

**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**

**SUPPLEMENTAL REPORT TO THE FIRST REPORT OF THE RECEIVER
ALVAREZ & MARSAL CANADA INC.**

MARCH 6, 2024

TABLE OF CONTENTS

1.0 INTRODUCTION..... 1
2.0 UPDATE ON TRANSITION TO NEW CONSTRUCTION MANAGER..... 2
3.0 MIZRAHI INC. MOTION FOR PAYMENT 6

1.0 INTRODUCTION

- 1.1 On October 18, 2023 (the “**Appointment Date**”), pursuant to the Order (Appointing Receiver) (the “**Receivership Order**”) of the Ontario Superior Court of Justice (Commercial List) (the “**Court**”), Alvarez & Marsal Canada Inc. was appointed as receiver and manager (in such capacities, the “**Receiver**”), without security, of all of the assets, undertakings and properties of Mizrahi Commercial (The One) LP, Mizrahi Development Group (The One) Inc., and Mizrahi Commercial (The One) GP Inc. (collectively, the “**Debtors**”).
- 1.2 In connection with the Receiver’s motion returnable March 7, 2024 (the “**Receiver’s Motion**”), the Receiver prepared and filed with the Court the First Report of the Receiver dated February 26, 2024 (the “**First Report**”), describing, among other things, the Receiver’s activities since the Appointment Date, including its decision to disclaim the GC Agreement and the Construction Management Agreement with Mizrahi Inc. (“**MI**” or the “**Former Developer**”), and to engage SKYGRiD Construction Inc. (“**Skygrid**”) as the new construction manager of the Project, effective March 13, 2024 (the “**Effective Date**”).
- 1.3 The First Report, the Receivership Order and copies of other public Court materials filed in connection with these Receivership Proceedings are available on the Receiver’s website at: www.alvarezandmarsal.com/theone (the “**Case Website**”).
- 1.4 This report is the supplemental report to the First Report (the “**Supplemental Report**”). The purpose of this Supplemental Report is to provide the Court and Project stakeholders with an update and additional information, in advance of the Receiver’s Motion, regarding:

- (i) the status of the transition of the Project from the Former Developer to Skygrid as the new construction manager; and
- (ii) an overview of the Receiver's position with respect to the MI Payment Motion (as defined below) and its scheduling.

1.5 This Supplemental Report should be read in conjunction with the First Report and is subject to the restrictions and limitations described therein. Capitalized terms used and not defined in this Supplemental Report have the meanings given to them in the First Report or the Receivership Order, as applicable.

2.0 UPDATE ON TRANSITION TO NEW CONSTRUCTION MANAGER

2.1 As reported in the First Report, on February 26, 2024, with the consent of the RFCA Lender as required by the RFCA, the Receiver:

- (i) issued a disclaimer notice to the Former Developer and counsel to Mizrahi, the Former Developer and Sam M Inc. on February 26, 2024 (the “**Disclaimer Notice**”), with such disclaimer to become effective on the Effective Date; and
- (ii) entered into the Skygrid Engagement Letter, with Skygrid's role as construction manager to become effective on the Effective Date.

2.2 Accordingly, as of the Effective Date, the Former Developer shall no longer act as developer or general contractor of the Project and Skygrid shall take over as construction manager of the Project.

2.3 As described in the First Report, the proposed Construction Continuance Order and the proposed Lien Regularization Order (together, the “**Proposed Orders**”) sought by the

Receiver in the Receiver's Motion are intended to support a smooth transition during and after the interim period between the date of the Disclaimer Notice and the Effective Date (the "**Transition Period**"), and to assist in ensuring the stability and ongoing construction of the Project on a go-forward basis.

- 2.4 As of the date of this Supplemental Report, the transition process has, in the Receiver's view, commenced smoothly with construction of the Project continuing as scheduled and no material disruption among the trades, suppliers or Project Employees (as defined below). These parties have generally been supportive of the transition and many have expressly advised the Receiver that they will continue to work with Skygrid to ensure that the transition goes smoothly.
- 2.5 In terms of Project funding, the Receiver received its third draw request under the RFCA in the amount of \$50 million on February 29, 2024. Accordingly, as of the date of this Supplemental Report, the Receiver is holding approximately \$103.4 million of cash on hand.
- 2.6 Further, payments owing to contractors, subcontractors and trade suppliers for their work on the Project during the January 2024 period were made by the Receiver in the ordinary course during the last week of February 2024. As of 9:00 am on the date of this Supplemental Report, no liens have been registered against the Project.
- 2.7 Since the commencement of the Transition Period, the Receiver, KDC and Skygrid have held numerous meetings with representatives of MI to discuss and advance various transition-related matters such that Skygrid can commence its role as construction manager

on March 13, 2024. To date, MI has cooperated and assisted the Receiver and Skygrid through a number of transition-related matters.

2.8 During the Transition Period to date, the Receiver's activities have included:

- (i) initiating a key stakeholder communication plan whereby letters to advise of the Disclaimer and the engagement of Skygrid, as well as other relevant Project and transition-related information, were sent to trades, consultants, suppliers and other stakeholders, including, among others, Unit Purchasers, the HCRA and the City of Toronto;
- (ii) posting the materials filed in connection with the Receiver's Motion, including the First Report and the Proposed Orders, as well as a link to the letter that was sent to all trades, contractors and suppliers engaged on the Project, to the Case Website;
- (iii) accompanying KDC and Skygrid on site tours of the Project, to, among other things, assess the safety and security protocols in place, and assess the overall status of construction of the Project in advance of the Effective Date;
- (iv) working with Skygrid and providing the necessary Project-related information such that Skygrid can commence its engagement as construction manager on the Effective Date;
- (v) together with KDC, attending numerous meetings with Skygrid, MI, and the Project's trades and consultants to familiarize Skygrid with certain contract, purchase order and other related matters to assist in transitioning the oversight of such matters to Skygrid;

- (vi) discussing with each of Tarion and Aviva and their respective legal counsel matters related to bonding, warranty, and deposit insurance;
- (vii) coordinating with MI, Skygrid, trades and consultants an accounting cut-off at the Effective Date;
- (viii) attending calls with the Debtors' insurance broker to address any insurance-related matters in respect of the transition; and
- (ix) together with KDC, responding to inquiries from trades and certain other Project stakeholders.

2.9 On February 26, 2024, the Receiver understands MI held a "town hall" meeting with MI employees to advise them of the Disclaimer and the transition to Skygrid as the new construction manager.

2.10 On February 27, 2024, Skygrid held a series of introductory meetings, which the Receiver also attended, with MI employees who are currently fully dedicated to the Project (the "**Project Employees**"). Since that time, Skygrid has held individual meetings with each Project Employee to explore opportunities for go-forward employment with Skygrid with a view to having the majority of the Project Employees remain in their current roles on the Project. As of the date of this Supplemental Report, the Receiver understands that Skygrid has offered employment to 15 Project Employees (representing approximately 60% of total Project Employees). Skygrid continues to hold discussions with certain of the remaining Project Employees and additional offers of employment may be extended to such Project Employees.

- 2.11 During the Transition Period to date, Skygrid has also held a number of meetings with the key Project consultants and trades to discuss the current status of their respective scope of work, contract and other matters, and go-forward considerations.
- 2.12 Further updates with respect to transition matters will be provided in the Receiver's next report to the Court.

3.0 MIZRAHI INC. MOTION FOR PAYMENT

- 3.1 On February 26, 2024, the same day that the Receiver issued the Disclaimer Notice and after service of the First Report, MI served a Notice of Motion (the "**MI Payment Motion**") seeking to compel payment by the Receiver of: (i) \$4,086,007.53 for the period from October 18, 2023 up to February 22, 2024 (the "**Claimed Amounts**"); and (ii) an unspecified amount for the period after February 22, 2024.
- 3.2 The core allegation underlying the MI Payment Motion is that paragraph 17 of the Receivership Order requires that the Receiver continue paying MI using the same payment practices instituted by the Debtors in the pre-receivership period (the "**MI Payment Practices**").
- 3.3 Counsel to MI has proposed a very compressed schedule for the MI Payment Motion that contemplates a hearing in early April 2024. The Receiver does not believe that this schedule is fair, or realistic. The Receiver requires time to assess the issues raised in the MI Payment Motion and to prepare a response to same, as the MI Payment Motion requires a detailed assessment of the history of the Project, amounts paid to MI to date, and the value of MI's work on the Project. In addition, the Debtors have significant potential claims against MI which may be greater than the amounts claimed in the MI Payment

Motion, and those claims should be adjudicated at the same time as the MI Payment Motion.

- 3.4 The Receiver has proposed an alternative schedule leading to a September 2024 hearing date. The Receiver believes this date is reasonable given the extent and nature of the issues between MI and the Debtors, as discussed further below.

Interpretation of Receivership Order

- 3.5 The MI Payment Motion is founded on the assertion that the Receivership Order requires that the Receiver continue the MI Payment Practices whether or not they are authorized by any contract between MI and the Debtors, and without considering whether the MI Payment Practices were reasonable.

- 3.6 The Receiver does not agree with MI's interpretation of the Receivership Order. The Receiver carefully considered the Receivership Order, and determined that its mandate included assessing whether MI was actually entitled to the amounts that it claimed.

- 3.7 Paragraph 17 of the Receivership Order applies to any Person with an oral or written agreement to supply goods and/or services to the Debtors, MI or the Project. It stops such Persons from terminating the supply of goods and/or services without leave of the Court provided that they are paid, "as determined by the Receiver":

- (i) in accordance with normal payment practices of the Debtors or the Developer, as applicable, **or**
- (ii) with respect to the Debtors or the Developer, such other practices as may be agreed upon by the supplier or service provider and the Receiver, **or**

(iii) as may be ordered by the Court.

3.8 In the Receiver's view, the Receivership Order confers on the Receiver the right to adopt the "normal payment practices", enter into a new agreement with respect to compensation (which as described in the First Report, it tried to do, unsuccessfully), or ask the Court to fix fair compensation for the services that MI provided since the commencement of the Receivership Proceedings. As further detailed below, the Court requires an appropriate evidentiary record to consider each of the foregoing matters.

Non-Urgent Nature of the MI Payment Motion

3.9 The Receiver does not believe that the MI Payment Motion is urgent. As noted in the First Report, the Receiver has disclaimed the Construction Management Agreement and the GC Agreement. As a result, MI will not act as developer or general contractor on the Project going forward. The MI Payment Motion will not impact the progress of the Project, nor the Receivership. There is therefore no "real-time" element to the MI Payment Motion. MI is, in effect, advancing a claim for damages caused by an alleged breach of the Receivership Order. The Receiver is prepared to litigate the MI Payment Motion efficiently and expeditiously, but requires a full and fair opportunity to respond.

3.10 The Receiver also notes that the dispute underlying the MI Payment Motion is not new. The Receiver outlined its position by e-mail dated November 26, 2023, which is included in the MI Payment Motion and appended as Exhibit "Q" to the Affidavit of Mark Kilfoyle. MI has, for reasons that are unclear, redacted the e-mail in its motion material.

Investigation of the Facts Underlying the MI Payment Motion

- 3.11 The Receiver must fully investigate the facts relevant to the MI Payment Motion before it is heard. As noted previously, the Receiver does not agree with MI's interpretation of the Receivership Order. The Receiver also believes that the MI Payment Motion significantly oversimplifies the issues that must be determined in order to resolve the amounts owed between MI and the Debtors.
- 3.12 MI seeks what is, in effect, summary judgment on an as-yet unquantified claim that is likely to exceed \$6 million once fully quantified.¹ The MI Payment Motion is based on historical information, and the supporting affidavits contain 1,800 pages of historical accounting and payment information that allegedly supports MI's position. The Receiver requires time to review and understand this information, particularly because it has no firsthand knowledge of the relevant facts.
- 3.13 The Receiver will provide a further report setting out a substantive response to the MI Payment Motion. In this Supplementary Report, it only seeks to illustrate the issues that are relevant to the MI Payment Motion and its scheduling.

Authority to Implement the MI Payment Practices

- 3.14 The Receiver must assess whether MI had the authority to implement the MI Payment Practices in the first place. MI's claim rests on the "normal payment practices" (i.e., the MI Payment Practices) that were implemented when Mizrahi controlled both MI and the Debtors. The Receiver understands that Mizrahi's management of the Debtors, including

¹ Based on paragraph 31 of MI's Notice of Motion, the Claimed Amounts do not appear to include any amounts for either January 2024 or February 2024, and MI claims to have been underpaid by approximately \$1 million per month.

whether Mizrahi had the authority to authorize the payments made to MI, were contested by Coco (who controls a secured lender to the Project and holds a 50% indirect interest in the Debtors and the Project) in dispute resolution proceedings that lasted many years.

- 3.15 The Receiver must investigate the long and complicated history of the dispute between Coco and Mizrahi in order to determine whether the MI Payment Practices were properly authorized by the Debtors and appropriate.

Contractual Basis for MI Payment Practices

- 3.16 The Receiver must assess what MI is properly entitled to based on its contracts. As set out in Section 5 of the First Report, the fees claimed by MI in the MI Payment Motion are unsupported by any of the written contracts between the parties. Those contracts required that MI receive payment based on the progress of the Project against an agreed-upon budget.

- 3.17 Based on the Receiver's review, MI did not produce a reliable Budget or Schedule, and the anticipated completion date of the Project is not yet confirmed. Accordingly, a complete analysis of MI's entitlement under the applicable contracts may show that MI has in fact been overpaid.

Commercial Reasonableness of MI Payment Practices

- 3.18 Evidence will be required as to the commercial reasonableness of the MI Payment Practices and market rates for similar services. As previewed above, if the Court accepts that the Receivership Order did not require that the Receiver continue the MI Payment Practices,

then it may determine that it is appropriate to fix a fee for MI's post-receivership work. The Court will likely require the assistance of experts to reach this determination.

Potential Set-Off Claims

3.19 MI's claim for post-receivership work is only one part of a broader relationship between MI and the Debtors. As set out in the First Report, the Receiver has been investigating various potential claims that the Debtors may have against MI. These claims may, if they are successfully advanced, reduce or eliminate any obligation to pay further funds to MI and may result in MI owing amounts to the Debtors. The set-off claims being assessed by the Receiver include, but are not limited to:

- (i) MI's potential obligation to refund approximately \$4 million in commissions. MI collected approximately \$4 million in commissions on sales to Unit Purchasers that defaulted on their purchase agreements by paying no deposit or failing to pay the full deposit required by their respective CSAs. The Receiver is assessing whether these CSAs should be terminated on that basis. If these CSAs are terminated, then MI must promptly repay the related commissions;
- (ii) outstanding arrears owing to Project suppliers. Since the date of its appointment, the Receiver has become aware of vendor invoices that were funded to MI via loan advances that have not been paid on to those vendors by MI. At this time, MI has advised the Receiver that it intends to pay these invoices, however, should any amounts not be paid by MI, those amounts could form a claim against MI; and
- (iii) any potential liability relating to substantial payments advanced by CERIECO (as discussed in Sections 3 and 12 of the First Report) that were paid to unknown third

parties and do not appear to have been invested in the Project. The Receiver is investigating this issue, including whether it gives rise to any liability on the part of MI.

Cross-Motion and Scheduling

3.20 Addressing the claims noted above by way of a cross-motion will enable the Court to address the set-off of any amounts potentially owing by the Receiver against any amounts potentially owing by MI, as opposed to dealing with two independent damages awards at separate times.

3.21 In order to properly prepare materials and respond to all issues, the Receiver will require sufficient time, likely several months, to assemble its factual and expert evidence (which will be followed by the exchange of written submissions by both parties). Given the issues raised in the MI Payment Motion (which are primarily monetary), and given that the Disclaimer Notice has now been issued to MI, it is the Receiver's position that the MI Payment Motion is not urgent and need not be heard on an expedited basis.

Proposed Schedule

3.22 In light of the foregoing, the Receiver has proposed the following schedule:

- (i) Receiver's responding material and cross-motion by May 31, 2024;
- (ii) MI reply and response to cross-motion by June 28, 2024;
- (iii) Cross-examinations on affidavits, and written questions posed to Receiver, by July 30, 2024;

- (iv) Receiver to respond to written questions by August 16, 2024;
- (v) Facts to be exchanged, based on hearing date; and
- (vi) Hearing in September 2024.

3.23 The Receiver believes that this schedule proposal appropriately balances MI's desire for an expeditious resolution with the procedural fairness that the Receiver (and other Project stakeholders who may participate in the MI Payment Motion) require.

All of which is respectfully submitted,

**Alvarez & Marsal Canada Inc., in its capacity as receiver and manager of
Mizrahi Commercial (The One) LP, Mizrahi Development Group (The One) Inc.,
and Mizrahi Commercial (The One) GP Inc.**

Per:



Name: Stephen Ferguson
Title: Senior Vice-President

Per:



Name: Josh Nevsky
Title: Senior Vice-President

**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

**SUPPLEMENTAL REPORT TO THE FIRST
REPORT OF THE RECEIVER
ALVAREZ & MARSAL CANADA INC.
MARCH 6, 2024**

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

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

Christopher Armstrong LSO# 55148B
carmstrong@goodmans.ca

Jennifer Linde LSO#86996A
jlinde@goodmans.ca

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

Lawyers for the Receiver