

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

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.

Applicants

**SUBMISSIONS OF CONCORD PROPERTIES DEVELOPMENTS CORP.**

**(Proposal Trustee Claims Process Motion, Returnable January 16, 2023)**

January 13, 2023

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TO: **THE SERVICE LIST**

1. These submissions set out the position of Concord Properties Developments Corp. (“**Concord**”), both the Proposal Sponsor and most significant unsecured creditor of the Applicants, with respect to the process to determine the claim of Maria Athanasoulis (“**Athanasoulis**”). Concord’s position is that: (a) Athanasoulis should be given the opportunity to file evidence and other materials with the Proposal Trustee before a final Notice of Revision or Disallowance (“**NORD**”) is issued; and (b) although it is premature to determine an appeal process until the NORD has been issued and an appeal from it sought in accordance with the *Bankruptcy and Insolvency Act*<sup>1</sup> (“**BIA**”), if this Court is inclined to determine the applicable appeal process now, any appeal from the NORD should proceed as a true appeal rather than an appeal *de novo*.

#### **A. Background Facts**

2. In early December, the Proposal Trustee proposed a process whereby the Limited Partners and Athanasoulis could submit briefs to the Proposal Trustee, following which the Proposal Trustee would bring a motion before Justice Kimmel to set the process to determine the claim. However, the parties were unable to agree on process.<sup>2</sup>

3. A case conference was held before Justice Kimmel on December 21, 2022 to address the scheduling of this motion. Justice Kimmel’s endorsement from that attendance states that “[t]he Proposal Trustee thus seeks to schedule a motion for directions from the court in respect of the proposed procedure that it suggests, in the context of which the interested stakeholders will be given the opportunity to put forward their respective positions.”<sup>3</sup>

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<sup>1</sup> [R.S.C. 1985, c B-3](#).

<sup>2</sup> Correspondence between counsel from December 2022, Responding Motion Record of Concord, Tab 1(A).

<sup>3</sup> Endorsement of Justice Kimmel dated December 21, 2022, Responding Motion Record of Concord, Tab 1(C).

4. Following the case conference, the Limited Partners delivered to the Proposal Trustee a “with prejudice” brief containing their evidence and submissions regarding the Athanasoulis claim.<sup>4</sup> To Concord’s knowledge, Athanasoulis did not similarly deliver a brief.

5. On December 30, 2022, the Proposal Trustee delivered a draft NORD, in which the Proposal Trustee proposes to allow Athanasoulis’ employment claim in the amount of \$880,000, but disallow her profit sharing claim in full on the basis that, among other things, it did not require any further evidence to make such determination.<sup>5</sup>

**B. Concord’s Position on Process**

6. Concord’s primary position is that the Court need not make any order on process at this time, and that this motion is another unfortunate interim procedure in the ultimate determination of the Athanasoulis claim that can and should have been avoided. Justice Kimmel’s decision of November 1, 2022 granted the Proposal Trustee considerable discretion to determine an appropriate claims resolution process. The Proposal Trustee need not have required a consensus among the parties to carry out the duties afforded to it under the BIA, in light of the guidance provided to it in Justice Kimmel’s decision.

7. To be clear, Concord is not taking the position that the Proposal Trustee did not engage with stakeholders or attempt to move the process forward in a manner inconsistent with Justice Kimmel’s decision. Rather, Concord’s position is that the issues being raised on the appeal process at this time should have been determined in the context of evidence and submissions having been

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<sup>4</sup> Affidavit of A. McKnight, para. 17, Responding Motion Record of the Limited Partners, Tab 1.

<sup>5</sup> Notice of Disallowance, Motion Record of the Proposal Trustee, Tab 2(H).

obtained from the parties in interest, a NORD having been issued, and an appeal actually proceeding forward, all in accordance with the process established under section 135 of the BIA.

8. Having now taken this interim step to seek the Court's blessing of the Athanasoulis claim determination process including with respect to appeal processes, if the Court is inclined to grant any relief, the only reasonable outcome would be where parties are granted a final opportunity to submit evidence and materials to the Proposal Trustee prior to the issuance of the NORD, and any appeal therefrom is conducted as a "true appeal" rather than an appeal *de novo*.

9. This Court has directed that, consistent with claims determination processes generally in the context of proposal proceedings, the determination of the Athanasoulis claim is to be carried out in a "in a timely and principled manner."<sup>6</sup>

10. Concord's position is that any process to be approved by this Court, if such relief is to be granted, must provide Athanasoulis with the opportunity to file further evidence and submissions before the Proposal Trustee issues the NORD. While there are no grounds at this time on which Athanasoulis would be entitled to an appeal *de novo*, affording Athanasoulis this final opportunity to file materials would further support the notion that any appeal of Athanasoulis' claim should proceed as a true appeal.

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<sup>6</sup> Endorsement of Justice Kimmel dated November 1, 2022, para. 67, Motion Record of the Proposal Trustee, Tab 2(E).

11. That said, Athanasoulis wrongly submits that she is entitled to a full *Rules of Civil Procedure*-like discovery process to obtain evidence to support her claim in advance of submitting further evidence. She has no such entitlement. The section 135 claims process under the BIA is “intended to be an efficient and summary process” for the determination of claims,<sup>7</sup> and provides for the “important” objectives of “speed, economy and informality”.<sup>8</sup> While she does bear the onus of proving her claim (as she concedes), Athanasoulis has no entitlement to delay the adjudication of her claim through a costly and protracted discovery process, particularly given the intensity involved in assessing her claim to-date in these proceedings.

12. The process to appeal the Proposal Trustee’s determination of Athanasoulis’ claim has also been raised on this motion, including whether the appeal should proceed as an appeal *de novo* or a true appeal.

13. The default rule for appeals of a trustee’s decision under section 135 of the BIA<sup>9</sup> is that appeals are to proceed as true appeals, and not as appeals *de novo*.<sup>10</sup> However, the Court has discretion to conduct an appeal *de novo* “if the Trustee committed an error or the interests of justice require it”.<sup>11</sup> Exercising this discretion is only appropriate where the determination process undertaken by a trustee has unduly abrogated a claimant’s rights, the claimant has not been afforded adequate opportunity to prove its claim, or where the acts or omissions of the trustee are so egregious that Court intervention is appropriate to avoid injustice.

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<sup>7</sup> [Asian Concepts Franchising Corporation \(Re\)](#), 2018 BCSC 1022, at para. 53.

<sup>8</sup> [Skyrider Holdings Ltd \(Re\)](#), 2014 ABQB 764, at para. 23.

<sup>9</sup> R.S.C. 1985, c. B-3, s. 135.

<sup>10</sup> See e.g. [Re Galaxy Sports Inc.](#), 2004 BCCA 284 at para 40, and [Re Asian Concepts Franchising Corporation](#), 2017 BCSC 1452 at para 24.

<sup>11</sup> [Bambrick \(Re\)](#), 2015 ONSC 7488, at paras. 16-18.

14. While Concord's primary position is that it is premature to determine whether the appeal should proceed as a true appeal or appeal *de novo*, if the Court is inclined to determine appeal process at this stage, there are no grounds to proceed with an appeal *de novo* because:

- (a) Athanasoulis has been given every opportunity to submit evidence and submissions in support of her claim, including during the first phase of the arbitration. Concord has suggested, and the Proposal Trustee does not appear to be opposed to, permitting one final opportunity for additional evidence and submissions to be submitted in response to the draft NORD put forward by the Proposal Trustee;
- (b) The claims determination procedures employed to-date far exceed typical processes in proposal proceedings – this is not a case where the claimant's process rights have been denied. To the contrary, Athanasoulis has been an active participant in developing the process to-date, and cannot now claim some process deficiency that entitles her to enhanced rights on appeal;
- (c) The Proposal Trustee's draft NORD is premised on sound reasoning based on the record before it; and
- (d) If a process to determine Athanasoulis' claim is approved by the Court on this motion, any attempt by Athanasoulis to seek an appeal *de novo* on the basis of process will amount to a collateral attack on this Court's approval of the process.

15. In summary, Concord proposes that:

- (a) Athanasoulis and the Limited Partners be given the opportunity to submit any final materials on which they might rely in an appeal, based on the reasons set out in the draft NORD;
- (b) The Proposal Trustee may consider such additional materials, if any, and revise the draft NORD if it deems any revisions to be appropriate;
- (c) The Proposal Trustee may then issue a final and binding NORD in accordance with section 135(3) of the BIA; and
- (d) Athanasoulis may then determine whether she wishes to appeal the NORD in accordance with section 135(4) of the BIA, and, if so, she may seek relief with respect to same, at which time Court can consider such relief on the basis of the record before it, including the history of this fulsome claims determination process to-date.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED** this 13th day of January, 2023.



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## Schedule “A”

1. [\*Asian Concepts Franchising Corporation \(Re\)\*, 2018 BCSC 1022](#)
2. [\*Skyrider Holdings Ltd \(Re\)\*, 2014 ABQB 764](#)
3. [\*Re Galaxy Sports Inc.\*, 2004 BCCA 284](#)
4. [\*Re Asian Concepts Franchising Corporation\*, 2017 BCSC 1452](#)
5. [\*Bambrick \(Re\)\*, 2015 ONSC 7488](#)

## Schedule “B”

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

#### **Trustee shall examine proof**

**135 (1)** The trustee shall examine every proof of claim or proof of security and the grounds therefor and may require further evidence in support of the claim or security.

#### **Determination of provable claims**

**(1.1)** The trustee shall determine whether any contingent claim or unliquidated claim is a provable claim, and, if a provable claim, the trustee shall value it, and the claim is thereafter, subject to this section, deemed a proved claim to the amount of its valuation.

#### **Disallowance by trustee**

**(2)** The trustee may disallow, in whole or in part,

**(a)** any claim;

**(b)** any right to a priority under the applicable order of priority set out in this Act; or

**(c)** any security.

#### **Notice of determination or disallowance**

**(3)** Where the trustee makes a determination under subsection (1.1) or, pursuant to subsection (2), disallows, in whole or in part, any claim, any right to a priority or any security, the trustee shall forthwith provide, in the prescribed manner, to the person whose claim was subject to a determination under subsection (1.1) or whose claim, right to a priority or security was disallowed under subsection (2), a notice in the prescribed form setting out the reasons for the determination or disallowance.

#### **Determination or disallowance final and conclusive**

**(4)** A determination under subsection (1.1) or a disallowance referred to in subsection (2) is final and conclusive unless, within a thirty day period after the service of the notice referred to in subsection (3) or such further time as the court may on application made within that period allow, the person to whom the notice was provided appeals from the trustee’s decision to the court in accordance with the General Rules.

#### **Expunge or reduce a proof**

**(5)** The court may expunge or reduce a proof of claim or a proof of security on the application of a creditor or of the debtor if the trustee declines to interfere in the matter.

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

Court File No. BK-21-02734090-0031

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Proceedings commenced in Toronto

**RESPONDING FACTUM OF CONCORD  
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