BCCA 307 ("***Barafield***") at para. 12, citing *Eadie v Brantford (Township)*, 1967 CanLII 13 (SCC), [1967] SCR 573 ("***Eadie***") at 581.

[147] *Barafield* at para. 13; *Eadie* at 582.

[148] *Eadie* at 582.

(x) Conclusion – MI Breached the GC Agreement by Charging the Labour Rates and is Liable for the Resulting Damages

121. In sum, MI breached the GC Agreement by charging $47.4 million based on the Labour Rates and a CM Fee of $1.9 million on the Labour Rates. MI is liable for the resulting damages of $49.3 million.

B. MI Had No Right to a 5% CM Fee After the Control Agreement Expired

122. MI is also liable to the Debtors because it continued to charge a 5% CM Fee after the Control Agreement expired. MI claims that the Control Agreement permanently increased the CM Fee to 5%. But MI's right to charge a 5% CM Fee expired with the Control Agreement, and MI was only entitled to a 3.5% CM Fee after August 2022.

123. The Control Agreement states that "upon execution" MI would be paid a "construction management fee of 5% of hard costs."[149] It does not explicitly address the CM Fee payable going forward if the Sale did not close. However, when the Control Agreement is read as a whole and in light of the surrounding circumstances known to the parties when they executed it, the parties' objective intent is clear.[150] The Control Agreement was meant to govern the relationship between Coco and Mizrahi (and, by extension, MI and the Debtors) *during* the Control Period only. The parties did not intend to give MI a permanent raise, even if Mizrahi failed to complete the purchase.

124. This conclusion is supported by the arbitral award issued in June 2023. As noted above, Coco commenced an arbitration to set aside the Control Resolution. By Award dated June 24, 2023, the Arbitral Panel[151] held that the Control Agreement "was entered into for a specific and limited purpose which was to provide [Mr. Mizrahi] with exclusive operational control of the

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[149] Control Agreement at s. 3, Receiver's MR Vol 2 at Tab 2(20), pdf p. 320.

[150] *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53 at para. 57.

[151] The Panel for the 2023 Arbitration was comprised of Stephen Morrison, The Honourable Frank Newbould, K.C. and the Honourable Gloria Epstein, K.C.

Project during the defined Escrow Period."[152] It was premised on the "expectation that [Mr. Mizrahi] would buy out [Coco] and become the Project's sole beneficial owner and manager."[153]

125. These findings, which bind Mizrahi and MI, support the conclusion that the 5% CM Fee expired with the Control Agreement. Ms. Coco intended to exit the Project because she was concerned about Mizrahi's conduct and the fees it was charging.[154] Agreeing to permanently *increase* MI's fees, even if Mizrahi did not complete the contemplated purchase, is not consistent with this intention and the overall context of the Control Agreement.

126. It follows that the Control Agreement did not authorize MI to charge a 5% CM Fee after the Control Period ended. MI charged excess CM Fees totalling $2.9 million that it was not entitled to charge, in breach of the Mediator's Proposal. It is liable to the Debtors for this amount.

C. MI is Liable for Breaches of its Exclusive Listing Agreement

127. In addition to the breaches described above, MI has breached the ELA first, by failing to repay its commissions as required upon purchaser default, and second, by causing the Debtors to pay Project funds to third party brokers.

(i) MI is Liable to Return Commissions Totalling $1.8 Million

128. The ELA required that any commission paid to MI would be "returned promptly" to the Debtors in a case of purchaser default on a particular unit.[155] A number of CSAs (the "**Defaulting CSAs**") were terminated for purchaser default. But MI has not returned the related commissions.[156]

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[152] Arbitral Award dated June 24, 2023 at para. 23, Receiver's Motion Record, Vol 2 at Tab 2(23), pdf pp. 385-386.

[153] Arbitral Award dated June 24, 2023 at para. 23, Receiver's Motion Record, Vol 2 at Tab 2(23), pdf pp. 385-386.

[154] Coco Cross, Q. 83-88, Transcript Brief at Tab 1, pdf p. 19.

[155] ELA at s. 4(a)(v)(2), MI Responding Record Vol 3 at Tab 2(HH), pdf p. 239; Mizrahi Cross Q. 1039, Transcript Brief at Tab 4, pdf p. 830.

[156] Fifth Report at paras. 13.19-13.22, Receiver's MR Vol 1 at Tab 2, pdf p. 109-111.

129. MI's breach is even more egregious, because the Defaulting CSAs never had any realistic chance of closing. The purported purchasers were a collection of foreign nationals, including an American who plead guilty to fraud, a family resident in the Islamic Republic of Iran that bought three Units without paying any deposit, and a company based in the United Arab Emirates and said to be owned by the Princess of Lichtenstein. Collectively, these purchasers paid deposits of less than $40,000 on Units worth more than $63.4 million. The Defaulting CSAs conferred no meaningful benefit on the Debtors, and their primary economic effect was to generate commissions for MI. MI recognized this before the receivership and offered to repay – but never actually repaid – commissions totalling $1.8 million.[157]

(ii) ***Commissions Paid to Third Party Brokers***

130. The ELA was an *exclusive* listing agreement – in other words, MI agreed to sell all of the Units in the Project.[158] It did not. Instead, MI retained – or caused the Debtors to retain – third party real estate brokers. MI then charged the Project both its own commission *and* commissions owed to these brokers for the same Units.

131. The ELA specifically states that "[MI] will be responsible for the cost and provision of all of his or her own advertising and sales promotion, qualified sales people and support staff"[159] and that "it shall be the sole responsibility of [MI] to pay any of its sales people who participate in the sale of the Units."[160]

132. **MI engaged Magix Technologies LLC** ("**Magix**") **and charged the Debtors for Magix's commission in addition to its own commission.** MI breached the ELA by retaining Magix to sell Units in Dubai. Magix was, essentially, a subcontractor of MI. It performed

[157] Mizrahi Cross, Q. 1051-1052, Transcript Brief at Tab 4, pdf p. 830-831.

[158] ELA at s. 1, MI Responding Record Vol 3 at Tab 2(HH), pdf p. 237.

[159] ELA at s. 7, MI Responding Record Vol 3 at Tab 2(HH), pdf p. 240.

[160] ELA at s. 7, MI Responding Record Vol 3 at Tab 2(HH), pdf p. 240.

essentially the same services that MI had been hired to perform, in a defined geographic area.[161] As noted, MI did not have the right under the ELA to effectively delegate its responsibilities to Magix and charge the Debtors its own commission *and* commissions allegedly owed to Magix.

133. Even if MI had been entitled to engage and pay a third party broker, Magix was not entitled to payment under the terms of the Magix Agreement. The Magix Agreement provided only that "commission shall become due to the Agent as soon as and to the extent that the Principal receives the payment of the amount comprising the Net Price of the relevant Unit or Units in cleared funds."[162] The Net Price is defined as "the price actually agreed with the Buyer".[163] Full prices have not been paid by the respective buyers on any of the sold Units to date, including the Units for which commission was paid to Magix. Yet Magix has been paid $190,000 by the Debtors out of $571,000 of commissions invoiced in respect of two Units, one of which is among the Defaulting CSAs that have since been terminated. This is in addition to the $368,000 in commissions paid to MI for the same Units.[164]

134. **MI caused the Debtors to appoint Royal LePage Real Estate Services ("Royal LePage") as exclusive listing agent but still charged its own commission.** Mr. Mizrahi also caused the Debtors to engage Royal LePage, a real estate brokerage based in Toronto, as the *exclusive* listing agent for certain Units in the Project.[165] MI and Royal LePage could not both be exclusive listing agents. But Mr. Mizrahi caused the Debtors to pay *both* MI and Royal LePage commissions on the same units. This was a breach of the ELA.[166]

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[161] ELA at s. 7, MI Responding Record Vol 3 at Tab 2(HH), pdf p. 240.

[162] Marketing Agency Agreement dated July 13, 2022 at s. 6.2, Receiver's MR Vol 4 at Tab 2(45), pdf p. 233.

[163] Marketing Agency Agreement dated July 13, 2022 at s. 1.1, Receiver's MR Vol 4 at Tab 2(45), pdf p. 230.

[164] Fifth Report at para. 13.31, Receiver's MR Vol 1 at Tab 2, pdf p. 113.

[165] Fifth Report at para. 13.33, Receiver's MR Vol 1 at Tab 2, pdf p. 114; See also Listing Agreement with Royal LePage dated November 29, 2021, Receiver's MR Vol 4 at Tab 2(47).

[166] Mizrahi Cross, Q. 1057, Transcript Brief at Tab 4, pdf p. 831.

135. Ultimately, to the extent that MI decided to delegate certain responsibilities under the ELA to a third-party broker, it is MI, not the Debtors, that is responsible for the resulting cost. MI was especially not entitled to claim its own commission and *also* cause the Debtors to pay a separate commission to a third-party broker.

D. MI is Liable for Breaches of the Mediator's Proposal

(i) $1.2 Million Reserve

136. As part of the Mediator's Proposal, MI agreed to transfer the Reserve into a joint trust account or use it to purchase a GIC. The Reserve was held partially in a non-segregated MI bank account and partially in a segregated MI bank account.[167]

137. The liability to which the Reserve related to did not arise, and so the Reserve ought to have been available to the Debtors.[168] But the Reserve disappeared. This is a breach of the Mediator's Proposal and must be remedied by damages.[169]

138. In his affidavit, Mr. Mizrahi contended that this $1.2 million Reserve was "credited" against amounts Mizrahi was owed for outstanding deposits on various Units purchased by him and his family members.[170] But there is no evidence that any credit occurred, and the alleged credit does not make sense.

139. Pursuant to the terms of the Mediator's Proposal, Mr. Mizrahi and members of his immediate family (the "**Mizrahi Family**") had the right to purchase one unit in the Project and pay a 50% deposit.[171] But the Mizrahi Family bought *five* units and paid only nominal deposits. This was itself a breach of the Mediator's Proposal that left the Mizrahi Family owing $2,704,640

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[167] Fifth Report at para. 13.35, Receiver's MR Vol 1 at Tab 2, pdf p. 114.

[168] Mediator's Proposal at s. 3, Receiver's MR Vol 2 at Tab 2(11), pdf p. 255.

[169] Supplemental Report at para. 6.14, Receiver's Reply MR at Tab 1, pdf p. 48.

[170] Mizrahi #2 at para. 165, MI RMR, Vol 1 at Tab 2, pdf p. 64.

[171] Mediator's Proposal at s. 7, Receiver's MR Vol 2 at Tab 2(11), pdf p. 256.

to the Project in unpaid deposit amounts (the "**Unpaid Mizrahi Deposits**").[172] To be clear, the Receiver does not assert any claim for the Unpaid Mizrahi Deposits as part of the Receiver's Cross-Motion. But Mr. Mizrahi's attempt to set-off the Reserve liability that never materialized against the Unpaid Mizrahi Deposits is nonsensical. First, the two debts were owed by different parties. Second, and more fundamentally, both debts were owed *to* the Debtors. Mr. Mizrahi's claim inverts the contractual reality.

140. MI claims that a draft "Set-Off Agreement" is binding. This has two further problems beyond those already articulated. First, the Set-Off Agreement was never signed by Coco. Mr. Mizrahi claims to have signed it without needing Mr. Coco's consent on May 4, 2022 (and this is the version he appends to his affidavit), yet his lawyer continued to follow up with Coco for her signature in September 2023, and Mr. Mizrahi provided a different, unsigned version of the agreement to the Receiver in October 2023.[173]

141. Second, even if the draft Set-Off Agreement was binding, MI was not allowed to hold the $1.2 million Reserve indefinitely. Instead, the draft Set-Off Agreement provided that if the related liability had been assessed by the time Mr. Mizrahi purchased his Unit in the Project, then the $1.2 million would be transferred to "an interest-bearing trust account" jointly held with the Beneficial Owner. Mr. Mizrahi's purchase will never close as it has been disclaimed, and the liability has never materialized. Yet the $1.2 million remains unaccounted for.[174]

142. In short, MI had an obligation to place $1.2 million into a trust account or GIC for the benefit of the Debtors. It did not do so, and has not explained where that money is or how it was used. This is a fbreach of the Mediator's Proposal.

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[172] Supplemental Report at para. 6.10, Receiver's Reply MR at Tab 1, pdf p. 47.

[173] Mizrahi Cross, Q. 1100-1115, Transcript Brief at Tab 4, pdf pp. 834-835; Supplemental Report at para. 6.17, Receiver's Reply MR at Tab 1, pdf p. 49; Compare Transcript Brief at Tabs 3(10) and 3(11) to Ex. D to Mizrahi #3.

[174] Fifth Report at para. 13.37, Receiver's MR Vol 1 at Tab 2, pdf p. 115.

*(ii) **Marketing Fees***

143. Pursuant to both the ELA and the Mediator's Proposal, MI was entitled to charge the Residential Management Fee.[175] That fee was full compensation for MI's marketing efforts. But MI charged an additional "marketing fee" of $100,000 plus HST every month from June 2021 to August 2023.[176] There appears to be no contractual basis for such payments, and the Debtors are entitled to damages caused by MI's breach.

144. Mr. Mizrahi alleges that these marketing fees were advance payments of the Residential Management Fee. Again, this explanation is unsupported by the evidence. The Residential Management Fee is not referenced anywhere in the marketing fee invoices.[177] Further, in an earlier letter from MI's counsel dated May 2024, when calculating the Residential Management Fees MI claims to be owed, MI did not deduct these payments. MI did not connect the marketing fees to the Residential Management Fee until it served the January 2025 Mizrahi Affidavit.[178] In a letter sent May 29, 2024 by MI's counsel to the Receiver, MI's counsel calculated MI's "gross amount owing" on account of the Residential Management Fee as $20.4 million, without any indication that marketing payments were considered a prepayment on account of the Residential Management Fee.[179]

PART IV– RELIEF REQUESTED

145. For the foregoing reasons, the Receiver respectfully requests that the Receiver's Cross-Motion be granted.

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[175] Mediator's Proposal at s. 8, Receiver's MR Vol 2 at Tab 2(11), pdf pp. 256-257; See also ELA at s. 4(a)(i), MI's Responding MR Vol 3 at Tab 2(HH), pdf p. 238.

[176] Fifth Report at paras. 13.39-13.40, Receiver's MR Vol 1 at Tab 2, pdf p. 115.

[177] Invoice C1407, Receiver's Reply MR, Tab 1(11), pdf p. 178.

[178] Letter dated May 29, 2024, Receiver's MR, Vol 4 at Tab 2(52).

[179] Letter dated May 29, 2024, Receiver's MR, Vol 4 at Tab 2(52).

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 19th day of May, 2025.

Goodmans LLP / SPS

Goodmans LLP

Brendan O'Neill LSO# 43331J
boneill@goodmans.ca

Christopher Armstrong LSO#: 55148B
carmstrong@goodmans.ca

Mark Dunn LSO#: 55510L
mdunn@goodmans.ca

Jennifer Linde LSO#: 86996A
jlinde@goodmans.ca

Lawyers for the Receiver

SCHEDULE "A"

LIST OF AUTHORITIES

I, Sarah Stothart, counsel for the Receiver, am satisfied as to the authenticity of every authority listed in the Factum of the Receiver as required by Rule 4.06.1.

Sarah Stothart

Sarah Stothart / Goodmans LLP

Case Law

1) *Barafield Realty Ltd v Just Energy (BC) Limited Partnership*, 2017 BCCA 307
2) *Eadie v Brantford (Township)*, 1967 CanLII 13 (SCC), [1967] SCR 573
3) *Jedfro Investments (U.S.A.) Ltd. v. Jacyk,* 2007 SCC 55
4) *Saskatchewan River Bungalows Ltd and Maritime Life Assurance Co.*, 1994 CanLII 100 (SCC), [1994] 2 S.C.R. 49
5) *Sattva Capital Corp. v. Creston Moly Corp*., 2014 SCC 53
6) *Telestat Canada and Juch-Tech, Inc*., 2012 ONSC 2785
7) *Wolverton Pacific Partnership v. Trip F Investments Ltd.,* 2022 BCCA 262

Secondary Sources

1) H.G. Beale et al., *Chitty on Contracts*, 34th ed., London, Sweet & Maxwell, 2021, volume I, par. 25-004.

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	**MIZRAHI COMMERCIAL (THE ONE) LP, et al.**	Court File No. CV-23-00707839-00CL
Applicant	Respondents	

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)
Proceeding commenced at Toronto

FACTUM OF THE RECEIVER
(MI Payment Motion – Receiver's Cross-Motion)
Returnable June 17-19, 2025

GOODMANS LLP
Barristers & Solicitors
333 Bay Street, Suite 3400
Toronto, Canada M5H 2S7

Brendan O'Neill (LSO# 43331J)
Christopher Armstrong (LSO# 55148B)
Mark Dunn (LSO# 55510L)
Jennifer Linde (LSO# 86996A)

Tel: (416) 979-2211
Fax: (416) 979-1234

Lawyers for the Receiver