Court File No. B-21-02734090-0031

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

IN THE MATTER OF THE *BANKRUPTCY AND INSOLVENCY ACT*,
R.S.C. 1985, c. B-3, as amended

IN THE MATTER OF THE NOTICES OF INTENTION TO MAKE A PROPOSAL OF
YG LIMITED PARTNERSHIP AND YSL RESIDENCES INC.

Claim of Maria Athanasoulis against
YG Limited Partnership and YSL Residences Inc.

# FACTUM OF MARIA ATHANASOULIS

*(Appeal of Disallowance of Claim)*

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## I. OVERVIEW

1. Maria Athanasoulis brings this motion to appeal the Trustee's determination that $18 million of her claim (the "**Claim**") against the Debtors (collectively, "**YSL**") should be valued at $0.[1]

2. Ms. Athanasoulis has already proven, in binding arbitration, that she had the right to receive 20% of the profits earned by YSL as part of her oral employment agreement (the "**Agreement**"), that profits are equal to revenue less expenses and that YSL repudiated the Agreement. But the Trustee purported to value the Claim *without* calculating—or even investigating—revenue *or* expenses. Ms. Athanasoulis tendered evidence showing that YSL had, in fact, earned a profit of approximately $40 million. The Trustee did not, apparently, assess this evidence at all. This is a fundamental error.

3. The Trustee's conclusion (and almost its entire analysis) rests on a second error. The Trustee determined that the Claim is an "equity claim" within the meaning of the *Bankruptcy and Insolvency Act* (the "***BIA***") that is subordinate to other equity claims submitted by certain limited partners (the "**LPs**") that invested in YSL. This is simply wrong. The *BIA* defines what an "equity claim" is. The Claim does not meet that definition. But the Trustee seemed to acknowledge this but declared, in effect, that the statutory definition is "not relevant to the analysis" because Ms. Athanasoulis' claim is "in substance" an equity claim. This is not—and cannot be—correct. The Trustee is bound by the statutory definition. It erred by disregarding that definition.

4. Most fundamentally, the Trustee reached the wrong conclusion because it asked the wrong question. The Claim seeks damages for breach of contract. If the Trustee had applied the well-established principles that govern all damages for breach of contract to the largely undisputed facts of this case, then it would have concluded that Ms. Athanasoulis is entitled to an approved claim of $18 million or more.

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[1] The Trustee allowed Ms. Athanasoulis' related $1 million wrongful termination claim in the amount of $880,000. This aspect of the Trustee's determination is not being appealed..

5. Damages for breach of contract must put the injured party in the position she would occupy if the contract had been performed. Damages are therefore calculated based on the position that the Plaintiff would be but-for the breach. The Agreement required that YSL seek to maximize the profits earned on the development project that it owned (the "**YSL Project**"). Justice Dunphy has already found in this proceeding that YSL "squandered" its opportunity to sell or restructure the YSL Project (as defined below) by trying to enrich its principal. This was, necessarily, a breach of the Agreement.

6. Ms. Athanasoulis is therefore entitled to the amount she would have earned if YSL had honoured the Agreement (instead of repudiating it) *and* maximized the value of the YSL Project instead of destroying that value).

7. The Trustee failed to consider what position Ms. Athanasoulis would be in if the Agreement had been performed. It disregarded all of the principles that govern damages assessments and asked, instead, whether YSL had enough cash on hand to pay back all equity investments and then make a payment to Ms. Athanasoulis. This is not the calculation required by the Agreement, or the law.

8. In light of the foregoing, the Trustee's determination should be set aside. The Claim is a debt claim. It takes priority over all equity claims, including those asserted by the LPs. A reference should be ordered to assess the value of the Claim based on the position Ms. Athanasoulis would occupy but-for YSL's breach of the Agreement. In the alternative, Ms. Athanaouslis should be awarded 20% of YSL's actual profits.

## II. FACTS

### A. The key facts have been established

9. The core facts underlying Ms. Athanasoulis' claim are either undisputed, or have already been established in: the Partial Award of Arbitrator William Horton (the "**Arbitrator**") dated

March 28, 2022 (the "**Partial Award**");[2] and, the decision of Justice Dunphy in these Proposal Proceedings dated June 29, 2021 (the "**First Proposal Decision**")[3].

10. Specifically, the Arbitrator found that: YSL agreed to pay Ms. Athanasoulis 20% of its profits, calculated based on revenues less expenses;[4] YSL agreed to work "to the objective of making a profit" and could not reduce the profit through "bad faith transactions";[5] and YSL repudiated the Agreement by terminating Ms. Athanasoulis in December 2019.[6]

11. Justice Dunphy found, in the First Proposal Decision, that YSL *did not* work to maximize profits on the YSL Project. After Ms. Athanasoulis was terminated, "good faith took a back seat to self-interest"[7] at YSL. As a result, YSL "squandered" the opportunity to maximize the value of the YSL Project trying to find a transaction that benefitted its principal, Mr. Casey.[8]

12. The findings in the Partial Award and the First Proposal Decision framed (or should have framed) the Trustee's evaluation of the Claim. The Trustee was tasked with identifying the damages caused by Ms. Athanasoulis' termination *and* the subsequent value-destroying (and partially successful) attempt to enrich Mr. Casey.

13. A more detailed description of these breaches is set out in section B, below.

## B. Ms. Athanasoulis' critical role at YSL and the Agreement

### *(i) YSL and Cresford*

14. Ms. Athanasoulis was, until December 2019, the President and COO of a group of companies, using the brand name "**Cresford**," engaged in the development, construction,

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[2] Partial Award of Arbitrator William Horton dated March 28, 2022 (**"Partial Award"**), Motion Record of Maria Athanasoulis ("MR") Vol. 3, Tab 6(2), p. 370.

[3] YG Limited Partnership and YSL Residences (Re), 2021 ONSC 4178 (the **"First Proposal Decision"**), Book of Authorities of Maria Athanasoulis (**"BOA"**), Tab 32.

[4] Partial Award at paras. 146, 160 and 166, MR Vol 3, Tab 6(2), pp. 400, 404.

[5] Partial Award at para. 146, MR Vol 3, Tab 6(2), pp. 400.

[6] Partial Award at paras. 189-191, MR Vol 3, Tab 6(2), pp. 413-414.

[7] First Proposal Decision at para. 74, BOA, Tab 32.

[8] First Proposal Decision at para. 82, BOA, Tab 32.

marketing and sale of condominiums in Toronto. Cresford was founded by Daniel Casey, and owned by companies and trusts that he controlled.[9]

15. Each of Cresford's development and construction projects was owned by a separate legal entity. Ms. Athanasoulis' role extended to overseeing each of Cresford's individual project companies as well. YSL was created to own, develop, market and sell the YSL Project.

***(ii) The Agreement***

16. Ms. Athanasoulis never signed a written employment agreement. Her responsibilities and compensation were governed by an oral agreement negotiated with Mr. Casey on behalf of Cresford and all of its related entities.[10][11] Ms. Athanasoulis and Mr. Casey agreed to the Profit Share in 2014, before YSL was founded.[12]

17. Mr. Casey induced Ms. Athanasoulis to work for, and add substantial value to, Cresford's projects by agreeing that each project owner would pay her 20% of the profits that it earned (the "**Profit Share**"). The Agreement applied to YSL as soon as it was created in 2016. The relevant terms of the Agreement, as it applied to YSL, were:

(a) YSL, as the owner of the YSL Project, agreed to pay Ms. Athanasoulis the Profit Share;[13]

(b) There was no requirement that Ms. Athanasoulis remain employed by YSL to be entitled to the Profit Share;[14]

(c) Profits were to be calculated, on a good faith basis, based on the *pro forma* budgets prepared by Cresford using revenues less expenses;[15]

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[9] Partial Award at paras. 22-23, MR Vol 3, Tab 6(2), pp. 374.

[10] Partial Award at paras. 41-42, 139, MR Vol 3, Tab 6(2), pp. 377, 378.

[11] Partial Award, paras. 41-42, 139, MR Vol 3, Tab 6(2), pp.377,378.

[12] Partial Award at paras. 49, 144, 148, MR Vol 3, Tab 6(2), pp. 379, 399, 401.

[13] Partial Award at para. 166(c), MR Vol 3, Tab 6(2), p. 405.

[14] Partial Award at para. 166(e), MR Vol 3, Tab 6(2), p. 405.

[15] Partial Award at paras. 166(b), 146, MR Vol 3, Tab 6(2), pp. 405, 400.

(d) Profits could not be artificially reduced by "bad faith" transactions;[16]

(e) YSL had an obligation to try and maximize the value of the YSL Project;[17] and,

(f) The Profit Share was to be paid to Ms. Athanasoulis when Profits were earned, usually at the completion of a project.[18]

18. The Trustee has confirmed that it is bound by the findings of the Arbitrator, including the above-noted terms.[19]

## C. The YSL Project

### *(i) YSL*

19. The Claim concerns Yonge Street Living Residences (the previously-defined "**YSL Project**"), which is an 85-story condominium tower located at the corner of Yonge and Gerrard in Toronto.[20] The YSL Project was owned by YSL. YSL was founded in 2016, and Ms. Athanasoulis worked for more than three years, before she was terminated, to make the YSL Project a success.[21]

20. The YSL Project was Cresford's largest project and its "crown jewel". Every single forecast or appraisal prepared before the commencement of these bankruptcy proceedings forecast profits of the YSL Project in excess of $100 million.[22]

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[16] Partial Award at paras. 166(b), 146, MR Vol 3, Tab 6(2), pp. 405, 400.

[17] Partial Award at para. 160, MR Vol 3, Tab 6(2), pp. 404.

[18] Partial Award at para. 166(d), MR Vol 3, Tab 6(2), pp. 405.

[19] Trustee's Notice of Disallowance of Claim (**"Trustee's Disallowance"**), MR Vol 1, Tab 2, p. 29.

[20] Partial Award at paras. 2, 24, MR Vol 3, Tab 6(2), pp. 371, 374.

[21] Affidavit of Maria Athanasoulis dated May 5, 2023 (**"Athanasoulis Affidavit"**) at paras. 5-9, 18, MR Vol 1, Tab 4, pp. 89-90, 92.

[22] See CBRE Appraisal Reports as of the Effective Dates of July 30, 2019 (**"July 2019 CBRE Report"**), November 1, 2018 (**"November 2018 CBRE Report"**), April 20, 2018 (**"April 2018 CBRE Report"**) and February 1, 2016 (**"February 2016 Appraisal Report"**), MR Vol 3-6, Tabs 6(7)-(10). See also First Proposal Decision at para. 75(a). BOA, Tab 32.

### *(ii) YSL's success*

21. YSL had achieved significant progress on the YSL Project by December 2019. It had (among other things) obtained all of the approvals required to build the YSL Project[23] and pre-sold approximately $650 million worth of condominium units at record-setting prices under Ms. Athanasoulis' leadership.[24] It had negotiated fixed-price contracts for the majority of its expenses, so it had certainty about construction costs.[25]

22. This progress yielded tangible financial gains. By July 2019, the YSL Project was valued at $375.5 million[26], approximately $125 million more than YSL had invested into it.[27] YSL's internal projections, which had been vetted by leading external consultants, forecasted profits of close to $200 million.[28] This analysis was not mere speculation. YSL's construction lender relied on it to agree to advance a $600 million construction loan.[29]

## D. The Limited Partners

### *(i) The Limited Partners invested in limited partnership units*

23. Individuals and entities that invested in the YSL Project by purchasing limited partnership units in YSL LP (previsouly defined as the "**LPs**") have taken on an outsized role in this

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[23] November 2018 CBRE Report at p. 16, MR Vol 4, Tab 8, p. 725; Transcript of the Arbitration before William G. Horton Held February 22, 2022 (**"Arbitration Transcript – February 22"**), at 174:3-12, MR Vol 3, Tab 6(3), p. 461.

[24] YSL Pro Forma dated October 18, 2019 (**"October 2019 Pro Forma"**), MR Vol 7, Tab 6(14); Arbitration Transcript - February 22 at para. 122:9-11, MR Vol 3, Tab 6(3),p. 448.

[25] Arbitration Transcript - February 22 at 178:20-179:5, MR Vol 3, Tab 6(3), pp. 462-463: Mr. Casey agreed and testified that the YSL Project "didn't have cost issues or other issues", "the new numbers that went into the business were strong and correct numbers", and "it gave us strength as a company, that if we needed to put money into other projects, it gave us the option that we could use our position in that company to either borrow against the equity in some manner, or sell, or do a joint venture on that project that would create cash for the other parts, and/or it created a much stronger company." Transcription of the Arbitration before William G. Horton held February 24, 2022 (**"Arbitration Transcript - February 24"**), MR Vol 3, Tab 6(5), 421:4-22.

[26] July 2019 CBRE Report, MR Vol 3, Tab 6(7), p. 601.

[27] See the Preliminary Report on YSL prepared by Altus Group Cost Consulting & Project Management dated October 2, 2019 ("**Altus Report**"), MR Vol 6, Tab 6(12), which illustrates investment by YSL of approximately $247 million. See also the explanation at Submissions of Maria Athanasoulis dated May 5, 2023 (**"Athanasoulis Submissions"**) at paras. 133, MR Vol 2, Tab 5, p. 237.

[28] October 2019 Pro Forma, MR Vol 7, Tab 6(14), p. 1428.

[29] Altus Report, MR Vol 6, Tab 6(12), p. 1096. See also Arbitration Transcript - February 22 at 180:22-181:12.

proceeding, because the Trustee decided (before any evidence was tendered on damages or priority)[30] that the LPs ought to be paid in priority to Ms. Athanasoulis. A brief background of the LPs' relationship with YSL is, therefore, relevant to this appeal.

24. YSL was founded in 2016, as a joint venture between Cresford and British Columbia Investment Management Corporation ("**BcIMC**"), a major institutional investor. BcIMC decided to exit the YSL Project in 2017 because of changes to the YSL Project that were required by the City of Toronto.[31]

25. Cresford decided to raise funds from accredited investors in order to purchase BcIMC's interest in the YSL Project. Ms. Athanasoulis proceeded to contact various individuals, including Paul Lam, Yuan (Michael) Chen and Lue (Eric) Li, and met with them to discuss the YSL Project.[32] Each of these individuals was a sophisticated and experienced participant in the real estate industry.[33]

26. Cresford prepared a presentation to communicate information about the YSL Project to potential investors (the "**Investor Presentation**"), and Ms. Athanasoulis referenced that presentation in certain meetings with investors. The Investor Presentation included a slide that described, in simple terms, the distribution of profits at the conclusion of the YSL Project (the "**Waterfall**"):

> Revenue proceeds (after payment of project expenses) will be distributed at the end of the project in the following priority:
>
> ➢ First, repayment of all external lenders;
>
> ➢ Second, return of invested capital to the investor;

[30] Arbitration Transcript – February 22, at Counsel for KSV's Opening Statement, 57:24-58:22, MR Vol 3, Tab 6(3), p. 432.

[31] YSL initially planned to build two towers on the YSL Property: an apartment building, which would have been owned and operated by BcIMC; and, a condominium building that would have been sold by YSL. The City of Toronot did not approve this plan, and YSL had to change its plan to include only one tower. Athanasoulis Affidavit at para. 19, MR Vol 1, Tab 4, p. 92.

[32] Athanasoulis Affidavit at para. 22, MR Vol 1, Tab 4, p. 93.

[33] Athanasoulis Affidavit at para. 25, MR Vol 1, Tab 4, p. 94.

➢ Third, distribution of the agreed upon return on investment to the investor; and

➢ Fourth, distribution to Cresford.[34]

27. The Investor Presentation also included a high level *pro forma* for the YSL Project, which listed revenue and cost categories such as "construction costs" and "design, marketing and administration."[35] The information provided to the LPs did not itemize any costs or other line items.

28. The Investor Presentation touted Mr. Casey's experience and leadership, and explained that Mr. Casey would personally guarantee the investment of each LP. It invited prospective investors to contact Mr. Casey personally and did not reference Ms. Athanasoulis at all.[36]

29. To be clear, and contrary to allegations made by the LPs in this proceeding, Ms. Athanasoulis never told anyone that no member of the "Cresford Group" would be paid until the LPs were paid in full.[37] She never made any agreement with, or representation to, the LPs with respect to her own relationship with YSL.

***(ii) The LPs invested in YSL LP***

30. The LPs purchased Class "A" Units in YG Limited Partnership ("**YSL LP**"). Cresford Yonge Limited Partnership ("**Cresford LP**"), an entity controlled by Mr. Casey and/or his family trusts, owned all of the Class "B" Units. YSL LP is the beneficial owner of the YSL Project.

31. Each of the LPs executed a Limited Partnership Agreement and a Subscription Agreement these documents (and not anything that Ms. Athanasoulis is alleged to have said) governed the terms of their investment. Each LP acknowledged and agreed in the Subscription "that it has

[34] Athanasoulis Affidavit at paras. 32, 38, MR Vol 1, Tab 4, pp. 95-96.

[35] Investor Presentation Slide-deck, being Exhibit B to the Affidavit of Lue (Eric) Li sworn December 20, 2022 (**"Lue Affidavit"**), Responding Record of the Proposal Trustee date October 16, 2023 (**"RR"**), Tab 1(B), p. 162.

[36] Investor Presentation Slide-deck, being Exhibit B to the Lue Affidavit, RR, Tab 1(B), p. 162.

[37] Athanasoulis Affidavit at paras. 42-47, MR Vol 1, Tab 4, pp. 97-98.

obtained independent legal accounting, tax and financial advice in connection with its investment in Units **and has not relied on the advice of the General Partner or any of its affiliates**."[38]

32. Each LP was entitled to the greater of: an annual interest rate of 12.5% or double its original investment.[39] Cresford LP was entitled to receive all of the proceeds remaining after creditors and LPs had been paid in full. Mr. Casey personally guaranteed YSL's obligations to the LPs.[40]

33. Ms. Athanasoulis was not a party to the LP Agreement, the Subscriptions or any other agreements with the LPs.

### *(iii) The LPs' agreements with YSL did not affect Ms. Athanasoulis' Agreement with YSL*

34. Ms. Athanasoulis and the LPs each contracted with YSL. They had (and have) no legal relationship with each other.

35. The Limited Partnership Agreement was a contract between the LPs and the General Partner, YSL Residence Inc. (the "General Partner"). It conferred broad and "exclusive" authority to act on behalf of the LPs.[41] The LP Agreement allowed the General Partner to contract with related parties at market rates.[42] The LPs claim that the Agreement contravened the LP Agreement, but the Trustee does not reference or rely on that argument in the Disallowance so it is not relevant to this appeal.

36. In any event, the LP Agreement did not affect Ms. Athanasoulis' entitlement under the Agreement. The Agreement was entered into in 2014, and YSL became bound by it in 2016 when it was founded. The LPs invested in YSL after Ms. Athanasoulis had worked on the YSL Project

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[38] YG Limited Partnership Subscription Form, Power of Attorney and Acknowledgement (**"Subscription Agreement"**) at s. 3.1, MR Vol 10, Tab 6(32), p. 2387. Note that while each LP executed a Subscription, Ms. Athanasoulis has included only a representative version in the MR.

[39] YG Limited Partnership Amended and Restated Limited Partnership Agreement dated August 4, 2017 (**"LP Agreement"**) at s. 4.2, MR Vol 10, Tab 6(31), p. 2350.

[40] Example of Guarantee of Dan Casey to LPs, RR, Tab 1(b), p. 584. See also Investor Presentation Slide-deck, being Exhibit B to the Lue Affidavit, RR, Tab 1(B), p. 170.

[41] LP Agreement s. 3.2, MR Vol 10, Tab 6(31), p. 2344.

[42] LP Agreement at s. 3.6(b), MR Vol 10, Tab 6(31), p. 2348.

in accordance with the terms of the Agreement. Ms. Athanasoulis was not a party to the LP Agreement, and it did not (and could not) change the terms of her agreement with YSL.

### *(iv) The LPs knew that Cresford would receive payments before them*

37. The principal of one of the LPs, Lu (Eric) Li now claims that he believed that the LP Agreement included a "requirement that the limited partners be repaid first before the Cresford Group would receive anything from the proceeds of the YSL Project."[43] This is, demonstrably, false.

38. Cresford's involvement in all aspects of the YSL Project was a selling feature: Cresford's in-house resources allowed it to ensure that its quality standards were met. This was part of the value proposition that Cresford offered. YSL emphasized Cresford's involvement in the Investor Presentation, which touted Cresford's integrated approach to development, including its "ability to control its own construction management" and its "winning sales formula."[44]

39. Cresford received millions of dollars in fees relating to the development, marketing and construction of the YSL Project.[45]

40. In addition to these payments, which appear to relate to services rendered by Cresford, YSL made a number of intercompany advances to other Cresford entities. The purpose and legitimacy of these payments are uncertain. These payments are also shown on Cresford's general ledger and bank statements.[46]

41. The LPs have never challenged (or investigated) any of these payments to Cresford. But they oppose any payment to Ms. Athanasoulis.

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[43] Lue Affidavit at para. 15, RR, Tab 1(B), p. 157.

[44] Athanasoulis Affidavit, MR Vol 1, Tab 4, para. 43.

[45] Athanasoulis Affidavit at para. 45, MR Vol 1, Tab 4, p.98 ; YSL General Ledger dated April 2021 (**"YSL General Ledger"**) at pp. 58, 85, MR Vol 7, Tab 6(20), pp. 1571, 1598.

[46] Athanasoulis Affidavit at para. 46, MR Vol 1, Tab 4, p.98; See also YG General Ledger, MR Vol 7, Tab 6(20), starting at p. 1514. These appear throughout the YG General Ledger as "Transfer to Cresford", "Transfer to Oakleaf Cnstltng", etc.

### *(v) The LPs bargained for the right to be paid ahead of Cresford LP, not the "Cresford Group"*

42. The LP Agreement required that revenue from the YSL Project would be paid in an order consistent with the Waterfall in the Slide Presentation, with payments of project expenses and external lenders ranking ahead of the LPs and with the LPs ranking ahead of Cresford LP.[47]

43. The LP Agreement provided that the LPs were to be paid before any distribution was made to Cresford LP on account of its Class "B" Units, but it did not otherwise subordinate *an*y payment to the LPs.

44. Thus, the LPs specifically bargained for the right to be paid before any proceeds went to Cresford LP. This has nothing to do with Ms. Athanasoulis. Ms. Athanasoulis had no interest in, or relationship with, Cresford LP. Cresford LP was a vehicle for Mr. Casey and his family to invest in YSL. Amounts paid to Ms. Athanasoulis (and other employees) were a project expense paid before any distribution was made to anyone.

## E. YSL's repudiation of the Agreement

### *(i) Cresford's financial difficulties on other projects*

45. Cresford's other major projects suffered significant cash flow problems in 2019, which culminated in insolvency proceedings in the spring of 2020. These proceedings, and the lender investigations that preceded them, uncovered serious financial wrongdoing at Cresford. This Court found, among other things, that Cresford entities kept two sets of books in order to hide information from lenders.[48]

46. YSL did not face similar financial issues. It was properly capitalized and, according to Mr. Casey, had "everything going for it."[49]

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[47] LP Agreement at s. 6.3, MR Vol 10, Tab 6(31), p. 2358.

[48] *BCIMC Construction Fund Corporation et al. v. The Clover on Yonge Inc*., 2020 ONSC 1953 at paras. 31-32, BOA, Tab 8.

[49] Arbitration Transcript - February 22 at 178:20-179:5, MR Vol 3, Tab 6(3) at p. 462-463; Mr. Casey agreed and testified that the YSL Project "didn't have cost issues or other issues", "the new numbers that went into the business were strong and correct numbers", and "it gave us strength as a company, that if we needed to put money into other projects, it gave us the option that we could use our position in that company to either borrow against the equity in

### *(ii) YSL repudiated the Agreement*

47. Ms. Athanasoulis discovered Cresford's financial difficulties and pressed Mr. Casey to take concrete steps to address Cresford's funding issues and preserve value for all stakeholders. She even brought Mr. Casey an offer to purchase all of Cresford's projects, fund cost overruns and pay Mr. Casey a personal profit of $80 million.[50] Mr. Casey refused this offer and stripped Ms. Athanasoulis of all her duties, which amounted to a constructive termination of Ms. Athtanasoulis' employment. The Arbitrator found that YSL had repudiated the Agreement by constructively terminating Ms. Athanasoulis' employment in December 2019.[51]

48. Ms. Athanasoulis accepted YSL's repudiation of the Agreement, and, in Janaury 2020, sued for the damages caused by the repudiation. This fundamentally changed Ms. Athanasoulis' relationship with YSL. Once she accepted the repudiation, Ms. Athanasoulis was not entitled to (and did not seek) *performance* of the Agreement. She *is* entitled to the *damages* caused by YSL's breach of the Agreement. This is an important distinction, which will be discussed in more detail below.

### *(iii) YSL breached the Agreement by destroying the value of the YSL Project with efforts to enrich Mr. Casey*

49. On a more practical level, YSL's termination of Ms. Athanasoulis—and a number of other Cresford staff—left Mr. Casey and a small group of loyalists free to pursue their own interests. Instead of maximizing and, if necessary, realizing the value of the YSL Project, Mr. Casey caused YSL to embark on a campaign to enrich him. YSL breached its construction loan agreement by borrowing $10 million without lender approval, which resulted in the termination of that loan.[52]

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some manner, or sell, or do a joint venture on that project that would create cash for the other parts, and/or it created a much stronger company." Arbitration Transcript - February 24 at 421:4-22, MR Vol 3, Tab 6(5), p. 528.

[50] Arbitration Transcript – February 22 at 183:17–187:8, MR Vol 3, Tab 6(3) p. 464-465.

[51] Partial Award at paras. 189-191, MR Vol 3, Tab 6(2), pp. 413-414.

[52] Athanasoulis Affidavit at para. 57, MR Vol 1, Tab 4, p. 100; Arbitration Transcript – February 24 at para. 541:13-543:2, MR Vol 3, Tab 6(5), pp. 558-559.

YSL had also breached its loan agreement with the same lender on another major project, 33 Yorkville, by hiding cost overruns.[53] In response, the lender terminated the construction loan.

### *(iv) YSL (and the Profit Share) had enormous value when Ms. Athanasoulis was terminated*

50. The termination of its construction loan put YSL in a difficult position. But YSL still had options. It owned a valuable project that was projected to earn profits of nearly $200 million. Even if it could not develop the YSL Project itself, it could have sold the YSL Project and earned a significant profit.

51. Put differently, if YSL had worked to maximize profits (as the Agreement required), then it could—and would—have earned enough to pay Ms. Athanasoulis her profit share and still repay the LPs' investment.

52. A fair, open and transparent marketing process would have yielded a very substantial profit. YSL had invested approximately $241 million in the YSL Project and the YSL Project had an appraised value of $375 million.[54] Based on these figures, YSL could have earned a profit of $134 million and the Profit Share would thus have had a value of more than $25 million.

53. But YSL did not try to maximize the value of the YSL Project. Justice Dunphy found that YSL "squandered" the time between Ms. Athanasoulis' termination and its bankruptcy proposal and that efforts to sell or refinance the YSL Project in 2020 and 2021 were "indelibly tainted" by Mr. Casey's self-interest.[55]

### *(v) YSL's insolvency proceedings*

54. Mr. Casey's efforts culminated in a Proposal Sponsor Agreement between YSL and an affiliate of Concord Developments (**"Concord"**). YSL served a Notice of Intention to Make a Proposal and then served a proposal (the **"First Proposal"**) that contemplated a 40% discount on

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[53] *BCIMC Construction Fund Corporation et al. v. The Clover on Yonge Inc.*, 2020 ONSC 1953 at para. 35, BOA, Tab 8

[54] July 2019 CBRE Report, MR Vol 3, Tab 6(7), p. 601.

[55] First Proposal Decision at paras. 76, 82.

payments to unsecured creditors, payments to Cresford totaling more than $20 million and no payment at all to either Ms. Athanasoulis or the LPs.[56]

55. The Trustee recommended approval of the First Proposal, but Justice Dunphy refused to so approve and found that the First Proposal was tainted by Mr. Casey's attempt to enrich himself, and that the Trustee's recommendation was supported by unreliable evidence.[57]

56. Justice Dunphy noted that all but one analysis of the YSL Project showed that it would earn a substantial profit, permitting payment to both the LPs and Ms. Athanasoulis.[58] The sole exception was an Appraisal by CBRE dated April 30, 2021, and prepared on Concord's instructions. Justice Dunphy held this Appraisal was entitled to "little weight" because when Concord instructed CBRE, Concord had a "clear and obvious interest in having appraisal evidence suggesting that the project was at least partly underwater."[59] The assumptions underlying CBRE's appraisal were "unexplained, untested and appear to be admitted as having been quite preliminary in all events."[60]

57. Justice Dunphy summed up his damning findings about YSL's failure to maximize the value of the YSL Project as follows:

> [76] Few things are more precious in the restructuring business than time. YG LP was able to "purchase" more than a year of time with the forbearance arrangements that it worked out. **That precious time appears to have been devoted solely to finding transactions that offered the greatest level of benefits for the Cresford group of companies. There is no evidence that any canvassing of the market** – however constrained the market of developers capable of undertaking the completion of an 85-story mixed use tower in downtown Toronto may be – **took place that was not indelibly tainted by the imperative of finding value for**

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[56] Third Report to Court of KSV Restructuring Inc. as Proposal Trustee of YG Limited Partnership and YSL Residences Inc. dated June 1, 2021 (**"Trustee 3rd Report"**) at s. 4.1 and Schedule A (Draft Proposal), MR Vol 9, Tab 6(26) p. 1802 and p. 1857.

[57] First Proposal Decision at para. 76.

[58] First Proposal Decision at para. 75(a).

[59] First Proposal Decision at para. 26(a).

[60] First Proposal Decision at para. 26(b).

> **the Cresford group of companies rather than for the partnership itself.[61]**

58. It necessarily follows that YSL breached its obligation under the Agreement to maximize the value of the YSL Project.

### *(vi) The Second Proposal was approved*

59. YSL and Concord tendered an amended proposal, which was approved on July 16, 2021 (the "**Second Proposal**").[62] The Trustee reported to the Court that the Second Proposal offered stakeholders an implied purchase price of $291 million for the YSL Project.[63]

60. Justice Dunphy *did not* find that the Second Proposal offered fair value for the YSL Project. The Proposal was approved because, by the time it came before the Court, creditors had not been paid for more than one year and Justice Dunphy found it would be unfair to force these creditors to wait through a prolonged sales process.[64]

61. As part of the Proposal, Concord acquired the YSL Project and set aside a pool of $30.9 million to satisfy creditor claims.[65] The Trustee was responsible for resolving disputed claims against YSL. By this appeal, Ms. Athanasoulis seeks her share of these funds.

### *(vii) YSL earned a profit on the Proposal*

62. As noted, profit (within the meaning of the Agreement) is equal to revenue less expenses. According to the Trustee, the Proposal generated compensation of $291 million. In addition, YSL sold two properties adjacent to the YSL Project to Concord for approximately $7.5 million, and a

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[61] First Proposal Decision at para. 76.

[62] YG Limited Partnership and YSL Residences (Re), 2021 ONSC 5206 (the **"Second Proposal Decision"**), BOA, Tab 33.

[63] Fourth Report to Court of KSV Restructuring Inc. as Proposal Trustee of YG Limited Partnership and YSL Residences Inc. dated July 15, 2021 ( **"Trustee 4th Report"**) at 5.1(5), MR Vol 10, Tab 6(27), p. 2174.

[64] Second Proposal Decision at paras. 24-30, BOA, Tab 33.

[65] Second Proposal Decision at para. 9(e), BOA, Tab 33.

company related to Concord paid Cresford LP approximately $6.6 million.[66] In all, YSL and Cresford received revenue of $305.4 million.

63. Based on YSL's bank records and general ledger, it appears that YSL spent approximately $265 million to advance the YSL Project, comprised of $157.5 million spent to purchase the YSL Property, and project costs of approximately $107.3 million.[67]

64. Thus, even after YSL squandered most of the value of the YSL Project trying to enrich Mr. Casey and Cresford, it *still* earned profits totaling approximately $40 million. No one knows what happened to these profits.

## F. Procedural History

### *(i) Ms. Athanasoulis wins the first phase of a bifurcated arbitration*

65. Ms. Athanasoulis' claim against YSL was stayed when YSL served its Notice of Intention to Make a Proposal. After the Second Proposal was approved, Ms. Athanasoulis submitted her claim to the Trustee for adjudication.

66. Ms. Athanasoulis' claim was, by its nature, difficult to assess in a traditional claims process. Accordingly, after the Proposal was approved, Ms. Athanasoulis and the Trustee agreed to a bifurcated arbitration process to determine her claim within the Proposal. The parties agreed to conduct a hearing to determine liability, and then to proceed to a damages hearing if Ms. Athanasoulis won on liability.

67. The LPs knew that the Arbitration was proceeding, but they did not take any steps to either participate in it or stop it from proceeding.

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[66] Statement of Adjustments for 357 ½ Yonge Street and 357A Yonge Street as of December 18, 2020 (**"Statement of Adjustment"**), MR Vol 7, Tab 6(18), p. 1483 and Reporting Letter from Dale & Lessman LLP to Cresford Holdings Limited dated June 10, 2022 (**"Dale & Lessman LLP Reporting Letter"**) at p. 2, MR Vol 7, Tab 6(15), p. 1454; see also Trustee 4th Report at p. 11, MR Vol 10, Tab 6(27), p. 2107: "pursuant to the Equity Offer, Cresford-related entities have the prospect of recovering up to $6.6 million from the Sponsor pursuant to the Equity Offer. This is calculated as follows: 12.5% ($15 million (re Cresford's capital) + $38.3 million (Related Party Claims))." .

[67] Letter to Proposal Trustee – Answers to Undertakings of Maria Athanasoulis dated July 5, 2023, MR Vol. 10, Tab 9, pp. 2468-2469, 2472-2489 (**"Athanasoulis Undertaking Answers"**). See also Athanasoulis Submissions at paras. 130 and 136, MR Vol 2, Tab 5, pp. 236, 238.

68. The first phase of the arbitration proceeded over four days in February 2022 (the "**Arbitration**"). As noted above, Ms. Athanasoulis proved that she was entitled to the Profit Share and that YSL repudiated the Agreement by constructively terminating her employment.[68]

### *(ii) The Trustee decides Ms. Athanasoulis suffered no damages before reviewing evidence or argument about it*

69. Since the parties agreed to bifurcate the arbitration, Ms. Athanasoulis did not tender either evidence or detailed argument about her damages claim. Despite this, the Trustee declared at the outset of the Arbitration that there was "no profit" from the YSL Project and so Ms. Athanasoulis was entitled to nothing. The Arbitrator did not consider these arguments, because they were unrelated to liability. [69] But the Trustee has never deviated from its position.

### *(iii) Challenges to the Arbitration*

70. Shortly after the Arbitrator's award was released, the LPs and Concord objected to the arbitration process on the basis that it was too expensive and that the Trustee did not have the jurisdiction to agree to it. The LPs claimed, for the first time, that they were entitled to be paid in priority to Ms. Athanasoulis and that the Agreement was not enforceable. No such claim was made before Ms. Athanasoulis spent substantial sums on the Arbitration.

71. By Endorsement dated November 1, 2022, the Honourable Justice Kimmel found that the second phase of the arbitration could not proceed. Her Honour ordered the Trustee to establish a new process for determining Ms. Athanasoulis' Claim (the "**Jurisdiction Decision**").[70]

72. By Endorsement dated February 10, 2023, Justice Kimmel established a procedure for determining Ms. Athanasoulis' claim, as well as a procedure for any appeal from the Trustee's determination of the claim (the "**Process Decision**").[71] Pursuant to the Process Decision,

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[68] Partial Award at paras. 146, 166, 189-191, MR Vol 3, Tab 6(2), pp. 400,404, 413-414.

[69] Partial Award at para. 164, MR Vol 3, Tab 6(2), p. 404.

[70] YG Limited Partnership (Re), 2022 ONSC 6138 (the **"Jurisdiction Decision"**), BOA, Tab 34.

[71] YG Limited Partnership (Re), 2023 ONSC 4638 (the **"Process Decision"**), BOA, Tab 35.

Ms. Athanasoulis' entitlement to damages was to be determined by the Trustee. The Trustee's determination is subject to appeal pursuant to the *BIA*.

73. The Jurisdiction Decision and the Process Decision dramatically altered the Trustee's relationship to the Claim. The Trustee participated in the Arbitration as Ms. Athanasoulis' adversary, and stated—clearly and repeatedly—that Ms. Athanasoulis had not suffered any damages. But the Jurisdiction Decision required that the Trustee change from advocate to adjudicator. In practice, the Trustee was called on to determine whether Ms. Athanasoulis' damages theory was correct or whether *its own* position on damages should be preferred.

### *(iv) The Draft Disallowance and Ms. Athanasoulis' submissions*

74. Before the Process Decision was issued, and before Ms. Athanasoulis tendered evidence or detailed argument to support her damages claim, the Trustee issued a "Draft Notice of Disallowance" explaining why it believed that Ms. Athanasoulis was not entitled to any payment in respect of the Claim (the "**Draft Disallowance**").[72]

75. The Trustee invited Ms. Athanasoulis to submit evidence and argument responding to the positions in the Draft Disallowance.

76. Beginning in February 2023, Ms. Athanasoulis delivered to the Trustee close to one hundred pages of written argument supported by thousands of pages of supporting evidence.

77. Among other things, Ms. Athanasoulis demonstrated—based on YSL's own accounting records—that YSL had earned a substantial profit. YSL's records showed expenses totalling approximately $265 million, including payments of approximately $11 million to Cresford that have not been adequately explained and may not have been in respect of valid project costs.[73] YSL earned revenues of approximately $305.4 million[74], including the sale of the YSL Project to

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[72] Trustee's Draft Disallowance, Supplementary Motion Record of Maria Athanasoulis, Tab 1.

[73] Athanasoulis Answers to Undertakings, MR Vol. 10, Tab 9, pp. 2468-2469, 2472-2489. For a full breakdown of this calculation, see the Athanasoulis Submissions at para. 136, MR Vol 2, Tab 5, p. 238.

[74] This is the sum of the revenues earned by YSL: $291M + $7.8M + $6.6M.

Concord for an implied purchase price of $291[75] million.[76] Thus, YSL's records showed that it earned a profit of $40.4 million.[77]

78. Some aspects of Ms. Athanasoulis' costs and revenue analysis were disputed by Cresford and/or the LPs. But Cresford did not provide *any* evidence that YSL's *actual* expenses exceeded its revenue. In fact, Cresford's primary response to Ms. Athanasoulis was to argue that certain expenses had been properly accrued for accounting purposes even though they were never paid.[78] Unpaid expenses are not expenses at all, and they are not relevant to Ms. Athanasoulis' entitlement.

### *(v) The Trustee did not accept any of Ms. Athanasoulis' submissions, and did not consider most of them*

79. In any event, the Proposal Trustee appears to have largely disregarded both Ms. Athanasoulis' submissions and the responses to those submissions.

80. The Trustee issued its Disallowance on August 10, 2023, the Trustee issued a Notice of Disallowance setting out its determination of the value of Ms. Athanasoulis' Claim (the "**Disallowance**"). The Trustee did not make any material change to the reasoning or conclusions articulated in the Draft Notice of Disallowance.

81. The Disallowance makes no reference at all to critical aspects of Ms. Athanasoulis' argument. The Proposal Trustee did not address Ms. Athanasoulis' primary legal argument, which is that her damages must be calculated based on what would have happened but-for YSL's breach of the Agreement. It did not reach any conclusion, or conduct any apparent analysis, about whether YSL had actually earned profits.

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[75] Trustee 3rd Report, MR Vol 9, Tab 6(26), p. 1809; Report of Finnegan Marshall Inc. re: Project Pro Forma Completion Report for YSL Residences dated May 16, 2021 (**"Finnegan Report"**) at p. 12, MR Vol 7, Tab 6(13), p. 1403.

[76] Athanasoulis Answers to Undertakings, MR Vol. 10, Tab 9, pp. 2468-2469, 2472-2489. For a full breakdown of this calculation, see the Athanasoulis Submissions at para. 137, MR Vol 2, Tab 5, p. 238.

[77] Athanasoulis Answers to Undertakings, MR Vol. 10, Tab 9, pp. 2468-2469, 2472-2489. For a full breakdown of this calculation, see the Athanasoulis Submissions at para. 137, MR Vol 2, Tab 5, p. 238.

[78] Cross-Examination Transcript of David Mann dated June 21, 2023 at qs. 35-40, MR Vol 10, Tab 7, pp. 2422-2423.

82. In light of the foregoing, Ms. Athanasoulis commenced this appeal to set aside the Trustee's Disallowance.

## III. ISSUES

83. The Trustee denied that Ms. Athanasoulis is entitled to anything, apart from the previously approved wrongful dismissal damages, for three primary reasons:

(a) The Trustee asserted that the Claim is an "equity claim" that is not "provable" pursuant to the *BIA*, without regard for the *BIA* requirement that an "equity claim" be in "respect of" an "equity interest";

(b) The Trustee concluded that no profits were earned by YSL, without considering either YSL's revenue or its expenses; and

(c) The Trustee concluded that Ms. Athanasoulis' claim was "subordinated" to the LPs, without finding that there was any agreement between Ms. Athanasoulis and the LPs.

84. Most importantly, the Trust did not apply the law of damages in its determination of Ms. Athanasoulis' damages claim. The Disallowance is, with respect, deeply flawed. It should be set aside.

### A. The standard of review is correctness

85. The Disallowance rests entirely on the Trustee's interpretation of the law. It can only stand if that interpretation is correct.[79]

86. Although factual determinations and the exercise of discretion by a trustee will sometimes warrant deference, that is not the case here. The Trustee did not, apparently, conduct any meaningful investigation into YSL's finances. No investigation or conclusions are referenced in

[79] *Business Development Bank of Canada v Pinder Bueckert & Associates Inc*, 2009 SKQB 458 at para. 24.; *Casimir Capital Ltd, Re*, 2015 ONSC 2819 at para. 33; *Charlestown Residential School, Re*, 2010 ONSC 4099 at para 17, BOA, Tabs 10, 11 and 12.

the Disallowance. The only evidence cited are three passages from Ms. Athanasoulis' testimony at (and in preparation for) the Arbitration. The Disallowance rests on how the Trustee believes the Claim *should be* analyzed. This is a legal conclusion, and the Trustee's legal conclusions are not entitled to deference.

87. The Trustee has not tendered any report that sets out the steps it took to investigate the Claim or the factual conclusions that it reached—because it did not, apparently, investigate the facts alleged by Ms. Athanasoulis. The Trustee concluded, in effect, that those facts were not relevant because they did not fit with how the Trustee thinks the Claim should be evaluated.

88. Moreover, according deference to the Trustee would result in significant injustice to Ms. Athanasoulis. Since her claim began almost four years ago, in January 2020, Ms. Athanasoulis has sought a fair adjudication of her claim by a neutral decision-maker. Her attempt to proceed in court was stayed by the *BIA*. Her attempt to bring her case before the Arbitrator was halted when the Arbitration was partially complete.

89. By the time the Trustee received Ms. Athanasoulis' Submissions, which set out her damages position in detail, it had already advocated repeatedly *against* that position in the Arbitration. In these circumstances, deference to the Trustee's decision would result in a significant injustice to Ms. Athanasoulis. No deference is appropriate.

## B. The Claim ought to have been assessed based on the law of contract damages and the *BIA*

90. The first step in understanding the Trustee's errors, and how they ought to be addressed, is to assess how the Claim *should have* been evaluated. The Trustee was faced with two questions:

(a) what is the value of the Claim?

(b) is the Claim subordinate to the equity claims advanced by the LPs?

91. These are separate questions, governed by separate legal and factual considerations. The Trustee's fundamental error is that it concluded—before considering any meaningful argument from Ms. Athanasoulis—that the LPs *should be* paid before Ms. Athanasoulis. The Trustee concluded that, since the LPs *have not* been paid, then Ms. Athanasoulis *cannot* be paid. Critically,

the Trustee *never* valued Ms. Athanasoulis' claim because it decided that no claim could exist unless and until the LPs receive payment in full. In order to justify this conclusion, the Trustee departed from the law of damages and the plain language of the *BIA*.

## C. Valuing the Claim based on the Law: Placing Ms. Athanasoulis in the Position she would be in if the Contract had been Performed

92. The Arbitrator's award, together with the well-established principles that apply to all breach of contract claims, provided a clear path for the Trustee. The Trustee ought to have calculated damages that put Ms. Athanasoulis in the position that she would be in if YSL had performed the Agreement.

### *(i) Ms. Athanaosulis is entitled to the profits she would have earned if YSL had honoured the Agreement*

93. The law for assessing contractual damages is established beyond any doubt. It is described in every leading text[80] and affirmed in all of the leading appellate decisions.[81] Professor Waddams articulated the applicable principles as follows:

> One of the most significant of all economic interests is the benefit of a favourable contract. **A person who has made a good bargain is treated by the law for many purposes as one who has a present right, the value of which is measured by the value of the promised performance.** The primary manifestation of this approach is reflected in the measure of damages for breach of contract; **the contract breaker is bound to make good the loss caused by the breach, a loss measured by the value of the performance promised.**

94. The value of the promised performance is measured by evaluating what *would have* happened if the contract had been performed. The correct approach is illustrated in *Performance Industries Ltd. v. Sylvan Lake Golf & Tennis Club Ltd* ("*Sylvan*").[82] In that case, one party to an

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[80] Waddams, *Law of Damages*, 6th ed. (Carswell, 2021) at. 5.1; Swan, Adamski and Na, *Canadian Contract Law*, 4th ed. (LexisNexus, 2018) at 6.2; Fridman, *The Law of Contract in Canada*, 6th ed. (Carswell, 2011) at 19.3, BOA, Tabs 37, 38 and 39.

[81] See for example *Bank of America Canada v Mutual Trust Co*, 2002 SCC 43 at para. 27; *Fidler v Sun Life Assurance Co of Canada*, 2006 SCC 30 at para. 27: *Atlantic Lottery Corp Inc v Babstock*, 2020 SCC 19 at para. 108; *Dasham Carriers Inc. v. Gerlach*, 2013 ONCA 707 at para. 17, BOA, Tabs 6, 5, and 14.

[82] *Performance Industries Ltd. v. Sylvan Lake Golf & Tennis Club Ltd.*, 2002 SCC 19 (CanLII), [2002] 1 SCR 678, BOA, Tab 36.

option agreement breached the contract and, as a result, the other party lots the opportunity to develop the land. The Supreme Court of Canada upheld the Trial Judge's award of the profits that the wronged party *would have* made.[83] In *Sylvan* no one *actually* earned profits. But that did not matter, the key question was what *would have* happened if the defendant had performed the contract instead of breaching it.

95. Applied to this case, *Sylvan* (and the many other cases articulating the same principles) teach that the key question is what Ms. Athanasoulis *would have* earned but-for the breach. The Trustee's approach, which explicitly focused on what profits Ms. Athanasoulis *actually* earned is, with respect, not supported by – or consistent with – the law of damages.

96. Ms. Athanasoulis is entitled to receive the damages *caused* by YSL's breaches of the Agreement, nothing more and nothing less. These damages must place Ms. Athanasoulis, so far as money can, in the position she would have occupied but-for the breach. In order to calculate damages for breach of contract, it is necessary to calculate the wronged party's financial position in the real world (the **"Actual Profit"**) and compare it to the position that the wronged party would occupy if the contract had been performed (the **"But-for Profit"**).

### *(ii) The Trustee wrongly rejected the test for assessing contractual damages*

97. The Trustee held that "a profit must have been earned for [Ms. Athanasoulis] to have a monetary claim."[84] This is, with respect, not correct. It is also deeply unfair to Ms. Athanasoulis. As noted, the Profit Share had enormous value when Ms. Athanasoulis was terminated. YSL breached the Agreement by taking steps that reduced (but did not eliminate) that value. The Trustee now says, in effect, that YSL's breach of the Agreement (which reduced the value of the YSL Project) eliminated Ms. Athanasoulis' damages. This cannot be correct. What the wronged party *actually* earned is not relevant.

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[83] *Performance Industries Ltd. v. Sylvan Lake Golf & Tennis Club Ltd.*, 2002 SCC 19 (CanLII), [2002] 1 SCR 678, BOA, Tab 36.

[84] Trustee's Disallowance at p. 3, MR Vol 1, Tab 2, p. 31.

### *(iii) Ms. Athanasoulis would have earned significant sums but-for the breach*

98. Ms. Athanasoulis' Actual Profit is easy to calculate. YSL paid her nothing[85] and forced her to spend significant time and enormous sums to vindicate her rights.

99. The damages analysis must calculate what Ms. Athanasoulis would have earned if YSL had complied with the Agreement.[86] There are two critical differences between Ms. Athanasoulis' actual position and the position she would be in if YSL had performed the Agreement: YSL would not have terminated Ms. Athanasoulis; and, YSL would have worked to maximize the profits earned on the YSL Project.

100. Quantification of Ms. Athanasoulis' damages has been reserved to a subsequent hearing. The current state of the evidence is summarized below, to illustrate the correct damages analysis.

101. YSL could have realized profits in one of two primary ways. It could have completed the YSL Project, sold condominium units, and realized the profits projected on its *pro forma*; or it could have sold the YSL Project and immediately realized the profits it had already earned. As noted above, the value of the YSL Project significantly exceeded any investment by YSL therein.

102. If Ms. Athanasoulis had not been constructively terminated, there is no reason to believe that the YSL Project would have suffered the same fate as it ultimately did. Before her termination, she urged Mr. Casey to sell all of Cresford's projects to address its cash flow issues. She was working for a solution that benefitted all stakeholders, and that effort would likely have succeeded if Mr. Casey had not repudiated the Agreement and pursued his own interests. YSL cannot credibly claim that it would be fair to use Mr. Casey's wrongdoing, and any resulting decrease in the value of the YSL Project, as a basis to eliminate or reduce damages in respect of Ms. Athanasoulis' contractual entitlement under the Agreement.

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[85] The Receiver recognized and acknowledged that Ms. Athanasoulis is owed $880,000 in lost salary, after Ms. Athanasoulis established in the Arbitration that she was wrongfully terminated. See Trustee's Disallowance at p. 1, MR Vol 1, Tab 2, p, 29.

[86] *Bank of America Canada v Mutual Trust Co*, 2002 SCC 43 at para. 27; *Fidler v Sun Life Assurance Co of Canada*, 2006 SCC 30 at para. 27: *Atlantic Lottery Corp Inc v Babstock*, 2020 SCC 19 at para. 108; *Dasham Carriers Inc. v. Gerlach*, 2013 ONCA 707 at para. 17, BOA, Tabs 6, 17, 5 and 14.

103. The Trustee did not refer to the relevant legal principles in the Disallowance. It proceeded on the assumption that Ms. Athanasoulis' damages must be equal to 20% of the *actual* profits earned on the YSL Project.

### *(iv) The value of the Profit Share at the time of termination is critical*

104. The value of the YSL Project in December 2019 was the result of many years of hard work by Ms. Athanasoulis and other employees working under her supervision. YSL had successfully completed (or partially completed) several important parts of the development process. This had created significant value, and YSL was obliged to protect and realize that value. If it had done this, Ms. Athanasoulis (and the LPs) would have been paid everything owed to them.

105. As a matter of both law and logic, the consequences of YSL's value destruction should not be imposed on Ms. Athanasoulis: as a matter of law, damages are presumptively calculated on the date of the breach; as a matter of logic, it would be deeply unfair for Ms. Athanasoulis' entitlement to be affected by Mr. Casey's wrongdoing after he terminated her.

106. It is a well-established legal principle that damages are presumptively to be calculated at the date of breach.[87] Displacing this presumption is rare and premised on fairness to the innocent harmed party.[88] The rationale for this rule was articulated by Laskin J.A. in his concurring opinion in *Kinbauri Gold Corp. v. Iamgold International African Mining Gold Corp*:

> . . . [D]amages for breach of contract are generally assessed at the date of breach. An early crystallization of the plaintiff's damages promotes efficient behaviour: the litigants become as free as possible to conduct their affairs as they see fit. Early crystallization also avoids speculation: the plaintiff is precluded from speculating at the defendant's expense by reaping the benefits of an increase in the value of the goods in question without bearing any risk of loss.[89]

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[87] *Kinbauri Gold Corp. v. Iamgold International African Mining Gold Corp.*, 2004 CanLII 36051 (Ont. C.A.) at para. 125; see also *Kipfinch Developments Ltd. v. Westwood Mall (Mississauga) Limited*, 2010 ONCA 45 at para. 15 ; *Baud Corp., N.V. v. Brook*, 1978 CanLII 16 301 (SCC) at p. 648, BOA at Tabs 22, 23, and 7.

[88] *642947 Ontario Ltd. v. Fleischer*, 2001 CanLII 8623 (ONCA) at paras. 41-42; *Rougemount Capital Inc. v. Computer Associates International Inc.*, 2016 ONCA 847at para. 50, citing *Dosanjh v. Liang*, 2015 BCCA 18 at para. 55, BOA at Tabs 1, 27 and 15.

[89] *Kinbauri Gold Corp. v. Iamgold International African Mining Gold Corp.*, 2004 CanLII 36051 (Ont. C.A.) at para. 125, BOA at Tab 22.

107. *Kinbauri* involved the calculation of damages where the value of the shares the Plaintiff was entitled to had increased. The plaintiff was not entitled to share in that increased value after the date of breach. This case presents the flip side of the same coin. Ms. Athanasoulis' entitlement should not decrease because Mr. Casey destroyed the value of the YSL Project after terminating her.

108. This principle is entirely consistent with the requirement that damages be equal to the profits that the plaintiff would have earned if the profit had been performed, but did not earn because of the breach. The Profit Share had enormous value on the date of the breach. The steps taken to reduce that value would not have occurred if YSL had performed the Agreement.

109. Thus, fairness here requires the application of the presumptive rule. Ms. Athanasoulis should not be forced to shoulder the impact of Mr. Casey's self-serving conduct over which she had no control.

110. The Trustee does not provide any meaningful analysis of these facts, nor of the relevant legal principles. The Trustee simply says that it is not "just and reasonable" to calculate profits on the repudiation date because "no profit had been earned" and the LPs had not been repaid.[90] But neither of these facts affects Ms. Athanasoulis' entitlement: the Arbitrator specifically held that Ms. Athanasoulis was entitled to the Profit Share even if she was terminated before profits were earned; and the LPs are strangers to Ms. Athanasoulis' Agreement.

## D. In the alternative, Ms. Athanasoulis is entitled to 20% of YSL's actual profit

### *(i) The Trustee did not investigate revenue or expenses*

111. As noted, the Trustee determined that a "profit must have been earned" for Ms. Athanasoulis to have a monetary claim. Even if this is correct (which Ms. Athanasoulis denies) then the Disallowance cannot stand, because the Trustee did not investigate YSL's revenue or its expenses. It did not make *any* determination about *any* part of the profit calculation required by the Arbitrator.

[90] Trustee's Disallowance at p. 2, MR Vol 1, Tab 2, p. 30.

### *(ii) The meaning of "profits"*

112. The YSL Project's profits are equal to project revenues less project expenses.[91] This is what Ms. Athanaoulis and Mr. Casey understood "in the context of Cresford's business".[92] And it was this definition of profits that was contemplated by the Agreement:

> **When they agreed to the 20% [profit share agreement], Athanasoulis and Casey had a common understanding of what "profits" meant. Broadly speaking they understood that profits are revenues less expenses.** It is reasonable to infer that they understood profits to be as calculated within the pro forma process that they used generally for all projects within their business. **As given in evidence by Papadakis, they agreed that profits would not be artificially reduced by "bad faith" transactions.**[93]

113. While the Arbitrator found that project profits are often earned at the completion of a project, he also held that profits can be earned earlier: "Profits can also be earned on projects prior to registration… For example, land may be sold after successful rezoning of the property or at a point where a partial development has occurred."[94]

114. That is what occurred when the YSL Project was sold to Concord in the context of this insolvency. YSL's sale of the YSL Project generated revenues that significantly exceeded its expenses, which constitute earned profits according to the meaning of the Agreement.

115. The Trustee's Disallowance, and its conclusion that no profits were earned on the YSL Project, does not engage with this calculation at all.

### *(iii) YSL's revenues*

116. According to the Trustee, the implied purchase price for the YSL Project under the Proposal totalled approximately $291 million.[95]

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[91] Partial Award at para. 93, MR Vol 3, Tab 6(2), p. 388.

[92] Partial Award, para. 146, MR Vol 3, Tab 6(2), p. 400.

[93] Partial Award at para. 146, MR Vol 3, Tab 6(2), p. 400.

[94] Partial Award, at para. 97, MR Vol 3, Tab 6(2), p. 389.

[95] Trustee 3rd Report, MR Vol 9, Tab 6(26), p. 1809; Finnegan Report at p. 12, MR Vol 7, Tab 6(13), p. 1403.

117. In addition, as noted above, YSL sold two properties that it owned adjacent to the YSL Property to Concord for $7.6 million (the "**Adjacent Properties**").[96] This is revenue, within the meaning of the Agreement.

118. In addition to the amounts paid under the Proposal itself, a company related to Concord paid Cresford $6.6 million.[97] This amount is part of the price that Concord paid to acquire the YSL Project and, as such, these amounts are revenue within the meaning of the Agreement.

119. In light of the foregoing, Ms. Athanasoulis respectfully submits that YSL earned revenues of at least $305.4 million.

### *(iv) YSL's expenses on the YSL Project were less than $265 million*

120. YSL's expenses were significantly less than its revenues. YSL paid $157.5 million to acquire the YSL Property.[98] Its general ledger summary of bank activity shows that it paid project expenses totalling approximately $107.3 million.[99] This supports the conclusion that YSL incurred costs of approximately $265 million.[100] A separate analysis of YSL's general ledger, and the cost report prepared on behalf of YSL's construction lender reached the same conclusion.[101]

### *(v) There were actual profits of at least $39.5 million*

121. Based on the foregoing, the available documents establish an actual profit of approximately $39.5 million. Ms. Athanasoulis' share of this profit is $7.9 million under the Agreement. Ms. Athanasoulis specifically asked for the documents accounting for the gap between the revenues earned by YSL on the YSL Project and the costs reflected in a report prepared by a leading cost

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[96] Statement of Adjustments, MR Vol 7, Tab (6)18, p. 1483.

[97] Dale & Lessman Reporting Letter, MR Vol 7, Tab 6(15), p.1453; see also Trustee 4th Report at p. 11, MR Vol 10, Tab 6(27), 2107.

[98] Athanasoulis Answers to Undertakings, MR Vol. 10, Tab 9, pp. 2468-2469, 2472-2489. For a full breakdown of this calculation, see Athanasoulis Submissions at paras. 130 and 136, MR Vol 2, Tab 5, pp. 236, 238.

[99] Athanasoulis Answers to Undertakings, MR Vol. 10, Tab 9, pp. 2468-2469, 2472-2489. For a full breakdown of this calculation, see the Athanasoulis Submissions at paras. 130 and 136, MR Vol 2, Tab 5, pp. 236, 238.

[100] Athanasoulis Answers to Undertakings, MR Vol. 10, Tab 9, pp. 2468-2469, 2472-2489. For a full breakdown of this calculation, see Athanasoulis Submissions at paras. 130 and 136, MR Vol 2, Tab 5, pp. 236, 238.

[101] Athanasoulis Answers to Undertakings, MR Vol. 10, Tab 9, pp. 2468-2469, 2472-2489. For a full breakdown of this calculation, see the Athanasoulis Submissions at para. 137, MR Vol 2, Tab 5, p. 238.

consultant, the Altus Group in August 2019.[102] Cresford was unwilling or unable to provide a meaningful answer.[103]

### *(vi) Profits do not appear to have been available for distribution*

122. The Trustee does not dispute Ms. Athanasoulis' analysis. But it also does not accept that analysis. Rather, the Trustee purports to determine that there was no profit *without* actually investigating YSL's revenue or expenses.

123. Even though YSL earned a profit as set out above, it did not have funds available for distribution after the Proposal was approved and completed. Ms. Athanasoulis does not bear the burden of explaining what happened to the funds that YSL brought in. She only bears the burden of proving that revenue exceeded expenses, or in other words, that profits were earned. She has met that burden. Although Ms. Athanasoulis supports an investigation into what happened to the funds that YSL brought in, she is not obliged to conduct that investigation in order to prove her Claim.

## E. The Trustee's valuation errors

### *(i) The Trustee erred by not applying the law of damages*

124. The Trustee did not conduct the analysis required by the law of damages. It did not consider what position Ms. Athanasoulis would be in if YSL had honoured the Agreement instead of breaching it. It did not assess YSL's actual revenue or expenses, or what its revenue or expenses would have been but-for the breach. This is a fatal flaw in the Trustee's analysis. It is also, without more, sufficient to set aside that analysis.

### *(ii) The Trustee erred by claiming that the valuation of the Claim is speculative*

125. The Trustee claims that Ms. Athanasoulis' damages are too speculative or remote. This is improper, because the quantification of Ms. Athanasoulis' damages has been deferred to a subsequent hearing by the Process Decision. As a result, the Trustee has not *tried* to quantify

[102] Email from Mark Dunn dated Feb 24 2024, MR Vol 10 , Tab 6(33), p. 2405.

[103] Email from Harry Fogul dated March 10, 2023, MR Vol 10, Tab 6(34), p. 2407.

Ms. Athanasoulis' damages. Ms. Athanasoulis' has not yet had an opportunity to tender any evidence relating to that quantification.

126. With respect, the Trustee is also wrong. Despite all this, the Trustee says that "the assumptions" required to calculate Ms. Athanasoulis' damages are "far too speculative" and the damages are "far too remote". This is simply incorrect.

127. Damages can be calculated with reasonable certainty in this case and based on sufficient proof. The Court can decide what would have happened if YSL had followed the contract, instead of repudiating it. The value of the YSL Project at the time of termination, together with the expenses incurred to build that value, can all be measured, and will be measured at the appropriate time with reference to the YSL Project *pro formas*, other relevant supporting documents and appropriate expert evidence.

128. The Trustee's position ignores the well established legal principle that a party should not be denied damages just because those damages are difficult to calculate.[104] The Alberta Court of Appeal has held that it is only where there is an *absence* of proof regarding a claim that it should not be valued. As the Court cautioned, "One must take care not to overstate the rule. It does not eliminate contingent or future claims. It merely subjects them to a valuation process."[105]

129. Even in cases where damages are difficult to calculate, damages must still be awarded. In such cases, damages are assessed with a broad axe and a sound imagination.[106] In this case, there is no evidence that the calculation is more difficult than other complex, high-stakes damages claims. Nothing in the *BIA* allows the Trustee to extinguish otherwise meritorious claims because they are alleged to be complicated. More importantly, there has been no attempt to calculate either but-for profits or actual profits. The Trustee does not even explain what assumptions were alleged to be too spectulative.

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[104] *General Mills Canada Ltd. v. Maple Leaf Mills Ltd.*, 52 C.P.R. (2d) 218 (Ont. H. Ct. Jus.) at para. 4; *Gould Outdoor Advertising Co. v. Clark*, [1994] O.J. No. 3094 (Ont. Ct. J) at para. 26, BOA at Tabs 19 and 20.

[105] *Abacus Cities Ltd. (Trustee of) v. AMIC Mortgage Investment Corp.*, 1992 ABCA 57, paras. 37-38, BOA at Tab 2.

[106] *Colonial Fastener Co. Ltd. v. Lightning Fastener Co. Ltd.*, [1937] SCR 36, pg. 44; *Apotex Inc. v. Eli Lilly and Company*, 2018 FCA 217, para. 142; *Janssen Inc. v. Teva Canada Limited*, 2016 FC 593, at para. 69, BOA at Tabs 13, 4 and 21.

130. Ms. Athanasoulis understands the computation of damages is a matter to be deferred to a future quantification hearing, with additional evidence and submissions. At this stage, it is sufficient to say that damages *can* be calculated (based on either actual profit or but-for profit) and that the Claim is not, therefore, speculative or remote.

## F. Ms. Athanasoulis is entitled to priority over the LPs

131. Determining the relative priority of Ms. Athanasoulis and the LPs is also a straightforward exercise. The Trustee should have applied the clear language of the *BIA* to the facts of the case. But this is not what it did. Instead of applying the *BIA*, the Trustee essentially *ignored* the statutory language of the *BIA* and substituted its opinion about who *should* have priority. This was, with respect, a fundamental error.

### *(ii) The LPs hold equity claims, which are subordinate to debt claims*

132. It is common ground that each LP holds an "equity claim" within the meaning of the *BIA*. The *BIA* provides that every creditor who *does not* hold an "equity claim" is entitled to be paid before any creditor that *has* an equity claim.[107] It follows that if the Claim is not an "equity claim" then Ms. Athanasoulis is entitled to priority over the LPs.

### *(iii) The Claim is not an "equity claim"*

133. The *BIA* provides a clear and binding definition of an "equity claim". A claim can only be an "equity claim" if it is "**in respect of an equity interest**."[108] An equity interest "**means** … **a share in the corporation** – or warrant or option or another right to acquire a share."[109] The use of the word "means" dictates that this definition is intended to be exhaustive, in accordance with well-accepted principles of statutory interpretation.[110]

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[107] *Bankruptcy and Insolvency Act*, R.S.C., 1985, c. B-3, s. 140(1), BOA at Tab 40.

[108] *Bankruptcy and Insolvency Act*, R.S.C., 1985, c. B-3, s. 2, BOA at Tab 40.

[109] *Bankruptcy and Insolvency Act*, R.S.C., 1985, c. B-3, s. 2, BOA at Tab 40.

[110] *Entertainment Software Association v. Society of Composers, Authors and Music Publishers of Canada*, 2012 SCC 34 (S.C.C.) at para. 42; *Alexander College Corp. v. R.*, 2016 FCA 269 at para 14, BOA at Tabs16 and 3.

134. Ms. Athanasoulis' Claim has no connection to any "equity interest." She never held any shares, warrants, or options in YSL or any other Cresford project.[111] No one alleges that she did. More importantly, the Claim is not "in relation to" any such interest. This is a complete answer to the allegation that Ms. Athanasoulis has an "equity claim" that is not provable in this proceeding.

135. The Trustee appears to accept that Ms. Athanasoulis does not hold an "equity interest". It does not make any attempt to tie the Claim to an "equity interest". It says that "the Trustee does not consider it relevant that Ms. Athanasoulis does not hold equity in YSL."[112] This is an explicit, and rather astonishing, rejection of the language of the *BIA*.

### *(iv) The Claim is not "in substance" an equity claim*

136. The Trustee seeks to side-step the statutory definition by saying that the Claim is "disguised as a debt claim while in substance it is an equity claim."[113]

137. The Trustee's *view* about the substance of an equity claim cannot trump the statutory language. Although Courts have read the term "equity claim" broadly, there is no support for the Trustee's decision to ignore the "equity interest" requirement. In each case where a claim has been found to be an equity claim, it is *related to* an equity interest within the meaning of the *BIA*.[114] While some cases suggest that the connection between an equity claim and an equity interest may be broad, they do not negate the requirement that such a connection must *exist*.

138. Existing jurisprudence further belies the suggestion that all claims calculated with reference to profits are inherently equity claims. Courts have been clear that wrongfully terminated

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[111] Athanasoulis Affidavit at para. 15, MR Vol 1, Tab 4, p. 92.

[112] Trustee's Disallowance at p. 6, MR Vol 1, Tab 2, p. 34.

[113] Trustee's Disallowance at p. 6, MR Vol 1, Tab 2, p. 34.

[114] *Sino-Forest Corporation (Re)*, 2012 ONCA 816, concerned a claim for indemnity relating to a shareholder class action; *Bul River Mineral Corporation (Re)*, 2014 BCSC 1732 concerned a shareholder's claim against the debtor that had been reduced to a court judgment before the bankruptcy filing; in *Return on Innovation v Gandi Innovations*, 2011 ONSC 5018 concerned a claim relating to the recovery of a $50 million dollar equity investment through an arbitration; *US Steel Canada Inc (Re)*, 2016 ONSC 569, concerned a claim relating to the recovery of loans advanced by the parent company / sole shareholder of the debtor; *Tudor Sales Ltd (Re)*, 2017 BCSC 119 concerned a claim relating to advances made by a shareholder of the debtor and its sole officer and director; *YG Limited Partnership and YSL Residences (Re)*, 2021 ONSC 4178 concerned claims brought by parties related to Cresford that had an equity interest in the YSL Project, BOA at Tabs 28, 9, 26, 31, 30, and 32.

employees may recover damages for incentive-based compensation in the bankruptcy context, including where such compensation is calculated with reference to sales or profitability.[115] This is true even where the employer's subsequent bankruptcy results in no actual profits being realized, since damages crystalize on the date of the employee's wrongful termination.[116]

139. The fact remains that Ms. Athanasoulis was not an investor in either YSL or the Cresford Group. She did not own shares, units or any other equity interest.[117] As the Trustee argued at the Arbitration, she was an employee.[118] A highly paid and highly skilled employee, but an employee nonetheless. YSL's wrongful repudiation of the Agreement created a legal debt, which Ms. Athanasoulis is entitled to recover. Her Claim seeks to do so and is accordingly provable in this proceeding.

140. As found by the Arbitrator, the compensation contemplated by the Agreement was intended to incentivize Ms. Athanasoulis' extraordinary contributions to the Cresford Group.[119] Like most other forms of recoverable incentive-based compensation, the parties chose to tie the quantification of this compensation to the company's performance. This tie does not transform a contractual obligation into an equity claim.

### *(v) The Trustee's circular logic*

141. The Trustee even argues that because Ms. Athanasoulis is subordinate to the LPs (as it claims), and the LPs hold equity claims, Ms. Athanasoulis must also hold an equity claim "because debt always ranks behind equity." This begs the question. The equity claim analysis is meant to *determine* whether Ms. Athanasoulis ranks ahead of the LPs. The Trustee found that she holds an equity claim, *because* she ranks behind the LPs. It assumes the very thing to be proven.

142. The Trustee's assertion seems to rest on Ms. Athanasoulis' testimony at the Arbitration about how profits were to be calculated under the Agreement. None of the supposed admissions

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[115] *Noble v. Principal Consultants Ltd. (Trustee of)*, 2000 ABCA 133 at paras. 41-42, BOA at Tab 24.

[116] *Noble v. Principal Consultants Ltd. (Trustee of)*, 2000 ABCA 133 at para. 41-42, BOA at Tab 24.

[117] Athanasoulis Affidavit at para. 15, MR Vol 1, Tab 4, p. 92.

[118] Partial Award at paras. 128, 131, MR Vol 3, Tab 6(2), pp. 394-395.

[119] Partial Award at paras. 144 and 160, MR Vol 3, Tab 6(2), pp. 399, 403.

referenced by the Trustee have the legal effect apparently attributed to them by the Trustee. Ms. Athanasoulis testified at the Arbitration about the terms of the Agreement and specifically about how she expected profits to be calculated.[120] She testified that profits were to be calculated as revenues less expenses, consistent with the YSL Project *pro formas*.[121] Within that equation, repayment of investors, including the LPs, was among the expenses or project costs that would be deducted before profits were calculated .[122]

143. Ms. Athanasoulis "admitted" that this was the calculation mechanism for determination of her profits under the Agreement. But at no time did Ms. Athanasoulis ever agree or "admit" that her claim for damages for breach of the Agreement would be subordinated to recovery of the equity investment by the LPs. Nothing in her testimony changes the basic calculation at the heart of the Agreement. Her entitlement was based on *actual* revenue less *actual* expenses.

144. Ms. Athanasoulis never purported to characterize her *entitlement* in the Proposal proceedings.[123] Nor would she, since of course this is a question of law and was not within either her or Cresford's reasonable expectations at the time they entered into the Agreement.[124]

145. Similarly, the fact that the pro formas prepared by Cresford show repayment to the LPs does not affect priority. YSL *expected* that the LPs would be paid in full if any profits were earned. This would have been a reasonable projection if YSL had honoured its contractual obligations—then *both* Ms. Athanasoulis and the LPs would have been paid in full. But this is not what happened.

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[120] Arbitration Transcript - February 22 at 153 :17-22, MR Vol 3, Tab 6(3), p. 456; Arbitration Transcript - February 23 at 233:22-25, 234:1-3, 276:3-14, MR Vol 3, Tab 6(4), pp. 478, 479, 489.

[121] Arbitration Transcript - February 22 at 153 :17-22, MR Vol 3, Tab 6(3), p. 456; Arbitration Transcript - February 23 at 233:22-25, 234:1-3, 276:3-14, MR Vol 3, Tab 6(4), pp. 478, 479, 489.

[122] Arbitration Transcript - February 22 at 153 :17-22, MR Vol 3, Tab 6(3), p. 456; Arbitration Transcript - February 23 at 233:22-25, 234:1-3, 276:3-14, MR Vol 3, Tab 6(4), pp. 478, 479, 489.

[123] Athanasoulis Affidavit at paras. 52, 54, MR Vol 1, Tab 4, 99, 100.

[124] Athanasoulis Affidavit at para. 87, MR Vol 1, Tab 4, p. 106.

146. Critically, Ms. Athanasoulis' damages are based on what would have happened but-for the breach. In this scenario, both Ms. Athanasoulis and the LPs would have recovered everything YSL owed them.

147. Thus, Ms. Athanasoulis' testimony is not the smoking gun the Trustee or the LPs allege it to be. The calculation mechanism for Ms. Athanasoulis' claim does not change the essential fact that Ms. Athanasoulis is a creditor of YSL and the LPs are not.

### *(vi) The Claim is in relation to a debt and is a "Provable Claim"*

148. The Trustee also asserts that the Claim is not a provable claim. A "provable claim" is defined in section 121(1) of the *BIA* as "All debts and liabilities, present or future, to which the bankrupt is subject on the day on which the bankrupt becomes bankrupt … shall be deemed to be claims provable in proceedings under this Act."[125]

149. The bar for establishing a provable claim is low and only requires that a claimant proves that there is an "air of reality" to their claim.[126]

150. There is certainly such an air of reality here—the issue of liability is not remote or speculative since the Arbitrator has determined that: the Agreement existed; it was a key element of Ms. Athanasoulis' employment contract; and it was breached when Ms. Athanasoulis was constructively terminated. As described above in relation to the calculation of profits, the fact that a claim involves some complexity in quantification is not a bar to a provable claim.

151. Ms. Athanasoulis seeks to recover damages caused by the wrongful repudiation of the Agreement. The Agreement is a contract, and the breach of this contract created a legally recoverable debt. This debt is provable in this proceeding.

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[125] *Bankruptcy and Insolvency Act*, R.S.C., 1985, c. B-3, s. 121(1), BOA at Tab 40.

[126] *Oil Lift Technology Inc. v. Deloitte & Touche Inc*., 2012 ABQB 357 at para. 18, BOA at Tab 25.

***(vii) The Trustee assumed, for an unknown reason, that profit is the same as cash on hand***

152. In determining that YSL earned no profits, the Trustee has conflated *profits* with *cash on hand*. The Trustee assumes that because YSL did not have cash after the Proposal closed, it did not earn a profit. But profit is calculated based on revenue less expenses, not cash on hand. The Trustee has not conducted any apparent analysis with respect to *why* YSL did not have cash available to pay Ms. Athanasoulis and the LPs. The assumption underlying its analysis is not valid.

***(viii) The Trustee ignored the effect of YSL's repudiation***

153. Even if Ms. Athanasoulis would have been paid after the LPs if the YSL Project had been completed, this changed when Ms. Athanasoulis' damages crystalized upon repudiation of the Agreement by YSL.

154. YSL dramatically altered Ms. Athanasoulis' entitlement when it repudiated the Agreement. It converted a *future* right to receive *actual* profits into a *current* right to receive *damages* for breach of contract.

155. If this insolvency had not occurred, Ms. Athanasoulis would likely have been awarded (and paid) her damages before the YSL Project was complete and the LPs were paid under the Waterfall. Those damages would have been awarded in a lump sum, and payable after trial whether or not the LPs had been paid.

## IV. CONCLUSION

156. Ms. Athanasoulis is entitled to a fair evaluation of her claim, in accordance with the governing legal principles. The Disallowance is, with respect, a rejection of those principles. It should be set aside, this Court should direct a reference to determine damages based on what *would have* happened if YSL had honoured the Agreement. In the alternative, this Court should assess damages based on the profits that YSL actually earned.

October 27, 2023

**ALL OF WHICH IS RESPECTFULLY SUBMITTED**

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**SCHEDULE "A"**

**LIST OF AUTHORITIES**

**Cases**

1. *642947 Ontario Ltd. v. Fleischer*, 2001 CanLII 8623 (ONCA)
2. *Abacus Cities Ltd. (Trustee of) v. AMIC Mortgage Investment Corp.*, 1992 ABCA 57
3. *Alexander College Corp. v. R.*, 2016 FCA 269
4. *Apotex Inc. v. Eli Lilly and Company*, 2018 FCA 217
5. *Atlantic Lottery Corp Inc v Babstock*, 2020 SCC 19
6. *Bank of America Canada v Mutual Trust Co*, 2002 SCC 43
7. *Baud Corp., N.V. v. Brook*, 1978 CanLII 16 301 (SCC)
8. *BCIMC Construction Fund Corporation et al. v. The Clover on Yonge Inc.*, 2020 ONSC 1953
9. *Bul River Mineral Corporation (Re)*, 2014 BCSC 1732
10. *Business Development Bank of Canada v Pinder Bueckert & Associates Inc*, 2009 SKQB 458
11. *Casimir Capital Ltd, Re*, 2015 ONSC 2819
12. *Charlestown Residential School, Re*, 2010 ONSC 4099
13. *Colonial Fastener Co. Ltd. v. Lightning Fastener Co. Ltd.*, [1937] SCR 36
14. *Dasham Carriers Inc. v. Gerlach*, 2013 ONCA 707
15. *Dosanjh v. Liang*, 2015 BCCA 18
16. *Entertainment Software Association v. Society of Composers, Authors and Music Publishers of Canada*, 2012 SCC 34 (S.C.C.)
17. *Fidler v Sun Life Assurance Co of Canada*, 2006 SCC 30
18. *General Mills Canada Ltd. v. Maple Leaf Mills Ltd.*, 52 C.P.R. (2d) 218 (Ont. H. Ct. Jus.)
19. *Gould Outdoor Advertising Co. v. Clark*, [1994] O.J. No. 3094 (Ont. Ct. J)
20. *Janssen Inc. v. Teva Canada Limited*, 2016 FC 593

21. *Kinbauri Gold Corp. v. Iamgold International African Mining Gold Corp.*, 2004 CanLII 36051 (Ont. C.A.)

22. *Kipfinch Developments Ltd. v. Westwood Mall (Mississauga) Limited*, 2010 ONCA 45

23. *Noble v. Principal Consultants Ltd. (Trustee of)*, 2000 ABCA 133

24. *Oil Lift Technology Inc. v. Deloitte & Touche Inc*., 2012 ABQB 357

25. *Performance Industries Ltd. v. Sylvan Lake Golf & Tennis Club Ltd.*, 2002 SCC 19 (CanLII)

26. *Return on Innovation v Gandi Innovations*, 2011 ONSC 5018

27. *Rougemount Capital Inc. v. Computer Associates International Inc.*, 2016 ONCA 847

28. *Sino-Forest Corporation (Re)*, 2012 ONCA 816

29. *Tudor Sales Ltd (Re)*, 2017 BCSC 119

30. *US Steel Canada Inc (Re)*, 2016 ONSC 569

31. *YG Limited Partnership and YSL Residences (Re)*, 2021 ONSC 4178; 2021 ONSC 5206; 2022 ONSC 6138 ; 2023 ONSC 4638

**Textbooks**

32. Fridman, *The Law of Contract in Canada*, 6th ed. (Carswell, 2011) at 19.3

33. Swan, Adamski and Na, *Canadian Contract Law*, 4th ed. (LexisNexus, 2018)

34. Waddams, *Law of Damages*, 6th ed. (Carswell, 2021)

## SCHEDULE "B"

## LIST OF STATUTES

***Bankruptcy and Insolvency Act*, R.S.C., 1985, c. B-3**

**Definitions**

**2** In this Act,

[…]

***equity claim*** means a claim that is in respect of an equity interest, including a claim for, among others,

**(a)** a dividend or similar payment,

**(b)** a return of capital,

**(c)** a redemption or retraction obligation,

**(d)** a monetary loss resulting from the ownership, purchase or sale of an equity interest or from the rescission, or, in Quebec, the annulment, of a purchase or sale of an equity interest, or

**(e)** contribution or indemnity in respect of a claim referred to in any of paragraphs (a) to (d); (*réclamation relative à des capitaux propres*)

***equity interest*** means

**(a)** in the case of a corporation other than an income trust, a share in the corporation — or a warrant or option or another right to acquire a share in the corporation — other than one that is derived from a convertible debt, and

**(b)** in the case of an income trust, a unit in the income trust — or a warrant or option or another right to acquire a unit in the income trust — other than one that is derived from a convertible debt; (*intérêt relatif à des capitaux propres*)

[…]

**Claims provable**

- **121 (1)** All debts and liabilities, present or future, to which the bankrupt is subject on the day on which the bankrupt becomes bankrupt or to which the bankrupt may become subject before the bankrupt's discharge by reason of any obligation incurred before the day on which the bankrupt becomes bankrupt shall be deemed to be claims provable in proceedings under this Act.

[…]

**140.1** A creditor is not entitled to a dividend in respect of an equity claim until all claims that are not equity claims have been satisfied.

**IN THE MATTER OF THE *BANKRUPTCY AND INSOLVENCY ACT*, R.S.C. 1985, c. B-3, AS AMENDED**

Court File No. B-21-02734090-0031

**AND IN THE MATTER OF THE NOTICES OF INTENTION TO MAKE A PROPOSAL OF YG LIMITED PARTNERSHIP AND YSL RESIDENCES INC.**

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

Proceeding commenced at Toronto

# FACTUM OF MARIA ATHANASOULIS

*(Appeal of Disallowance of Claim)*

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