

ONTARIO

SUPERIOR COURT OF JUSTICE

COMMERCIAL LIST

B E T W E E N:

CONSTANTINE ENTERPRISES INC.

Applicant

- and -

MIZRAHI (128 HAZELTON) INC. AND MIZRAHI 128 HAZELTON RETAIL INC.

Respondents

**IN THE MATTER OF AN APPLICATION UNDER SECTION 243(1) 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**

REPLY AIDE MEMOIRE OF MIZRAHI INC. AND SAM MIZRAHI

(9:30 Returnable October 1, 2025)

September 29, 2025

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TO: SERVICE LIST

REPLY AIDE MEMOIRE OF MIZRAHI INC. AND SAM MIZRAHI

1. This Reply Aide Memoire responds to the Receiver’s Cas Conference Brief, dated September 30, 2025.
2. The Receiver has not responded to or addressed the issue of disputed facts raised by its proposed motion or that those disputed facts are already subject to two extant legal proceedings (a civil action: *Mizrahi v Constantine et al*, and an application to enforce a guarantee: *Constantine v Mizrahi*).
3. With respect to the single proceeding model, the Receiver relies on the Court of Appeal’s decision in *Mundo Media Ltd (Re)*. It appears this case did not concern a dispute on material facts. Instead, the decision turned on the appropriate jurisdiction in the face of a competing arbitration agreement. The Court of Appeal held that the single proceeding model “favours litigation concerning an insolvent company to be dealt with in a single jurisdiction rather than fragmented across separate proceedings”, i.e. in the Ontario Superior Court of Justice and not fragmented by private arbitration proceedings. On the issue of the ‘sufficient cause’ test raised by the Receiver, that test sets out the burden applied “to have the proceedings fragmented across multiple jurisdictions”.¹ This is not the issue raised in this proceeding.
4. Mizrahi Inc. and Mr. Mizrahi do not raise a jurisdictional challenge. The fact is that Rule 14 of the *Rules* provides that applications are, with few exceptions that do not apply, reserved for proceedings without material facts in dispute. The Receiver’s motion is akin to an application and should be subject to the same considerations. In any event, Mr. Mizrahi and Mizrahi Inc. should not be prohibited from bringing their proposed motion.
5. The fact that the Receiver gave notice of its intention to pursue its motion is irrelevant to the right of Mizrahi Inc. and Mr. Mizrahi to challenge the proposed manner of proceeding. The notion that these respondents must be put to the time and expense of preparing a responding motion record given the significant disputed facts, two competing proceedings (which are all subject to the same jurisdiction and managed by the Commercial List) and only at the return of the motion have the opportunity to challenge and argue the manner of proceeding is entirely unfair and clearly inefficient.

¹ *Mundo Media Ltd. (Re)*, 2022 ONCA 607 at para 6.

6. Mr. Mizrahi and Mizrahi Inc. should be allowed to make their case that the manner of proceeding is inherently unfair before they are put to the expense of preparing a response.
7. There is no doubt that the limitations argument can be pursued regardless of the manner of proceeding, but Mr. Mizrahi and Mizrahi Inc. lose the procedural protections of an action in a case with disputed facts if they are compelled to deliver a responding motion record without the opportunity to bring their motion to challenge the mode of proceeding. Mr. Mizrahi and Mizrahi Inc. cannot put their best foot forward if the case proceeds as a motion.
8. There is no compelling reason to prevent Mr. Mizrahi and Mizrahi Inc. from challenging the mode of proceeding, particularly when there is no clear authority for the Receiver to seek leave to seek judgment in a case that clearly raises disputes as to material facts that are already subject to two extant legal proceedings.
9. On the issue of challenging the admissibility of certain evidence, a respondent is entitled to challenge the admissibility of evidence pre-emptively and such challenges are to be considered on a case-by-case basis where efficiency and fairness require that disputes about the factual record be determined before the substantive motion.² Again, there is no justification to prohibit Mr. Mizrahi and Mizrahi Inc. from advancing this motion.

All of which is respectfully submitted September 30, 2025.

² *Gutierrez v Watchtower Bible and Tract Society of Canada*, 2019 ONSC 3069 at para 35

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Court File No. CV-24-00715326-00CL

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PROCEEDING COMMENCED AT
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