

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

**IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT  
ACT, R.S.C. 1985, c. C-36, AS AMENDED**

**AND IN THE MATTER OF A PLAN OF COMPROMISE OR  
ARRANGEMENT OF VALIDUS POWER CORP., IROQUOIS FALLS  
POWER CORP., BAY POWER CORP., KAP POWER CORP., VALIDUS  
HOSTING INC. AND KINGSTON COGEN GP INC., EACH BY THEIR  
COURT APPOINTED RECEIVER AND MANAGER, KSV  
RESTRUCTURING INC.**

**FACTUM OF MACQUARIE EQUIPMENT FINANCE LTD  
(Responding to the Submissions of Todd Shortt Opposing  
the Monitor's Motion for SISP Approval)**

October 30, 2023

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Limited

**TO: SERVICE LIST**

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## PART I - OVERVIEW

1. Macquarie supports the Monitor's proposed SISP. The SISP includes a stalking horse bid that incorporates a credit bid of Macquarie's secured debt.
2. The Validus Entities—likely on behalf of shareholder and former CEO Todd Shortt—object. They have no capacity to take such steps to interfere with the realization of the Validus Entities' assets and prevent recovery to creditors. Mr. Shortt continues his previous objections here that Macquarie's claim is too large.
3. None of these objections have any basis. Mr. Shortt negotiated the relevant contracts for the Validus Entities. But he has adduced no evidence on this motion. He cites no applicable case law and makes no effort to satisfy any relevant legal tests. The Monitor has reviewed his objections, found them to lack merit and concluded that Macquarie's claim is valid.
4. It is unclear what, exactly, the basis is for the Validus Entities and Mr. Shortt's objections. There is no basis to interfere with Macquarie's claim. It is calculated under the clear and express instructions in the contract. It arises from a genuine liquidated damages provision that captures a *bona fide* attempt during the parties' negotiations—including negotiations leading to the four-month forbearance in February 2023—to estimate Macquarie's losses in the event of a default. Macquarie had many sources of loss, including the value of Macquarie's leased property that it transfers to the Validus Entities after its liquidated damages are paid, and Macquarie's lost future revenues from the lease.
5. Mr. Shortt claims that the formula he negotiated unfairly double counts the rent the Validus Entities failed to pay. Not only is this purported double counting not a legal ground to rewrite the parties' bargain, but there is no such double counting. The loss crystallized on the date

of Macquarie’s demand in July 2023. Mr. Shortt wants credit to reduce the “stipulated loss value” portion of the liquidated damages calculation for rent that the Validus Entities never paid. That is not the commercial bargain the parties made.

## **PART II - THE FACTS**

6. For this Court’s convenience, the following table provides a breakdown of Macquarie’s secured claim and the language in section 13.1(f) of the Lease Agreement upon which each component of the claim is calculated. The full text of section 13.1(f) and an excerpt of the Stipulated Loss Value table referred to below are also reproduced at Schedule C of this Factum.

<b>Sub-claim</b>	<b>Quantum<sup>1</sup></b>	<b>Applicable Language in Section 13.1(f)</b>
Unpaid base rent and other arrears	\$9,605,000	“any unpaid Base Rent and other amounts due before, and in arrears on, the Default Payment Date”
Stipulated Loss Value	\$45,765,000	“the Stipulated Loss Value for the Leased Property, as specified on Schedule 3 to the initial Lease Supplement determined as of the date of written notice from Lessor to Lessee under this Section 13.1(f)”
Interest	\$1,848,822	“interest on such sum of [the foregoing] at the Late Rate from the Default Payment Date to the date of actual payment”
<b>TOTAL</b>	<b>\$57,218,822</b>	-

### **A. Macquarie has a secured lease**

7. Macquarie’s relationship with the Validus Entities started in April 2022 when the parties entered into a sale and leaseback transaction in respect of the Iroquois Falls power plant

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<sup>1</sup> As at September 22, 2023.

operations.<sup>2</sup> Under those arrangements, Macquarie purchased substantially all of the turbines, plant and equipment used in the Iroquois Falls power plant operations (the “**Leased Property**”) from IFPC under a participation agreement (the “**Participation Agreement**”).<sup>3</sup> Macquarie paid \$50.85 million for the Leased Property, comprised of a purchase price of \$45 million plus \$5.85 million of HST.<sup>4</sup>

8. Macquarie then leased those purchased assets back to IFPC under a lease agreement (the “**Lease Agreement**”), which required IFPC to make regular monthly “base rent” payments and to pay all other amounts when due under the Lease Agreement and the other agreements, guarantees and documents related to the sale and leaseback transaction (collectively, the “**Lease Documents**”).<sup>5</sup> Each of the other Validus Entities guaranteed all of IFPC’s and each of the other Validus Entities’ obligations under the Lease Agreement and the other Lease Documents and provided security in respect of those obligations.<sup>6</sup>

9. Section 13.1(f) of the Lease Agreement provided Macquarie with a liquidated damages remedy that it was entitled to exercise if IFPC or another Validus Entity committed an event of default thereunder. That clause provided that, upon Macquarie’s exercise, Macquarie would specify a “default payment date” on which IFPC would be required to pay to Macquarie a genuine pre-estimate of liquidated damages in an amount equal to the sum of:

- (a) any unpaid base rent and other amounts in arrears as of the default payment date;

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<sup>2</sup> Affidavit of Joshua Hamilton Stevens sworn July 31, 2023, para 31, Tab 2 to Macquarie’s Motion Record dated October 30, 2023 (“**July Stevens Affidavit**”).

<sup>3</sup> July Stevens Affidavit, para 31(a).

<sup>4</sup> July Stevens Affidavit, para 31(a); Participation Agreement dated February 24, 2023, s 2.4, Exhibit B to the July Stevens Affidavit (“**Participation Agreement**”).

<sup>5</sup> July Stevens Affidavit, para 31(b); Lease Agreement dated February 24, 2023, ss 3.2, 3.4, Exhibit C to the July Stevens Affidavit (“**Lease Agreement**”).

<sup>6</sup> July Stevens Affidavit, para 37, 39.

- (b) the “Stipulated Loss Value” for the Leased Property in an amount set out on a table in Schedule 3 of a supplement to the Lease Agreement; and
- (c) interest on (a) and (b) at an annual rate of 18%.<sup>7</sup>

10. Upon IFPC’s payment in full of those liquidated damages, Macquarie is required to transfer ownership of the Leased Property to IFPC, or as IFPC directs, and the Lease Agreement terminates.<sup>8</sup> As noted, the full text of section 13.1(f) and the Stipulated Loss Value table provided in Schedule 3 of the Lease Agreement supplement is reproduced at Schedule C of this Factum.

11. Importantly, because the Lease Agreement is part of a sale and leaseback transaction, the second branch of the liquidated damages calculation—the Stipulated Loss Value—was designed to compensate Macquarie for three sources of value: the value of the Leased Property, the loss of Macquarie’s bargain and the risks associated with placing a value on the foregoing.<sup>9</sup>

12. Value of Leased Property. First, Macquarie’s ownership of the Leased Property is transferred to IFPC after the liquidated damages are paid. The Stipulated Loss Value captures the value of that transferred property.<sup>10</sup> Indeed, as a result of representations from Mr. Shortt during the forbearance negotiations, Macquarie and the Validus Entities expected that value to be very high in February 2023.<sup>11</sup>

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<sup>7</sup> Lease Agreement, s 13.1(f).

<sup>8</sup> Lease Agreement, s 13.1(f).

<sup>9</sup> Affidavit of Joshua Hamilton Stevens sworn October 30, 2023, para 25, Tab 1 to Macquarie’s Motion Record dated October 30, 2023 (“**October Stevens Affidavit**”).

<sup>10</sup> October Stevens Affidavit, para 26.

<sup>11</sup> October Stevens Affidavit, paras 16-18.

13. This value capture is illustrated by the alternative liquidated damages calculation in section 13.1(e) of the Lease Agreement. Unlike section 13.1(f), section 13.1(e) applies where Macquarie first repossesses and uses or to sells the Leased Property. In that alternative calculation, an amount is subtracted from the Stipulated Loss Value to reflect the recoveries, if any, that Macquarie obtains from its operation or sale of the Leased Property.<sup>12</sup>

14. Loss of Bargain. Next, the Lease Agreement was itself part of a bargain intended to provide Macquarie with a stable flow of revenues from the Leased Property. The Stipulated Loss Value was intended in part to compensate Macquarie for the loss of that bargain and the accompanying stability.<sup>13</sup> Macquarie expected when the original Lease Agreement was signed that that this bargain would last well beyond the initial 36-month base term of the lease, or that IFPC would otherwise exercise its option to purchase the Leased Property under the Lease Agreement.<sup>14</sup> Among other reasons, Macquarie held this view because of the Debtors' high cost of replacing the Leased Property, which could continue in use for up to ten years.<sup>15</sup> The parties affirmed this aspect of the bargain when the Lease Agreement and its supplement were amended and restated in February 2023.

15. Risk Premium. Finally, the Stipulated Loss Value captured a risk premium to compensate for the inherent uncertainty with estimating the future value of the Leased Property and lost cash flows. Factors such as rising interest rates and potential volatility in the power generation market made long term projections difficult in February 2023, and it was unknowable with any certainty

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<sup>12</sup> Lease Agreement, s 13.1(e)(x).

<sup>13</sup> October Stevens Affidavit, para 30.

<sup>14</sup> October Stevens Affidavit, para 31.

<sup>15</sup> October Stevens Affidavit, para 31.

when the Validus Entities might default and trigger the calculation. The Stipulated Loss Value aimed to ensure that Macquarie would earn a satisfactory return, even in a bad-case scenario.<sup>16</sup>

**B. Macquarie and the Validus Entities entered into forbearance arrangements**

16. In December 2022, Macquarie discovered that certain Validus Entities had allegedly breached the terms of a material power purchase agreement with Hut 8, a customer. Macquarie viewed that agreement as an important source of future revenue for the Validus Entities. This allegation, if true, constituted an event of default under the Lease Agreement.<sup>17</sup>

17. In January 2023, Macquarie and the Validus Entities discussed, and reached, a potential resolution of this default. IFPC would make a \$10 million prepayment of base rent plus HST to Macquarie on or by January 16, 2023. In exchange, Macquarie would waive the specific default caused by the Validus Entities' breach of the Hut 8 agreement and release its security in the Validus Entities' North Bay power plant (the plant that the Hut 8 agreement related to).<sup>18</sup>

18. The Validus Entities failed to make that prepayment by the January 16 deadline, which prompted forbearance negotiations between Macquarie and the Validus Entities.<sup>19</sup> Those negotiations continued until the parties ultimately reached a forbearance deal on February 24, 2023. Both sides received valuable consideration and benefitted from the deal.

19. Macquarie, on the one hand, provided the Validus Entities with significant accommodations that gave them breathing room to resolve their financial and operational issues and find a path forward that would permit them to satisfy their obligations to Macquarie while

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<sup>16</sup> October Stevens Affidavit, para 32.

<sup>17</sup> July Stevens Affidavit, para 50.

<sup>18</sup> July Stevens Affidavit, para 51.

<sup>19</sup> July Stevens Affidavit, para 52.



retaining autonomy over their business.<sup>20</sup> Those accommodations included a four-month rent holiday that provided for a single \$6 million base rent payment due on May 31, 2023 as a replacement for the \$5 million of base rent payments due from February to May.<sup>21</sup> They also included Macquarie's agreement to forego enforcing its rights and remedies under the Lease Agreement for that four-month period and to assist with, and to fund, a sale process for IFPC (the "**IFPC Marketing Process**").<sup>22</sup>

20. The Validus Entities, on the other hand, provided Macquarie with concessions that compensated Macquarie for those accommodations. The Validus Entities agreed, among other things, to pay an additional \$1 million of base rent that was incorporated into the new \$6 million base rent payment due on May 31.<sup>23</sup> The Validus Entities also granted Macquarie additional collateral in their Kingston power plant and agreed to amend and restate the Lease Documents to incorporate new deal terms.<sup>24</sup>

21. Those new terms in the Lease Documents included changes to the way that the liquidated damages provision in section 13.1(f) of the Lease Agreement was calculated going forward. As noted, \$6 million of base rent came due on May 31. The "unpaid base rent" portion of the liquidated damages provision would therefore increase by \$6 million on May 31 if the Validus Entities failed to make that payment.<sup>25</sup> The "Stipulated Loss Value" portion, which was calculated on the basis of the number of base rents paid, was left unchanged.<sup>26</sup>

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<sup>20</sup> October Stevens Affidavit, para 20.

<sup>21</sup> October Stevens Affidavit, para 20(a).

<sup>22</sup> October Stevens Affidavit, paras 20(b)-(c).

<sup>23</sup> October Stevens Affidavit, para 21(a).

<sup>24</sup> October Stevens Affidavit, paras 21(b), (d), (e).

<sup>25</sup> October Stevens Affidavit, para 23.

<sup>26</sup> October Stevens Affidavit, para 23.

**C. Macquarie demanded its secured claim for liquidated damages**

22. Following the four-month forbearance period, the Validus Entities failed to make that base rent payment on May 31.<sup>27</sup> As a result, Macquarie issued notices of default, together with section 244 notices, to the Validus Entities on June 2, 2023.<sup>28</sup> However, Macquarie did not elect to exercise its rights to the liquidated damages under section 13.1(f) of the Lease Agreement at that time.

23. On July 24, after the IFPC Marketing Process unsuccessfully concluded, Macquarie sent out two further sets of demand letters to the Validus Entities. One set of demand letters demanded immediate repayment of all arrears outstanding as of that date, including unpaid base rent and HST, and the other set of demand letters, in accordance with the Lease Agreement, demanded immediate payment of the liquidated damages in accordance with section 13.1(f).<sup>29</sup>

24. As of September 22, 2023, the total amount of the indebtedness owing by the Validus Entities to Macquarie was \$57,218,822, comprised of: (i) \$9,605,000 of unpaid base rents, including HST; (ii) a \$45,765,000 Stipulated Loss Value, including HST; and (iii) \$1,848,822 of interest accrued on the foregoing.<sup>30</sup>

**PART III - THE ISSUES**

25. The issue before the Court is the approval of the Monitor's proposed SISP Order. Objections have been raised on grounds that include the quantum of Macquarie's debt. Those objections should be dismissed.

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<sup>27</sup> July Stevens Affidavit, para 59.

<sup>28</sup> July Stevens Affidavit, paras 90-91.

<sup>29</sup> July Stevens Affidavit, para 96.

<sup>30</sup> October Stevens Affidavit, para 37.

26. This factum addresses the following sub-issues with respect to the claim:
- (a) The Validus Entities—or Todd Shortt—lack standing to raise the objections.
  - (b) The liquidated damages clause does not “double count” base rent.
  - (c) The liquidated damages clause is not an unenforceable penalty clause.
  - (d) The anti-deprivation rule has no application in this case.
  - (e) Macquarie paid \$45 million plus HST, not only \$36 million, under the Participation Agreement.

#### **PART IV - THE LAW**

##### **A. Threshold issue: The Validus Entities and Todd Shortt lack standing**

27. As a threshold issue, the objections are made without capacity or standing. They should be disregarded on this basis. The Validus Entities lack the capacity and standing to make these objections; moreover, it is unclear what interest they would have in creditor or bidder issues. Instead, the Validus Entities are likely used as a straw man to advance the interests of Todd Shortt, either as a shareholder or potential bidder. He lacks standing in either capacity to object.

28. First, the Validus Entities lack capacity or standing to raise objections to the SISP or Stalking Horse Bid approval. The Receivership Order dated August 10, 2023 gave the Receiver possession and control of the Debtors’—i.e. the Validus Entities’—business and assets for the benefit of their creditors “to the exclusion of all other Persons, including the Debtors.”<sup>31</sup> That order explicitly removed the Validus Entities’ capacity to take steps that would hinder the realization of their assets.<sup>32</sup> The Validus Entities do not have an interest in the sale process, in

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<sup>31</sup> Receivership Order of Justice Osborne dated August 10, 2023, para 3 (“**Receivership Order**”), Appendix A of the Second Report of the Monitor dated October 19, 2023, Tab 2 of the Monitor’s Motion Record dated October 19, 2023 (“**Second Report**”).

<sup>32</sup> Receivership Order, paras 3(k)-(m).

any event; they are insolvent and issues relating to creditor recoveries are a matter for those creditors and the court officers.

29. The “Debtors” have filed no evidence attesting to their interest or explaining their standing here. There is no evidence as to who is directing the objection, what capacity he/she has to instruct counsel or who is paying for counsel.

30. Instead, it is most likely that the objections are driven solely by Todd Shortt, the Validus Entities’ shareholder, using the Validus Entities as a stand-in. For simplicity, the remainder of this Factum refers to the arguments raised in the Validus Entities’ materials as those of Mr. Shortt.

31. Mr. Shortt likewise has no standing. As a shareholder of Validus Parent, the law is clear that equity claimants have no economic interest in insolvency proceedings and lack standing to object to restructuring efforts or to object to creditor claims.<sup>33</sup> Conversely, to the extent Mr. Shortt is a potential bidder, potential bidders lack standing to object to a SISP or to approval of a transaction to act as a stalking horse bid.<sup>34</sup>

32. Mr. Shortt has consistently attempted throughout this insolvency process to prevent Macquarie from effectively recovering on its secured claim against the Validus Entities. In early August, when Macquarie sought the appointment of the Receiver, he set out a purportedly unconditional offer letter for financing.<sup>35</sup> The offer never materialized. He now insists on

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<sup>33</sup> *YG Limited Partnership and YSL Residences Inc. (Re)*, 2023 ONCA 505, paras [11-12](#); *Canadian Airlines Corp., Re*, 2000 ABQB 442, para [143](#).

<sup>34</sup> *Skyepharm PLC v Hyal Pharmaceutical Corporation*, [2000] 47 O.R. (3d) 234, 15 C.B.R. (4th) 298 (Ont. C.A.), para [32](#).

<sup>35</sup> Affidavit of Todd Shortt sworn August 10, 2023, Exhibit A, p 6 (“**August 10 Shortt Affidavit**”).

contesting the quantum of Macquarie's claims—something none of the Validus Entities' creditors see reason to do. It is not clear whose interests Mr. Shortt is advancing, but it is not those of the Validus Entities or their creditors. Mr. Shortt has no legally cognizable standing. His objections should be dismissed on this basis alone.

**B. Macquarie's secured claim is \$57,218,822 under the Lease Agreement—there is no double counting**

33. The terms of the Lease Agreement, under section 13.1(f), are clear in how to calculate the amount owing to Macquarie on default. As noted above at paras 11-15, the liquidated damages calculation has three components: unpaid base rent, Stipulated Loss Value and interest.

34. The first component, unpaid base rent, expressly captures the Validus Entities' unpaid base rent: "any unpaid Base Rent and other amounts due before, and in arrears on, the Default Payment Date."<sup>36</sup>

35. The "Default Payment Date" is defined as the date specified in Macquarie's written notice of exercise, which Macquarie specified as July 24, 2023 when it demanded payment of the liquidated damages.<sup>37</sup> On July 24, the Validus Entities had missed two regular base rent payments totaling \$2,500,000 and the deferred rent payment of \$6,000,000, meaning a total of \$8,500,000 is captured in this branch of the calculation, or **\$9,605,000** including HST.<sup>38</sup>

36. The second component, the Stipulated Loss Value, is added to the liquidated damages calculation in an amount equal to:

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<sup>36</sup> Lease Agreement, s 13.1(f).

<sup>37</sup> Lease Agreement, s 13.1(e).

<sup>38</sup> October Stevens Affidavit, para 37; August 10 Shortt Affidavit, Exhibit B, p 21.

the Stipulated Loss Value for the Leased Property, as specified on Schedule 3 to the initial Lease Supplement determined as of the date of written notice from Lessor to Lessee under this Section 13.1(f);<sup>39</sup>

37. Again, the date at the which to assess Stipulated Loss Value is the date of written notice, which here was July 24. The relevant Schedule 3, in turn, provides a table of Stipulated Loss Values based on “number of Base Rents paid (including, without double counting, prepaid Base Rent in accordance with the Lease) at the relevant time.”<sup>40</sup> That relevant time is July 24. On July 24, the Validus Entities had paid 16 base rents (including the \$9 million prepayment, discussed in Section E). The Stipulated Loss Value is \$40,500,000, or **\$45,765,000** including HST.<sup>41</sup>

38. Finally, the liquidated damages includes an interest component that starts accruing on the two preceding amounts at the Default Payment Date until the liquidated damages are repaid. Interest was **\$1,848,822** as of September 22, including interest accrued on unpaid base rent prior to Macquarie’s demand, and continues to accrue.<sup>42</sup>

39. In sum, the Lease Agreement’s clear text provides that Macquarie’s liquidated damages claim as at September 22, 2023 was **\$57,218,822**, comprised of: (i) \$9,605,000 of unpaid base rents, including HST; (ii) a \$45,765,000 Stipulated Loss Value, including HST; and (iii) \$1,848,822 of interest accrued on the foregoing as of that date.

40. Mr. Shortt argues that this calculation involves “double counting” of the Base Rent arrears and asks this Court to take “a hard look at Macquarie’s calculations to determine whether

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<sup>39</sup> Lease Agreement, s 13.1(f).

<sup>40</sup> Supplement No. 1 to the Lease Agreement, Schedule 3, Exhibit F to the July Stevens Affidavit; see also Schedule C of this Factum.

<sup>41</sup> October Stevens Affidavit, para 37; Affidavit of Todd Shortt sworn August 10, 2023, Exhibit B, p 21.

<sup>42</sup> October Stevens Affidavit, para 37.

there is either double-counting.”<sup>43</sup> Mr. Shortt’s argument here is unclear—Macquarie’s arithmetic is not in question; instead, the question is what the Lease Agreement prescribes as a remedy. Absent specific recognized doctrines like unconscionability, the Court’s role is to interpret a contract under established legal principles, not to rewrite the bargain.

41. Indeed, Mr. Shortt appears to concede that Macquarie has properly calculated the amount owing to it under the contract. He appears to concede that “a strict interpretation of the Lease allows” the calculation.<sup>44</sup> However, following the express text of the agreement is not a “strict interpretation.” The text of a contract is paramount: “the interpretation of a written contractual provision must always be grounded in the text.”<sup>45</sup>

42. Notably, Mr. Shortt advances no alternative interpretation of the Lease Agreement. It is trite law that the surrounding circumstances of a contract are an important tool of contractual interpretation—although they can never overwhelm, or deviate from, the text.<sup>46</sup> However, Mr. Shortt adduces no evidence whatsoever of the surrounding circumstances; nor does he explain how the surrounding circumstances could lead to an alternative interpretation.

43. Instead, the surrounding circumstances are wholly consistent with the plain reading of the text. Much of the surrounding circumstances is discussed above at paras 11-15. Critically, the Lease Agreement is a sale and leaseback transaction, not a loan. Mr. Shortt assumes that the Stipulated Loss Value serves the same purpose as an acceleration clause in a typical lending facility. It does not. Instead, the Stipulated Loss Value serves to combine several commercial

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<sup>43</sup> Responding Factum of Validus Parent et al. dated October 26, 2023, para 41 (“**Responding Factum**”).

<sup>44</sup> Responding Factum, para 42.

<sup>45</sup> [Sattva Capital Corp. v Creston Moly Corp.](#), 2014 SCC 53, para 57.

<sup>46</sup> [Sattva Capital Corp. v Creston Moly Corp.](#), 2014 SCC 53, para 58.

purposes. Importantly, because section 13.1(f) required Macquarie to transfer the Leased Property to IFPC following payment of the liquidated damages amount, Macquarie needed to be compensated for the value of that property at the time of transfer. It also needed to be compensated for the loss of its bargain and the long-term stability that accompanied that bargain. That was the purpose of the Stipulated Loss Value; not merely to capture future base rents.

44. In sum, Macquarie's claim does not double count. It counts exactly according to the instructions that the parties agreed to in the event of default.

**C. Section 13.1(f) is a valid liquidated damages clause; it is not an improper penalty**

45. Mr. Shortt alleges that the calculation under 13.1(f) is an improper penalty. Despite bearing the onus to show how the clause is an improper penalty, he cites no case law, adduces no evidence and makes no legal argument as to how or why it would be unenforceable.<sup>47</sup> Mr. Shortt further appears to conflate the issue of whether section 13.1(f) is a penalty clause with the issue of whether it violates the anti-deprivation rule. But, as *Chandos* itself noted, the issue of penalty clauses is a separate and distinct analysis from the anti-deprivation rule.<sup>48</sup>

46. Nonetheless, out of an abundance of caution, this issue of a penalty clause is canvassed here briefly.

47. Liquidated damages clauses are enforceable on their terms. Section 13.1(f) is a quintessential example of such a clause. It represents a genuine pre-estimate of the damages that Macquarie would suffer upon default. That clause was the product of good faith negotiations

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<sup>47</sup> *Infinite Maintenance Systems Ltd. v ORC Management Ltd.*, [2001] O.J. No. 77, 102 A.C.W.S. (3d) 522 (Ont. C.A.) ([Westlaw](#)), para 13.

<sup>48</sup> [Chandos Construction v Deloitte](#), 2020 SCC 25, para 10.



between Macquarie and the Validus Entities and was one part of a larger forbearance deal that provided value to all parties.

48. Mr. Shortt bears the burden of proving that section 13.1(f) is an unenforceable penalty clause.<sup>49</sup> To do so, he must establish both: (i) that section 13.1(f) is indeed a penalty clause, rather than a genuine attempt, at the time of contract formation, to estimate the damages suffered by the innocent party in the event of a future breach; and (ii) that the enforcement of section 13.1(f) is unconscionable.<sup>50</sup> Mr. Shortt fails to prove either.

***(i) Section 13.1(f) represents a genuine pre-estimate of Macquarie's damages***

49. Section 13.1(f) of the Lease Agreement represents a genuine pre-estimate of Macquarie's losses in the event of default.

50. Sources of loss include past arrears of base rent and other amounts but also Macquarie's forward-looking losses, including: (i) the value of the Leased Property at the time it is transferred to IFPC following repayment of the liquidated damages claim; (ii) the lost value of Macquarie's bargain; and (iii) the uncertainties inherent with calculating the foregoing. These losses are explained at paras 11-15 above.

51. The temporal element is important. The Lease was renegotiated in the context of the forbearance in February 2023. In the context of the forbearance negotiations, as a result of Mr. Shortt's representations, there was a mutual expectation that IFPC's assets could be sold for

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<sup>49</sup> *Infinite Maintenance Systems Ltd. v ORC Management Ltd.*, [2001] O.J. No. 77, 102 A.C.W.S. (3d) 522 ([Westlaw](#)) (Ont. C.A.), para 13.

<sup>50</sup> *Peachtree II Associates – Dallas LP v 857486 Ontario Ltd.*, [2005] O.R. (3d) 362, 256 D.L.R. (4th) 490 (Ont. C.A.), paras [24-25](#); *HF Clarke v Thermidaire Corp.*, [1976] 1 S.C.R. 319, 54 D.L.R. (3d) 385 (S.C.C.), p 338.

approximately \$100 million.<sup>51</sup> This would have resulted in a \$68 million buyout for Macquarie under the Lease Agreement.<sup>52</sup> That expected buyout is itself higher than the total quantum of the liquidated damages claim.

52. Nor is there an expectation of perfection in the estimation of damages. Section 13.1(f) was negotiated in circumstances of commercial uncertainty, including because of rising interest rates and potential volatility in the natural gas-powered electricity market.<sup>53</sup> This was further compounded by the uncertainty of when the liquidated damages clause would actually be triggered. An estimate of losses does not need to be a precise calculation in these circumstances.<sup>54</sup>

**(ii) Section 13.1(f) is not unconscionable**

53. Even if section 13.1(f) was a penalty—and it is not—its enforcement must be shown to be unconscionable. It is not.

54. Unconscionability has two necessary elements: an inequality of bargaining power stemming from weakness or vulnerability and an unfair transaction.<sup>55</sup> But it does not assist parties trying to “escape from a contract when their circumstances are such that the agreement now works a hardship upon them.”<sup>56</sup>

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<sup>51</sup> October Stevens Affidavit, para 17; Letter from Macquarie to the Validus Entities dated May 3, 2023, p 1, Exhibit A to the Stevens Affidavit.

<sup>52</sup> October Stevens Affidavit, para 18.

<sup>53</sup> October Stevens Affidavit, para 32.

<sup>54</sup> [\*HF Clarke v Thermidaire Corp\*](#), [1976] 1 S.C.R. 319, 54 D.L.R. (3d) 385 (S.C.C.), p 338.

<sup>55</sup> [\*Uber Technologies Inc. v Heller\*](#), 2020 SCC 16, para 62.

<sup>56</sup> [\*Uber Technologies Inc. v Heller\*](#), 2020 SCC 16, para 74. In the context of a penalty clause, unconscionability requires a showing that the quantum is “extravagant and unconscionable in amount in comparison with the greatest loss that could conceivably be proved to have followed from the breach”: [\*HF Clarke v Thermidaire Corp\*](#), [1976] 1 S.C.R. 319, 54 D.L.R. (3d) 385 (S.C.C.), p 338.

55. There are no indicia of unconscionability here. The liquidated damages provision was the product of good faith negotiations between sophisticated counterparties with access to, and input from, legal professionals.<sup>57</sup>

56. The deal struck in those negotiations was fair. It was one part of a broader forbearance package that gave real value to both sides. Macquarie provided the Validus Entities with significant accommodations that gave them breathing room to resolve their financial and operational issues and to find a path forward to satisfy their obligations to Macquarie while retaining autonomy over their business.

57. Furthermore, the quantum of this alleged “double counting” is lower than Mr. Shortt suggests. Had Macquarie exercised its section 13.1(f) rights in February 2023, it would have been entitled to interest on the Stipulated Loss Value from that time onward. The interest alone would have been approximately \$600,000 per month.<sup>58</sup>

**D. The anti-deprivation rule does not apply**

58. Mr. Shortt invokes the anti-deprivation rule. But it does not assist him. Because it does not apply.

59. As the Supreme Court has recently made clear in *Chandos*, the anti-deprivation rule only applies where a clause is triggered by an event of insolvency or bankruptcy:

This [anti-deprivation rule] test has two parts: first, the relevant clause must be triggered by an event of insolvency or bankruptcy; and second, the effect of the clause must be to remove value from the insolvent's estate.<sup>59</sup>

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<sup>57</sup> October Stevens Affidavit, para 13.

<sup>58</sup> October Stevens Affidavit, paras 34-35.

<sup>59</sup> [\*Chandos Construction v Deloitte\*](#), 2020 SCC 25, paras [31](#), [40](#) [emphasis added].

60. The liquidated damages clause in section 13.1(f) of the Lease Agreement was *not* triggered by an event of insolvency or bankruptcy. It was triggered by the Validus Entities' default, after the terms of the forbearance ended. Whether the Validus Entities were bankrupt or insolvent is irrelevant for the purposes of section 13.1(f). Indeed, the Validus Entities were not put into receivership until more than two weeks had passed following Macquarie's exercise of that clause, a point that Mr. Shortt concedes.<sup>60</sup>

61. Moreover, the Court of Appeal for Ontario has also recently confirmed that, under *Chandos*, the anti-deprivation rule does not apply to valid secured transactions.<sup>61</sup> Macquarie is a secured creditor, seeking to enforce and exercise its security. The triggers upon which Mr. Shortt relies to invoke the anti-deprivation doctrine—the formal demands and a BIA notice—are elements of enforcing Macquarie's security. The anti-deprivation clause does not apply here.

**E. Macquarie paid \$45 million plus HST under the Lease Documents**

62. Mr. Shortt argues that Macquarie only paid \$36 million under the Lease Documents, rather than \$45 million plus HST. This argument is irrelevant. Mr. Shortt argues this point for rhetorical emphasis of how the Validus Entities should only have to repay the funds they received. This is not how either sale and leaseback transactions—or contracts generally—work. As the Monitor concludes in its Second Report, “[t]he provisions of the Lease Agreement plainly envision Macquarie ultimately receiving more than \$36 million.”<sup>62</sup>

63. The argument is also wrong. Mr. Shortt's submissions ignore the clear terms of the Participation Agreement.

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<sup>60</sup> Responding Factum, para 51.

<sup>61</sup> [\*Urbancorp Toronto Management Inc. \(Re\)\*](#), 2022 ONCA 181, para 36.

<sup>62</sup> Second Report, s 2(a).

64. The Validus Entities and Macquarie agreed in the Participation Agreement that Macquarie would purchase the Leased Property for a purchase price of \$45 million plus \$5.85 million of HST. This was reaffirmed in the amended and restated version of the Participation Agreement in February, which states that the Lessor's Cost, *i.e.* the consideration, was "\$45,000,000."<sup>63</sup>

65. Macquarie and the Validus Entities further agreed in the Participation Agreement that Macquarie would hold back \$9,000,000 of that purchase price pending its receipt of evidence that a condition had been met—the delivery of a deposit from a third-party cryptocurrency mining company in respect of an agreement between certain Validus Entities and that company.<sup>64</sup> If that condition was met, the \$9,000,000 would be paid to IFPC and, if it was not met, it would be applied as a prepayment of base rent.<sup>65</sup>

66. That condition was ultimately not met.<sup>66</sup> In accordance with the Participation Agreement, the \$9,000,000 was applied as a full prepayment of the base rents plus HST due from October 7, 2024 to March 7, 2025 in an aggregate amount of \$8,475,000, and a partial prepayment of the base rent plus HST due September 7, 2024 in an amount of \$525,000.<sup>67</sup>

67. Mr. Short suggests that the partial prepayment of that September 7, 2024 base rent should give the Validus Entities a "credit" in the Stipulated Loss Value table. But, as discussed, the Stipulated Loss Value decreases only with the payment of a full base rent.<sup>68</sup> The Validus Entities

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<sup>63</sup> Participation Agreement, ss 2.1, Schedule 1, Appendix A ("Lessor's Cost" definition, p 11).

<sup>64</sup> Participation Agreement, 2.4(2), 4.48(3).

<sup>65</sup> Participation Agreement, 2.4(2), 4.48(3).

<sup>66</sup> July Stevens Affidavit, para 31(a)(ii); August 10 Shortt Affidavit, Exhibit B, p 14.

<sup>67</sup> August 10 Shortt Affidavit, Exhibit B, p 14.

<sup>68</sup> Supplement No. 1 to the Lease Agreement, Schedule 3, Exhibit F to the July Stevens Affidavit; see also Schedule C of this Factum.

understood in February 2023 that this “stub” amount of base rent would not count towards the Stipulated Loss Value calculation.<sup>69</sup> Mr. Shortt is not entitled to rewrite the terms of liquidated damages calculation because he wishes it had been different.

**PART V - RELIEF REQUESTED**

68. For the reasons set forth herein, Macquarie respectfully requests that this Court dismiss Mr. Shortt’s objections and grant the Monitor’s proposed SISP Order.

ALL OF WHICH IS RESPECTFULLY SUBMITTED



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Scott Bomhof / Jeremy Opolsky  
Mike Noel

Lawyers for Macquarie Equipment Finance Limited

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<sup>69</sup> August 10 Shortt Affidavit, Exhibit B, p 14.

## SCHEDULE A – LIST OF AUTHORITIES

1. [YG Limited Partnership and YSL Residences Inc. \(Re\)](#), 2023 ONCA 505
2. [Canadian Airlines Corp., Re](#), 2000 ABQB 442
3. [Skyepharm PLC v Hyal Pharmaceutical Corporation](#), [2000] 47 O.R. (3d) 234, 15 C.B.R. (4th) 298 (Ont. C.A.)
4. [Sattva Capital Corp. v Creston Moly Corp.](#), 2014 SCC 53
5. *Infinite Maintenance Systems Ltd. v ORC Management Ltd.*, [2001] O.J. No. 77, 102 A.C.W.S. (3d) 522 (Ont. C.A.) ([Westlaw](#))
6. [Chandos Construction v Deloitte](#), 2020 SCC 25
7. [Peachtree II Associates – Dallas LP v 857486 Ontario Ltd](#), [2005] O.R. (3d) 362, 256 D.L.R. (4th) 490 (Ont. C.A.)
8. [HF Clarke v Thermidaire Corp](#), [1976] 1 S.C.R. 319, 54 D.L.R. (3d) 385 (S.C.C.)
9. [Uber Technologies Inc. v Heller](#), 2020 SCC 16
10. [Urbancorp Toronto Management Inc. \(Re\)](#), 2022 ONCA 181

## **SCHEDULE B – TEXT OF STATUTES, REGULATIONS & BY-LAWS**

None.



**SCHEDULE C – SECTION 13.1(F) OF THE LEASE AGREEMENT AND  
EXCERPT OF STIPULATED LOSS VALUE TABLE**

**13.1 Remedies.**

If a Lease Event of Default exists, Lessor may, at its option, declare this Lease to be in default by a written notice to Lessee (but this Lease shall be deemed to be in default and no written notice to Lessee shall be required if a Lease Event of Default occurs under Section 12(h)); and at any time thereafter, so long as Lessee has not remedied all outstanding Lease Events of Default before the exercise of any remedy below, Lessor may do one or more of the following as Lessor in its sole discretion may elect, to the extent permitted by, and subject to compliance with any mandatory requirement of, Applicable Law then in effect, whether or not Lessor rescinds or terminates this Lease (other than clause (b)(i) below):

[...]

(f) unless Lessor exercises its rights under Section 13.1(e), Lessor, by written notice to Lessee specifying a Default Payment Date, may require that Lessee pay to Lessor, and Lessee shall pay to Lessor, on the Default Payment Date as a genuine pre-estimate of liquidated damages and not as a penalty (in lieu of scheduled Base Rent due thereafter and in respect of the Leased Property), the sum of:

(w) any unpaid Base Rent and other amounts due before, and in arrears on, the Default Payment Date; plus

(x) the Stipulated Loss Value for the Leased Property, as specified on Schedule 3 to the initial Lease Supplement determined as of the date of written notice from Lessor to Lessee under this Section 13.1(f); plus

(y) interest on such sum of (w) and (x) at the Late Rate from the Default Payment Date to the date of actual payment;

and upon payment in full of such amount, together with all other amounts of Supplemental Rent then due and any applicable taxes or duties on any amounts hereunder, Lessor shall make a Lessor Transfer to Lessee or as it may direct, and the Lease for the Leased Property, if not theretofore ended, shall end;

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**SCHEDULE 3**

**TO LEASE SUPPLEMENT NO. 1**

**Stipulated Loss Values**

The amount determined at the relevant time using the following table:

Number of Base Rents paid (including, without double counting, prepaid Base Rent in accordance with the Lease) at the relevant time	\$ Amount
1	54,000,000
2	53,100,000
3	52,200,000
4	51,300,000
[...]	[...]
16	40,500,000
[...]	[...]
60+	900,000

IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, c. Court File No. CV-23-00705215-00CL  
C-36, AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF VALIDUS  
POWER CORP., IROQUOIS FALLS POWER CORP., BAY POWER CORP., KAP POWER  
CORP., VALIDUS HOSTING INC. AND KINGSTON COGEN GP INC., EACH BY THEIR  
COURT APPOINTED RECEIVER AND MANAGER, KSV RESTRUCTURING INC.

**ONTARIO  
SUPERIOR COURT OF JUSTICE  
COMMERCIAL LIST**

Proceeding commenced at TORONTO

**FACTUM OF  
MACQUARIE EQUIPMENT FINANCE LTD  
(Responding to the Submissions of Todd Shortt  
Opposing the Monitor's Motion for SISP Approval)**

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