Court of Appeal File No._____
Court File No. BK-21-02734090-0031

COURT OF APPEAL FOR ONTARIO

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

NOTICE OF APPEAL

THE APPELANTS, YongeSL Investment Limited Partnership, 2124093 Ontario Inc., SixOne Investment Ltd., E&B Investment Corporation, TaiHe International Group Inc., 2504670 Ontario Inc., 8451761 Canada Inc. and Chi Long Inc. (the "**Class A LPs**"), **APPEAL** to the Court of Appeal from the Order of the Honourable Justice Jessica Kimmel (the "**Motion Judge**") of the Superior Court of Justice (Commercial List) dated March 19, 2024, at the City of Toronto, Ontario (the "**Order**"),

THE APPELLANTS ASK that this Court set aside the Order and replace it with an order that:

1. Affirms the Proposal Trustee's disallowance of Ms. Athanasoulis' Profit-Sharing Claim;

2. In the alternative, declares that the Profit-Sharing Agreement is unenforceable;

3. If leave to appeal is required, grants leave to appeal from the Order pursuant to section 193 (e) of the *Bankruptcy and Insolvency Act* ("***BIA***");

4. Awards the Appellants the costs of the motion below and this appeal; and

5. Grants such further and other relief as the Appellants may request and this Court may deem just.

THE GROUNDS OF APPEAL are as follows:

6. The Motion Judge erred by:

   (a) restricting the Class A LPs' standing to a single issue despite the Motion Judge's own prior order that gave directions regarding the issues that the Class A LPs had standing to address; and

   (b) declining to determine all of the Class A LPs' arguments that the Profit-Sharing Agreement (defined below) was unenforceable, despite her holding that the Profit-Sharing Agreement was enforceable and binding on the Class A LPs for all purposes, including separate litigation commenced against Ms. Athanasoulis; and

   (c) failing to find that the Profit-Sharing Agreement was unenforceable as it was an undisclosed self-dealing agreement entered into between Ms. Athanasoulis and the General Partner (defined below), each being fiduciaries to the limited partnership, and wrongly finding that there was no evidence showing that the Profit-Sharing Agreement was not on market terms and therefore breached the LP Agreement (defined below).

7. The Motion Judge's errors led to the anomalous result where a fiduciary can enforce a secret agreement for their own benefit and to the detriment of vulnerable beneficiaries. This decision has negative implications for the rights and obligations of fiduciaries and beneficiaries in limited partnerships and should be set aside.

8. The Class A LPs also adopt and rely on the grounds set out in the Proposal Trustee's Notice of Appeal dated March 28, 2024. The appeals should be heard together.

Background to the parties

9. The debtors YG Limited Partnership (the "**Partnership**") and YSL Residences Inc. (together, the "**Debtors**") are members of the "**Cresford**" group, a real-estate developer. They were formed to develop and construct the YSL Project.

10. The Class A LPs are the outside arms-length investors who invested $14.8 million in the Partnership. They are at risk of losing their entire investment if Ms. Athanasoulis' claim in this proposal proceeding is accepted.

11. The Respondent, Maria Athanasoulis ("**Ms. Athanasoulis**") was the former President and Chief Operating Officer of Cresford and one of two individuals who controlled the Partnership through its general partner. She was the "face" of Cresford to investors and the primary person dealing with the Class A LPs both before and after they made their investments in the partnership.

12. At all times, the Class A LPs were entirely reliant on Cresford for information. At all times prior to and after their investment, the Class A LPs were told by Cresford, including specifically by Ms. Athanasoulis, that they would recover their investment and guaranteed return on investment (100% return) prior to any profits being paid to Cresford. The Class A LPs relied on these representations.

13. Ms. Athanasoulis now claims she is owed $18 million from the Partnership on account of an oral agreement (the "**Profit-Sharing Agreement**") with Cresford's owner, Daniel

Casey, pursuant to which she claims 20% of the profits of all of Cresford's developments. It is undisputed that the Profit-Sharing Agreement was never disclosed to or ratified by the Class A LPs. Ms. Athanasoulis claims she is entitled to $18 million on account of unrealized "profits" as a former insider of Cresford and fiduciary of the Partnership despite the fact it would extinguish any recovery by the arm's length Class A LPs.

14. The Class A LPs supported the Proposal Trustee's disallowance of the Profit-Sharing Claim and made independent arguments as to why the Profit-Sharing Agreement was unenforceable due to: (i) the terms of the Amended and Restated Limited Partnership Agreement (the "**LP Agreement**"), (ii) breaches of fiduciary duty (by both Ms. Athanasoulis and the general partner entity she controlled) and (iii) misrepresentations (by Ms. Athanasoulis).

Background to the proceeding

15. In 2021, the Debtors commenced this *BIA* proceeding as a pre-packaged liquidation designed primarily to benefit Cresford. The Debtors' original proposal would have seen Cresford extract approximately $22 million from the YSL Project. Unsecured creditors would have recovered a maximum of 58% of their claims. Under the original proposal, the Class A LPs would have lost their entire investment.

16. The Class A LPs opposed the Debtors' motion for court approval of that original proposal. The Court agreed that the original proposal was not made in good faith or designed to benefit the general body of creditors. The Court refused to sanction the original proposal but gave the Debtors an opportunity to put forward a new proposal. The new proposal, which was ultimately approved by the court (the "**Proposal**"), did not cap unsecured

creditor recovery. Indeed, unsecured creditors may yet recover 100% of their claims. The Class A LPs may yet recover a significant portion of their investment in the YSL Project although they will not realize any return.

17. By way of the Proposal, the Debtors transferred the YSL Project lands to Concord Properties Developments Corp. ("**Concord**"), another developer.

Ms. Athanasoulis' Profit-Sharing Claim

18. The Proposal Trustee and Ms. Athanasoulis originally agreed to a bifurcated arbitration of her Profit-Sharing Claim. The first phase of that arbitration resulted in a finding that Ms. Athanasoulis had an agreement with Cresford whereby she would share in the profits of the YSL Project (the Profit-Sharing Agreement).

19. Certain issues ***were not*** decided at the arbitration, including whether the Profit-Sharing Claim:

(a) is an equity claim;

(b) has any value at all;

(c) is unenforceable given (i) the terms of the LP Agreement, (ii) the fiduciary duties owed by Ms. Athanasoulis and the Partnership's general partner (the "**General Partner**") to the Partnership and the Class A LPs, (iii) Ms. Athanasoulis' knowing assistance in the General Partner's breach of its fiduciary duties and/or (iv) Ms. Athanasoulis misrepresentations to the Class A LPs; and

(d) is payable before the Class A LPs are repaid in full.

21. The Class A LPs and Concord were not invited to participate in the Arbitration, nor were they parties to the arbitration agreement between the Proposal Trustee and Ms. Athanasoulis. Once they learned of the outcome, they took steps to challenge the Proposal Trustee's right to arbitrate Ms. Athanasoulis' claim. Those steps are summarized in a November 1, 2022, decision in this proceeding. In that decision, the Motion Judge directed the Proposal Trustee determine and value Ms. Athanasoulis' claim.

The Motion Judge's procedural directions

22. The parties were unable to agree on the procedure for the Proposal Trustee's adjudication of Ms. Athanasoulis' claim and any subsequent appeal, so the Proposal Trustee brought a motion for directions. By decision dated February 10, 2023, the Motion Judge set the procedure for the determination of the claim. She gave directions that the Class A LPs had standing on the appeal, limited to the following issues:

    (a) the impact of the prohibition contained in the LP Agreement on non-arm's length agreements, such as the Profit-Sharing Agreement;

    (b) the enforceability of the Profit-Sharing Agreement; and

    (c) the priority/subordination of the Profit-Sharing Claim to the Class A LPs' recovery of their initial investments based on alleged breaches of contractual and fiduciary duties and alleged misrepresentation.

23. In connection with that confirmed standing, the Class A LPs submitted evidence and made submissions relevant to their issues. Ms. Athanasoulis had the opportunity to, and did, respond to that evidence and submissions. She did not cross-examine the Class A LPs.

24. The Proposal Trustee disallowed the Profit-Sharing Claim and Ms. Athanasoulis appealed.

The Motion Judge erred and allowed Ms. Athanasoulis' appeal

25. In reviewing the Proposal Trustee's treatment of the Profit-Sharing Claim, the Motion Judge made errors. The Proposal Trustee has appealed from the Order given those errors. As noted above, the Class A LPs adopt and support the Proposal Trustee's grounds of appeal and intend to ask that the appeals from the Order be heard together.

26. In addition, the Motion Judge made the errors identified below.

Restriction of the Class A LPs' standing

27. The Motion Judge declined to determine the Class A LPs' arguments on the basis that they "fall outside the scope of the standing that was granted to" the Class A LPs. The Motion Judge erred by improperly interpreting and applying her earlier decision where the Motion Judge gave directions for the appeal and granted standing to the Class A LPs to address specific issues in response to Ms. Athanasoulis' claim, including issues that the Proposal Trustee did not address or where it deferred to the Class A LPs.

28. The Motion Judge incorrectly held that the Class A LPs' standing was limited to "matters relating to the validity and enforceability of the Profit-Sharing Agreement having regard to the provisions and restrictions under the agreements that the LPs were party to, such as the LPA and the Management Agreements".

29. This conclusion is irreconcilable with the Motion Judge's prior directions and order. The Motion Judge did not give any notice to the Class A LPs that the standing they were

afforded would be varied and narrowed significantly, nor did the Motion Judge given any reasons for failing to follow her earlier directions and order. The Motion Judge further erred by narrowing the Class A LPs' standing on the basis that their issues regarding the enforceability of the Profit-Sharing Agreement were "extraneous to the Trustee's Disallowance" when her earlier directions and order expressly granted standing to the Class A LPs to address "any unique or added perspective or submissions that they have that are not advanced by the Proposal Trustee, or that the Proposal Trustee defers to the LPs on".

30. Had the Motion Judge heard the Class A LPs' arguments, the Motion Judge would have concluded that:

(a) Ms. Athanasoulis breached her fiduciary duties by failing to disclose the existence of the Profit-Sharing Agreement to the Class A LPs;

(b) the General Partner breached its fiduciary duty to the Class A LPs in entering into the secret Profit-Sharing Agreement with Ms. Athanasoulis, and Ms. Athanasoulis knowingly assisted in that breach; and

(c) Ms. Athanasoulis made misrepresentations to the Class A LPs that induced them to make investments in the Partnership.

31. Any one of those conclusions would have led the Motion Judge to determine that the Profit-Sharing Agreement was unenforceable, and the Profit-Sharing Claim was therefore not a provable claim.

The Motion Judge erred in not determining the Class A LPs' Arguments

32. The issues of breach of fiduciary duty, knowing assistance and misrepresentation raised by the Class A LPs are inextricably interwoven with the enforceability of the Profit-Sharing Agreement. The Motion Judge erred in concluding that the Profit-Sharing Agreement was enforceable without considering the Class A LPs' arguments.

33. As a result, the Motion Judge determined that the Profit-Sharing Agreement was enforceable in a vacuum. She considered only the terms of the LP Agreement and accompanying Sales Management Agreement dated February 16, 2016. She failed to consider the fiduciary duties and partnership relationships that established the context in which Ms. Athanasoulis sought to enforce her Profit-Sharing Claim. She failed to consider the well-established law that imposes disclosure obligations on a fiduciary if they seek to benefit from a self-dealing transaction.

34. The Motion Judge compounded this error by concluding that the issue would become *res judicata* and the Class A LPs would be estopped from arguing that the Profit-Sharing Agreement was unenforceable in another proceeding, including in separate and existing litigation that had been commenced by certain Class A LPs against Ms. Athanasoulis and the general partner.

35. The effect of the Motion Judge's decision is to deprive the Class A LPs the right to be heard in any forum on key issues where their interests are directly prejudiced. The issues of breach of fiduciary duty, misrepresentation and knowing assistance are inextricably interwoven with the issues of enforceability, validity and priority of the Profit-Sharing Agreement. The Motion Judge erred in law by making her findings on the latter issues

binding on the Class A LPs in this and other proceedings while refusing to decide issues that have a direct bearing on the enforceability, validity and priority of the Profit-Sharing Agreement, which the Class A LPs had properly raised in front of her.

The Motion Judge erred in finding no breach of the LP Agreement

36. The Motion Judge also erred in finding that the Profit-Sharing Agreement was not captured by the prohibition in the LP Agreement against non-arm's length agreements. Ms. Athanasoulis was a "Related Party", as that term is used in the LP Agreement because she was an officer of the General Partner and its affiliates. The Profit-Sharing Agreement was a non-arm's length agreement.

37. In addition to the fundamental problem that the Profit-Sharing Agreement was kept secret from and prejudices the Class A LPs, the agreement was not on market terms. The Motion Judge committed palpable and overriding error when she ignored the evidence tendered by the Class A LPs that the Profit-Sharing Agreement was not on "market terms" and instead incorrectly found that the Class A LPs presented no evidence on the point.

38. The Motion Judge also erred by not concluding that the Profit-Sharing Agreement was in direct breach of provisions of the LP Agreement and subscription agreements that required payment to the Class A LPs of the entire amount of their investments plus the guaranteed return (100%) before any profit was paid to Cresford or its affiliates. That "waterfall" was confirmed by Ms. Athanasoulis when the Class A LPs were induced to make their advances to the Debtors. As a result, the Class A LPs were entitled to receive $29.6 million before any profits were paid to any Cresford affiliate or representative.

39. Had the Motion Judge not made the errors described above, she would have found that the Profit-Sharing Agreement is invalid and unenforceable with respect to the Partnership.

THE BASIS OF THE APPELLATE COURT'S JURISDICTION IS:

40. An appeal lies to the Court of Appeal from the Order pursuant to s. 183(2) of the *BIA* and s.193(a) and (c), or alternatively (e), of the *BIA*.

41. Pursuant to s.193(a) of the *BIA*, the Class A LPs may appeal the Order without leave. The Order affects their future rights over the residual cash pool held by the Proposal Trustee.

42. Pursuant to s.193(c) of the *BIA*, the Class A LPs may appeal the Order without leave. The property involved in the appeal exceeds ten thousand dollars. Ms. Athanasoulis' Profit-Sharing Claim is for $18 million. The property involved in the appeal meets the statutory minimum.

43. Alternatively, if leave to appeal is required, the Class A LPs seek leave to appeal pursuant to s.193(e) of the *BIA* and ask that the motion for leave be heard at the same time as the appeal.

44. This appeal involves matters of general importance to bankruptcy matters and to the administration of justice as a whole, including whether a director or officer of a limited partnership should be allowed to profit from circumventing their duties to the limited partners by entering into a secret side agreement with the general partner that subordinates the limited partners' interest to those of the directors or officers, without disclosure same to the limited partners.

45. The Order being appealed from expressly and finally determines the Class A LPs' rights and claims in other litigation and it would be manifestly unfair if they had no right to appeal the Motion Judge's errors.

46. The appeal is *prima facie* meritorious, as set out above, and this proceeding will not be unduly delayed by this appeal. The outcome of the appeal may in fact eliminate the need for any further steps in this proceeding, such as the valuation of Ms. Athanasoulis' claim.

47. The Class A LPs ask that this appeal be heard at the same time as the Proposal Trustee's appeal from the Order.

April 2, 2024

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PROCEEDING COMMENCED AT TORONTO

NOTICE OF APPEAL

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