

**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.**

FACTUM OF THE APPLICANTS

June 18, 2021

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TO: SERVICE LIST

FACTUM OF THE APPLICANTS

PART I - INTRODUCTION

1. This motion is brought by YSL Residences Inc. ("**YSL Inc.**"), and YG Limited Partnership ("**YG LP**", and together with YSL Inc., "**YSL**") pursuant to the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 as amended (the "**BIA**"), for (i) an Order substantially in the form attached to the within motion record at Tab 3, (the "**Proposal Approval Order**"), among other things, approving the proposal filed with the Official Receiver on June 15, 2021 (the "**Further Amended Proposal**"), which proposal was accepted by the requisite majority of creditors of YSL at the Creditors' Meeting held on June 15, 2021, and (ii) should the Proposal Approval Order be granted, an Order that will facilitate the dismissal of certain actions commenced by creditors that have registered liens against title to the YSL Project lands, as requested by and consented to by the plaintiff parties to such actions (the "**Consenting Lien Creditors**").

2. The principal purpose of the Further Amended Proposal is to, among other things:

- (a) provide for the payment in full of the Secured Claims;
- (b) make a distribution of up to 58% of the amounts owing to each Affected Creditor; and
- (c) provide a viable path to completing the YSL Project in the near term, thereby preserving the vast majority of Condo Purchase Agreements (as defined below) and delivering much-needed housing supply to the Toronto market, while providing employment opportunities for those parties that will be involved in the go-forward construction of the YSL Project.¹

3. The Proposal Trustee has recommended that the Court approve the Further Amended Proposal and grant the Proposal Approval Order.

¹ Report to Creditors of the Proposal Trustee dated June 4, 2021 at section 4.1 at para 1 [**Report to Creditors**].

4. Should the Court grant the Proposal Approval Order, the parties will implement the transactions contemplated by the Further Amended Proposal, including the acquisition of the YSL Project lands by Concord Properties Developments Inc., or its nominee, and in this scenario the Consenting Lien Creditors have requested the assistance of this Court in facilitating the discharge of their respective liens, including the dismissal of actions commenced in respect of such liens in accordance with the *Construction Act* (Ontario).

5. If the Court does not grant the Proposal Approval Order, Timbercreek has leave to bring on for hearing its pending application for appointment of a receiver, to which there is no defence of which YSL is aware. If that were to come to pass, YSL's creditors face a serious risk of receiving a lower or nil recovery, and would certainly be delayed in obtaining any recovery.

PART II - SUMMARY OF FACTS

6. The facts underlying this motion are more fully set out in the affidavits of David Mann, sworn June 4, 2021 (the "**June 4 Affidavit**") and June 18, 2021, as well as the report of KSV Restructuring Inc. in its capacity as proposal trustee in respect of the Further Amended Proposal (in such capacity, the "**Proposal Trustee**"), dated June 4, 2021 (the "**Report to Creditors**"), and the Third Report of the Proposal Trustee, to be filed (the "**Third Report**").² All capitalized terms used but not defined herein have the meanings ascribed to them in the June 4 Affidavit, the Further Amended Proposal or the Report to Creditors, as applicable.

Background

7. Together, YSL are the owners and developers of an intended mixed-use office, retail and residential condominium project located at 363-385 Yonge Street, Toronto (the "**YSL Project**"). The YSL Project is a mixed-use office, retail and residential condominium development comprised of approximately 1,100 residential units, a commercial/retail component, and 242 parking spaces. As of the Filing Date, approximately 800 residential condominium units were pre-sold (collectively, the "**Condo Purchase Agreements**").³

² Affidavit of David Mann, sworn June 4, 2021.

³ Report to Creditors, *supra* at section 2.1 at para 4.

8. To date the YSL Project has obtained city zoning, drawings have been prepared, significant pre-sales of residential units achieved, and construction has commenced, with demolition, shoring and partial excavation having been completed to-date.⁴ However, due to YSL's insolvency, work has been halted on the YSL Project site, other than as necessary for site preservation and maintenance.

9. YG LP is subject to an Amended and Restated Limited Partnership Agreement Effective August 4, 2017 (the "**YG Partnership Agreement**"), and is a limited partnership registered under Manitoba law pursuant to *The Partnership Act*, CCSM c P30.⁵ The General Partner of YG LP is 9615334 Canada Inc. (the "**GP**").

10. There are eight (8) Limited Partners who are investors in YG LP and have Class A Preferred Units (the "**LPs**"), as well as 1 holder of Class B Units, which entities are related parties within the Cresford Group of Companies ("**Cresford**").

11. The LPs hold limited partnership units in YG LP.

12. Lax, O'Sullivan, Lissus Gottlieb LLP (Shaun Laubman) acts for three (3) LPs and it issued an Application in the Superior Court of Justice (Commercial List) bearing Court File No. CV-21-0061386-00CL requesting, among other relief, termination of the GP and a declaration that any agreements that it entered into are null and void.

13. Thornton Grout Finnigan LLP (Alexander Soutter) acts for five (5) LPs and it issued an Application in the Superior Court of Justice (Commercial List) bearing Court File No. CV-21-00661530-00CL requesting, among other relief, the appointment of a receiver and removing the GP.

14. The LPs oppose the approval of the Proposal, and one group seeks the nullification of these proposal proceedings. In accordance with the Endorsement of Justice Dunphy issued June 1, 2021 within these proceedings, YSL's response to the LP's applications is provided in a separate factum, and this factum addresses YSL's request that the Further Amended Proposal be approved.

⁴ June 4 Affidavit, at para 3.

⁵ Affidavit of Lue (Eric) Li, sworn May 3, 2021, at para 6.

15. Another stakeholder in opposition is Maria Athanasoulis, a former executive within Cresford that has filed a proof of claim with the proposal trustee, which claim was disputed by the Proposal Trustee for voting and distribution purposes ("**Ms. Athanasoulis' Claim**"). This treatment is consistent with the treatment of Ms. Athanasoulis' claims in the other insolvency proceedings that entities within Cresford are involved in.⁶

16. The YSL Project has been in acute financial trouble since early 2020, and the GP has been attempting to find a buyer able to execute the YSL Project on terms that would provide a return to the LPs since that time.⁷

17. Due to the aforementioned financial difficulties, YG LP defaulted on its loan agreement with its senior secured lender, Timbercreek Mortgage Servicing Inc. ("**Timbercreek**"), and subsequently entered into a series of forbearance agreements starting in March 2020. The most recent forbearance agreement requires that Timbercreek be paid in full by June 30, 2021 or Timbercreek will proceed with its Application to appoint a receiver. The Application to appoint a receiver is scheduled to be heard on July 12, 2021, although, pursuant to the Endorsement of the Honourable Justice Dunphy dated June 1, 2021, that timing is anticipated to be accelerated should the Court decline to approve the proposal.⁸

18. Initially in March 2020, and again in May 2020, Empire (Water Wave) Inc. ("**Empire**") engaged in discussions with the GP regarding the acquisition of the YSL Project. Empire submitted an Agreement of Purchase and Sale dated June 22, 2020 (as amended, the "**Empire APS**"). A further offer was presented on July 12, 2020 that provided any sale was contingent on the LPs executing a Special Resolution approving a sale of the YSL Project.⁹

19. On July 17, 2020, following certain conversations with Eric Li of YongeSL Investment Limited Partnerships, one of the LPs, the GP submitted a proposal which provided for a buy-back of 50% of the Class A units in the YG LP (financed by Empire) at cost. The remaining capital would remain the YG LP and earn a 100% return as provided for in the Limited

⁶ See, e.g. [Endorsement of the Honourable Justice Hainey](#) in the matter of *the Clover on Yonge Inc. and the Clover on Yonge Limited Partnership* dated January 8, 2021, Toronto, Court File No. CV-10-00642928-00CL (ONSC).

⁷ June 4 Affidavit, *supra* at para 4.

⁸ June 4 Affidavit, *ibid* at paras 34 and 37 to 41.

⁹ June 4 Affidavit, *ibid* at para 8.

Partnership Agreement. As an incentive to the LPs any monies owing to an entity of Cresford would be subordinated to the LPs.¹⁰

20. On July 20, 2020, the GP was asked by certain of the LPs to provide a copy of the Empire APS. Although Empire was unwilling to consent to provide the LPs a copy of the Empire APS, it did provide the LPs with a summary of the proposed transaction.¹¹

21. In late July, after hearing that the LPs wished to redeem all of their units, Empire further revised the Empire APS such that funds would be provided on an expected closing date of September 22, 2020 sufficient to redeem all units at principal plus 12.25% accrued interest.¹²

22. Despite efforts to strike a deal with the LPs, the GP's efforts to obtain full recovery of their capital investment and multiple extensions by Empire, no agreement was reached and all negotiations with Empire ended in late September 2020.¹³

23. The GP then entered into discussions with Concord Adex Inc. to determine whether it had any interest in the YSL Project.¹⁴

24. The GP entered into a Term Sheet with Concord Properties Developments Corp. ("**Concord**") on November 20, 2020 (the "**Concord Term Sheet**") pursuant to which the GP would hand over management of the YSL Project to Concord or another Concord entity. Pursuant to the terms of the Concord Term Sheet, any profits earned on the YSL Project would be shared. However, the Concord entity had to obtain construction financing and would provide mezzanine financing.¹⁵ The LPs who signed a non-disclosure agreement were provided with a copy of the Concord Term Sheet.¹⁶

25. On November 30, 2020, YSL had a meeting with certain of the LPs to review the proposed arrangement with Concord. YSL proposed that the LPs forgo interest until January 1, 2021 and then receive an 8% return on their investment until completion of the YSL Project. In

¹⁰ June 4 Affidavit, *ibid* at para 10.

¹¹ June 4 Affidavit, *ibid* at para 11.

¹² June 4 Affidavit, *ibid* at paras 14 and 19.

¹³ June 4 Affidavit, *ibid* at para 17.

¹⁴ June 4 Affidavit, *ibid* at para 20.

¹⁵ June 4 Affidavit, *ibid* at para 23.

¹⁶ June 4 Affidavit, *ibid* at para 24.

exchange, Cresford and its subsidiaries would subordinate their unsecured claim (which, as debt, has priority to the LPs' equity investments). The LPs were not prepared to negotiate and the request was thereafter dropped.¹⁷

26. Subsequent to these events, Otera Capital Inc. ("**Otera**") came forward with an interest to provide Concord the financing necessary to complete the YSL Project. However, Otera required substantial changes to the structure initially envisaged by the Concord Term Sheet and insisted that Concord obtain complete ownership of the YSL Project, without any go-forward participation by any Cresford-related entities. As a result, in April 2021, Concord re-approached YG LP and proposed that it would sponsor a proposal under the BIA, whereby all secured creditors and registered construction lien claimants would be paid in full and the unsecured creditors would receive 58¢ on the dollar.¹⁸

27. On April 30, 2021, YSL, certain Cresford entities and Concord Properties Developments Corp. (the "**Sponsor**"), a Concord affiliate, with the consent and support of YSL's secured lenders, executed an agreement whereby the Sponsor agreed to sponsor a proposal to be made to YSL's creditors pursuant to the BIA. In consideration for its sponsorship of the Further Amended Proposal, should the proposal was implemented, the Sponsor or another Concord-affiliate would become the owner and developer of the YSL Project, with a view to completing the YSL Project, including by assuming the vast majority of purchase agreements for pre-sold condominium units.¹⁹

Proposal Proceedings

28. On April 30, 2021, each of the YSL entities filed Notices of Intention to Make a Proposal (the "**NOIs**").²⁰

29. The YSL Inc and YSL LP estates were consolidated (together, the "**Consolidated Estates**") by an Order of Madam Justice Gilmore on May 14, 2021. The Consolidated Estates now bear Court File No. 31-2734090.²¹

¹⁷ June 4 Affidavit, *ibid* at para 26.

¹⁸ June 4 Affidavit, *ibid* at paras 27 and 30.

¹⁹ Report to Creditors, *supra* at section 2.1 at para 7.

²⁰ June 4 Affidavit, *supra* at para 31.

30. On May 27, 2021, YSL filed a proposal in accordance with Section 50(2) of the BIA (the "**Original Proposal**"). Following discussions with the Proposal Trustee, and as a result of feedback received from various stakeholders, the Original Proposal was amended and filed with the Official Receiver on June 3, 2021 (the "**Amended Proposal**"). Following additional discussions and stakeholder feedback, the Amended Proposal was further amended immediately prior to the meeting of creditors and the Further Amended Proposal was filed with the Official Receiver on June 15, 2021.²²

(i) ***Key Terms of the Amended and Further Amended Proposal***

31. On June 4, 2021, the Proposal Trustee provided a Notice of Proposal to Creditors and its Report to Creditors by regular mail, the Office of the Superintendent in Bankruptcy and to every known creditor affected by the Amended Proposal (the "**Materials**"). The Proposal Trustee then posted the Materials on its website.

32. The Report to Creditors included a detailed summary of the Amended Proposal. The salient features of the Amended Proposal are described below:

- (a) ***Classes of Creditors*** – for the purposes of voting on the Amended Proposal, there is only one class of creditors, being the Affected Creditor Class.²³
- (b) ***Treatment of Affected Creditors*** – the Amended Proposal is being made to the holders of Affected Claims against YSL. Unaffected Claims under the Amended Proposal include: (i) the Claims of YSL's senior secured creditor, Timbercreek; (ii) the Claims of YSL's second-ranked secured creditor, Westmount; (iii) the Claims of YSL's third-ranked secured creditor 2576725 Ontario Inc.; (iv) any Claim by the City of Toronto; (v) all Condo Purchaser Claims; (vi) all Construction Lien Claims, but only to the extent such Claims are valid in accordance with the *Construction Act* (Ontario) and have been perfected by the Proposal Implementation Date; (vii) Administrative Fees and Expenses, including the fees, expenses and legal fees and disbursements incurred by or on behalf of

²¹ Report to Creditors, at section 1.0 at para 2.

²² June 4 Affidavit, at para 32.

²³ Report to Creditors, at section 4.2 at para 1.

the Proposal Trustee and the solicitors of the Companies; and (viii) such other Claims as the Companies and Sponsor may agree with the consent of the Proposal Trustee.²⁴

- (c) **Convenience Creditors** – a Convenience Creditor is an Affected Creditor with a Convenience Creditor Claim, being: (i) any Proven Claims of an Affected Creditor in an amount less than or equal to \$15,000; and (ii) any Proven Claim of an Affected Creditor in an amount greater than \$15,000 if the relevant Creditor has submitted a valid Convenience Creditor Election Form prior to 5:00 pm (Toronto time) on June 14, 2021, the Convenience Creditor Election Deadline. A Convenience Creditor was deemed to have voted the full amount of its Proven Claim in favour of the approval of the Amended Proposal.²⁵
- (d) **Conditional Claims** - Conditional Claims include, but are not limited to, any Claim of an Affected Creditor that is not a Proven Claim as at the Filing Date of April 30, 2021 because one or more conditions precedent to establish such Affected Creditor's entitlement to payment by the Companies had not been completed in accordance with any applicable contractual terms as at the Filing Date, and such Affected Creditor has indicated in its proof of claim that the Claim should be treated as a Conditional Claim. This provision was included in the Amended Proposal both for the benefit of any affected creditors who may need more time to complete their obligations to establish their claim, as well as the for the overall benefit of the YSL Project, which benefits from the completion of such creditors' obligations to YSL.
- (e) **Proposal Conditions** – Implementation of the Amended Proposal is conditional upon, among other things: (i) acceptance of the Amended Proposal by the statutory majority of the Affected Creditors as required under the BIA; (ii) the order approving the Amended Proposal being issued by the Court in a form and substance satisfactory to the Sponsor; (iii) registrations in respect of all encumbrances, including without limitation any registrations in respect of

²⁴ Report to Creditors, at section 4.3 at paras 1 and 2.

Construction Lien Claims, but excluding the Permitted Encumbrances, shall have been deleted from title to the Real Property, provided that, should the Implementation of the Proposal not occur following the deletion of an Affected Creditor's encumbrance pursuant to this provision, such Affected Creditor shall have the right to renew such registration; (iv) sufficient financing for the acquisition of the Real Property by the Sponsor, or its nominee, shall have been provided by Otera, on terms satisfactory to the Sponsor, and all material conditions precedent to such financing shall be capable of completion by the Sponsor prior to the Proposal Implementation Date; (v) the Proposal Implementation Date occurring on June 30, 2021, or any such other date prior to July 31, 2021 as may be agreed by the Sponsor; and (vi) the Companies shall have delivered the Implementation Certificate to the Proposal Trustee.²⁶

- (f) **Release** – upon Implementation, each of the Released Parties shall be released and discharged from all present and future actions, causes of action, damages, judgement, executions, obligations, liabilities and Claims arising on or prior to the Proposal Implementation Date in connection with the Amended Proposal and any proceedings commenced with respect to or in connection with the Amended Proposal, the YSL Project, the transactions contemplated by the Amended Proposal, and any other actions or matters related directly or indirectly to the foregoing, provided that the current and former directors and officers of YSL, General Partner, and its affiliates shall not be released in respect of any : (i) secured claims of Timbercreek; (ii) Equity Claim, as defined in section 2 of the BIA or any analogous claim in respect of a partnership interest; or (iii) any claim by a former employee of YSL or its affiliates relating to unpaid wages or other employment remuneration.²⁷ Based on feedback received from counsel to the LPs and counsel to certain former employees, the scope of the releases was amended on June 15, 2021 in the Further Amended Proposal to provide for the carve outs

²⁵ Report to Creditors, at section 4.4 at para 1 and 2.

²⁶ Report to Creditors, at section 4.10 at para 1.

²⁷ Report to Creditors, at section 4.11 at para 1(a).

described in items (ii) and (iii) in the preceding sentence in an attempt to address the concerns raised.

- (g) **Equity Claims** - holders of Equity Claims shall not be entitled to vote in respect of their Equity Claims at the Creditors' Meeting and shall not receive any distribution under the Amended Proposal on account of their Equity Claims. Upon Implementation, all Equity Claims against YSL shall, and shall be deemed to be, irrevocably and finally extinguished and all Existing Equityholders shall have no further right, title or interest in and to their respective Equity Claims.²⁸ The Amended Proposal does not prevent the holders of Equity Claims from pursuing claims against YSL's current and former directors and officers.

33. The Further Amended Proposal remains entirely consistent with the description of the Amended Proposal with the exception of the caveat provided at the end of paragraph 32(f).

(ii) **The Creditors' Meeting**

34. The Creditors' Meeting was held on Tuesday, June 15, 2021 at which meeting the Further Amended Proposal was unanimously accepted by 46 creditors representing approximately \$18.5 million dollars in value of claims voted to approve the Amended Proposal.²⁹

35. The Report to Creditors dated June 4, 2021 by KSV Restructuring Inc (the "**Report to Creditors**") recommended that the unsecured creditors vote in favour of the Amended Proposal. The Report to Creditors stated that the Proposal Trustee retained Finnegan Marshal Inc. ("**FMI**"), an industry leading construction cost consultant in the Greater Toronto Area market, to report on the Appraisals of CBRE in 2019, the current CBRE Appraisal prepared in May 2021 and to analyze several alternatives to the Amended Proposal. The Proposal Trustee concluded from the analysis undertaken by FMI that: (i) the recovery under the Amended Proposal was a much better recovery for the unsecured creditors than in any other alternative transaction; and (ii) there is no alternative transaction available that would satisfy YSL's debts and provide any return to

²⁸ Report to Creditors, at section 4.11 at para 1(h).

²⁹ Third Report of the Proposal Trustee.

the LPs.³⁰ As noted in paragraph 33, the Further Amended Proposal is in form and substance almost identical to the Amended Proposal.

36. Further, prior to the Creditors' Meeting, and in respect to a request from counsel to the LPs, FMI was presented with documentation relating to three prior potential transactions for the purchase and sale of the YSL Project, but were ultimately not consummated. These documents were not available to FMI during the preparation of its report. However, the Proposal Trustee announced at the Creditors' Meeting that FMI had reviewed these additional documentation and advised that this information did not change its analysis or the conclusions set out in its report.

37. In accordance with the provisions of the BIA, the Proposal Trustee sent the prescribed notice to creditors (section 58(b) of the BIA) on June 4, 2021, with respect to the hearing before the Court on June 23, 2021 for approval of the Further Amended Proposal. The Proposal Trustee further filed with the Official Receiver the prescribed report (section 58(c) of the BIA). The notice was also posted on the Proposal Trustee's website.

PART III - ISSUES

38. The primary issues to be considered on this motion is whether the Court should:
- (a) grant the Proposal Approval Order approving the Further Amended Proposal pursuant to section 59 of the BIA; and
 - (b) should the Court be inclined to grant the Proposal Approval Order, whether the Court ought to grant the Lien Action Dismissal Order.

³⁰ Report to Creditors, at section 6.1 at para 4 and 6.

PART IV - LAW AND ARGUMENT

A. *Proposal Approval Order*

Procedure on a Proposal

39. Pursuant to section 54(2)(d) of the BIA, a proposal is deemed to be accepted by the creditors if it has achieved the requisite "double majority" vote at a duly constituted meeting of creditors:

the proposal is deemed to be accepted by the creditors if, and only if, all classes of unsecured creditors - other than, unless the court orders otherwise, a class of creditors having equity claims - vote for the acceptance of the proposal by a majority in number and two thirds in value of the unsecured creditors of each class present, personally or by proxy, at the meeting and voting on the resolution. [*Emphasis added*]

Test for Court Approval of a Proposal

40. Under section 59(2) of the BIA, the Court will refuse to approve a proposal where its terms are not reasonable or are not calculated to benefit the general body of creditors. Further, courts have held that in order to satisfy section 59(2) of the BIA, the following three-pronged test must be satisfied:

- (a) the proposal must be reasonable;
- (b) the proposal must be calculated to benefit the general body of creditors; and
- (c) the proposal must be made in good faith.³¹

41. The first two (2) factors are set out in section 59(2) of the BIA, while the last factor has been implied by the Court as an exercise of its equitable jurisdiction.³²

42. In considering the foregoing factors, it has been held that the Court should take into account not only the wishes and interests of creditors, but also the conduct and interests of the

³¹ *Mayer (Re)*, 1994 CanLII 7461 (ON SC) at para 2 [*Mayer*]; *Magnus One Energy Corp (Re)*, 2009 ABQB 200 at para 10 [*Magnus One*].

³² *Mayer*, at para 3.

debtor, the interests of the public and future creditors and the requirements of commercial morality.³³

43. The Court should also accord substantial deference to: (i) the majority vote of creditors at a meeting of creditors; and (ii) the recommendation of the trustee on the proposal.³⁴

44. Given that: (i) the creditors voting at the Creditors' Meeting voted in unanimously favour of the Further Amended Proposal; (ii) the Proposal Trustee has recommended the approval of the Further Amended Proposal; and (iii) no strong reasons weigh against the judgment of YSL's creditors and the Proposal Trustee – YSL submits that the test for court approval of the Further Amended Proposal has been met. The enumerated factors are set out in greater detail below.

(i) *The Terms of the Further Amended Proposal are Reasonable*

45. With respect to the first prong of the test for approving a proposal, the Court must be satisfied that the terms of the proposal are "not unreasonable".

46. Courts have interpreted "reasonable" to mean the proposal can be carried out in accordance with its terms:

The court is authorized to approve only proposals which are reasonable and calculated to benefit the general body of creditors. "Reasonable" means that on a dispassionate view, the court is satisfied that the things proposed can, in fact, be carried out. The court, in other words, reviews the terms of the proposal in order to ensure that creditors have not, in their enthusiasm or lack of attention approved a proposal which is bound to fail.³⁵

47. Additionally, the proposal must meet the requirements of commercial morality and must maintain the integrity of the bankruptcy system.³⁶ Deference must also be given to creditor support – if a large majority of creditors (i.e., substantially in excess of the statutory majority) have voted for acceptance of a proposal, it will take strong reasons for the court to substitute its judgment for that of creditors.³⁷ As noted in this case, the Further Amended Proposal was

³³ [Abou-Rached, \(In Bankruptcy\)](#), 2002 BCSC 1022 at para 68 [[Abou-Rached](#)], [Magnus One](#), at para 11.

³⁴ [Abou-Rached](#), at para 65; [Magnus One](#), *ibid* at para 11.

³⁵ [Booth \(Re\)](#), 1998 CarswellOnt 2053 (O.C.G.D., in Bkcy) at para 6.

³⁶ [Abou-Rached](#), at para 68.

³⁷ [Abou-Rached](#), at para 66.

unanimously approved by voting creditors and the Proposal Trustee has recommended that the Court approve the Proposal.³⁸

48. In the present case, the Further Amended Proposal provides for a certain and timely recovery for the Affected Creditors with Proven Claims by way of a distribution: (i) in the amount of its Affected Creditor Share, net of the Superintendents Levy, to be made by the Proposal Trustee from the fund established by the Proposal Sponsor; or (ii) if the aggregate Affected Creditor Share amount payable to all Affected Creditors exceeds the Maximum Proposal Claims Amount, then each Affected Creditor shall receive its Affected Creditor Pro Rata Share. All Convenience Creditors are to receive in respect of their Convenience Creditor Claim, the Convenience Creditor Consideration, net of the Superintendent's Levy.³⁹

49. YSL has been insolvent for more than a year and creditors have by and large been unpaid during that time.⁴⁰ As detailed below, the Further Amended Proposal provides for a meaningful recovery of up to 58¢ on the dollar value of each Affected Creditor's claim – the Further Amended Proposal unequivocally provides for a greater recovery than any other option currently in front of the Court, and, according to FMI, a greater recovery than is likely under any alternative transaction.

50. The acquisition of the YSL Project by Concord is reasonable in light of its role as Sponsor, moreover, it will allow for completion of the YSL Project. As previously noted, approximately 800 residential condominium units were pre-sold as at the Filing Date.⁴¹ Unlike other comparable proceedings,⁴² the Further Amended Proposal proposes to honour the Condo Purchase Agreements (with the exception of approximately 60 Condo Purchase Agreements which were disclaimed because they were under market)⁴³ as opposed to terminating them *en masse* – the effect of which would be to significantly increase the quantum of YSL's debt, in

³⁸ Third Report of the Proposal Trustee.

³⁹ Report to Creditors, at section 4.6.

⁴⁰ Construction trades involved in ongoing site maintenance operations (principally dewatering) have been paid since the outset of these proceedings.

⁴¹ Report to Creditors, at section 2.1 at para 4.

⁴² [Approval and Vesting Order](#) in the matter of *33 Yorkville Residences Inc. and 33 Yorkville Residences Limited Partnership* dated March 11, 2021 at para 8, Toronto, Court File No. CV-20-00637297-00CL (ONSC).

⁴³ Report to Creditors, at section 2.1 at para 5.

addition to the human-scale impact of cancelling nearly 800 new homes in a supply-constrained housing market.

51. In its Report to Creditors, the Proposal Trustee provided its analysis as to the estimated distributions in the event of a bankruptcy. The Report to Creditors relies on the FM Report which indicates that the value of the YSL Project under the Amended Proposal exceeds the value of the YSL Project if it was sold through the As-Is Scenario or the Re-Sell Scenario⁴⁴

52. The Further Amended Proposal is clearly capable of being implemented in accordance with its terms, was unanimously approved by YSL's creditors and is intended to provide all Affected Creditors with a greater recovery than they would otherwise receive if YSL were to become bankrupt under the BIA.

53. The Proposal Trustee recommended that the creditors of YSL vote in favour of the Amended Proposal and is of the view that there is greater value to YSL's creditors in the Amended Proposal than in a bankruptcy scenario, or any other scenario for that matter, for the following reasons:

- (a) the FM Report reflects that the value of the YSL Project under the Amended Proposal exceeds the value of the YSL Project under the As-Is and Re-Sell Scenarios;
- (b) Affected Creditors will have an opportunity for a recovery of up to 58¢ on the dollar value of their claims; and
- (c) the FM Report stipulates that distribution to Affected Creditors may be nil if the YSL Project is marketed for sale.⁴⁵

54. In light of the foregoing, it is respectfully submitted that the terms of the Further Amended Proposal meet the reasonableness standard under the test for court approval.

⁴⁴ Report to Creditors, at section 6.1 para 6.

⁴⁵ Report to Creditors, at section 7.0 at paras 1-5.

(ii) *The Proposal Benefits the General Body of Creditors and is the Only Transaction that will Provide a Material Recovery to Unsecured Creditors*

55. Under the second branch of the test for approving a proposal, the Court must be satisfied that the proposal is calculated to benefit the general body of creditors.

56. Courts have refused to approve proposals on this prong of the test where, for example, the proposal serves the interests of persons other than the creditors; where there has not been full disclosure of the assets of the debtor and the encumbrances against those assets; or where the proposal, by its terms, is bound to fail.⁴⁶ YSL submits that none of those circumstances are present in this case. Rather, the Further Amended Proposal provides for an even-handed distribution to Affected Creditors. Additionally, creditors were provided with full and frank disclosure of the terms of the Further Amended Proposal prior to the Creditors' Meeting and voted unanimously in support of the Further Amended Proposal. Such overwhelming support is strong evidence of the benefit perceived by the general body of creditors.

57. The Further Amended Proposal includes the payment in full of Convenience Creditors, or to each creditor who delivered a Convenience Creditor Election Form to the Proposal Trustee by the Convenience Creditor Election Deadline – the latter of which shall receive the lesser of: (i) \$15,000; and (ii) the amount of its Proven Claim. While each case must be reviewed in its unique circumstances, payout of the type provided to the Convenience Creditors is not uncommon in Canadian restructurings. This Court has accepted that creditors who receive payout of such claims may be deemed to have voted in favour of a compromise and arrangement of the debtor's affairs.⁴⁷

58. Additionally, YSL contacted multiple developers and there was little interest in the YSL Project. All other options, including the deal with Empire, were rejected by the LPs. As such, the Further Amended Proposal is not only the best and most viable option currently available to the creditors of YSL, but the only actionable option likely to result in the construction of the YSL Project (as opposed to the cancellation of the project outright).⁴⁸ A corollary of this dynamic is

⁴⁶ *Abou-Rached*, at para 78.

⁴⁷ *Re Lutheran Church – Canada*, 2016 ABQB 419 at para 155.

⁴⁸ June 4 Affidavit, at para 61.

that any alternative transaction will likely take considerable time and resources to attract and secure, the result of which will be significant delay to any recovery for secured and unsecured creditors alike, all with no assurances that a superior recovery than that offered by the Further Amended Proposal is achievable – in fact, the FM Report indicates a superior outcome is highly unlikely in the circumstances.

59. The appropriateness of the Proposal is apparent when compared to the outcome of the receivership sales process conducted in respect of the Halo condominium project, another of Cresford's projects that undertook insolvency proceedings. Like the YSL Project, the Halo project is located in downtown Toronto and was only partially constructed at the commencement of proceedings, similarly a partially excavated hole. The results of the receiver-supervised sale process conducted on Halo are set out in the Fourth Report to the Court of the receiver in those proceedings. In Halo:

- (a) Eight (8) expressions of interest were submitted by bidders at the Phase 1 Bid Deadline, and all eight contemplated the termination of all existing agreements of purchase and sale with condominium buyers; and
- (b) Only two (2) Final Bids were submitted at the Phase 2 Bid Deadline, one of which was from a Concord-affiliated entity. The receiver there noted that the remaining interested parties were unable to obtain financing or other approvals to proceed with a final bid.⁴⁹

60. The Applicants submit that the outcome in Halo should inform the Court's reasoning in the present case, particularly given that the YSL Project is a larger scale than the Halo project with additional complexities, thereby reducing the number of developers able to perform a project at such scale.

61. It is important to recognize that the transactions contemplated by the Proposal – the acquisition of the real property and material contracts by Concord – are firm deals, but for approval by this Court. For clarity, there are no due diligence, financing or any other conditions

⁴⁹ [Fourth Report to the Court of PriceWaterhouseCoopers Inc.](#) in its capacity as receiver of 480 Yonge Street Inc. and 480 Yonge Street Limited Partnership dated August 28, 2020 at paras 28-30.

that will prevent the expeditious closing of the Concord transactions after this Court approves the Proposal.

62. The value of a firm deal in this asset class cannot be overstated, and the rarity of this transaction is apparent when the certainty of the Proposal is compared to the uncertain outcomes on Cresford's other insolvent condominium development projects.

63. In light of the foregoing, it is respectfully submitted that the terms of the Further Amended Proposal are calculated to benefit the general body of creditors.

(iii) The Further Amended Proposal is Made in Good Faith

64. Any person seeking Court approval of a proposal must be acting in good faith which requires full disclosure of the assets of the debtor and the encumbrances against them.⁵⁰ When making a determination on good faith, the Court must consider whether the proposal is fashioned such that, having regard to the interests of creditors and the public, it preserves the integrity of the bankruptcy system and complies with the requirements of commercial morality.⁵¹

65. As explained above, the principal purpose of these proceedings is to, among other things:

- (a) provide for the payment in full of the Secured Claims;
- (b) make a distribution of up to 58% of the amounts owing to each Affected Creditor; and
- (c) provide a viable path to completing the YSL Project in the near term, thereby preserving the vast majority of Condo Purchase Agreements and delivering much-needed housing supply to the Toronto market, while providing employment opportunities for those parties that will be involved in the go-forward construction of the YSL Project.⁵²

66. YSL has been acting in good faith, and in compliance with section 4.2 of the BIA, throughout these proceedings. The benefit to YSL's creditors are greater under the terms of the

⁵⁰ [Mayer](#), at para 6.

⁵¹ [In the matter of the Proposal of Innovative Coating Systems Inc.](#), 2017 ONSC 3070 at para 24.

Further Amended Proposal than would otherwise arise from a bankruptcy. As noted, YSL's response to the objections of the limited partners of YG LP are set out in a separate factum.

67. The GP took all necessary steps to address YSL's insolvency which culminated in the Further Amended Proposal. Despite being provided with a number of accretive alternatives prior to the filing of the NOIs, the LPs refused to negotiate. As a result, Concord and its financier Otera were the only remaining parties at the table. By refusing the alternative transactions proposed to them, the LPs left YSL with no choice but to pursue the Proposal transaction.

68. Based on the FM Report, there is no likely scenario where the LPs will see a return on their investment. Nevertheless, the Further Amended Proposal does not preclude the LPs from pursuing recovery as against the directors and officers of YSL.

69. The Further Amended Proposal was drafted in a manner to properly reflect the interests of creditors, the requirements of commercial morality and maintains the integrity of the bankruptcy system. To this point, it would be perverted and directly adverse to the requirements of commercial morality and the integrity of the bankruptcy system, if the LPs, whose claims are exhausted, could derail the Further Amended Proposal to their exclusive benefit and the detriment of all other creditors of YSL. Moreover, section 60(1.7) of the BIA is clear that there can be no return to equity unless, and until, all debtors are paid in full – the LPs should not be able to hold YSL's creditors hostage and prevent them from realizing on their only viable chance for a recovery under the Further Amended Proposal.

70. In light of the foregoing, it is respectfully submitted that the Further Amended Proposal has been made in good faith and with the best interests of YSL's stakeholder community in mind.

Ms. Athanasoulis' Claim

71. As previously noted, while the Further Amended Proposal was unanimously approved by voting creditors, there remains one significant unresolved voting claim, Ms. Athanasoulis' Claim, which she has valued at \$19 million. If Ms. Athanasoulis' Claim were accepted on its face, the Further Amended Proposal would have been defeated. However, all but \$1 million dollars of Ms.

⁵² Report to Creditors, at section 4.1 at para 1.

Athanasoulis' \$19 million Claim is a claim for a share of profits and alleged profit entitlements tied to the YSL Project. Notwithstanding that the large majority of Ms. Athanasoulis' Claim is tied to contingent future events that have not yet and will not occur (the YSL Project is intractable insolvent, and the FM Report indicates no profit is achievable in the face of YSL's current debt load), and are therefore contingent, too remote and speculative at best, equity claims are not counted for voting purposes under the BIA.

72. If the Proposal Trustee's assessment is correct and Ms. Athanasoulis' profit entitlement claim has no value (due either to the fact that it is an equity claim, or a contingent claim too speculative to value), then the Further Amended Proposal is approved.

73. The criterion used by courts to determine whether a contingent claim will be included in the insolvency process is whether the event that has not yet occurred is too remote or speculative. A creditor with a contingent claim bears the onus of showing that its claim is neither speculative nor remote.⁵³

74. By way of example, in *Nalcor Energy v. Grant Thornton*, 2015 NBQB 20, where the proposal trustee's decision to disallow a contingent creditor's claim for purposes of voting was affirmed by the Court on a summary basis, many of the facts were strikingly similar:

- (a) the proposal had the overwhelming support of almost all creditors;
- (b) the claim in question had been challenged in good faith;
- (c) the contested claim was larger than the claim of any other creditor;
- (d) the creditor in question was one of the only creditors who intended to vote against the proposal; and
- (e) the creditor in question was the only creditor who stood to benefit from the failure of the proposal.⁵⁴

⁵³ [Newfoundland and Labrador v. AbitibiBowater Inc.](#), 2012 SCC 67, [2012] S.C.R. 443 at para 36; [Air Canada, Re](#), 2004 CanLII 6674 (ON SC) at para 5.

⁵⁴ [Nalcor Energy v. Grant Thornton](#), 2015 NBQB 20 at para 35.

75. Moreover, even if the Court was somehow convinced that Ms. Athanasoulis' Claim has a reasonable expectation of profits that is was not too remote or speculative, the fact is that a profit claim is an equity claim and therefore not counted for voting purposes.⁵⁵

76. The BIA's definition of "equity claim" is sufficiently broad to include profit participation, which is exactly the type of claim being alleged in Ms. Athanasoulis' Claim. In this regard, "equity claim" under the BIA means:

"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)"

77. The Proposal Trustee's treatment of Ms. Athanasoulis' Claim in the present case is also entirely consistent with the treatment of Ms. Athanasoulis' claim by Mr. Justice Hainey in the Companies' Creditors Arrangement Act proceedings in respect of The Clover on Yonge Limited Partnership ("Clover"), another of Cresford's projects. There, as here, Ms. Athanasoulis' asserted a claim for an entitlement to the profits of the insolvent Clover project. There, as here, Ms. Athanasoulis' asserted that her claim should be valued at a date other than the commencement of the receivership proceedings because, as here, no profit had been generated by the Clover project at the commencement of insolvency proceedings (as should be self-evident). In upholding the receiver's dismissal of Ms. Athanasoulis' claim for voting purposes on Clover, Mr. Justice Hainey concluded that "to argue that the relevant date to calculate her profit-sharing claim is later than the Receivership Appointment date and that profit will be derived from the Clover on

⁵⁵ [Bankruptcy and Insolvency Act, R.S.C., 1985, c. B-3](#), s. 54.1.

Yonge Project is **far too remote and speculative and lacks an air of reality**" [emphasis added].⁵⁶

78. In light of the foregoing, Ms. Athanasoulis' Claim cannot, at the highest end, be valued at anything more than \$1 million for voting purposes in respect of the Further Amended Proposal - being the amount claimed in respect of wrongful dismissal (the substance of which claim is also disputed, but which dispute is not relevant for the within motion) - and the Further Amended Proposal would have met the requisite thresholds for approval notwithstanding her no vote.

B. Lien Action Dismissal Order

79. Should the Court approve the proposed Proposal Approval Order, YSL is also seeking an Order to dismiss certain lien actions commenced by construction trade creditors that have registered liens on title to the YSL Project lands (collectively, the "**Lien Action Dismissal Order**"). As part of the discharge of liens contemplated by section 6.01 of the Amended Proposal, these lien-holder creditors have requested and consented to this Order to expedite the consensual resolution of their lien claims in the event that the Further Amended Proposal is proceeding to implementation. For clarity, the Proposal Sponsor, YSL and the lien-holder creditors will work collaboratively to have the liens discharged from title as a separate consensual process, and no relief is requested in this regard: the requested relief is limited to the dismissal of lien actions, at the request of and on the consent of the plaintiffs to such actions.

80. The Lien Action Dismissal Order is imperative to Implementation and the overall success of the Further Amended Proposal.

PART V - RELIEF REQUESTED

81. YSL submits that they meet all the qualifications required to obtain the requested relief and request that this Court grant the proposed form of Proposal Approval Order and Lien Action Dismissal Order.

⁵⁶ [Endorsement of the Honourable Justice Hainey](#) in the matter of *the Clover on Yonge Inc. and the Clover on Yonge Limited Partnership* dated January 8, 2021, Toronto, Court File No. CV-10-00642928-00CL (ONSC).

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 18th day of June, 2021.



per: Harry Fogul

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SCHEDULE "A"
LIST OF AUTHORITIES

Cases Cited

1. [*Abou-Rached, \(In Bankruptcy\)*](#), 2002 BCSC 1022
2. [*Air Canada, Re*](#), 2004 CanLII 6674 (ON SC)
3. [*Booth \(Re\)*](#), 1998 CarswellOnt 2053 (O.C.G.D., in Bkcy)
4. [*In the matter of the Proposal of Innovative Coating Systems Inc.*](#), 2017 ONSC 3070
5. [*Magnus One Energy Corp \(Re\)*](#), 2009 ABQB 200
6. [*Mayer \(Re\)*](#), 1994 CanLII 7461 (ON SC)
7. [*Newfoundland and Labrador v. AbitibiBowater Inc.*](#), 2012 SCC 67, [2012] S.C.R. 443
8. [*Nalcor Energy v. Grant Thornton*](#), 2015 NBQB 20
9. [*Re Lutheran Church – Canada*](#), 2016 ABQB 419

Motion Materials and Court Orders

1. [*Approval and Vesting Order*](#) in the matter of *33 Yorkville Residences Inc. and 33 Yorkville Residences Limited Partnership* dated March 11, 2021, Toronto, Court File No. CV-20-00637297-00CL (ONSC)
2. [*Endorsement of the Honourable Justice Hainey*](#) in the matter of *the Clover on Yonge Inc. and the Clover on Yonge Limited Partnership* dated January 8, 2021, Toronto, Court File No. CV-20-00642928-00CL (ONSC)

SCHEDULE "B"
STATUTES RELIED ON

BANKRUPTCY AND INSOLVENCY ACT, RSC 1985, C B-3

Section 2

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*).

Section 4.2

Good faith

(1) Any interested person in any proceedings under this Act shall act in good faith with respect to those proceedings.

Good faith — powers of court

(2) If the court is satisfied that an interested person fails to act in good faith, on application by any interested person, the court may make any order that it considers appropriate in the circumstances.

Section 50

Documents to be filed

(2) Subject to section 50.4, proceedings for a proposal shall be commenced, in the case of an insolvent person, by filing with a licensed trustee, and in the case of a bankrupt, by filing with the trustee of the estate,

- (a) a copy of the proposal in writing setting out the terms of the proposal and the particulars of any securities or sureties proposed, signed by the person making the proposal and the proposed sureties if any; and
- (b) the prescribed statement of affairs.

Section 54

Voting system

- (2) For the purpose of subsection (1),
- (a) the following creditors with proven claims are entitled to vote:
 - (i) all unsecured creditors, and
 - (ii) those secured creditors in respect of whose secured claims the proposal was made;
 - (b) the creditors shall vote by class, according to the class of their respective claims, and for that purpose
 - (i) all unsecured claims constitute one class, unless the proposal provides for more than one class of unsecured claim, and
 - (ii) the classes of secured claims shall be determined as provided by subsection 50(1.4);
 - (c) the votes of the secured creditors do not count for the purpose of this section, but are relevant only for the purpose of subsection 62(2); and
 - (d) the proposal is deemed to be accepted by the creditors if, and only if, all classes of unsecured creditors — other than, unless the court orders otherwise, a class of creditors having equity claims — vote for the acceptance of the proposal by a majority in number and two thirds in value of the unsecured creditors of each class present, personally or by proxy, at the meeting and voting on the resolution.

Section 58

Application for court approval

On acceptance of a proposal by the creditors, the trustee shall

- (a) within five days after the acceptance, apply to the court for an appointment for a hearing of the application for the court's approval of the proposal;
- (b) send a notice of the hearing of the application, in the prescribed manner and at least fifteen days before the date of the hearing, to the debtor, to every creditor who has proved a claim, whether secured or unsecured, to the person making the proposal and to the official receiver;
- (c) forward a copy of the report referred to in paragraph (d) to the official receiver at least ten days before the date of the hearing; and
- (d) at least two days before the date of the hearing, file with the court, in the prescribed form, a report on the proposal.

Section 59

Court to hear report of trustee, etc.

(1) The court shall, before approving the proposal, hear a report of the trustee in the prescribed form respecting the terms thereof and the conduct of the debtor, and, in addition, shall hear the trustee, the debtor, the person making the proposal, any opposing, objecting or dissenting creditor and such further evidence as the court may require.

Court may refuse to approve the proposal

(2) Where the court is of the opinion that the terms of the proposal are not reasonable or are not calculated to benefit the general body of creditors, the court shall refuse to approve the proposal, and the court may refuse to approve the proposal whenever it is established that the debtor has committed any one of the offences mentioned in sections 198 to 200.

Section 60

Payment — equity claims

(1.7) No proposal that provides for the payment of an equity claim is to be approved by the court unless the proposal provides that all claims that are not equity claims are to be paid in full before the equity claim is to be paid.

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

Consolidated Court File No. 31-2734090

***ONTARIO*
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)
IN BANKRUPTCY AND INSOLVENCY**

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