

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

IN THE MATTER OF THE NOTICES OF INTENTION TO MAKE A PROPOSAL OF
YG LIMITED PARTNERSHIP AND YSL RESIDENCES INC.
OF THE CITY OF TORONTO, IN THE PROVINCE OF ONTARIO

NOTICE OF MOTION

The Proposal Trustee, KSV Restructuring Inc. (the “**Proposal Trustee**”), will make a motion to the Court at 10:00 a.m. on January 16, at the court house, 330 University Avenue, Toronto, Ontario.

PROPOSED METHOD OF HEARING: The motion is to be heard

- in writing under subrule 37.12.1(1) because it is on consent;
- in writing as an opposed motion under subrule 37.12.1(4);
- orally by Zoom videoconference or in person as the Court may direct.

THE MOTION IS FOR AN ORDER:

- (a) Establishing the process for any appeal from the Proposal Trustee’s notice of determination of the proof of claim filed by Maria Athanasoulis against YG Limited Partnership and YSL Residences Inc. (the “**Companies**”); and
- (b) such further and other Relief as counsel may advise or this Honourable Court may deem just.

THE GROUNDS FOR THE MOTION ARE:

A. BACKGROUND TO THE PROPOSAL PROCEEDINGS

1. On April 30, 2021, the Companies filed Notices of Intention to Make a Proposal pursuant to section 50.4(1) of the *Bankruptcy and Insolvency Act* (“**BIA**”) (the “**NOIs**”).
2. On May 14, 2021, the Court issued an order consolidating the NOIs into the instant proceeding.
3. After a series of amendments and discussions among the various stakeholders, on July 9, 2021, the Sponsor filed in this proceeding a third amended proposal (the “**Third Amended Proposal**”). Between July 9, 2021 and July 15, 2021, further revisions were made to the Third Amended Proposal at the request of the Proposal Trustee. The Third Amended Proposal, as further amended, is referred to as the “**Final Proposal**” in this notice of motion.
4. On July 15, 2021, the Proposal Trustee filed its Fourth Report to the Court recommending that the Court approve the Final Proposal.
5. On July 16, 2021, the Court approved the Final Proposal.

B. THE ATHANASOULIS CLAIM

6. Of the over 65 claims filed against the Companies in this proceeding, the Proposal Trustee, as of the date of this notice of motion, has resolved all claims except the following:
 - (a) a claim by CBRE for approximately \$1.2 million (the “**CBRE Claim**”);

- (b) a claim by Henry Zhang for approximately \$1.5 million (the “**Zhang Claim**”);
and
- (c) a claim by Ms. Athanasoulis for \$19 million (the “**Athanasoulis Claim**”, and collectively with the CBRE and Zhang Claims, the “**Disputed Claims**”).

7. The CBRE and Zhang Claims are the subject of separate claims proceedings. On November 7, 2022, Justice Osborne set aside the disallowance of the CBRE Claim, and allowed the Claim. Certain of the Limited Partners of the Companies (the “**LPs**”) have appealed that decision. An appeal of the Proposal Trustee’s allowance of the Zhang Claim is awaiting the resolution of the appeal in respect of the CBRE Claim, as it raises the same issues.

8. The Athanasoulis Claim is the largest unresolved Claim. Of the \$19 million claim, \$18 million is based on an alleged oral agreement between Ms. Athanasoulis and Ms. Athanasoulis claims that the Companies gave her a right to 20% of the profits earned upon the completion of the projects undertaken by the Companies. The Companies denied the existence of any such agreement. The remaining \$1 million is based on alleged damages for wrongful dismissal.

9. All of the LPs oppose the Athanasoulis Claim because allowing her claim will reduce the funds potentially available to the LPs. The Proposal Sponsor, Concord, wishes to minimize the expense of the Proposal proceedings and also has acquired various unsecured claims against the Companies thereby making it the largest unsecured creditor, and therefore has an interest adverse to the Athanasoulis Claim.

10. To determine whether an oral agreement existed, the veracity and credibility of witnesses asserting diametrically opposed versions of the facts needed to be assessed through *viva voce* testimony under oath. Given the constrained availability of Court resources, the Proposal Trustee and counsel for Ms. Athanasoulis agreed that the most fair, expeditious, and efficient manner of determining whether such an oral agreement existed was by way of arbitration.

11. In this regard, the Proposal Trustee and Ms. Athanasoulis appointed William Horton as sole arbitrator (the “**Arbitrator**”). The Proposal Trustee and Ms. Athanasoulis agreed to bifurcate the arbitration, with the result that liability for breach of the alleged (as it was then) oral agreement would be determined in Phase 1 and damages for the breach (if any) would be determined later in Phase 2. Despite being aware that the Proposal Trustee intended to arbitrate the merits of the Athanasoulis Claim, no stakeholder took steps to oppose or prevent the Phase 1 arbitration.

12. The Arbitrator rendered his decision in respect of Phase 1 of the arbitration on March 28, 2022. The Arbitrator held that an oral agreement existed between Ms. Athanasoulis and the Companies that entitles her to 20% of the profits on projects completed by the Companies.

13. Following the release of the Arbitrator’s decision, the LPs and Concord expressed concerns regarding the manner and nature of the arbitration proceedings and objected to Ms. Athanasoulis and the Proposal Trustee proceeding to Phase 2 of the arbitration. Concord refused to fund the Proposal Trustee’s fees and expenses associated with pursuing arbitration.

14. In response, and given its agreement with Ms. Athanasoulis to arbitrate her claim, the Proposal Trustee brought a motion before this Court to compel Concord to provide continued funding towards the resolution of the Athanasoulis Claim (the “**Funding Motion**”).

15. On November 1, 2022, Justice Kimmel rendered her decision in the Funding Motion (the “**Funding Decision**”). Among other things, she held that the Phase 2 arbitration was beyond the scope of the authority granted to the Proposal Trustee under s. 135 of the *Bankruptcy and Insolvency Act*, but that Concord was required to indemnify the Proposal Trustee for all fees and expenses reasonably incurred to date and moving forward.

16. Following the Funding Decision, the Proposal Trustee engaged the various interested stakeholders in a series of “without prejudice” communications regarding a process for resolving the Athanasoulis Claim in the most efficient manner possible. The Proposal Trustee was unable to obtain a consensus from the various stakeholders and has therefore brought this motion for directions. No stakeholder objects to the bringing of this motion.

C. THE PROPOSAL TRUSTEE’S PROPOSED PROCEDURE

17. The Proposal Trustee has proposed the following procedure for resolution of the Athanasoulis Claim:

- (a) The Proposal Trustee will issue a Notice of Determination substantially in the form of the draft attached as an Appendix to its Report. The Notice of Determination is based on the full record to date in these proceedings,

including the materials filed and evidence given at the Phase 1 arbitration, the decision of Mr. Horton, and any responses to direct information requests from the Trustee.

- (b) The Notice of Determination accepts all of the factual determinations made by Mr. Horton in his decision in Phase 1 of the arbitration, consistent with Justice Kimmel's direction in the Funding Decision that it be the "factual predicate upon which the determination of [Ms Athanasoulis'] claim will proceed". Ms. Athanasoulis may file any appeal pursuant to Section 135 of the *BIA*.
- (c) Ms. Athanasoulis' appeal shall not be required to adduce detailed evidence valuing and quantifying her profit share claim, but may address any issues raised in the Notice of Determination.
- (d) The LPs shall be entitled only to raise issues in the appeal that pertain directly: (a) to whether the LPs must be repaid in full prior to any payments being made on the Athanasoulis Claim; and (b) to the enforceability of any element of the Athanasoulis Claim given the terms of the Limited Partnership Agreement.
- (e) Ms. Athanasoulis will be entitled to make a full response to any materials filed by the LPs in this regard.

- (f) The LPs shall not be entitled to raise issues relating to any counterclaim or set-off that they may assert against Ms. Athanasoulis. Such issues will be addressed, if necessary, at a future distribution motion.
- (g) To the extent that the decision on appeal finds that a debt is owing and payable to Ms. Athanasoulis on her profit share agreement, then a summary trial on the quantification of damages will be scheduled.

THE FOLLOWING DOCUMENTARY EVIDENCE will be used at the hearing of the motion:

- (h) The Eighth Report of the Proposal Trustee, to be delivered ; and
- (i) such further and other evidence as the lawyers may advise and this Honourable Court permit.

December 22, 2022

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Court File No. BK-21-02734090-0031

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