

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

B E T W E E N:

2504670 CANADA INC., 8451761 CANADA INC.
and CHI LONG INC.

Applicants

and

CRESFORD CAPITAL CORPORATION, YSL RESIDENCES INC, 9615334
CANADA INC., YG LIMITED PARTNERSHIP and DANIEL CASEY

Respondents

AND

Court File No.: CV-21-00661530-00CL

B E T W E E N:

2583019 ONTARIO INCORPORATED as general partner of YONGESL INVESTMENT
LIMITED PARTNERSHIP, 2124093 ONTARIO INC., SIXONE INVESTMENT LTD.,
E&B INVESTMENT CORPORATION and TAIHE INTERNATIONAL GROUP INC.

Applicants

-and-

9615334 CANADA INC. as general partner of YG LIMITED PARTNERSHIP and
YSL RESIDENCES INC.

Respondents

JOINT FACTUM OF THE APPLICANTS

June 16, 2021

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PART I - OVERVIEW

1. The limited partners of the YG Limited Partnership seek Court intervention to stop their general partner from acting in its own self-interest and breaching the partnership agreement. The general partner has most recently agreed to transfer all of the partnership's property to a third party developer over the limited partners' objections. The parties' agreement prohibits any transfer of the partnership's property or business without the unanimous approval of the limited partners.

2. The fact that the general partner is attempting to implement the transaction using the *Bankruptcy and Insolvency Act* does not empower it with legal authority it is otherwise expressly denied. There are three grounds for this Court to set aside the Proposal Sponsor Agreement entered into with Concord and the subsequent filing of a BIA Notice of Intention and Proposal, Proposal, or to declare those acts as a nullity:

- (a) The general partner had no authority to agree to transfer the partnership's property and business without the limited partners' approval;
- (b) The partnership agreement states that the general partner had already automatically ceased to serve as general partner, prior to the agreement with Concord or taking any steps under the BIA or entering into the Proposal Sponsor Agreement (defined below), because it had consented to the appointment of a receiver over the partnership and acquiesced to a receivership proceeding; and
- (c) The general partner has repeatedly breached its fiduciary duties to the limited partners. It has disregarded their interests and tried to secure a deal for the YSL Project that will generate a return to Cresford in priority to the limited partners.

The Proposal Sponsor Agreement is the latest attempt by the general partner to engage in a self-interested transaction that would lead to millions of dollars being paid to Cresford while the limited partners lose their entire investments. The evidence proves that, for the past eight months, the general partner made no effort to explore other offers or alternatives for the project and simply agreed to a transaction that was significantly below value compared to multiple other offers it received in 2020.

3. The general partner has lost the trust of the limited partners to discharge its duties as a fiduciary and to act honestly and in good faith. Its repeated breaches, including its recent pursuit of the BIA Proposal over the limited partners' objections, have given rise to these applications. The fact it has now committed itself to acting without authority in an effort to circumvent the limited partners' approval rights and push through the transaction with Concord highlight why the general partner is disqualified from acting on behalf of the partnership.

4. The limited partners seek declaratory relief that the general partner has breached the partnership agreement and its fiduciary duties owed to the limited partners. They also seek declaratory relief that the general partner is no longer the general partner of the YG Limited Partnership and that agreements it entered into with Concord and the filing of a BIA Notice of Intention and Proposal on behalf of the partnership are null and void and ought to be set aside.

5. The YSL Project should be placed into receivership and its property and business sold through a court-supervised sales process that will provide transparency and assurance that value is being maximized for all stakeholders, not just Cresford and Concord.

PART II - BACKGROUND OF THE YG PARTNERSHIP

A. The YG Partnership

6. The Applicants, collectively in both Applications, CV-21-00661386-00CL (the “**Chi Long Applicants**”) and CV-21-00661530-00CL (the “**YongeSL Applicants**”) and together with the Chi Long Applicants the “**Limited Partners**”) are limited partners to the YG Limited Partnership (the “**Partnership**”), which is a limited partnership under the laws of the Province of Manitoba.

7. The Limited Partners hold all of the Class A limited partnership units.

8. The Partnership’s purpose is to own, develop and sell the YSL Project. The YSL Project is a high-rise condominium development located near Yonge Street and Gerrard Street in Toronto, Ontario.

B. The LP Agreement

9. The Partnership is governed by a partnership agreement dated August 4, 2017 (the “**LP Agreement**”). The LP Agreement requires the General Partner to “exercise its powers and discharge its duties under [the LP Agreement] honestly, in good faith and in the best interests of the Limited Partners and it shall exercise the care, diligence and skill that a reasonably prudent operator of a similar business to that of the Partnership would exercise in comparable circumstances”.¹

10. The LP Agreement further provides that:

¹ Affidavit of Anthony Szeto, sworn April 28, 2021 (“**Szeto Affidavit**”), para. 13, Tab 2 of the Application Record, p. 26; Exhibit “C” of the Szeto Affidavit, LP Agreement, section 3.5(a), Tab 2C, p. 104.

- (a) There can be no sale or exchange of all or substantially all of the business or assets of the Partnership without the approval of all the Limited Partners;² and
- (b) the General Partner automatically ceases to be the general partner of the Partnership if it seeks, consents to or acquiesces in the appointment of a trustee, receiver or liquidator of all or any substantial part of its properties, makes a general assignment for the benefit of the creditors, or it makes a voluntary application under the *Bankruptcy and Insolvency Act (Canada)* (“**BIA**”).³

11. The LP Agreement provides that the Limited Partners’ return on their capital investments would be (1) return of their initial investment, and (2) a preferred return calculated as the greater of (a) an amount equal to their capital contribution, and (b) a compounded and cumulative preferred annual return of 12.25% calculated from the date of their investment.⁴

12. Cresford repeatedly represented to the Limited Partners that it would not be paid any amounts by the Partnership until after the Limited Partners received their full return of capital and interest entitlement.⁵ For example, Cresford’s marketing material to the Limited Partners made it clear that proceeds would be paid to the Limited Partners prior to any distribution to Cresford.⁶

² Exhibit “C” of the Szeto Affidavit, LP Agreement, section 10.14(a), Tab 2C, p. 125.

³ Exhibit “C” of the Szeto Affidavit, LP Agreement, section 11.2(b), Tab 2C, p. 128.

⁴ Exhibit “C” of the Szeto Affidavit, LP Agreement, section 4.2, Tab 2C, pp. 107-108.

⁵ Exhibit “D” of the Szeto Affidavit, Schedule A of the Subscription Agreement, Tab 2D, p. 144; Exhibit “U” of the Szeto Affidavit, J. Larry Letter of October 29 2020, Tab 2U, p. 357.

⁶ Affidavit of Eric Li, sworn May 3, 2021, Applicants (“**Li Affidavit**”), para. 19, YongeSL Application Record, Tab 2.

C. The General Partner and the YG Partnership

13. The General Partner, 9615334 Canada Inc., is affiliated with a group of companies operating under the “Cresford” name, which are controlled and operated by an individual named Dan Casey.⁷

14. The LP Agreement authorizes the General Partner or such nominee it appoints to hold the assets owned by the Partnership⁸ and provides that any and all property and assets of the Partnership which are held in the name of the General Partner shall be held by it in trust as nominee for and on behalf of the Partnership⁹

15. The General Partner’s nominee company, YSL Residences Inc., holds the YSL Project’s lands in trust for the Partnership. Both entities are owned by Cresford Holdings Limited. Dan Casey is the sole director and officer for both YSL Residences Inc. and 9615334 Canada Inc.¹⁰

16. The General Partner and YSL Residences have no property other than the Partnership’s assets that are held in trust. As discussed below, they are indistinguishable from the Partnership for purposes of this proceeding.

PART III - NO AUTHORITY TO MAKE THE PROPOSAL

A. Limited Partners’ Unanimous Approval Required

17. On April 14, 2021, the General Partner informed the Limited Partners that it was entering into an agreement with a third party developer, Concord Properties Development Corp. (together, with its affiliates, referred to as “**Concord**”), under which Concord would sponsor a

⁷ Szeto Affidavit, para. 12, Tab 2, p. 26; Exhibit “C” of the Szeto Affidavit, LP Agreement, Tab 2C, p. 95.

⁸ Exhibit “C” of the Szeto Affidavit, LP Agreement, section 3.2(b)(xi), Tab 2C, p. 102.

⁹ Exhibit “C” of the Szeto Affidavit, LP Agreement, section 3.10(g), Tab 2C, p. 106.

¹⁰ Cross-examinations of Daniel Mann, Friday, June 11, 2021 (“**D. Mann Cross-examination**”), qq. 173-185; Exhibit 2, Cross-examination Brief, Tab 7-9.

Proposal by the Partnership under the BIA (“**Proposal Sponsor Agreement**”). In exchange, Concord would receive all of the Partnership’s land and rights to the YSL Project.

18. Despite the clear language of s. 10.14 of the LP Agreement prohibiting any sale or exchange of the Partnership’s business or assets without the unanimous approval of the Limited Partners, the General Partner never sought approval to proceed. As described below, the General Partner failed to inform the Limited Partners about its negotiations with Concord despite a Court Order requiring it to do so.

19. The Limited Partners immediately raised their objection to the Proposal Sponsor Agreement, the General Partner’s conduct and any further steps to purportedly transfer the Partnership’s assets to Concord by way of the Proposal Sponsor Agreement. The General Partner has ignored these objections. It went so far as to argue that the Applications were stayed in an effort to prevent the Limited Partners’ from challenging its conduct and the validity of the Proposal Sponsor Agreement.

20. The General Partner had no authority to enter into the Proposal Sponsor Agreement and agree to transfer the Partnership’s assets without the unanimous approval of the Limited Partners. The LP Agreement is clear and the General Partner cannot circumvent its terms by using the BIA as a means to unilaterally force a transaction on the Limited Partners.

21. Sections 8 and 11 of the Manitoba *Partnership Act* state that no act by a partner is binding on the partnership when the act is done without authority or in contravention of an agreement between the partners restricting the power of any one or more of the partners to bind the partnership.¹¹

¹¹ *The Partnership Act*, C.C.S.M. c. P30 (the “*Partnership Act*”), s. 8 and s. 11.

22. In circumstance where the general partner enters into an agreement without authority, the Court has set aside agreements entered into without proper authority.¹² For example, in *Tridelta*, Justice Koehnen set aside agreements that were entered into after the general partner was removed as general partner of the partnership.¹³ The General Partner had no authority to enter into the Proposal Sponsor Agreement with Concord and the agreement should be set aside.

B. No Authority to File Under BIA Without Consent

23. The General Partner continued to act without authority when it took further steps to implement the Proposal Sponsor Agreement by filing the Notice of Intention to Make a Proposal (“NOI”) and the Proposal without the Limited Partners’ consent. Courts have set aside BIA filings in circumstances where the filing was signed by only the general partner.

24. In *Re Aquaculture component Plant V Limited Partnership*, the Court set aside assignments in bankruptcy of two limited partnerships due to the fact that the assignments were only signed by the general partners and not by each of the limited partners.¹⁴ The Court held that in order to be valid, an assignment by a limited partnership must be signed by each of the limited partners:

I find that the assignments in bankruptcy of the two limited partnerships are invalid because of the provisions of s.85 of the Bankruptcy and Insolvency Act. That section provides that the Act will apply to limited partnerships in like manner as if the limited partnership was an ordinary partnership. In order for an ordinary partnership to make an assignment in bankruptcy, the assignment must be executed by each of the partners. **In this case, the assignments in bankruptcy of the two limited partnerships were only signed by their**

¹² *Tridelta Financial Partners Inc. v. Zephyr Abl Ser-A 4.875% Jan 25, 2020* ONSC 5211 (CanLII) [*Tridelta*], Applicants’ Book of Authorities (“BOA”), Tab 1.

¹³ *Tridelta*, para. 94.

¹⁴ *Aquaculture component Plant V Limited Partnership (Re) [Aquaculture]*, 1995 CanLII 9324 (NS SC), BOA, Tab 2.

general partners, not by each of the limited partners, and, hence, the assignments are invalid.¹⁵

25. In *Re Squires* the Court found that an assignment under bankruptcy was invalid in the circumstance when a co-partner was not aware or had not provided approval to make an assignment.¹⁶

26. The requirement that all partners, including the Limited Partners, consent to any filing of the NOI and the proposal is consistent with the *Partnership Act*. Section 27(h) of the *Partnership Act* provides that “no change may be made in the nature of the partnership business without the consent of all existing partners”.¹⁷ The NOI and the Proposal Sponsor Agreement represent a fundamental change to the Partnership and its business.

27. The Partnership business is “to own, develop and sell the Project”. The Proposal Sponsor Agreement contemplates the transfer of all of the Partnership’s assets and rights to the YSL Project to Concord thereby eliminating the only business of the Partnership. The General Partner had no authority to unilaterally file the NOI and Proposal Sponsor Agreement for the Partnership over the Limited Partners’ objections. As a result, the agreement with Concord and all steps taken with respect to the Proposal Sponsor Agreement are invalid and properly set aside.¹⁸

¹⁵ *Aquaculture*, BOA, Tab 2.

¹⁶ *Squires Brothers, Re*, [1922] 3 W.W.R. 130, BOA, Tab 3.

¹⁷ *Partnership Act*, s. 8.

¹⁸ Exhibit “C” to the Szeto Affidavit, LP Agreement, s. 10.14(a), Tab, 2C, p. 124; W. Houlden and Geoffrey B. Morawetz, *Bankruptcy and Insolvency Law of Canada*, 4th Ed, D§72, Tab 4, BOA. *Aquaculture*, Tab 2, BOA.

PART IV - CRESFORD CEASES TO BE GENERAL PARTNER

28. By 2020, the YSL Project's largest secured creditor, Timbercreek Mortgage Servicing Inc. ("**Timbercreek**")'s, loan matured and the Partnership had not repaid the outstanding amounts.¹⁹

29. Cresford subsequently entered into a series of forbearance agreements with Timbercreek. One of the forbearance agreements included a condition that required Cresford to consent to the appointment of a receiver. The General Partner consented to the appointment of the receiver²⁰ over its nominee company, YSL Residences, and the Partnership.²¹

30. On October 26, 2020, Timbercreek filed a Notice of Application seeking the appointment of the receiver, which primarily relied upon the General Partner's consent to the appointment of a receiver. The receivership application remains pending to this date.

31. Section 11.2(b) of the LP Agreement provides that "[t]he General Partner shall cease to be the general partner of the Partnership if:"

- (a) It seeks, consents to, or acquiesces in the appointment of a receiver of the General Partners or of all or any substantial part of the General Partner's properties; or
- (b) If, within 60 days of a third party (eg. Timbercreek) commencing any proceeding seeking reorganization, arrangement, composition, readjustment, liquidation, dissolution or similar relief, the proceeding has not been dismissed.²²

32. The operation of section 11.2(b) is mandatory and automatic upon the occurrence of any of the triggering events. In this case, by first consenting to the appointment of a receiver and then

¹⁹ Szeto Affidavit, para. 33, Tab 2, p. 33.

²⁰ Exhibit "V" of the Li Affidavit, Tab 2V.

²¹ Exhibit "C" of the Szeto Affidavit, LP Agreement, section 3.2(b)(xi), Tab B2C, p. 103.

²² Exhibit "C" to the Szeto Affidavit, LP Agreement, s. 11.2(b), Tab, 2C, p. 127.

allowing Timbercreek's receivership application to remain pending for more than 60 days, the General Partner ceased to have authority to act as general partner for the Partnership.

33. Any argument by Cresford that the General Partner did not consent to a receivership over its property is illusory. The General Partner represents, acts for, and for purposes of holding the partnership's property, *it essentially is*, the Partnership. The LP Agreement stipulates that any and all property and assets of the Partnership held in the name of the General Partner shall be held by it in trust as nominee for and on behalf of the Partnership.²³ It also provides that the General Partner can appoint a nominee (YSL Residences) to hold the Partnership's assets on its behalf.

34. Courts have repeatedly confirmed the principle that the general partner of a limited partnership is responsible for holding title of any land owned by the partnership and is liable for the partnership's debts. Therefore, by consenting to a receivership over the Partnership's and YSL Residences' property, the General Partner effectively consented to a receivership over its property.

35. In *Hudson's Bay Company v. OMERS Realty Corporation*, the Court of Appeal summarized:

A limited partnership is not a legal entity. It is required by law to have a general partner through which it normally acts: *Kucor Construction & Developments & Associates v. Canada Life Assurance Co.* (1998), 41 O.R. (3d) 577, 1998 CanLII 4236 (C.A.). A limited partnership cannot hold title to real property. It can hold title to real property only through its general partner.²⁴

²³ Exhibit "C" to the Szeto Affidavit, LP Agreement, s. 3.10(g), Tab, 2C, p. 106.

²⁴ *Hudson's Bay Company v. OMERS Realty Corporation*, 2016 ONCA 113, para 17.

36. In *Re Lehndorff*, Justice Farley described the intertwined relationship between a general partner and the limited partnership, particularly in respect of the business and property of the partnership and debtor-creditor relationships.²⁵ He concluded that “[a] general partner is responsible to defend proceedings against the limited partnership in the firm name, so in procedural law and in practical effect, a proceeding against a limited partnership is a proceeding against the general partner.”²⁶ His analysis was subsequently confirmed by the Court of Appeal in *Kucor Construction & Developments & Associates v. Canada Life Assurance Co.*²⁷

37. Cresford cannot escape the effect of consenting to Timbercreek’s receivership application. *On this basis alone*, the General Partner automatically ceased to be the general partner of the Partnership. Accordingly, it had no authority to make the Proposal Sponsor Agreement with Concord and file the NOI on behalf of the Partnership.

PART V - THE GENERAL PARTNER BREACHED ITS FIDUCIARY DUTIES

38. The General Partner has committed numerous breaches of its fiduciary duty to the Limited Partners, culminating with entering into the Proposal Sponsor Agreement without consent. The General Partner’s breaches of its fiduciary duty provide an independent ground for removing the General Partner and setting aside the agreement with Concord and subsequent NOI and Proposal.

39. A detailed review of the facts that underlie the Applications are set out in the Affidavit and Reply Affidavit of Anthony Szeto and the Affidavit and Reply Affidavit of Eric Li. Their evidence stands virtually unchallenged in the Applications. Cresford put forward an affiant,

²⁵ *Re Lehndorff General Ltd.*, [1993] 17 CBR (3d) 24 [*Lehndorff*] at para. 17, BOA, Tab 5.

²⁶ *Lehndorff*, at para. 18.

²⁷ *Kucor Construction & Developments & Associates v. Canada Life Assurance Co.*, [1998] O.J. No. 4733, BOA, Tab 6.

David Mann, with little first-hand knowledge of the acts and events that constitute the breaches. His affidavit consists of bare denials and statements based on unattributed hearsay.

40. Cresford refused to produce the sole director and officer of the General Partner, Dan Casey, even though he was served with a Rule 39.03 summons.²⁸ During his cross-examination, Mr. Mann acknowledged that Mr. Casey would have knowledge of key meetings and facts that Mr. Mann had no personal knowledge of.²⁹ Mr. Mann admitted that Mr. Casey was the “point person” and was one of the “Cresford representatives actually leading the negotiations with” GFL Infrastructure Group Inc. (“GFL”), Empire Waterwave (“**Empire**”), and Concord, since “he’s got the most at stake”.³⁰ Despite this, Cresford shielded Mr. Casey from being examined.

41. In circumstances where a party fails to call evidence from material witnesses under its control, or whose evidence would be expected to assist the party’s case, the Court has discretion to draw adverse inferences.³¹ The case for an adverse inference is even more compelling here since Mr. Casey was summonsed yet still refused to be examined. At a minimum, the Court should give Mr. Mann’s bald denials that the General Partner breached its fiduciary duties little weight in light of this record.

A. The General Partner Owes Fiduciary Duties to the Limited Partners

42. It is well established that a general partner owes fiduciary duties to limited partners. Those duties have been described as, at a minimum: the duties of loyalty and good faith; the duty to act in the best interests of the fiduciary; the duty to avoid creating a conflict between the best interests

²⁸ Affidavit of Ashley McKnight, affirmed June 10, 2021, Supplementary Reply Record (“**McKnight Affidavit**”), paras. 4-5, Tab 1, p. 2; Exhibit “C” of the McKnight Affidavit, Notice of Examination to Daniel Casey, p. 13.

²⁹ D. Mann Cross-examination, qq. 197, 206, 207.

³⁰ D. Mann Cross-examination, q.153.

³¹ *Thyssenkrupp Elevator v 1147335 Ontario Inc.*, 2013 ONSC 485, BOA, Tab 7.

of the fiduciary and those of the partnership; and the duty to not put its own interest ahead of those of the limited partners.³²

43. The Limited Partners were vulnerable to the General Partner's abuse by virtue of its control over the Partnership's business. The bases of the common law fiduciary duties "are principles of equity and agency".³³ Such duties are "often described as 'utmost good faith'" and that the fiduciary is "required to act in a manner consistent with the best interests to the beneficiary".³⁴ The fiduciary is "unable to profit or gain from any matter which comes to the knowledge of the fiduciary, as to the beneficiary or matters undertaken for the beneficiary, while acting in, or arising out of, the fiduciary role."³⁵

44. The LP Agreement also requires the General Partner to act "honestly, in good faith and in the best interests of the Limited Partners".³⁶ As described below, the General Partner acted contrary to its fiduciary duties owed to the Limited Partners.

B. The General Partner Pursues Deals in its Own Self-Interest

45. The Limited Partners discovered in the spring 2020 that the General Partner was soliciting offers to refinance or purchase the YSL Project.³⁷

46. Despite multiple requests for information, the General Partner failed to keep the Limited Partners informed of its attempts to refinance or sell the YSL Project³⁸. Meanwhile, the General Partner secretly negotiated proposed transactions with developers that would see Cresford

³² *Merklinger v. Jantree No. 3 Limited Partnership & Snapdragon Ltd.*, 2004 CanLII 54553 (ON SC) [*Merklinger*], para 109, Tab 8, BOA, [Emphasis added]; See also: *Tridelta*, Tab 1, BOA.

³³ *Merklinger*, para 107.

³⁴ *Merklinger*, para 107.

³⁵ *Merklinger*, para 107.

³⁶ Exhibit "C" of the Szeto Affidavit, LP Agreement, section 3.5(a), Tab 2C, p. 104.

³⁷ Szeto Affidavit, para 21, Tab 2, p. 30.

³⁸ Szeto Affidavit, para 23, Tab 2, p. 31.

receiving millions of dollars, while compromising the Limited Partners' return on investment. Prior to commencing the BIA proposal proceeding, Cresford made at least *five* separate attempts to pressure the limited partners into accepting deals that put Cresford's own financial interest ahead of the Limited Partners' financial interest.

i. GFL Infrastructure Group Transaction

47. On May 22, 2020, the YongeSL Applicants became aware that the General Partner had negotiated a potential transaction with GFL. The General Partner required that the YongeSL Applicants sign a waiver to forgo the interest earned on their capital contribution, which meant that the YongeSL Applicants would be paid *only* their capital contribution, without any return on capital. Meanwhile, Cresford would be paid approximately \$44-45 million.³⁹ The Chi Long Applicants were not included in the negotiations.⁴⁰

48. This arrangement was contrary to the terms of the LP Agreement⁴¹. As a result, the YongeSL Limited Partners found this arrangement unacceptable.⁴²

ii. The Empire Transaction

49. Later that summer, the Limited Partners became aware that the General Partner was negotiating to have Empire take over the YSL Project. The terms of the offer involved the Limited Partners receiving a return of *only* their capital contributions, without a return on investment. Meanwhile, Cresford would receive \$40.2 million.⁴³

³⁹ Li Affidavit, para. 29, YongeSL Application Record, Tab 2.

⁴⁰ Affidavit of Anthony Szeto, sworn June 9, 2021 ("**Reply Szeto Affidavit**"), para. 14, Reply Record of the Chi Long Applicants ("**Reply Record**"), Tab 1.

⁴¹ Li Affidavit, para. 29, YongeSL Application Record, Tab 2.

⁴² Li Affidavit, paras. 33-34, YongeSL Application Record, Tab 2.

⁴³ Li Affidavit, para. 36, YongeSL Application Record, Tab 2.

50. Again, the terms of the offer were not acceptable as it contemplated the Limited Partners taking a significant reduction on their contractually entitled return on investment so that Cresford could receive funds in priority, contrary to the terms of the LP Agreement.

iii. The Amended Empire Transaction

51. On July 14, 2020, the Limited Partners learned that the General Partner entered into a conditional Agreement of Purchase and Sale without the approval of the Limited Partners.⁴⁴ The amended terms of the transaction involved the YSL Project being transferred to Empire, which required unanimous approval by way of special resolution by the Limited Partners.⁴⁵

52. The Limited Partners were not informed of any of the details of the negotiations with Empire. It was only *after* the General Partner entered into the conditional APS that it sought the Limited Partners' consent to proceed with the new transaction.⁴⁶

53. Despite repeated requests for a copy of the Empire APS, the General Partner refused and only gave the Limited Partners what it claimed was a *summary* of the terms. The summary disclosed an anticipated profit of approximately \$99.7 million for the Partnership.⁴⁷ However, the transaction also contemplated a significant reduction in what the Limited Partners were entitled to pursuant to the LP Agreement; the Limited Partners would only receive a return of capital plus accrued interest (which was significantly lower than the maximum 100% return under the LP Agreement).

⁴⁴ Szeto Affidavit, para. 24, Tab 2, p. 31.

⁴⁵ Szeto Affidavit, para 24, Tab 2, p. 31.

⁴⁶ Szeto Affidavit, para 25, Tab 2, p. 31.

⁴⁷ Szeto Affidavit, para 27, Tab 2, p. 31.

54. While the Empire transaction would have resulted in the Limited Partners receiving less than what they were contractually entitled to, Mr. Casey stood to personally receive **\$4.8 million** as an “advisory fee”.⁴⁸

55. The General Partner refused to provide the Limited Partners with a copy of the APS (in respect of the very property that the General Property held in trust for the Limited Partners) or details of the proposed transaction with Empire to the Limited Partners. There was no way to ascertain the actual profits to the Partnership or whether there were fees or other payments being directed to the General Partner, Mr. Casey or Cresford instead of to the Partnership.⁴⁹ Therefore, the Limited Partners did not approve the Empire transaction.⁵⁰

iv. The Concord Offer

56. The General Partner’s next proposed transaction was a negotiated offer in or around November 2020 with Concord.⁵¹

57. The Concord offer was based on a pro forma prepared by Concord that forecasted profits at completion of \$182,493,799. The net profits to the Partnership were forecasted as \$90,000,000.⁵²

58. Once again, the Concord offer contemplated the Limited Partners waiving their entitlement to a return on their capital contributions, and instead, accepting only a return of 8% per year starting

⁴⁸ Li Affidavit, para. 40, YongeSL Application Record, Tab 2.

⁴⁹ Szeto Affidavit, para. 28, Tab 2, p. 36.

⁵⁰ Szeto Affidavit, para 28, Tab 2, p. 36.

⁵¹ Szeto Affidavit, para 44, Tab 2, p. 36. Exhibit “P” of the Szeto Affidavit, Concord ProForma, p. 345.

⁵² Szeto Affidavit, para 44, Tab 2, p. 36.

on January 1, 2021. Meanwhile, Cresford would receive approximately \$36.8 million at the conclusion of the YSL Project.⁵³

C. The General Partner Attempts to Turn its Capital Contribution into an Unsecured Loan

59. After presenting the proposed deal with Concord, the General Partner attempted to justify why it should receive \$36.8 million in priority to the Limited Partners' return. Its explanations were inconsistent and a transparent attempt to extract funds in its own interest.

60. Prior to the proposed Concord deal, Cresford had consistently represented that its advances to the YSL Project were equity and subordinate to the Limited Partners' investments.⁵⁴ However, in an effort to justify the significant amounts to be paid to Cresford before the Limited Partners received their entitlements, Cresford began to allege that the amounts were all unsecured loans.

61. Despite repeated requests by the Limited Partners, Cresford has been unable to provide any agreements between Cresford and the Partnership to establish that its alleged contributions to the Partnership were unsecured loans.⁵⁵

62. In pursuing the Proposal Sponsor Agreement, Cresford has maintained the allegation that it is owed \$38.2 million as an unsecured creditor. This means that Cresford could see a return of approximately \$22 million under the Proposal. As described below, this position and attempt to secure payments out of the YSL Project in advance of the Limited Partners is a primary motivation for the General Partner agreeing to the Proposal Sponsor Agreement.

⁵³ Li Affidavit, para. 62, YongeSL Application Record, Tab 2; Szeto Affidavit, para. 44, Tab 2, p. 36.

⁵⁴ Li Affidavit, para. 65, YongeSL Application Record, Tab 2.

⁵⁵ Szeto Affidavit, para 47, Tab 2, p. 42.

D. The General Partner Breaches a Court Order

63. Throughout the past year, the General Partner refused to provide information that the Limited Partners were statutorily and contractually entitled to. As a result, the Chi Long Applicants brought an urgent motion for disclosure of information. On January 13, 2021, Justice Cavanagh granted the motion and ordered disclosure (the “**Disclosure Order**”). The Disclosure Order required the General Partner to disclose, among other things:

- (a) any offers, Letters of Intent, term sheets, proposals or agreements regarding the financing, transfer or acquisition of the YSL Project when received (section 2(a));
- (b) any proposed agreements relating to the YSL Project before they are entered into, including without limitation any agreements relating to the Timbercreek Mortgage Services Inc.’s mortgage or Concord Property Development Corp.’s proposed financing (section 2(b)); and,
- (c) any proposed agreements or terms that may have a material impact on the Limited Partners’ interest in the YSL Project and the YG Limited Partnership (section 2(d)).⁵⁶

64. However, since the Disclosure Order, the Limited Partners have had to repeatedly chase information from the General Partner⁵⁷, including updates about the status of discussions between Concord and the General Partner. In response to specific enquiries by the Limited Partners, the General Partner provided few substantive updates and would simply respond that discussions were ongoing and conducted over the telephone, such that no documents were available.⁵⁸

65. In addition, unbeknownst to the Limited Partners, the General Partner sold a portion of the Partnership’s lands, municipally known as 357A and 357.5 Yonge Street, to Concord in December 2020. The General Partner did not disclose the sale to the Limited Partners, even after the Disclosure Order was granted.

⁵⁶ Szeto Affidavit, para. 56, Tab 2, p. 39; Exhibit “V” of the Szeto Affidavit, Disclosure Order, Tab 2V.

⁵⁷ Szeto Affidavit, para. 66, Tab 2, p. 42.

⁵⁸ Szeto Affidavit, paras. 67-68, Tab 2, p. 42.

66. The Limited Partners had to discover on their own that the General Partner had sold the lands to Concord. The Limited Partners also learned that the lands were sold for *less than what they were acquired for* – the Partnership originally acquired the lands for \$10.5 million in the summer of 2016, yet they were sold to Concord for \$7.6 million.⁵⁹

67. The issues came to a head on April 14, 2021 when the General Partner first informed the Limited Partners that Cresford and Concord were entering into the Proposal Sponsor Agreement that would result in the Partnership's assets being transferred to Concord.⁶⁰ At the same, the Limited Partners would lose their entire investments. This agreement had been secretly negotiated for weeks without any disclosure to the Limited Partners and despite the Limited Partners' lawyers making multiple requests for information in the weeks leading up to the announcement.

E. The General Partner Fails to Explore any Alternative to Concord

68. The Limited Partners did not agree to the proposed terms of the Concord transaction. The unfairness of Cresford receiving a windfall of millions of dollars, while the Limited Partners were being asked to forgo their entitlement under the LP Agreement was unacceptable.⁶¹ Because of section 10.14(a) of the LP Agreement, no sale or transfer could proceed without the Limited Partners' unanimous approval.

69. The General Partner knew the Limited Partners' position regarding the proposed deal with Concord by December 2020. The General Partner had no exclusivity agreement with Concord.⁶² However, for the next 4 months, there is no evidence that the General Partner pursued any other options or solicited any other offers with respect to the YSL Project.

⁵⁹ Szeto Affidavit, paras. 62-63, Tab 2, p. 41.

⁶⁰ Exhibit "KK" of the Szeto Affidavit, p. 525.

⁶¹ Cross-examination of Anthony Szeto.

⁶² D. Mann Cross-examination, q. 242.

70. Cresford's representative, David Mann testified that he was "not aware" of any efforts by the General Partner to solicit or canvas interest in the YSL Project other than Concord.⁶³ As it stands, the record establishes that the General Partner *took no steps* to find alternative transactions or solicit offers for financing or a sale in the face of an impending receivership application. Instead, the General Partner *did nothing* to re-pay and simply waited to consummate a deal with Concord.

71. The General Partner's inactivity was made more egregious when Concord allegedly took the position in February 2021 that its proposed financier was no longer prepared to proceed with the original structure proposed in November 2020 (it is unclear why this was still being discussed in light of the Limited Partners' rejection of the proposed transaction). The General Partner reported to the Limited Partners at the time that Concord was reconsidering whether it wanted to walk away from a deal.⁶⁴

72. There is no evidence that Concord was actually experiencing issues with its proposed financing. The General Partner did nothing to confirm what it was apparently told by Concord. More importantly, the General Partner still did nothing to explore alternatives for the YSL Project. It continued to stand idly by while Concord devised the proposal arrangement.⁶⁵

73. According to Mr. Mann, at some point between March 25, 2021 and April 14, 2021, Concord proposed the Proposal Sponsor Agreement to Cresford and refused to consider any other transaction. The General Partner still did nothing to explore alternatives.⁶⁶ Instead, it acquiesced to Concord and agreed to the Proposal Sponsor Agreement. The Limited Partners were informed after-the-fact.

⁶³ D. Mann Cross-examination, q. 307.

⁶⁴ Exhibit "AA" to the Szeto Affidavit, Email from H. Fogul, p. 464-465.

⁶⁵ D. Mann Cross-examination, qq. 272-274.

⁶⁶ D. Mann Cross-examination, q. 306.

74. The General Partner completely abdicated its fiduciary duties. Because the General Partner did nothing from November 2020 until April 2021 other than speak with Concord, there is no evidence that the proposal represents the best or even a good deal for the YSL Project.

75. The evidence points to the Proposal not representing the highest or even fair value for the YSL Project. The Proposal contemplates that Concord would pay approximately [REDACTED]. This is significantly less than previous offers received for the YSL Project. For example:

- [REDACTED]
- [REDACTED]
- [REDACTED]

76. The Proposal Sponsor Agreement was not in the best interest of the Limited Partners or the Partnership. The Limited Partners stand to lose their entire investment. Instead, the Proposal Sponsor Agreement benefits Cresford because it establishes a mechanism for Cresford to actually *recover* a portion of its equity contribution. Concord stands to benefit from this arrangement

⁶⁷ Exhibit “MM” of the Szeto Affidavit, Tab 2MM, p. 535. [REDACTED]

⁶⁸ Exhibit “S” of the Szeto Affidavit, Tab 2S, p. 189.

⁶⁹ Exhibit “G” of the Szeto Affidavit, Tab 2G, p. 189.

⁷⁰ Exhibit “J” of the Li Affidavit, Tab 2J.

because it could acquire the YSL Project for an amount that is significantly under market value and without having to participate in a competitive sales process.⁷¹

77. Despite the Limited Partners' right to prevent the General Partner from unilaterally implementing such an unfair and below market transaction, the General Partner and Concord are attempting to use the BIA as a means to circumvent the terms of the LP Agreement and cut out the Limited Partners.

F. Breach of Fiduciary Duties Warrants Removal

78. As detailed above, the General Partner has been acting in its own self-interest since at least 2020 by secretly negotiating a sale of the YSL Project that will result in losses to the Limited Partners so that Cresford can extract value for itself. It has refused to make full disclosure to the Limited Partners. Finally, it has now resorted to acting without authority in an effort to force a deal over the Limited Partners' objections using the BIA proposal process.

79. The court has inherent jurisdiction to remove a general partner:

The question that arises is whether the court has the power to remove a general partner in the absence of statutory authority where the general partner acted in bad faith toward one limited partner, breached its obligations under the Partnership Agreement, breached its fiduciary duties at common law and under the Agreement, and breached its covenant and warranty to act with utmost fairness. Is the limited partner, who has done nothing wrong, forced to continue in a partnership arrangement with the general partner for whom there is a *bona fide* lack of confidence? **I find that the Superior Court has the inherent jurisdiction to remove the general partner in the special circumstances of this case.**⁷²

80. The Court has the authority to declare that Cresford is terminated as General Partner and to remove it for breaches of its fiduciary duties. The Court also has the authority to set aside the

⁷¹ [REDACTED]

⁷² *Merklinger*, para. 204. [Emphasis added], BOA, Tab 8.

Proposal Sponsor Agreement and subsequent steps taken by the General Partner to implement that agreement.⁷³

PART VI - THE NOI AND PROPOSAL SHOULD BE SET ASIDE

81. The Chi Long Application was commenced before Cresford and Concord finalized their agreement regarding the Partnership and its assets and before Cresford initiated the proposal process. However, after being served with the Application Record and put on notice that the Limited Partners challenged the General Partner's authority, the General Partner proceeded to expedite the filing of the NOI. The Applicants submit that this was done without authority. If the Court finds that Cresford ceased to be the general partner of the Partnership or proceeded without authority, the NOI is a nullity and the NOI and Proposal should be set aside.

PART VII - A RECEIVER OUGHT TO BE APPOINTED

82. If the NOI and Proposal are declared to be a nullity or set aside then the alternative is to appoint a receiver over the General Partner's and the Partnership's assets. The Applicants are content to have Timbercreek's receiver appointed and a sales process implemented.

83. A receivership is a far more appropriate procedure for an inquiry into the purportedly "unsecured" Cresford loans, rather than a Proposal Trustee, which is a debtor-led process controlled by Cresford and Concord wherein the debtor remains fully in control of its property and assets. A court-appointed Receiver displaces the debtor from possession and control of its property and assets, is an officer of the Court, and acts in the best interests of all parties. It is just and convenient to appoint an independent third party as receiver to: (a) investigate the assets and liabilities of the Partnership and (b) to maximize the value of the YSL Project by conducting a

⁷³ *Tridelta*, BOA, Tab 1.

competitive sales process. The Limited Partners are agreeable to have Timbercreek's receiver appointed.

PART VIII - A SEALING ORDER SHOULD BE GRANTED

84. The Court has the discretion to order that any document filed in a civil proceeding by treated as confidential, sealed and not form part of the public record. A sealing order is granted where: (a) necessary to prevent serious risk to an important interest, including a commercial interest, in the context of litigation because reasonable alternative measures will not prevent the risk; and (b) the salutary effects of the order outweigh the deleterious effects.⁷⁴

85. Information relating to the market value of the YSL Project is commercially sensitive. In the event that the Court sets aside the NOI and the Proposal or declares them to be a nullity, a public sales process should be initiated for the YSL Project. Commercially sensitive information should not be made available to potential bidders, as such disclosure could undermine the integrity of the potential sales process.

86. If granted, the sealing order will protect the commercial interests of the YSL Project and its stakeholders. The salutary effect greatly outweighs the deleterious effects of not sealing the market information of the YSL Project. The Applicants therefore request information relating to the market value of the YSL Project be sealed pending further order of this Court.

PART IX - ORDER REQUESTED

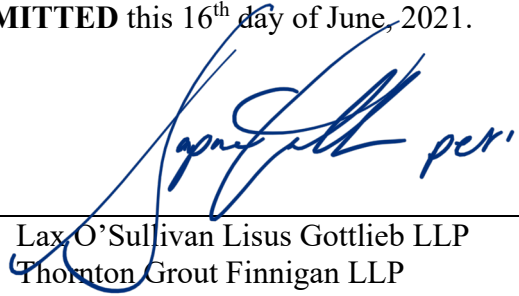
87. The Applicants request that this Court make an Order, *nunc pro tunc* (if necessary):

⁷⁴ *Courts of Justice Act*, RSO 1990, c C43, s.137(2); *Sierra Club of Canada v Canada (Minister of Finance)*, 2002 SCC 41 at para. 53, BOA, Tab 9.

- (a) Declaring that the General Partner is terminated as general partner of the Partnership and/or has ceased to be the general partner of the Partnership and therefore, cannot exercise any powers as the General Partner to bind the Partnership;
- (b) Declaring that any agreements entered into by the General Partner with Concord are null and void and otherwise unenforceable against the Partnership;
- (c) Declaring that the NOI pursuant to subsection 50.4(1) of the BIA by the Partnership and YSL Residences, the Proposal, and the Proposal Sponsorship Agreement are void *ab initio*;
- (d) Appointing a receiver over the property, assets and undertakings of the Partnership and YSL Residences; and,
- (e) Sealing the market information of the YSL Project contained in the Application Records.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 16th day of June, 2021.

June 16, 2021



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SCHEDULE “A”

LIST OF AUTHORITIES

1. *Tridelta Financial Partners Inc. v Zephyr Abl Ser-A 4.875% Jan 25, 2020* ONSC 5211
2. *Aquaculture component Plant V Limited Partnership (Re)*, 1995 CanLII 9324 (NS SC)
3. *Squires Brothers, Re*, [1922] 3 W.W.R. 130.
4. W. Houlden and Geoffrey B. Morawetz, *Bankruptcy and Insolvency Law of Canada*, 4th Ed
5. *Re Lehndorff General Ltd.*, [1993] 17 CBR (3d)
6. *Kucor Construction & Developments & Associates v. Canada Life Assurance Co*, [1998] O.J. No. 4733
7. *Thyssenkrupp Elevator v 1147335 Ontario Inc.*, 2013 ONSC 485
8. *Merklinger v. Jantree No. 3 Limited Partnership & Snapdragon Ltd.*, 2004 CanLII 54553 (ON SC)
9. *Sierra Club of Canada v Canada (Minister of Finance)*, 2002 SCC 41

SCHEDULE “B”

TEXT OF STATUTES, REGULATIONS & BY-LAWS

The Partnership Act, C.C.S.M. c. P30

Power of partner to bind the firm

8 Every partner is an agent of the firm and his other partners for the purpose of the business of the partnership; and the acts of every partner who does any act for carrying on, in the usual way, business of the kind carried on by the firm of which he is a member bind the firm and his partners, unless the partner so acting has, in fact, no authority to act for the firm in the particular matter, and the person with whom he is dealing either knows that he has no authority or does not know or believe him to be a partner.

Effect of notice that firm will not be bound by acts of partner

11 Where it is agreed between the partners to restrict the power of any one or more of them to bind the firm, no act done in contravention of the agreement is binding on the firm with respect to persons having notice of the agreement.

Courts of Justice Act, RSO 1990, c C43

Sealing documents

137 (2) A court may order that any document filed in a civil proceeding before it be treated as confidential, sealed and not form part of the public record.

2583019 ONTARIO INCORPORATED et al.

2504670 CANADA INC. et al.
Applicants

-and- 9615334 CANADA INC. et al.

-and- CRESFORD CAPITAL CORPORATION et al.
Respondents

Court File No.: CV-21-00661530-00CL

Court File No.21-00661386-00CL

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST
PROCEEDING COMMENCED AT TORONTO**

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