

**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.

Claim of Maria Athanasoulis against  
YG Limited Partnership and YSL Residences Inc.

**FACTUM OF MARIA ATHANASOULIS**  
*(Motion for Advice and Directions Returnable January 16, 2023)*

**GOODMANS LLP**  
Barristers & Solicitors  
Bay Adelaide Centre  
333 Bay Street, Suite 3400  
Toronto, ON M5H 2S7

**Mark Dunn** LSO#: 55510L  
mdunn@goodmans.ca  
**Sarah Stothart** LSO#: 73068O  
sstothart@goodmans.ca  
Tel: 416.979.2211  
Fax: 416.979.1234

Lawyers for Maria Athanasoulis

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## **PART I. OVERVIEW**

1. These submissions are filed by Maria Athanasoulis in response to the motion of the Proposal Trustee, KSV Restructuring Inc. (the “**Trustee**”). The Trustee’s motion seeks to establish a process for the resolution of complex, high-stakes, multi-party litigation. The same basic principles that apply to any litigation should apply here: Ms. Athanasoulis should be allowed to file evidence and respond to the evidence filed by adverse parties; and the dispute should be resolved efficiently without multiple proceedings to consider the same (or closely related) issues. To the extent the matter is bifurcated, the issues to be determined and the evidence admissible at each stage should be clearly stated.

2. The Trustee has proposed a procedure for resolving Ms. Athanasoulis’ claim, which is set out in its Notice of Motion (the “**Proposed Process**”). With respect, the Proposed Process suffers from at least four significant frailties:

- (a) **The Proposed Process does not allow Ms. Athanasoulis to submit evidence or argument in support of her claim before it is determined, or potentially at all.**

The Proposed Process entails the delivery of a Notice of Disallowance based on the record to date. The LPs assert that Ms. Athanasoulis’ appeal should proceed on the same record. Taken together, these positions will prevent Ms. Athanasoulis from *ever* tendering evidence or argument to support her claim. The inability to submit evidence is particularly troubling because the Trustee appears to have rejected one of Ms. Athanasoulis’ factual allegations – that YSL earned a profit (in the sense that its revenues exceeded its expenses) – without considering Ms. Athanasoulis’ evidence;

- (b) **The Proposed Process includes two hearings to quantify Ms. Athanasoulis' Claim, but does not specify what issues will be dealt with in which hearing.** The Proposed Process contemplates two hearings on the Claim: an “appeal” and a “summary trial” if Ms. Athanasoulis succeeds on the appeal. But the Proposed Process provides no clarity with respect to what issues will be determined at what stage of the proceeding. This risks further confusion and repeated arguments;
- (c) **The Proposed Process contemplates multiple hearings to deal with the issues raised by the LPs.** The Proposed Process deals with some – but not all – of the issues raised by the LPs. This means that multiple proceedings will be required to address the LPs' allegations. Worse still, the LPs served evidence and argument on the Trustee, but that evidence and argument *has not been shared with Ms. Athanasoulis*. As a result, she does not even know the specific allegations being made against her. This lack of transparency, and multiplicity of proceedings, runs directly contrary to the goal of an efficient and expeditious hearing;
- (d) **The Proposed Process does not deal with appeal or payment of the wrongful termination claim.** The Proposal Trustee has stated that it will allow Ms. Athanasoulis' claim in the amount of \$880,000 but does not specify when this amount will be paid or how any appeal of the remaining \$120,000 of Ms. Athanasoulis' wrongful termination claim will be addressed.

3. Ms. Athanasoulis respectfully requests an Order amending the Proposed Process such that she can have a full opportunity to submit evidence and respond to the evidence against her; all issues are determined in one proceeding, or it is clearly indicated when and how the different issues

between the parties will be litigated; and all of the LPs' issues are raised and determined in a single proceeding.

## **PART II. BACKGROUND**

### **A. The Proposal**

4. The YSL entities are single purpose development entities that own a real estate development project (the “**YSL Project**”). The YSL Project was part of a broader development group controlled by Daniel Casey that used the brand name “Cresford”.<sup>1</sup> Ms. Athanasoulis was Cresford’s President and Chief Operating Officer.<sup>2</sup>

5. YSL delivered a bankruptcy proposal that was initially rejected by Justice Dunphy for many reasons, including that it was the product of a “flawed process” involving “breaches of fiduciary duty” by YSL.<sup>3</sup> Justice Dunphy also rejected the valuation tendered to establish that the purchase price paid as part of the proposal was fair and reasonable.<sup>4</sup>

6. An amended Proposal was ultimately approved by the Court on July 16, 2021 (the “**Proposal**”). As part of the Proposal, Concord acquired the YSL Project and set aside a pool of \$30.9 million to satisfy creditor claims.<sup>5</sup> The Proposal Trustee is responsible for resolving disputed claims against YSL.<sup>6</sup>

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<sup>1</sup> Partial Award, paras. 2-3, Responding Motion Record of Maria Athanasoulis (“**Athanasoulis RMR**”), Tab 1.E, p. 66, CL No. [F6492](#)

<sup>2</sup> Partial Award, para. 30, Athanasoulis RMR, Tab 1.E, p. 70, CL No. [F6496](#)

<sup>3</sup> *YG Limited Partnership and YSL Residences (Re)*, [2021 ONSC 4178](#) (“**Interim Reasons**”), [paras. 68-74](#), Motion Record of the Proposal Trustee (“**Trustee MR**”), Tab 2.A, p. 42, CL No. [E2531-E2532](#)

<sup>4</sup> Interim Reasons, [para. 26](#), Trustee MR, Tab 2.A, p. 32, CL No. [E2521-E2522](#)

<sup>5</sup> Proposal, s. 1.02, Trustee MR, Tab 2.G, p. 127-128, CL No. [E2616-E2617](#)

<sup>6</sup> Proposal, s. 3.02, Trustee MR, Tab 2.G, p. 131, CL No. [E2620](#)

**B. Ms. Athanasoulis' Claim**

*(i) The oral Profit Sharing Agreement and its breach*

7. Ms. Athanasoulis had sued YSL prior to its insolvency for breach of contract and wrongful termination. The lawsuit related to an oral agreement by which YSL would pay Ms. Athanasoulis 20% of the profits earned on the YSL Project (the “**Profit Sharing Agreement**”).

8. The value of the YSL Project increased tremendously between the time YSL purchased it and the Repudiation Date (defined below), thanks in large part to Ms. Athanasoulis' efforts.<sup>7</sup> YSL could have realized the substantial profits it had generated by completing the YSL Project or selling it before completion. Either way, Ms. Athanasoulis would be paid a substantial sum on account of the Profit Sharing Agreement.

9. This is, of course, not what happened. Ms. Athanasoulis discovered significant financial irregularities at Cresford's other projects, and urged Mr. Casey to address them. He refused. Instead, YSL (and the other Cresford entities) terminated Ms. Athanasoulis and repudiated the Profit Share Agreement.<sup>8</sup>

*(ii) Liability is established in the first phase of the arbitration*

10. When YSL became subject to the Proposal, Ms. Athanasoulis and the Trustee agreed to a bifurcated arbitration process to determine her Claim within the Proposal.

11. The first phase of the arbitration on liability issues proceeded over four days in February 2022. By Partial Award in favour of Ms. Athanasoulis, the arbitrator founds as matters of fact that:

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<sup>7</sup> Statement of Issues, paras. 18-21, Athanasoulis RMR, Tab 1.A, p. 10-11, CL No. [F6432-F6433](#)

<sup>8</sup> Statement of Issues, para. 10, Athanasoulis RMR, Tab 1.A, p. 8, CL No. [F6430](#)

- (a) The Profit Sharing Agreement was an enforceable agreement; and
- (b) YSL constructively terminated Ms. Athanasoulis in December 2019 (the “**Repudiation Date**”).<sup>9</sup>

*(iii) Ms. Athanasoulis’ damages quantification*

12. Liability having been established in the first phase of the arbitration, Ms. Athanasoulis delivered a detailed Statement of Issues on May 4, 2022 setting out her positions on issues relating to damages quantification. Among other things, she claimed:

6. The Profit Sharing Entitlement Damages are, therefore, equal to the value of the Profit Sharing Entitlement in December 2019 when Ms. Athanasoulis was terminated. That value must be calculated according to the real and significant chance that existed in December 2019 that the YSL Project would ultimately generate profits.

7. In the alternative, even if Mr Casey’s post-breach conduct or the Proposal are somehow relevant to Ms. Athanasoulis’ damages, she is still entitled to substantial damages for breach of the Profit Sharing Entitlement. This is because, despite Mr. Casey’s machinations, the YSL Project earned a significant profit through early withdrawals of equity and the Proposal.<sup>10</sup>

13. Ms. Athanasoulis alleged that her entitlement under the Profit Sharing Agreement (the “**Profit Sharing Claim**”) was worth between \$19 million and \$25 million in December 2019. The figures underlying this claim are not, at this stage, disputed. The YSL Project had an appraised value of approximately \$375 million; YSL had invested approximately \$247 million in it. Thus, YSL had *earned* profits of approximately \$128 million, it just had not yet *realized* these profits.<sup>11</sup>

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<sup>9</sup> Partial Award, para. 191, Athanasoulis RMR, Tab 1.E, p. 109, CL No. [F6535](#)

<sup>10</sup> Statement of Issues, paras. 6-7, Athanasoulis RMR, Tab 1.A, p. 6-7, CL No. [F6428-F6429](#)

<sup>11</sup> Statement of Issues, paras. 20-21, Athanasoulis RMR, Tab 1.A, p. 11, CL No. [F6433](#)

14. Ms. Athanasoulis further alleged that YSL was projected to earn profits of more than \$196 million when the YSL Project was complete, and even if the projected profits were discounted to reflect a risk that the YSL Project would fail, the entitlement remained very valuable.<sup>12</sup>

15. Importantly, Ms. Athanasoulis alleged that her damages were to be calculated based on the value of the Profit Sharing Entitlement on the Repudiation Date, and thus “Any steps taken by Cresford to increase or decrease the value of the YSL Project after the Repudiation Date do not affect the damages to which Ms. Athanasoulis is entitled because Ms. Athanasoulis’ damages had already crystallized.”<sup>13</sup>

16. In the alternative, and to the extent she is incorrect that her damages should be based on the value of her entitlement before the profits were in fact earned, it is also Ms. Athanasoulis’ position that the YSL Project earned actual profits. She is entitled to 20% of those profits in accordance with the terms of the Profit Sharing Agreement.<sup>14</sup>

17. In connection with these issues, Ms. Athanasoulis delivered document requests to the Trustee and YSL seeking detailed financial records that would allow her to quantify her Claim.<sup>15</sup> The document production and review process largely stopped because it was not clear when and how the claim would be adjudicated.

18. In order to prove her Claim with respect to both of these issues, expert evidence analyzing the records provided and valuation principles will be required to properly value the YSL Project,

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<sup>12</sup> Statement of Issues, para. 21, Athanasoulis RMR, Tab 1.A, p. 11, CL No. [F6433](#)

<sup>13</sup> Statement of Issues, para. 15, Athanasoulis RMR, Tab 1.A, p. 9, CL No. [F6431](#)

<sup>14</sup> Statement of Issues, paras. 46-60, Athanasoulis RMR, Tab 1.A, p. 18-20, CL No. [F6440-F6442](#)

<sup>15</sup> Initial Document Request dated April 13, 2022, Supplementary Responding Motion Record of Maria Athanasoulis (“**Athanasoulis Supplementary RMR**”), Tab 1.A, p. 4, CL No. [F6547](#); Further Document Request dated May 12, 2022, Athanasoulis Supplementary RMR, Tab 1.B, p.6-7, CL No. [F6550- F6551](#)



assess the appropriate quantification of damages for breach of contract, and assess any actual profits earned by YSL.

**C. The Trustee's Response to Ms. Athanasoulis' Claim**

19. The Trustee's position on Ms. Athanasoulis' claim is set out in a draft "Notice of Disallowance". Although the Notice of Disallowance is said to be a draft, the Proposed Process does not include any mechanism to review or revise it based on submissions from Ms. Athanasoulis or anything else. The Trustee asserts that the Profit Sharing Claim has no value because:

- (a) the Profit Sharing Claim is equity, not debt;
- (b) YSL did not earn any profits because the Project was not completed and the LPs have not been repaid; and
- (c) the Profit Share Claim is subordinated to the claim advanced by the LPs.<sup>16</sup>

20. Ms. Athanasoulis disputes all of these positions. Briefly, her responses are:

- (a) Pursuant to the *BIA*, an "equity claim" must be in respect of an "equity interest". Ms. Athanasoulis never held an equity interest. She is owed a debt because YSL breached its contract with her. The fact that the debt is calculated by reference to profits does not make it an equity claim;
- (b) Whether YSL actually earned profits is irrelevant. Ms. Athanasoulis is entitled to the value of the Profit Sharing Claim *on the Repudiation Date*. The fact that Mr. Casey's self-serving breaches of fiduciary duty destroyed much of that value after

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<sup>16</sup> Draft Notice of Disallowance, Trustee MR, Tab 2.H, p. 144-149, CL. No. [E2633-E2638](#)

the fact is not relevant. Further, even if actual profits are relevant, they are calculated based on actual expenses less actual revenue, and YSL earned profits;

- (c) Ms. Athanasoulis did not agree to subordinate her interest to those of the LPs. Her Claim is independent of any claims they may have. That her Claim is calculated based on a *pro forma* that contemplated repayment of the LPs does not affect the value of Ms. Athanasoulis' Claim. But-for YSL's breach of contract (and subsequent breaches of fiduciary duty), the LPs would have been repaid in full. The fact that the LPs were not repaid gives rise to claims against YSL, Mr. Casey, and potentially others. It does not affect Ms. Athanasoulis' entitlement.

#### **D. The LPs' Issues**

21. Shortly after the release of the arbitrator's Partial Award on the first phase of arbitration, the LPs (who will receive any residual funds not paid to creditors under the Proposal) raised procedural and substantive objections to the arbitration.<sup>17</sup>

22. In that context, one group of LPs delivered a draft Notice of Motion setting out some of their complaints, which was later replaced in October 2022 by a formal Notice of Motion.<sup>18</sup> Another group of LPs delivered a draft Statement of Claim on the same general issues.<sup>19</sup>

23. Both documents set out a number of allegations that the LPs say preclude Ms. Athanasoulis from being awarded any amount in respect of her Profit Sharing Claim under the Proposal.<sup>20</sup> The

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<sup>17</sup> Sixth Report of the Proposal Trustee, s. 6.1, Trustee MR, Tab 2.C, p. 74, CL No. [E2563](#)

<sup>18</sup> Notice of Motion, Athanasoulis RMR, Tab 1.C, p. 46-58, CL No. [F6470-F6482](#)

<sup>19</sup> Draft Statement of Claim, Athanasoulis RMR, Tab 1.B, p. 25-44, CL No. [F6448-F6467](#)

<sup>20</sup> Draft Statement of Claim, Athanasoulis RMR, Tab 1.B, p. 25-44, CL No. [F6448-F6467](#); Notice of Motion, Athanasoulis RMR, Tab 1.C, p. 46-58, CL No. [F6470-F6482](#)

LPs' issues overlap significantly, although not entirely, with those raised by the Proposal Trustee.

The LPs' material raises the following issues:

- (a) Ms. Athanasoulis' claim is subordinate to the LPs' entitlement;
- (b) The Profit Sharing Claim is unenforceable against YSL because Ms. Athanasoulis made misrepresentations or breached her fiduciary duty to the LPs;
- (c) To the extent Ms. Athanasoulis recovers anything, she is liable to the LPs for damages caused by the aforementioned representations and breach of fiduciary duty.<sup>21</sup>

24. The LPs allege that Ms. Athanasoulis made misrepresentations at seven separate meetings. The LPs have refused to say what, exactly, Ms. Athanasoulis is alleged to have said at these meetings. It is, therefore, unclear whether resolving the LPs' claims involves credibility issues or if the LPs simply allege that Ms. Athanasoulis summarized the terms of the Limited Partnership Agreement for them.<sup>22</sup> Ms. Athanasoulis has repeatedly asked for briefing, details and/or particulars. To date, she has received none.<sup>23</sup>

25. The LPs submitted evidence and/or argument to the Trustee, but that evidence has not been provided to Ms. Athanasoulis.<sup>24</sup> She does not know exactly what allegations the LPs have made against her. This is, with respect, not appropriate.

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<sup>21</sup> See generally, LPs' Draft Statement of Claim dated June 2022, Athanasoulis RMR, Tab 1.B, p. 25-44, CL No. [F6448-F6467](#), and LPs' Notice of Motion dated October 13, 2022, Athanasoulis RMR, Tab 1.C, p. 46-58, CL No. [F6470-F6482](#)

<sup>22</sup> Draft Statement of Claim, paras. 20, 44, 47-51, Athanasoulis RMR, Tab 1.B, p. 33, 37-38, CL No. [F6456](#), [F6460-F6461](#); Notice of Motion, paras. 23-26, Athanasoulis RMR, Tab 1.C, p. 51-53, CL No. [F6475-F6477](#)

<sup>23</sup> Email Correspondence between Mark Dunn, Shaun Laubman, and Alex Soutter dated October 25-26, 2022, Athanasoulis RMR, Tab 1.D, p. 60-63, CL No. [F6485-F6488](#)

<sup>24</sup> Affidavit of Ashley McKnight sworn January 4, 2023, para. 17, Joint Responding Motion Record of the Limited Partners ("LPs' RMR"), Tab 1, p. 9, CL No. [F6254](#)

26. Depending on the allegations made by the LPs, resolution of their claims may require evidence from the numerous individuals alleged to have participated in discussions and meetings at which Ms. Athanasoulis is alleged to have made misrepresentations. That evidence will need to be subject to cross-examination and responding evidence from Ms. Athanasoulis and potentially others.

**E. The Trustee Proposed a Process and Stakeholders Raised Issues with the Process**

27. By Endorsement dated November 1, 2022 in response to a motion relating to continued payment of fees by Concord (the “**Fee Motion**”), Justice Kimmel found that the second phase of the arbitration that Ms. Athanasoulis and the Trustee agreed to could not proceed and ordered the Trustee to establish a new process for determination of Ms. Athanasoulis’ Claim.<sup>25</sup>

28. In light of Justice Kimmel’s endorsement, Ms. Athanasoulis engaged in discussions with the Trustee about a new process. Counsel to Ms. Athanasoulis ultimately set forward her position on elements that should be included in a new process in a letter dated November 21, 2022.<sup>26</sup>

29. The Trustee initially proposed a process on December 2, 2022 that contemplated the LPs, Ms. Athanasoulis and the Trustee issuing “with prejudice” briefs before any Notice of Disallowance would be issued (the “**Initial Proposed Process**”). The Initial Proposed Process also contemplated an opportunity for Ms. Athanasoulis to respond to the submissions of the LPs and the Trustee.<sup>27</sup>

30. The Trustee asked the parties for comment and to advise when delivery of the contemplated “with prejudice” briefs would be possible before the hearing of this motion.<sup>28</sup> Ms. Athanasoulis

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<sup>25</sup> Kimmel Decision, para. [96](#), Trustee MR, Tab 2.E, p. 109-110, CL No. [E2598-E2599](#)

<sup>26</sup> Letter dated November 21, 2022, Athanasoulis Supplementary RMR, Tab 1.C, p. 9-13, CL. No. [F6554- F6558](#)

<sup>27</sup> Email from Matthew Milne-Smith dated December 2, 2022, LPs’ RMR, Tab 1.G, p. 63, CL No. [F6308](#)

<sup>28</sup> Email from Matthew Milne-Smith dated December 5, 2022, 2022, LPs’ RMR, Tab 1.G, p. 62, CL No. [F6307](#)

responded, outlining her concerns that the Initial Process contemplated the exchange of material but did not specify whether further material could be submitted on appeal. This created the risk that the submissions would be either under-inclusive (because they did not include all evidence that might be required to prove the claim) or over-inclusive (because they included all potentially relevant evidence, which would take significant time and money to assemble).<sup>29</sup>

31. Ms. Athanasoulis never received the clarification she sought. The LPs took the position that there should be no opportunity to submit further evidence once the Trustee made its determination, and the Trustee took no position at all.<sup>30</sup>

32. The Trustee advised that it could not provide confirmation as to what evidence will be permitted.<sup>31</sup> Accordingly, counsel for Ms. Athanasoulis said that “we should proceed to court and get clarity on process so everyone can know the rules.”<sup>32</sup> In essence, Ms. Athanasoulis was not prepared to agree to a timetable for evidence and argument in support of her Claim without knowing whether she would have an opportunity to file further evidence at a later date.

## **F. The Proposed Process**

33. The Trustee brought this motion for advice and direction with respect to the Proposed Process, which is summarized in its Notice of Motion. The Proposed Process is different from the Initial Proposed Process. Importantly, the Proposed Process does not include *any* opportunity for Ms. Athanasoulis to submit evidence or argument before a determination is made. The Proposed Process includes essentially four stages:

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<sup>29</sup> Email from Sarah Stothart dated December 5, 2022, LPs’ RMR, Tab 1.G, p. 61, CL No. [F6306](#)

<sup>30</sup> Email from Alexander Soutter dated December 7, 2022, LPs’ RMR, Tab 1.G, p. 59, CL No. [F6304](#)

<sup>31</sup> Email from Matt Milne-Smith dated December 14, 2022, LPs’ RMR, Tab 1.G, p. 55, CL No. [F6300](#)

<sup>32</sup> Email from Mark Dunn dated December 14, 2022, LPs’ RMR, Tab 1.G, p. 55, CL No. [F6300](#)

- (a) **Disallowance:** the Trustee will disallow Ms. Athanasoulis' Claim, without considering further evidence or argument from her;<sup>33</sup>
- (b) **Appeal:** Ms. Athanasoulis will appeal the disallowance. The appeal will determine the issues addressed in the Notice of Disallowance, and the issues raised by the LPs' with respect to priority and the enforceability of Ms. Athanasoulis' agreement. The balance of the LPs' issues will be left for another day. Ms. Athanasoulis will be entitled to "full response" to the LPs, but it is not clear what (if any) right she will have to respond to the Trustee;<sup>34</sup>
- (c) **Valuation trial:** If Ms. Athanasoulis succeeds on appeal there will be a summary trial "on the quantification of damages". It is not clear what specific issues will be left for the damages trial, since all of the remaining issues are (broadly speaking) relevant to the quantification of damages;<sup>35</sup>
- (d) **Distribution motion:** If Ms. Athanasoulis succeeds on both the appeal and Summary Trial then there will be a further "distribution motion" where the LPs will raise the balance of their issues.<sup>36</sup>

34. Thus, the Proposed Process contemplates three hearings. Each of the three hearings has one thing in common: if Ms. Athanasoulis loses, then the process ends. If Ms. Athanasoulis wins the first two hearings, then she proceeds to face further challenges at yet another hearing.

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<sup>33</sup> Notice of Motion, para. 17(a), Trustee MR, Tab 1.A, p. 7-8, CL No. [E2496-E2497](#)

<sup>34</sup> Notice of Motion, para. 17(d), Trustee MR, Tab 1.A, p. 8, CL No. [E2497](#)

<sup>35</sup> Notice of Motion, para. 17(g), Trustee MR, Tab 1.A, p. 9, CL No. [E2498](#)

<sup>36</sup> Notice of Motion, para. 17(f), Trustee MR, Tab 1.A, p. 9, CL No. [E2498](#)

### **PART III. ISSUES**

35. Ms. Athanasoulis respectfully submits that this case raises the following issues for determination:

- (a) Is Ms. Athanasoulis entitled to submit evidence and argument in support of her Claim, either before the Notice of Disallowance is issued or as part of an appeal *de novo* from it?
- (b) To the extent that Ms. Athanasoulis' claim is determined in multiple proceedings, should the issues addressed in each proceeding be clearly identified at the outset?
- (c) Should all of the issues raised by the LPs be determined in a single proceeding?

36. Ms. Athanasoulis respectfully submits that the answer to each of these questions is yes.

#### **A. The Proposed Process Must Allow Ms. Athanasoulis to Fully Submit Evidence and Argument in Support of Her Claim**

- (i) *The Proposed Process does not allow Ms. Athanasoulis to submit evidence or argument before the Trustee issues its determination*

37. As set out above, the Initial Proposed Process contemplated Ms. Athanasoulis and the LPs delivering "with prejudice" briefs and responding to briefs delivered by the other parties prior to any determination being made. While Ms. Athanasoulis objected to *immediate* delivery of a brief without clarity as to whether she would have further opportunity to deliver additional evidence at a later stage, she did not reject the opportunity to submit evidence altogether.

38. Notably, the Proposed Process no longer contemplates any opportunity to submit evidence and argument. The Trustee has not explained this change to the Initial Proposed Process.

39. The issue requiring clarification is particularly acute with respect to actual profits earned on the YSL Project, as the Trustee purports to determine there are none in its draft Notice of Disallowance.<sup>37</sup> But Ms. Athanasoulis asserts that the YSL Project *did* earn a profit as defined in the oral Profit Sharing Agreement, since its expenses were significantly lower than its revenues.<sup>38</sup> She wrote to the Proposal Trustee on November 21, 2022 and asked for an opportunity to submit evidence to prove this allegation.<sup>39</sup> The Trustee did not respond to Ms. Athanasoulis' letter and does not explain what (if any) investigation it undertook before reaching its conclusion.

40. This issue can be solved by allowing Ms. Athanasoulis to appeal the disallowance of her Claim *de novo*, such that she can submit evidence and respond to the evidence against her in the ordinary course. If appeals are not (or may not be) *de novo*, then the Proposed Process ought to be amended to provide Ms. Athanasoulis with a full and fair an opportunity to make her case.

41. Disallowing a claim without any evidence to support that disallowance runs afoul of prior determinations of courts in the context of proceedings relating to sections 121 and 135 of the *BIA* (and their predecessors).<sup>40</sup> Failing to seek or allow additional evidence before reaching a determination would also be inconsistent with the direction given by Justice Kimmel in her Endorsement that “the Proposal Trustee will need to carry out its responsibilities under s. 135 of the *BIA*, get the factual and other inputs it requires from witnesses, other stakeholders, experts and

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<sup>37</sup> Draft Notice of Disallowance, Trustee MR, Tab 2.H, p. 144-149, CL No. [E2633-E2638](#)

<sup>38</sup> Partial Award, para. 146, Athanasoulis RMR, Tab 1.E, p. 95, CL No. [F6521](#)

<sup>39</sup> Letter dated November 21, 2022, Athanasoulis Supplementary RMR, Tab 1.C, p. 9-13, CL. No. [F6554- F6558](#).

<sup>40</sup> See for *e.g.*, *Re Durham*, [2005 NSSC 57](#), *McCrie v. Gray*, 1940 CarswellOnt 67, and *Asian Concepts Franchising Corporation (Re)*, [2018 BCSC 1022](#), in which the B.C. Supreme Court found that the Trustee conducted a merely “superficial” investigation of the claim value and failed to independently review and require support for the claim by accepting a stated value on the basis of the debtor’s information without further investigation. The Court noted that “the duty of the trustee to properly evaluate claims is not abrogated in a proposal process.”



the like and determine whether the Athanasoulis Claim has been proven and, if so, at what amount it should be valued.”<sup>41</sup>

42. Ms. Athanasoulis respectfully submits that the Proposed Process ought to be amended to allow her to file evidence and argument to support her claim, and respond to the evidence and argument against her. The best way to accomplish this goal is to allow appeals to proceed *de novo*.

**(ii) Both the “appeal” and “summary trial” should proceed de novo**

43. Ms. Athanasoulis submits that it would be appropriate, efficient, and fair for the Court to direct at this preliminary stage that her appeal will proceed as a hearing (or hearings) *de novo*, coupled with appropriate case management.

44. An appeal *de novo* is appropriate in this instance given the nature of Ms. Athanasoulis’ claim and the procedural history to date. Ms. Athanasoulis advances a complex commercial claim that turns on a number of factual and legal disputes, and for which expert valuation evidence will need to be considered. In ordering *de novo* appeals in bankruptcy proceedings, courts have considered that a claim is based on underlying civil litigation and that it will necessitate consideration of potentially conflicting expert evidence.<sup>42</sup>

45. The Trustee has already accepted, in agreeing to arbitrate and proceeding through the first phase of arbitration, that a full hearing is the appropriate procedure for resolving Ms. Athanasoulis’ claim.<sup>43</sup> The Trustee made submissions before Justice Kimmel on the Fee Motion about the further evidence that would be required in order to determine the value of Ms. Athanasoulis’ claim,

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<sup>41</sup> Kimmel Endorsement, paras. [62](#) and [68](#), Trustee MR, Tab 2.E, p. 105-106, CL No. [E2594-E2595](#)

<sup>42</sup> See for example, *Oil Lift Technology Inc. v. Deloitte & Touche Inc.*, [2012 ABQB 357](#) at para. [42](#); *San Juan Resources Inc., Re*, [2009 ABQB 55](#) at paras. [28](#), [31-32](#).

<sup>43</sup> Partial Award, Athanasoulis RMR, Tab 1.E, p.65-110 , CL No. [F6491-F6536](#)

including relating to the LPs' issues, and why determination by a third-party adjudicator was appropriate.<sup>44</sup>

46. The need for a full evidentiary record has not changed because the arbitration cannot proceed. An appeal *de novo* would provide many of the procedural advantages offered by the arbitration, without the issues relating to delegation of authority that resulted in termination of the arbitration. It also offers a transparent, expeditious and efficient manner for evaluating Ms. Athanasoulis' claim and any challenges to it, including the known challenges to be advanced by the LPs.

47. In addition, the procedural history of this matter provides further justification for an appeal *de novo*. The Proposal Trustee's role is, as a result of Justice Kimmel's decision, effectively changing from an advocate to an adjudicator. It participated in the arbitration process as Ms. Athanasoulis' adversary. Among its various positions, it urged the arbitrator to consider that Ms. Athanasoulis' Claim was an equity claim, that there were no profits, and that the Claim should be dismissed.<sup>45</sup> The arbitrator decided that the arguments raised by the Trustee were damages arguments that ought to be determined in the second phase of the arbitration.<sup>46</sup>

48. Now, the Trustee is tasked with deciding whether the very arguments that it advanced in the arbitration are valid. The Trustee's prior positions put it in a difficult position to evaluate Ms. Athanasoulis' claim and any evidence delivered in support of it in a neutral manner. Not surprisingly, the draft Notice of Disallowance has taken the same position as the Trustee took in

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<sup>44</sup> See Kimmel Decision, para. [58-59](#), Trustee MR, Tab 2.E, p. 104, CL No. [E2593](#)

<sup>45</sup> Partial Award, paras. 128-129, Athanasoulis RMR, Tab 1.E, p. 89, CL No. [F6515](#)

<sup>46</sup> Partial Award, para. 164, Athanasoulis RMR, Tab 1.E, p. 99, CL No. [F6525](#)

the arbitration: that Ms. Athanasoulis' Claim sounds in equity, that YSL earned no profits, and thus that Ms. Athanasoulis' claim should be valued at zero.<sup>47</sup>

49. In the circumstances of this case, limiting the parties to a true appeal in the Proposed Process would work an injustice on Ms. Athanasoulis. The Proposed Process currently denies Ms. Athanasoulis any opportunity to deliver further evidence in support of her Claim, while providing no assurance that she will be permitted to go beyond the record before the Trustee on appeal. This is plainly unfair. Ontario courts have held that in circumstances in which a creditor has not had a full opportunity to put forward its claim or to respond to the disallowance of a trustee, or the interests of justice otherwise require it, an appeal *de novo* is appropriate.<sup>48</sup>

50. This unfairness could be minimized if Ms. Athanasoulis is given a full and complete opportunity *before* determination to deliver all of the evidence that she might conceivably need to refer to in future appeals relating to her claim. This is not a case where Ms. Athanasoulis is seeking to abdicate her responsibility to prove her claim as a creditor. However, this option imports a necessary delay of months while Ms. Athanasoulis gathers this evidence, which delay is not reasonable or efficient in light of the issues forming the basis for the Trustee's draft Notice of Disallowance (which do not relate to the valuation of the YSL Project on the Repudiation Date or the alleged misrepresentations made to the LPs) and the other bases set out herein for which an appeal *de novo* would be appropriate.

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<sup>47</sup> Draft Notice of Disallowance, Trustee MR, Tab 2.H, p. 144-149, CL. No. [E2633-E2638](#)

<sup>48</sup> *YG Limited Partnership and YSL Residences Inc.*, [2022 ONSC 6548](#), para. 34; *Credifinance Securities Limited v DSLC Capital Corp.*, [2011 ONCA 160](#) at para. 24; *Charlestown Residential School, Re.*, 2010 ONSC 4099; *Poreba, Re.*, [2014 ONSC 277](#) at para. 27.

*(iii) Ms. Athanasoulis is entitled to document production and, if necessary, examination of a representative of YSL to gather needed evidence*

51. The Proposed Process does not contemplate any discovery rights. In order to obtain relevant documents and information that may assist in proving her Claim, Ms. Athanasoulis must seek these documents from the Trustee and YSL. YSL produced some documents in the initial stages of the arbitration and in response to document requests by Ms. Athanasoulis.<sup>49</sup> However, the process of reviewing documents and making follow-up requests largely stopped because of uncertainty about whether the arbitration would proceed and what procedure would be followed if the arbitration did not proceed.

52. Ms. Athanasoulis requires production of documents to support her Claim, and she should not be denied those documents because the process for determination of her Claim has changed. She should also be entitled to examine a representative of YSL. This is particularly the case here, given the Trustee has noted that “In the context of Cresford’s various restructuring proceedings, the credibility and availability of Cresford’s management, and the reliability of its books and records have been significant issues.”<sup>50</sup>

53. Both of these entitlements ought to be included in the Proposed Process.

**B. The Proposed Process Lacks Clarity About the Phase in Which Various Issues Will be Addressed**

54. As noted, the Proposed Process appears to contemplate three hearings after the determination: an “appeal” phase; a “summary trial” phase; and a “distribution” hearing.<sup>51</sup> Ms.

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<sup>49</sup> Initial Document Request dated April 13, 2022, Athanasoulis Supplementary RMR, Tab 1.A, p. 4, CL. No. [F6547](#); Further Document Request dated May 12, 2022, Athanasoulis Supplementary RMR, Tab 1.B, p 6-7., CL. No. [F6550- F6551](#)

<sup>50</sup> Sixth Report of the Proposal Trustee, s. 2.6, Trustee MR, Tab 2.C, p. 67, CL No. [E2556](#)

<sup>51</sup> Notice of Motion, para. 17, Trustee MR, Tab 1, p. 7-9, CL No. [E2496-E2498](#)

Athanasoulis submits that this is too many hearings. But if more than one hearing is approved, then the parties require clarity about what issues will be addressed at what stage.

55. As noted above, the Proposed Process provides that Ms. Athanasoulis shall not be required in her appeal to adduce “detailed evidence valuing and quantifying her profit share claim”, and may do so at a subsequent summary trial. But liability has already been established, such that *all* of the remaining issues, in a broad sense, involve “valuing” Ms. Athanasoulis’ Claim.

56. It is not apparent how the Trustee proposes to segregate various issues relating to “valuing” Ms. Athanasoulis’ Claim. As referenced above, the clearest example of this is with respect to actual profits, which is Ms. Athanasoulis’ alternative damages claim.<sup>52</sup> Determinations of actual profits earned by the YSL Project will require detailed factual evidence. Yet the Trustee’s apparent “determination” (without evidence from Ms. Athanasoulis) on this topic is one of the bases for the draft Notice of Disallowance, implying that it should be the subject of Ms. Athanasoulis’ first stage appeal “address[ing] any issues raised in the Notice of Disallowance”<sup>53</sup>.

57. Further, clarity regarding the LPs’ ability to participate in the Proposed Process and the scope of the issues they are entitled to raise is critical. The Proposed Process provides that “(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.”<sup>54</sup>

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<sup>52</sup> Statement of Issues, paras. 46-60, Athanasoulis RMR, Tab 1.A, p. 18-20, CL No. [F6440-F6442](#)

<sup>53</sup> Notice of Motion, para. 17(c), Trustee MR, Tab 1, p. 8, CL No. [E2497](#)

<sup>54</sup> Notice of Motion, para. 17(d), Trustee MR, Tab 1, p. 8, CL No. [E2497](#)

58. In Ms. Athanasoulis' respectful submission, if the summary trial phase is intended to address only quantification issues (on which the LPs could plainly have no evidence or submissions of any weight), then the LPs' participation ought to be restricted to the "appeal" phase and they must fully brief and submit their issues at that phase.

**C. The LPs' Issues Should All be Included in the Proposed Process and addressed at one hearing**

59. With respect to the LPs' issues, the Proposed Process goes on to state that "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."<sup>55</sup>

60. While Ms. Athanasoulis believes that the LPs' allegations as without merit, it is her respectful submission that they ought to all be addressed in one hearing. It would be most efficient to address all related issues together and avoid a multiplicity of proceedings. This is particularly the case as Ms. Athanasoulis understands that the same alleged misrepresentations underlie the LPs' allegations of subordination as underlie their counterclaim and allegations of set-off.

61. Further, the LPs have apparently served evidence and argument on the Trustee, which *has not been shared with Ms. Athanasoulis*.<sup>56</sup> As a result, Ms. Athanasoulis does not even know the specific allegations being made against her and how they will fall within or without the issues proposed to be addressed in the Proposed Process. This lack of transparency, and multiplicity of proceedings, runs directly contrary to the goal of an efficient and expeditious hearing.

62. Indeed, the avoidance of a multiplicity of proceedings was contemplated in the directions of Justice Gilmore when the LPs' objections to the arbitration procedure were initially raised. She

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<sup>55</sup> Notice of Motion, para. 17(f), Trustee MR, Tab 1, p. 9, CL No. [E2498](#)

<sup>56</sup> Affidavit of Ashley McKnight sworn January 4, 2023, para. 17, LPs' RMR, Tab 1, p. 9, CL No. [F6254](#)

held that “The claims all arise from the same set of facts”<sup>57</sup> and “It struck me that the priority issues and the damages could all be arbitrated at the arbitration already scheduled”<sup>58</sup>. Those concerns are appropriate and ought to be mitigated by ordering complete resolution of the LPs’ issues in the context of the appeal stage, rather than a third “distribution motion” outside the Proposed Process.

**D. Ms. Athanasoulis’ Wrongful Termination Claim Should be Addressed**

63. Ms. Athanasoulis submitted a claim for wrongful termination damages in the amount of \$1,000,000. The Proposal Trustee has indicated that it intends to accept a total of \$880,000 of the claim, but it does not specify when this amount will be paid. Similar claims by other employees have been paid in full, and there is no reason that payment to Ms. Athanasoulis should be delayed pending until the balance of the claim is resolved. This payment should be included in the Proposed Process.

**E. Ms. Athanasoulis’ Proposal**

64. In light of the foregoing concerns, Ms. Athanasoulis proposes that the Proposed Process be modified as follows. To the extent not addressed below, Ms. Athanasoulis accepts the balance of the Proposed Process put forward by the Trustee in its Notice of Motion:

- (a) The amount allowed by the Trustee in respect of Ms. Athanasoulis’ claim will be paid as soon as possible and, in any event, within 60 days;
- (b) The parties will be permitted to deliver any further evidence they consider relevant to the Trustee’s determination before the Trustee issues its Notice of Disallowance;

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<sup>57</sup> June 8 Endorsement, LPs’ RMR, Tab 2.F, p. 48-51, CL No. [F6293-F6296](#)

<sup>58</sup> May 24 Endorsement, LPs’ RMR, Tab 2.D, p. 35-36, CL No. [F6280-F6281](#)

if the Court orders appeals from the Notice of Disallowance will be taken *de novo* as proposed in point (b), the time period for delivery of additional evidence will be two weeks; if the Court declines to order that appeals will be taken *de novo* as proposed in point (b), the time period for delivery of additional evidence will be three months;

- (c) Ms. Athanasoulis' appeal from the Notice of Disallowance will proceed *de novo*;
- (d) Ms. Athanasoulis shall have the right to production of documents by YSL and the right to examine a representative of YSL;
- (e) The LPs shall substantiate whatever allegations they make with affidavit evidence, and Ms. Athanasoulis shall have the right to serve responding evidence and cross-examine on those affidavits;
- (f) The appeal shall address the following issues:
  - (i) whether Ms. Athanasoulis' claim is a "provable claim" within the meaning of the *BIA* or whether it is an equity claim as alleged by the Trustee;
  - (ii) whether Ms. Athanasoulis' claim is subordinate to the claims advanced by the LPs;
  - (iii) whether any of the allegations raised by the LPs in this proceeding have merit and are relevant to Ms. Athanasoulis' right to recover her claim;
  - (iv) how Ms. Athanasoulis' damages ought to be calculated, including whether they are to be calculated at the Repudiation Date;



- (v) whether YSL earned a profit, as the term is defined in the Partial Award;  
and
- (vi) whether Ms. Athanasoulis is entitled to the full amount of her wrongful termination claim;
- (g) the LPs shall have the right to advance their allegations against Ms. Athanasoulis, but they shall not have standing to address the matters covered by the Trustee;
- (h) If Ms. Athanasoulis is successful on her appeal in point (f), then issues relating to quantification of Ms. Athanasoulis' damages according to the mechanism determined at the appeal phase, including the valuation of Ms. Athanasoulis' entitlement pursuant to the Profit Sharing Agreement as of the Repudiation Date, are to be addressed in a summary trial thereafter.

#### **PART IV. CONCLUSION**

65. For the foregoing reasons, Ms. Athanasoulis respectfully asks the Court to direct the Trustee to modify its Proposed Process as proposed in Section III.E above or to otherwise provide direction that addresses the concerns set forth herein.

January 12, 2023

**Goodmans LLP**

Barristers & Solicitors

Bay Adelaide Centre

333 Bay Street, Suite 3400

Toronto, ON M5H 2S7

**Mark Dunn** LSO#: 55510L

mdunn@goodmans.ca

**Sarah Stothart** LSO#: 73068O

sstothart@goodmans.ca

Tel: 416.979.2211

Fax: 416.979.1234

Lawyers for Maria Athanasoulis

**SCHEDULE A**  
**LIST OF AUTHORITIES**

1. *YG Limited Partnership and YSL Residences (Re)*, [2021 ONSC 4178](#)
2. *YG Limited Partnership (Re)*, [2022 ONSC 6138](#)
3. *Re Durham*, [2005 NSSC 57](#)
4. *McCrie v. Gray*, 1940 CarswellOnt 67
5. *Asian Concepts Franchising Corporation (Re)*, [2018 BCSC 1022](#)
6. *Oil Lift Technology Inc. v. Deloitte & Touche Inc.*, [2012 ABQB 357](#)
7. *San Juan Resources Inc., Re*, [2009 ABQB 55](#)
8. *YG Limited Partnership and YSL Residences Inc.*, [2022 ONSC 6548](#)
9. *Credifinance Securities Limited v DSLC Capital Corp.*, [2011 ONCA 160](#)
10. *Charlestown Residential School, Re*, 2010 ONSC 4099
11. *Poreba, Re*, [2014 ONSC 277](#)

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

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**ONTARIO  
SUPERIOR COURT OF JUSTICE  
(COMMERCIAL LIST)**

Proceeding commenced at Toronto

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**FACTUM OF MARIA ATHANASOULIS**  
*(Motion for Advice and Directions  
Returnable January 16, 2023)*

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**GOODMANS LLP**

Barristers & Solicitors  
Bay Adelaide Centre  
333 Bay Street, Suite 3400  
Toronto, ON M5H 2S7

**Mark Dunn** LSO#: 55510L

mdunn@goodmans.ca

**Sarah Stothart** LSO#: 730680

sstothart@goodmans.ca

Tel: 416.979.2211

Fax: 416.979.1234

Lawyers for Maria Athanasoulis