

**ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)**

B E T W E E N:

CONSTANTINE ENTERPRISES INC.

Applicant

- and -

**SAM M (180 SAW) LP INC. AND
SAM M (180 SAW) INC.**

Respondents

REPLY FACTUM

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TO: **THE SERVICE LIST**

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A. Overview

1. The Debtors¹ seek to muddy the true nature and purpose of this receivership application by mischaracterizing the matter as a mere partnership dispute and inappropriately relying on mere allegations in a recently issued pleading against CEI and its principals in excess of \$100 million (the “**Mizrahi Claim**”) as if they were fact. Tellingly though, the Debtors do not dispute that they owe CEI over \$28.9 million pursuant to certain secured promissory notes and guarantees that are in default since September 2022 and that they granted CEI a contractual right to seek the appointment of the Receiver.

2. CEI seeks to appoint the Receiver with a view to preserving and realizing on the Property which will, in turn, advance the development of the 180 Steeles Project. Indeed, without the immediate appointment of the Receiver, there is serious risk of harm to the Property because the value of that Property is inextricably tied to the 180 Steeles Project.

¹ Capitalized terms have the meaning given to them in the Factum of the Applicant dated April 26, 2024.

3. The development of the 180 Steeles Project has been brought to a halt because of the Debtors' failure to meet their financial obligations, the breakdown in the relationship between CEI and the Mizrahi Group, and more importantly, the complete loss of confidence by CEI in the management of the Debtors. There is a real and material risk of further development delays and enforcement action being taken by the mortgagees over the 180 Steeles Real Property, which would materially diminish the value of the Property because of the significant costs associated with that outcome. Despite the Debtors' suggestion to the contrary, the appointment of a Receiver all but eliminates these risks while also allowing CEI the opportunity to recover on the approximately \$28.9 million owing by Mizrahi Partner and Mizrahi Shareholder pursuant to certain secured promissory notes and guarantees.

4. Simply put, it is just and convenient to appoint a Receiver to salvage the 180 Steeles Project and, in turn, the value of the Property. The Court should approach the series of brief affidavits filed by the Debtors in complete disregard of the Court-endorsed timetable—right up to and including with service of its factum—with the skepticism warranted by the circumstances. This haphazard approach to filing selective, slapdash, and inaccurate evidence in breach of the timetable (which the Debtors' themselves proposed) is a telltale sign that these affidavits are nothing more than a last-ditch effort to detract from the issues actually before this Court. More importantly, the evidence provided for in the affidavits is irrelevant to the issues underlying CEI's application.

B. Appointment of the Receiver Would Mitigate Risk of Potential Enforcement Steps

5. It is true, as the Debtors point out, that the Receiver would act over the Property but not the 180 Steeles Project as a whole.

6. However, it is completely inaccurate to suggest that the appointment of the Receiver would do nothing to prevent potential enforcement steps from the mortgagees and otherwise address the deterioration of the 180 Steeles Project. To the contrary, it significantly reduces if not eliminates these risks.

7. The appointment of the Receiver provides a means to monetize the Debtors' interests in the 180 Steeles Project, which in turn facilitates an avenue for the continued development of the 180 Steeles Project.²

8. If the Receiver is appointed, CEI expects that the Receiver would return to Court in short order to seek approval of a process whereby the Debtors' interests would be marketed for sale and transferred to a replacement partner. To facilitate that process, CEI has indicated that it intends to submit a stalking-horse credit bid. A sale would mean that decisions could be made cooperatively with the replacement partner (and the Receiver in the interim) and funds could be advanced by a new partner.³

9. The court-appointed receiver is therefore critical to provide for the urgently needed stability necessary to facilitate the success of the 180 Steeles Project, and, in turn, protecting against the diminishing value of the Property.

10. The recent *proposals* to renew the Trez and CWB mortgages on short and onerous terms does not reduce the likelihood of enforcement proceedings by the mortgagees. There are a series of conditions precedent associated with both proposed renewals, including significant renewal fees and, in the case of Trez, the payment of an overdue, accrued interest balance in the amount of \$493,387.71. There is no evidence that these conditions precedent have been met. In fact,

² Affidavit of Robert Hiscox sworn February 23, 2024 paras 48-49 [*Hiscox Affidavit*].

³ Reply Affidavit of Robert Hiscox sworn April 16, 2024 at paras 4(c) and 5 [*Reply Hiscox Affidavit*].

they have not. Notably, the renewal terms proposed by CWB are explicitly “subject to material progress having been made toward the resolution of the Receivership”.

11. Further, the Partnership’s ability to comply with its obligations under these mortgages continues to depend on being appropriately funded and able to make decisions. In other words, the primary issue in ensuring the mortgagees do not enforce on their mortgages is to ensure they are serviced in accordance with the proposed renewal terms and on a monthly basis, and to progress the 180 Steeles Project. Since funding and decision-making are both missing from the equation with Mizrahi involved, the real and substantial risk of default and enforcement proceedings remains regardless of whether the short-term renewals are completed despite the financial and other conditions precedent. With Mizrahi as a partner, and without a court-appointed receiver, there is no path to monetize or advance the development of the 180 Steeles Project.

B. There is Significant Risk of Irreparable Harm and Imminent Risk to the Property

12. The Debtors incorrectly assert that there is a requirement that CEI prove an imminent risk to the Property to justify the appointment of a receiver. This is wrong.

13. Rather, case law specifically states the opposite - ***there is no requirement for a creditor to demonstrate that it will suffer irreparable harm in situations where a contractual right to seek the appointment of a receiver exists.***⁴ CEI’s security provides it with the right to appoint a receiver where the Debtors have committed an event of default.⁵ It is undisputed that the Debtors have committed an event of default (which default remains unremedied since September 2022) and, accordingly, CEI is entitled to appoint a receiver.⁶

⁴ *Bank of Montreal v Carnival National Leasing Limited*, [2011 ONSC 1007](#) at paras [24](#) and [28](#), citing *Bank of Nova Scotia v Freure Village of Clair Creek* (1996), [40 CBR \(3d\) 274](#) (ONSC) at para [10](#).

⁵ Hiscox Affidavit at para 54.

⁶ Hiscox Affidavit at paras 48-49 and 54.

14. In any event, there is evidence of imminent harm if the Receiver is not appointed. It increases the likelihood of the mortgagees enforcing under the terms of their agreements—which could potentially lead to no recovery for the equity holders of the 180 Steeles Project (i.e. the Partnership and therefore CEI and Mizrahi Partner)—and impedes CEI’s ability to find a replacement partner in the 180 Steeles Project that will actually provide the necessary funding and work cooperatively toward the advancement and completion of the project.⁷ The breakdown in the relationship between CEI and Mizrahi Group is most recently evidenced by the Mizrahi Claim.

C. The Appointment of a Receiver is Just and Convenient

15. The existence of only one secured creditor is hardly a bar to the appointment of a receiver. Courts have routinely recognized that a receiver may be appointed where there is only one secured creditor.⁸

16. For example, in *Pandion*, the Court granted the sole secured creditor’s application for the appointment of a receiver, noting as relevant factors in favour of appointing the receiver that the appointment would facilitate stability and the preservation and orderly marketing of the assets for the benefit of creditors, that the applicant was the party with the greatest economic stake, that the applicant had a contractual right for the appointment of the receiver, that the value of the security was deteriorating, that the appointment would prevent the assertion of lawsuits without leave of

⁷ Hiscox Reply Affidavit at para 4(c)(B).

⁸ See e.g., *Pandion Mine Financial Fund LP v Otso Gold Corp*, [2022 BCSC 136](#) at para 4 [*Pandion*] (and see [Joseph Archibald sworn January 7, 2022](#) at paras 1 and 2 and the PPSA search results attached as [Exhibit “I”](#) to the affidavit of Joseph Archibald sworn January 7, 2022, which clarifies that the only secured creditor of the debtor was one of the applicants and that each of the applicants are related to one another); *General Motors v Peco Inc* (2006), [15 BLR \(4th\) 282](#) (ONSC) at paras 27-28; *Forest & Marine Financial Corp, Re*, [2009 BCSC 1554](#) at para 1; *306440 Ontario Ltd v 782127 Ontario Ltd*, [2014 ONCA 548](#) at para 5; *Royal Bank of Canada v MBA Asset Management Inc*, [2024 BCSC 546](#) at paras 3-4.

the court, and that the objectivity and neutrality of the receiver was of great benefit in the circumstances.⁹ These factors are also present in the current circumstances.

17. The Debtors rely on *M&K Construction Limited et al v Kingdom Covenant International*¹⁰ in support of its argument that the appointment of the Receiver is not appropriate, but that case is also entirely distinguishable. In that case, the underlying debt was in question, there was no urgency to sell the property, the property was not diminishing in value, the value of the property greatly exceeded the value of the outstanding debt, and the appointment of a receiver would have effectively ended the action commenced by the respondent (which was a not for profit corporation that operated a church and school) against the applicants and others.¹¹

18. That is not the case before this Court. The subject property is imminently at risk of diminishing in value if a receiver is not appointed.¹² Also, the plaintiffs to the Mizrahi Claim are Sam Mizrahi and members of the Mizrahi Group, for profit entities, for whom the appointment of the Receiver will not prejudice or end their ability to advance their claims.

19. Similarly, *9-Ball Interests Inc v Traditional Life Sciences Inc*,¹³ cited in the Debtors' Factum, is entirely distinguishable. In that case, not only was a receivership order sought, but in the same application the applicant secured creditor sought to approve a sale of the property to a related purchaser. The secured creditor, debtor, and purchaser were all related entities and the security interest was granted when the debtor was insolvent. Given the applicant and respondent were related parties, there was no prospect that the respondent would resist the appointment of a private receiver, or that the applicant, receiver, or purchaser would face litigation or claims by

⁹ *Pandion* at paras 56-59.

¹⁰ [2015 ONSC 2241 \[M&K Construction\]](#).

¹¹ *M & K Construction* at para 6.

¹² Hiscox Affidavit at para 52; Hiscox Reply Affidavit at paras 9 and 15.

¹³ [2012 ONSC 2788 \[9-Ball Interests\]](#).

the respondent. The court inferred that the reason to seek the appointment of a receiver was to facilitate a quick-flip sale transaction, which the applicant was seeking court approval of without a proper evidentiary basis to allow the court to consider the efficacy and integrity of the sale process or whether the receiver made sufficient effort to get the best price.¹⁴ That is also not the case before this Court.

20. The instant case is also not analogous to the situation in *Royal Trust Corporation of Canada v Dq Plaza Holdings Ltd*,¹⁵ a case which the Debtors inappropriately rely on, which predates the relevant provisions in the *Bankruptcy and Insolvency Act* and is not on point. In that case, the applicant mortgagee was already in receipt of the rents and profits of the mortgaged property such that the applicant's mortgage was being serviced and the appointment of a receiver was not necessary to preserve assets.¹⁶ Also in that case, there was no evidence that a court appointment would enable the receiver to more efficiently carry out its work and duties.¹⁷ That is certainly not reflective of CEI's predicament.

D. The Receivership is Not Sought to Remedy a Business Dispute

21. The Debtors' also incorrectly assert that the nature of the issue before the Court is a partnership dispute. In that context, the Debtors err in relying on *Milborne v Kepinski*¹⁸ where the person seeking the appointment of a receiver was not a secured creditor. There was no loan. There was no security. There was no contractual right to seek the appointment of a receiver. There was not even a contractual requirement for the respondent to make additional contributions

¹⁴ *9-Ball Interests* at paras [20](#), [25-26](#) and [30-33](#).

¹⁵ [\(1984\) 36 Sask R 84](#) (SK KB) [*Dq Plaza Holdings*].

¹⁶ *Dq Plaza Holdings* at paras [11-12](#).

¹⁷ *Dq Plaza Holdings* at para [14](#).

¹⁸ [2024 ONSC 1825](#) [*Kepinski*].

to fund the project. Rather the relief sought was a unique 'interlocutory receiver' in the context of an oppression application.¹⁹

22. In this case, CEI is a secured creditor with a contractual right to an appointment of the Receiver. The underlying Indebtedness is in default and it is uncontested that the Debtors granted CEI a contractual right to seek the appointment of the Receiver. CEI has reasonably lost confidence in the Debtors because, among other things, of the significant amount of unpaid debt still owing, the significant delays in the development of the 180 Steeles Project, the repeated allegations by Mizrahi of bad faith and breach of duty, the commencement of Mizrahi Claim, and the occurrence of other receivership proceedings involving the Mizrahi Group.²⁰

23. CEI urgently seeks the appointment of the Receiver to protect its interests and the interest of other stakeholders and to provide a path to realize on the Property in an efficient, transparent, and orderly manner.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 8th day of May, 2024.

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¹⁹ *Kepinski* at paras [32](#) and [35](#).

²⁰ *Hiscox Affidavit* at para 52.

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SCHEDULE “A”

LIST OF AUTHORITIES

1. *306440 Ontario Ltd v 782127 Ontario Ltd*, [2014 ONCA 548](#)
2. *9-Ball Interests Inc v Traditional Life Sciences Inc*, [2012 ONSC 2788](#)
3. *Bank of Montreal v Carnival National Leasing Limited*, [2011 ONSC 1007](#)
4. *Bank of Nova Scotia v Freure Village of Clair Creek* (1996), [40 CBR \(3d\) 274](#) (ONSC)
5. *Forest & Marine Financial Corp, Re*, [2009 BCSC 1554](#)
6. *General Motors v Peco Inc*, [15 BLR \(4th\) 282](#) (ONSC)
7. *M & K Construction Limited et al v Kingdom Covenant International*, [2015 ONSC 2241](#)
8. *Milborne v Kepinski*, [2024 ONSC 1825](#)
9. *Pandion Mine Financial Fund LP v Otso Gold Corp*, [2022 BCSC 136](#)
10. *Royal Bank of Canada v MBA Asset Management Inc*, [2024 BCSC 546](#)
11. *Royal Trust Corporation of Canada v Dq Plaza Holdings Ltd*, [\(1984\) 36 Sask R 84](#) (KB)

SCHEDULE “B”

TEXT OF STATUTES, REGULATIONS & BY - LAWS

Bankruptcy and Insolvency Act, RSC 1985, c B-3

PART XI SECURED CREDITORS AND RECEIVERS

Court may appoint receiver

243 (1) Subject to subsection (1.1), on application by a secured creditor, a court may appoint a receiver to do any or all of the following if it considers it to be just or convenient to do so:

- (a) take possession of all or substantially all of the inventory, accounts receivable or other property of an insolvent person or bankrupt that was acquired for or used in relation to a business carried on by the insolvent person or bankrupt;
- (b) exercise any control that the court considers advisable over that property and over the insolvent person's or bankrupt's business; or
- (c) take any other action that the court considers advisable.

[...]

Courts of Justice Act, R.S.O. 1990, c. C.43

PART VII COURT PROCEEDINGS

Injunctions and receivers

101 (1) In the Superior Court of Justice, an interlocutory injunction or mandatory order may be granted or a receiver or receiver and manager may be appointed by an interlocutory order, where it appears to a judge of the court to be just or convenient to do so.

Terms

(2) An order under subsection (1) may include such terms as are considered just.

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

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