Court File No. BK-21-02734090-0031

# *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.
OF THE CITY OF TORONTO, IN THE PROVINCE OF ONTARIO

## RESPONDING FACTUM OF THE PROPOSAL TRUSTEE, KSV RESTRUCTURING INC. (Appeal of Disallowance of Claim)

November 10, 2023

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## PART I - OVERVIEW

1. This proceeding concerns the insolvency of YG Limited Partnership and YSL Residences Inc. (together, "**YSL**"). YSL were single-purpose project entities. Their sole purpose was the development of an 85-plus storey, 300 metre tall condominium tower located at Yonge and Gerrard Streets in Toronto (the "**YSL Project**"). The forecasted costs to complete the YSL Project were enormous, and exceeded $1 billion. Ultimately the YSL Project failed.

2. By Spring 2021, YSL was insolvent. It commenced the instant proceeding on April 30, 2021 by filing a Notice of Intention to Make a Proposal under the *Bankruptcy and Insolvency Act*[1] (the "***BIA***"). The YSL Project was still at the excavation stage at the time of insolvency, and even the most ambitious forecasts did not anticipate the Project being completed until 2025 at the earliest. Figuratively and literally, the YSL Project was just a hole in the ground when KSV Restructuring Inc. was appointed as the "**Proposal Trustee**" in this proceeding.

3. The Proposal Trustee has decades of experience administering dozens of insolvency proceedings as an officer of this Court. It takes its obligations seriously and has always acted in good faith. As an officer of this Court, the Proposal Trustee always considers fairly the positions taken and interests of all relevant stakeholders in a proceeding. Ms. Athanasoulis's claim in the instant proceeding is no exception. What is exceptional about Ms. Athanasoulis's claim, however, is that it asserts a claim for a share of profits from an insolvent debtor. *Profitable* businesses do not make *BIA* proposals, and YSL is no different.

4. YSL was owned by the Cresford group. It had raised $14.8 million in early-stage capital from a group of limited partners (the "**LPs**") who held Class A units in YSL, entitling them to the return of their capital and a 100% return on investment (for a total of $29.6 million) before the

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[1] *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3.

Cresford group, as the holders of Class B units, could earn a profit from the YSL Project. To date, neither the LPs nor the Cresford Group has received any distributions from YSL.

5. Given that the insolvent debtor has not earned – and will never earn – a profit, Ms. Athanasoulis's claim for a share of non-existent profits is properly valued at zero. Furthermore, she has no "provable claim" against the insolvent debtor under the *BIA*. Without a provable claim, Ms. Athanasoulis is not a "creditor" of the insolvent debtor under the *BIA* and has no entitlement to a distribution from the sale of the debtor's assets.

## PART II - THE FACTS

### A. THE PARTIES

6. The Proposal Trustee was appointed on April 30, 2021 when YSL commenced these proceedings under s. 50.4(1) of the *BIA*.[2]

7. Ms. Athanasoulis was a senior officer of Cresford. She made two claims in these proceedings that totalled $19 million:

(a) a $1 million claim for wrongful dismissal damages;[3] and

(b) an $18 million claim for breach of an oral profit-share agreement with Cresford entitling her to 20% of the profits of the YSL Project.[4]

8. As Ms. Athanasoulis states in her appeal factum, the Proposal Trustee has accepted her claim for wrongful dismissal damages in the amount of $880,000. Ms. Athanasoulis is not appealing the Proposal Trustee's determination of that claim.[5] Ms. Athanasoulis's remaining $18 million profit-share claim is by far the largest unsecured claim that was made against YSL.[6]

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2 Sixth Report of the Proposal Trustee, at para. 1.0(1) [Supp. Responding Record, Tab 7, p. 1065].

3 Proof of Claim, at Appendix B – Statement of Claim, at paras. 1 and 103 [Motion Record, Vol. 1, Tab 3, pp. 56 and 83].

4 Sixth Report of the Proposal Trustee, at para. 5.1(1) [Supp. Responding Record, Tab 7, p. 1074].

5 Factum of Maria Athanasoulis dated October 27, 2023, at footnote 1.

6 See, *e.g.*, Eighth Report of the Proposal Trustee, at s. 4.0(9) [Supp. Responding Record, Tab 9, p. 1265].

9. The LPs are third party investors who are unrelated to Cresford. The Proposal Trustee has estimated that if Ms. Athanasoulis's profit-share claim is denied then the LPs will only recover approximately $13.8 million of their initial $14.8 million investment.[7] If Ms. Athanasoulis's profit-share claim were to be allowed in this proceeding, the LPs would recover nothing.

## B. THE YSL PROJECT

10. YSL was established in 2016 for the sole purpose of developing the YSL Project. It was the sole owner of the land in downtown Toronto (3 Gerrard Street East) upon which the YSL Project was to be erected. The YSL Project was envisioned to be a mixed-use office, retail, and residential condominium development of more than 85 floors with 1,100 residential units, 190,000 square feet of commercial or retail space, and 242 parking spaces.[8]

11. YSL obtained zoning approval for the YSL Project in August 2018[9] and began marketing the Project in October 2018. Excavation at the site, however, did not start until October 2019. The construction schedule for the YSL Project as of October 2019 contemplated that the Project would not be completed until 2025 at the earliest.[10]

### *(i) The Insolvency of Cresford and YSL*

12. In addition to the YSL Project, Cresford was in 2019 also developing three other condominium projects: The Residences of 33 Yorkville ("**33 Yorkville**"), Halo Residences on Yonge ("**Halo**"), and The Clover on Yonge ("**Clover**"). By late 2019, Cresford was in dire

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7 Eighth Report of the Proposal Trustee, at s. 4.0(9) [Supp. Responding Record, Tab 9, p. 1265]. As at December 2022, the Proposal Trustee had accepted approximately $16.2 million in proven claims. Since December 2022, the Proposal Trustee accepted Ms. Athanasoulis's $880,000 wrongful dismissal claim as a proven claim. This means that of the $30.9 million cash pool, only $13.8 million of the cash pool is available for distribution assuming that no other claims are proven.

8 *YG Limited Partnership and YSL Residences (Re)*, 2021 ONSC 4178, at paras. 3-5; and First Report of the Proposal Trustee, at s. 2.0(2) [Supp. Responding Record, Tab 1, p. 4].

9 Direct Examination of Maria Athanasoulis, at p. 174, lines 5-16 [Motion Record, Vol. 3, Tab 6(3), p. 461].

10 *Pro Forma* for YSL Project dated October 2019 [Motion Record, Vol. 7, Tab 14, p. 1428].

financial straits and required additional funding. During this financial crisis, Ms. Athanasoulis had a falling out with the principal of Cresford, Dan Casey. Ultimately, she was constructively dismissed by Cresford in December 2019.[11]

13. After the termination of her employment, in January 2020 Ms. Athanasoulis forged two letters in the name of Cresford's Chief Financial Officer to Cresford's principal lenders.[12] These letters alleged that Mr. Casey was misleading the lenders, Cresford's various projects were over-budget, and immediate additional financing was needed to avoid insolvency. Ms. Athanasoulis then issued a statement of claim against Cresford alleging extensive improprieties. Not surprisingly, Cresford's lenders immediately withdrew their support. As a result, in March 2020, the 33 Yorkville, Halo and Clover projects filed for insolvency and were ultimately sold to third parties through insolvency processes.[13] At the time they were sold, construction in respect of each of 33 Yorkville, Halo, and Clover was far more advanced than in respect of the YSL Project.[14]

14. With the advent of the COVID-19 pandemic and the collapse of the Cresford group's financing, the YSL Project eventually followed the same path as 33 Yorkville, Halo, and Clover. At the time that YSL filed a proposal under the *BIA* on April 30, 2021, the YSL Project was still in the excavation stage.[15] The YSL Project remains far from completion to this day.

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11 Partial Award of Arbitrator Horton, at para. 191(d) [Motion Record, Vol. 3, Tab 6(2), p. 414].

12 Ms. Athanasoulis initially denied forging the letters but eventually admitted to having done so when confronted with incontrovertible videotaped evidence of her involvement. *10390160 Canada Ltd. v. Casey*, 2022 ONSC 628, at paras. 17-20.

13 Partial Award of Arbitrator Horton, at para. 38 [Motion Record, Vol. 3, Tab 6(2), pp. 376-377].

14 Cross-Examination of Maria Athanasoulis, at p. 302, line 24 to p. 308, line 12 [Motion Record, Vol. 3, Tab 6(4), pp. 496-497].

15 Second Report of the Proposal Trustee, at s. 2.0(6) [Supp. Responding Record, Tab 2, p. 30].

### *(ii) The Purchase of the YSL Project by Concord*

15. The sponsor of YSL's proposal under the *BIA* was Concord Properties Developments Corp. (the "**Proposal Sponsor**").[16] The Proposal Sponsor is a significant, third party property developer that is unrelated to the Cresford group.

16. In Amended Reasons for Decision dated July 2, 2021, Justice Dunphy found as fact that YSL was burdened with at least $260 million in secured debt and approximately $20 to $25 million in unsecured debt (excluding the profit-share claim of Ms. Athanasoulis).[17] With regard to the claim of Ms. Athanasoulis, Justice Dunphy held as follows:

> There are also various litigation claims outstanding the largest of which is from a former officer claiming that the limited partnership was a common employer and seeking, among other things, to enforce oral profit-sharing agreements. I have reviewed the Trustee's report and in particular the Trustee's reasoned conclusion that these claims are too contingent to be considered valid for voting purposes. I concur in that assessment.[18]

17. Importantly, Justice Dunphy held that the stakeholders with an interest in the purchase price proposed by the Proposal Sponsor were the unsecured creditors holding $20 to $25 million in unsecured debt (*i.e.*, excluding Ms. Athanasoulis) and the LPs.[19]

18. On July 9, 2021, YSL filed the Third Amended Proposal in respect of the proposed acquisition of the YSL Project.[20] The Third Amended Proposal addressed certain concerns raised by Justice Dunphy in his Amended Reasons for Decision dated July 2, 2021. The motion for this Court's approval of the Third Amended Proposal was heard by Justice Dunphy on July 16, 2021.

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16 Second Report of the Proposal Trustee, at s. 2.0(7) [Supp. Responding Record, Tab 2, p. 30].
17 *YG Limited Partnership and YSL Residences (Re)*, 2021 ONSC 4178, at paras. 8-9 and 11.
18 *YG Limited Partnership and YSL Residences (Re)*, 2021 ONSC 4178, at para. 9.
19 *YG Limited Partnership and YSL Residences (Re)*, 2021 ONSC 4178, at para. 11.
20 *YG Limited Partnership and YSL Residences (Re)*, 2021 ONSC 5206, at para. 2.

19. Justice Dunphy held that "there can be no question of the insolvency of the debtors",[21] and that "[t]his is a real bankruptcy. There is nothing artificial about it".[22] Justice Dunphy approved the Third Amended Proposal and found that "this Proposal provides a superior outcome for all classes of creditors under every conceivable scenario and addresses all of the concerns raised in my reasons of July 2, 2021 constructively and substantively".[23]

20. The Third Amended Proposal, which was supported by the unsecured creditors and approved by Justice Dunphy, provided that the Proposal Sponsor would acquire the YSL Project in exchange for three principal forms of consideration: (i) the Proposal Sponsor would assume 100% liability for of all secured creditor claims and construction lien claims; (ii) the Proposal Sponsor would pay to the Proposal Trustee a pool of cash of $30.9 million to be distributed to unsecured creditors with proven claims; and (iii) any residual amounts left unclaimed from the cash pool may be distributed to YSL (and then pursuant to the limited partnership agreement).[24] The unsecured creditors approved this proposal knowing that it was unlikely that their claims would be paid in full.

21. The Proposal Sponsor acquired the YSL Project shortly after the Third Amended Proposal was approved by Justice Dunphy. As a result, YSL no longer owns, and will never complete, the YSL Project. Moreover, no distributions will be made to Cresford entities holding Class B units of YSL from the sale of the YSL Project because the LPs will not, under any scenario, receive the full return that they are entitled to under their limited partnership agreement. As will be explained

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21 *YG Limited Partnership and YSL Residences (Re)*, 2021 ONSC 5206, at para. 17(a). As described above, under the LP agreement, the LPs were entitled to a 100% return on their investment before any funds flowed to Cresford.

22 *YG Limited Partnership and YSL Residences (Re)*, 2021 ONSC 5206, at para. 30.

23 *YG Limited Partnership and YSL Residences (Re)*, 2021 ONSC 5206, at para. 15.

24 *YG Limited Partnership and YSL Residences (Re)*, 2021 ONSC 5206, at para. 9.

in more detail below, Ms. Athanasoulis's profit-share interest falls behind the LPs and is derived from the interest held by Class B unitholders.

## C. THE PROFIT-SHARE CLAIM OF MARIA ATHANASOULIS

22. The profit-share claim of Ms. Athanasoulis flows from the breach of an oral agreement between Ms. Athanasoulis and the Cresford group of companies. The Proposal Trustee understands that Ms. Athanasoulis's claim for $18 million in this proceeding is based on her assertion that if her employment had not been terminated in late 2019, it is more likely than not that YSL would have earned a profit of at least $90 million on the YSL Project and that she would have been entitled to 20% of that profit (*i.e.*, $18 million).[25]

23. In these proceedings, the Proposal Trustee originally took the position that: (i) there was no meeting of the minds on the material terms of the oral agreement necessary to establish an enforceable contract; and (ii) even if an enforceable contract did exist, no damages are owing. The Proposal Trustee and Ms. Athanasoulis agreed to arbitrate this disagreement in a bifurcated manner in which phase one of the arbitration would determine whether an enforceable contract existed and phase two of the arbitration would determine whether any damages are owing.

### *(i) Phase One of the Arbitration*

24. Phase one of the arbitration was held before Arbitrator William Horton from February 22 to 24, 2022. The evidence adduced at the arbitration concerning the oral profit-share agreement (the "**Oral Agreement**") revealed just how undefined the alleged agreement was. Among other things, witnesses testified that:

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[25] Affidavit of Maria Athansoulis dated June 21, 2021, at para. 5 [Motion Record, Vol. 1, Tab 4(A), p. 112].

(a) there was no specific discussion as to who the parties to the Oral Agreement were, how profits would be calculated, or how the profit-share interest would be paid;[26] and

(b) there was no discussion as to how the profit-share interest would be treated if Cresford or YSL became insolvent, the YSL Project was sold to a third party before completion, or if Ms. Athanasoulis's employment with Cresford ended.[27]

25. Significantly, however, Ms. Athanasoulis conceded two essential points about the profit-share agreement. First, she acknowledged that her profit-share interest would be paid "at the end of a project when it's complete";[28] and second, she conceded that it was a term of the profit-share agreement that her entitlement would be calculated *after equity investments were returned from the YSL Project to the LPs*.[29] This is of course completely inconsistent with her current claim that she should be awarded all of the residual funds left from the sale of the YSL Project to the Proposal Sponsor, leaving nothing for the LPs.

26. Arbitrator Horton held that the Oral Agreement entitled Ms. Athanasoulis to 20% of the profits earned on all current and future Cresford projects, including the YSL Project.[30] He held that the key terms of the Oral Agreement as they pertain to the YSL Project were as follows:

(a) "Profits were to be calculated, on a good faith basis, based on the *pro forma* budgets prepared by Cresford with respect to each project",[31] and "would ultimately have to be accounted for with third party investors";[32]

(b) Ms. Athanasoulis's profit-share interest "was to be paid by [YSL]";[33]

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26 Direct Examination of John Papadakis, at p. 71, lines 17-24 [Motion Record, Vol. 3, Tab 6(3), p. 436]; Direct Examination of John Papadakis, at p. 72, line 19 to p. 73, line 9 [Motion Record, Vol. 3, Tab 6(3), p. 436]; and Cross-Examination of John Papadakis, at p. 110, line 19 to p. 113, line 11 [Motion Record, Vol. 3, Tab 6(3), pp. 445-446].

27 Cross-Examination of John Papadakis, at p. 107, lines 3-12, p. 111, line 8 to p. 112, line 17, and p. 112, line 23 to p. 113, line 6 [Motion Record, Vol. 3, Tab 6(3), pp. 445-446].

28 Direct Examination of Maria Athanasoulis, at p. 160, line 23 to p. 161, line 2 [Motion Record, Vol. 3, Tab 6(3), p. 458].

29 Cross-Examination of Maria Athanasoulis, at p. 276, lines 3 to 25 [Motion Record, Vol. 3, Tab 6(4), p. 489].

30 Partial Award of Arbitrator Horton, at para. 191(a) [Motion Record, Vol. 3, Tab 6(2), p. 414].

31 Partial Award of Arbitrator Horton, at para. 191(b)(ii) [Motion Record, Vol. 3, Tab 6(2), p. 414].

32 Partial Award of Arbitrator Horton, at para. 147 [Motion Record, Vol. 3, Tab 6(2), p. 400].

33 Partial Award of Arbitrator Horton, at para. 191(b)(iii) [Motion Record, Vol. 3, Tab 6(2), p. 401]. The Arbitrator did not specify which YSL entity was to pay Ms. Athanasoulis's claim.

(c) "Profits were to be shared when earned, usually at the completion of a project";[34] and

(d) "There was no requirement that [Ms.] Athanasoulis remain employed at the time that a profit was earned".[35]

27. Finally, Arbitrator Horton held that Ms. Athanasoulis was constructively dismissed by YSL in December 2019.[36] He made no finding as to whether YSL breached the Oral Agreement.[37]

### *(ii) Phase Two of the Arbitration*

28. Phase two of the arbitration was intended to address damages. However, following the release of Arbitrator Horton's award in respect of phase one, as a consequence of opposition raised by the LPs and the Proposal Sponsor, this Court ordered that phase two of the arbitration shall not proceed. Instead, the Court directed that the Proposal Trustee was to determine whether Ms. Athanasoulis had a "provable claim" in this *BIA* proceeding.[38]

## D. THE DETERMINATION OF THE CLAIMS OF MARIA ATHANASOULIS

29. On March 30, 2023, the Proposal Trustee delivered to Ms. Athanasoulis notice that it would accept her wrongful dismissal damages claim in the amount of $880,000.[39] As noted, Ms. Athanasoulis has not appealed the Proposal Trustee's determination in this regard.

30. With respect to the profit share claim, the Proposal Trustee considered the findings of Arbitrator Horton; the extensive record of evidence; additional evidence submitted by Ms. Athanasoulis; cross-examinations of Ms. Athanasoulis and a representative of Cresford; and the submissions of the various parties.[40] On August 10, 2023, the Proposal Trustee delivered to Ms.

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34 Partial Award of Arbitrator Horton, at para. 191(b)(iv) [Motion Record, Vol. 3, Tab 6(2), p. 414].
35 Partial Award of Arbitrator Horton, at para. 191(b)(v) [Motion Record, Vol. 3, Tab 6(2), p. 414].
36 Partial Award of Arbitrator Horton, at para. 191(d) [Motion Record, Vol. 3, Tab 6(2), p. 414].
37 Partial Award of Arbitrator Horton, at para. 164 [Motion Record, Vol. 3, Tab 6(2), p. 404].
38 *YG Limited Partnership (Re)*, 2022 ONSC 6138, at para. 7.
39 Notice of Disallowance, at p. 1 [Motion Record, Vol. 1, Tab 2, p. 29].
40 Notice of Disallowance [Motion Record, Vol. 1, Tab 2, pp. 29-34].

Athanasoulis a Notice of Disallowance of her $18 million profit-share claim. Contrary to the assertions of Ms. Athanasoulis, the Proposal Trustee was diligent in assessing and investigating the merits of her profit-share claim. Indeed, the record assembled in respect of the profit-share claim is voluminous and has been filed on this appeal motion.

### *(i) The Treatment of the Profit-Share Claim in Other Court Proceedings*

31. As noted above, Justice Dunphy held that Ms. Athanasoulis's profit-share claim was "too contingent" for voting purposes in these proceedings. His Honour's assessment in this regard has been shared by other judges who presided over other Cresford-entity insolvency proceedings as well. For example, Ms. Athanasoulis advanced the same 20% profit-share claim in the insolvency proceeding pertaining to the Clover project. Justice Hainey dismissed her profit-share claim and held as follows:

> I accept that the proper date to value Maria's claim is when the Receiver was appointed on March 27, 2020. There was no profit from the Clover on Yonge Project that could be shared with Maria.[41]

32. Notably, Ms. Athanasoulis took exactly the opposite approach to her damages crystallization argument in proceedings before Justice Hainey in respect of the Clover project than she does in the instant case. Before Justice Hainey, Ms. Athanasoulis argued that her profit-share interest should be viewed as crystallized on the future date that the Clover project will be brought to completion by the third party who purchased it. Justice Hainey rejected Ms. Athanasoulis's theory of damages crystallization on the basis that it was "far too remote and speculative and lacks

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41 *Re Clover on Yonge Inc.*, CV-20-00642928, Endorsement of Justice Hainey dated January 8, 2021 (unreported), at para. 4 [Responding Brief of Authorities, Tab 1].

an air of reality".[42] His Honour further "declare[d] that Maria's claim cannot be valued at more than $1 million (the wrongful dismissal portion of the claim)".[43]

## PART III - ISSUES

33. Apart from the applicable standard of review, there are three issues for determination on this appeal motion:

(a) whether the profit-share claim of Ms. Athanasoulis is a "provable claim" as that term is used in the *BIA*;

(b) what is the appropriate date for the quantification of damages arising from Ms. Athanasoulis's profit-share claim; and

(c) whether the profit-share claim of Ms. Athanasoulis ranks ahead of the claims of the LPs.

## PART IV - LAW AND ARGUMENT

### A. THE STANDARD OF REVIEW

34. The standard of review applicable to the Proposal Trustee's identification of the applicable law to use to allow or disallow Ms. Athanasoulis's profit-share claim is correctness.[44] However, the Proposal Trustee's exercise of discretion in applying the applicable law to its assessment of the evidence is reviewable for reasonableness or palpable and overriding error.[45]

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42 *Re Clover on Yonge Inc.*, CV-20-00642928, Endorsement of Justice Hainey dated January 8, 2021 (unreported), at para. 7 [Responding Brief of Authorities, Tab 1].

43 *Re Clover on Yonge Inc.*, CV-20-00642928, Endorsement of Justice Hainey dated January 8, 2021 (unreported), at para. 12 [Responding Brief of Authorities, Tab 1].

44 *Re Casimir Capital*, 2015 ONSC 2819, at para. 33.

45 *Re Charlestown Residential School*, 2010 ONSC 4099, at para. 17. The standard of review on statutory appeals of claim disallowance decisions of trustees under the *BIA* appears to be unsettled in Ontario. There is case law from the British Columbia Court of Appeal holding that the standard of review should be identical to the appellate standard of correctness or palpable and overriding error (*8640025 Canada Inc. (Re)*, 2018 BCCA 93, at para. 41 and *Galaxy Sports Inc. (Re)*, 2004 BCCA 284, at para. 40). The Ontario Court of Appeal has discussed this review standard but has not explicitly adopted it (*Credifinance Securities Limited v. DSLC Capital Corp.*, 2011 ONCA 160, at paras. 24-27). The Supreme Court's decision in *Canada v. Vavilov*, 2019 SCC 65 supports the BC case law in that it held that appeals from administrative decision makers are subject to the ordinary appellate review standard.

## B. THE PROFIT-SHARE CLAIM IS NOT A PROVABLE CLAIM

35. Ms. Athanasoulis is only entitled to a distribution from the $30.9 million cash pool established by the Proposal Sponsor under the Third Amended Proposal if she can prove that she is a creditor and can prove her claim.[46] Because the *BIA* defines a "creditor" as "a person having a claim provable as a claim under this Act",[47] the threshold inquiry is whether she has a "claim provable" under the *BIA*.

36. Section 121 of the *BIA* defines the scope of "claims provable" under the Act as follows:

> **Claims provable**
>
> (1) All debts and liabilities, present or future, to which the bankrupt is subject on the day on which the bankrupt becomes bankrupt or to which the bankrupt may become subject before the bankrupt's discharge by reason of any obligation incurred before the day on which the bankrupt becomes bankrupt shall be deemed to be claims provable in proceedings under this Act.
>
> **Contingent and unliquidated claims**
>
> (2) The determination whether a contingent or unliquidated claim is a provable claim and the valuation of such a claim shall be made in accordance with section 135. [underlining added]

37. Section 135 of the BIA then provides in relevant part as follows:

> **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. [underlining added]

### *(i) The Profit-Share Claim is Too Remote and Speculative*

38. On a straightforward textual analysis of the *BIA*, Ms. Athanasoulis has not asserted a claim provable in bankruptcy. On the date of bankruptcy, April 30, 2021, YSL owed no debt or liability to Ms. Athanasoulis under the Oral Agreement, nor will it become subject to any before its

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46 *BIA*, s. 124.
47 *BIA*, s. 2.

discharge. A debt or liability to Ms. Athanasoulis could only arise if YSL turned a profit, which it has not done and will never do. The YSL Project itself is now owned by the Proposal Sponsor Concord, which is the only party that can now generate a profit from the YSL Project.

39. Ms. Athanasoulis's profit-share claim is, if anything, a contingent and unliquidated claim. The Supreme Court held in *Newfoundland and Labrador v. AbitibiBowater Inc.* that the determination of whether such contingent claims are provable claims depends on "whether the event that has not yet occurred is too remote or speculative".[48]

40. If a contingent claim cannot reasonably be expected to be recovered then it is "too remote or speculative" and not a provable claim. For example, in *Schnier v. Canada (Attorney General)*, the Court of Appeal for Ontario was tasked with determining whether an assessed amount of tax owing that the taxpayer had appealed to the Tax Court of Canada was a provable claim within the taxpayer's bankruptcy proceeding under the *BIA*. The Court of Appeal held that the registrar in bankruptcy had appropriately determined that assessed tax owing was not a provable claim because it was contingent upon the Crown succeeding through trial at the Tax Court.[49]

41. The Court of Appeal explained that "a creditor's inability to enforce a claim bears directly on the creditor's ability to prove its claim under the *BIA*. In order to be a provable claim within the meaning of *BIA* s. 121, a claim must be one recoverable by legal process".[50] Because the alleged debt owing by the taxpayer was being disputed in Court, and no judgment ordering payment of the debt had been rendered, the Court of Appeal held that the trustee was entitled to find that the Crown's claim was not a provable claim and disallow the claim.[51]

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48 *Newfoundland and Labrador v. AbitibiBowater Inc.*, 2012 SCC 67, at para. 36. See also *Orphan Well Association v. Grant Thornton Ltd.*, 2019 SCC 5, at para. 138.

49 *Schnier v. Canada (Attorney General)*, 2016 ONCA 5, at paras. 26-50.

50 *Schnier v. Canada (Attorney General)*, 2016 ONCA 5, at para. 49.

51 *Schnier v. Canada (Attorney General)*, 2016 ONCA 5, at para. 50.

42. Ms. Athanasoulis's profit-share claim is analogous to the situation in *Schnier*. Like Schnier, Ms. Athanasoulis's profit-share claim was the subject of separate proceedings (in this case, litigation that she had commenced against various entities within the Cresford group). Arbitrator Horton held only that there was an oral agreement but explicitly declined to go further.

43. Ultimately, Ms. Athanasoulis seeks a share of profits from a failed project. It was reasonable for the Proposal Trustee to conclude that this was too "remote and speculative" to be a provable claim. Indeed, Justices Hainey and Dunphy as described above took a similar view of Ms. Athanasoulis's claim. These prior judicial determinations, coupled with the litigation uncertainty surrounding Ms. Athanasoulis's litigation against the Cresford group, entirely justify the Proposal Trustee's exercise of discretion to determine that her claim is not a provable claim.

### *(ii) The Profit-Share Claim is an Equity Claim*

44. Even if the profit-share claim was not too remote or speculative, it would still not be a provable claim under the *BIA* because it is not a "debt or liability" as required under s. 121(1) of the *BIA*. In characterizing an investment as debt or equity, a court "must look to the surrounding circumstances to determine whether the true nature of the relationship is that of a shareholder who has equity in the company or whether it is that of a creditor owed a debt or liability by the company".[52] In this case, Ms. Athanasoulis's profit-share claim is akin to a partner who has equity in a business and is entirely unlike a creditor who has lent and is owed money by YSL.

45. Furthermore, even if her profit claim can be characterized as a liability of YSL, it then must be an "equity claim" as that term is defined under and has been interpreted in relation to the *BIA*.

46. Section 2 of the *BIA* defines an "equity claim" as follows:

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[52] *Re. Central Capital Corp.* (1996), 27 O.R. (3d) 494, at para. 67 (C.A.); and *Re. Canada Deposit Insurance Corp.*, [1992] 3 S.C.R. 558.

> **equity claim** means a claim that is in respect of an equity interest, including a claim for, among others,
>
> (a) a dividend or similar payment,
>
> (b) a return of capital,
>
> (c) a redemption or retraction obligation,
>
> (d) a monetary loss resulting from the ownership, purchase or sale of an equity interest or from the rescission, or, in Quebec, the annulment, of a purchase or sale of an equity interest, or
>
> (e) contribution or indemnity in respect of a claim referred to in any of paragraphs (a) to (d)… [underlining added]

47. Ms. Athanasoulis's argument that the *BIA* prescribes a narrow definition of an "equity claim" is inconsistent with binding case law. The Court of Appeal for Ontario made clear in *Re Sino-Forest Corporation*[53] that the definition of "equity claim" in the *BIA* is expansive rather than restrictive. The Court stated as follows:

> Parliament also defined equity claim as "including a claim for, among others", the claims described in paragraphs (a) to (e). The Supreme Court has held that this phrase "including" indicates that the preceding words – "a claim that is in respect of an equity interest" – should be given an expansive interpretation, and include matters which might not otherwise be within the meaning of the term, as stated in *National Bank of Greece (Canada) c. Katsikonouris*, [1990] 2 S.C.R. 1029 (S.C.C.), at p. 1041:
>
> > [T]hese words are terms of extension, designed to enlarge the meaning of preceding words, and not to limit them.
> >
> > ... [T]he natural inference is that the drafter will provide a specific illustration of a subset of a given category of things in order to make it clear that that category extends to things that might otherwise be expected to fall outside it.
>
> […]
>
> "Equity claim" is not confined by its definition, or by the definition of "claim", to a claim advanced by the holder of an equity interest. Parliament could have, but did

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53 *Re Sino-Forest Corporation*, 2012 ONCA 816.

not, include language in paragraph (e) restricting claims for contribution or indemnity to those made by shareholders.[54]

48. In *Sino-Forest*, the Court of Appeal held that claims made by auditors and underwriters against the debtor for contribution and indemnity related to liability arising in a securities misrepresentation class action were equity claims under the *BIA*. Those claims for contribution and indemnity were equity claims under the *BIA* because they arose from the underlying equity nature of the shareholders' claims against the debtor.[55] The fact that the cause of action of the auditors and underwriters was breach of contract did not transform their claims into debt or liability claims. The profit-share claim of Ms. Athanasoulis is no different.

49. Profit by its nature is a matter of equity, not debt. Ms. Athanasoulis's claim is a derivative of the profit in the project available to the Class B unitholders (Cresford). As the evidence in phase one of the arbitration demonstrated, all parties were *ad idem* that profit accrued to YSL's Class B unitholders after all expenses, including the amounts owing to the LPs, are paid.[56] The final profit held by YSL accrues exclusively to YSL's equity. In this proceeding, Ms. Athanasoulis claims a 20% interest in that equity. As in *Sino-Forest*, Ms. Athanasoulis's contractual claim is inextricably linked to the equity in the debtor. Regardless of the cause of action under which she chooses to style her claim, her claim is an equity claim because it is "clearly connected to or 'in respect of'"[57] an equity claim, namely the profits of or equity in YSL. Ms. Athanasoulis seeks to reclassify that

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54 *Re Sino-Forest Corporation*, 2012 ONCA 816, at paras. 44-46. See also *Tudor Sales Ltd. (Re)*, 2017 BCSC 119, at para. 36, citing *US Steel Canada Inc. (Re)*, 2016 ONSC 569, at para. 183, aff'd 2016 ONCA 662 on the point of equity claims being characterized by an entitlement to a share of the company's profits and residual cash flows; *Bul River Mineral Corporation (Re)*, 2014 BCSC 1732, at paras. 68-71 and 85 on the point of looking at the true substance of an underlying transaction with regard to the economic reality of the surrounding circumstances when characterizing a claim as debt or equity; and *Return on Innovation v. Gandi Innovations*, 2011 ONSC 5018, at paras. 56-59.

55 *Re Sino-Forest Corporation*, 2012 ONCA 816, at para. 43.

56 Notably, the *pro formas* forecasted profits being calculated net of return of capital to the LPs. See *Pro Forma* for YSL Project dated October 2019 [Motion Record, Vol. 7, Tab 14, p. 1428].

57 *Re Sino-Forest Corporation*, 2012 ONCA 816, at para. 43.

equity claim as a debt claim. She seeks to be in a better position as a result of the insolvency of YSL than if YSL had not become insolvent.

50. Because Ms. Athanasoulis does not hold a debt or liability, she is not a creditor with a provable claim in this proceeding. Furthermore, even if it is determined that she in fact has a provable claim, then she can only have an equity claim and cannot recover until all non-equity claims are paid in full.[58] In particular, and as explained in the last section of this factum, Ms. Athanasoulis by her own admission ranks behind the LPs and therefore cannot claim a debt in priority to them.

## C. DAMAGES SHOULD BE QUANTIFIED AS OF THE DATE OF THIS HEARING

51. Although the strict legal issue raised on this appeal motion is solely the disallowance of Ms. Athanasoulis's profit-share claim and not the valuation of that claim, the Proposal Trustee has nonetheless considered potential damages associated with the profit-share claim because the damages assessment informs the legal test of whether the contingent claim is "too remote or speculative" to be a provable claim.

52. In this regard, Ms. Athanasoulis's statement of the law regarding the date for assessment of damages is incomplete. Contrary to her assertion, there is no requirement that this Court crystallize damages as of the date of the alleged breach of the Oral Agreement, which she argues is the date of her constructive dismissal. Although the assessment of damages as of the date of breach may be the default rule, courts may depart from that presumption in appropriate circumstances. The Court of Appeal for Ontario recently summarized these principles in *Maple Leaf Foods Inc. v. Ryanview Farms* as follows:

> The presumptive date for assessment of damages in contract law is the date of breach: *Rougemount Capital Inc. v. Computer Associates International Inc.*, 2016

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58 *BIA*, s. 60(1.7).

> ONCA 847, 410 D.L.R. (4th) 509, at para. 45. This presumptive rule can be displaced in appropriate circumstances, where an assessment of damages at the date of breach would not fairly reflect a party's loss: *Rougemount*, at paras. 46, 50; *Kinbauri Gold Corp. v. Iamgold International African Mining Gold Corp.* (2004), 2004 CanLII 36051 (ON CA), 246 D.L.R. (4th) 595 (Ont. C.A.), at paras. 65-68. As this court explained in *Rougemount*, at para. 52, only special circumstances will warrant a deviation from this presumption.[59] [underlining added]

53. In *Maple Leaf*, the Court of Appeal expressly affirmed the trial judge's decision to assess damages as of the date of trial rather than the date of breach. That case concerned a claim for consequential damages arising from the sale of pigs. The plaintiff by counterclaim claimed that it suffered economic damages flowing from the defendant by counterclaim's failure to deliver pigs under the parties' contract. The trial judge refused to award certain damages claimed for the failure to deliver pigs because, between the date of breach of contract and trial, there had been an outbreak of disease among pigs and a crash in the market value for pigs. The trial judge found that the outbreak of disease and crash in the pig market rendered the claimed damages too uncertain.

54. The Court of Appeal affirmed the trial judge's decision to crystallize damages as of the date of trial instead of the date of breach. The Court held that "**[t]he presence of significant intervening events**, which the trial judge found made the loss suffered more uncertain, **must be considered in determining what measure of damages fairly reflects the appellants' loss** as a direct and natural consequence of the breach. To do otherwise would not be just in all the circumstances and risks burdening the respondent with more than its fair share of liability" (emphasis added).[60]

55. Similar to *Maple Leaf*, there are significant intervening events that this Court "must" consider in quantifying Ms. Athanasoulis's claim.[61] These include the COVID-19 pandemic,

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59 *Maple Leaf Foods Inc. v. Ryanview Farms*, 2022 ONCA 532, at para. 35.

60 *Maple Leaf Foods Inc. v. Ryanview Farms*, 2022 ONCA 532, at para. 41.

61 Our law has long recognized that such external, intervening events should be taken into account when assessing damages in private law claims. For example, in *Athey v. Leonati*, [1996] 3 S.C.R. 458, at paras. 31-

record inflation, rapidly rising interest rates, the current state of the real estate markets, and most notably, the fact that YSL was insolvent and entered into proposal proceedings. All of these intervening exogenous events work in one direction: they all adversely or would have adversely affected the profitability of the YSL Project even if Ms. Athanasoulis had never been constructively dismissed.

56. It would be an error of law for a Court to ignore the material intervening events that have transpired through no fault of Cresford, Ms. Athanasoulis, or YSL.[62] The actual intervening events that transpired bear directly on the issue of whether YSL would have made a profit on the YSL Project, and must be taken into account by this Court in assessing the reasonableness of the Proposal Trustee's determination that Ms. Athanasoulis's claim was too remote or speculative. The law does not require the Proposal Trustee to allow a claim based on fiction, blind to reality.

57. None of the cases cited by Ms. Athanasoulis for the proposition that this Court must assess damages as of the date of the alleged breach of the Oral Agreement are analogous to this case. The principal case in this regard is *Performance Industries Ltd. v. Sylvan Lake Golf & Tennis Club Ltd*.[63] In that case, the plaintiff had a right to purchase from the defendant a tract of land so that the plaintiff could build and profit from a residential development. The defendant breached the agreement by refusing to sell the tract of land to the plaintiff and was ordered to pay damages to the plaintiff in an amount representing the estimated profit the plaintiff would have earned from the development. Importantly, however, no alternative residential development was ever

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32, the Supreme Court held that an independent intervening event occurring after tortious conduct that causes the same injury caused by the tortious conduct will break the chain of causation and therefore operate to reduce the damages otherwise owed to a plaintiff.

62 As the Court of Appeal held in *Rougemont Capital Inc. v. Computer Associates International Inc.*, 2016 ONCA 847, at para. 54, it is an error of law to ignore factors pertaining to a party's "troubled financial history" and financial uncertainty when assessing damages.

63 *Performance Industries Ltd. v. Sylvan Lake Golf & Tennis Club Ltd.*, 2002 SCC 19.

constructed on the tract of land at issue. As such, the only and best evidence before the Court were the estimated amounts of lost profits generated through damages models.

58. Unlike this case, in *Performance Industries* there was no significant intervening event between the date of breach of the contract and the date of trial to be taken into account in assessing damages for lost profits. Had the defendant developed the land itself and earned profits on an actual development, it is unlikely that the Court would have simply ignored what actual profits were earned in assessing damages. In this case, this Court does not need to rely upon estimates of damages because the YSL Project actually went insolvent and returned nothing to its owners.

59. Moreover, in *Performance Industries*, the trial judge found as fact that the plaintiff would have completed its residential development within the term of the governing contract.[64] Ms. Athanasoulis's claim is again distinguishable. Unlike the development in *Performance Industries*, the YSL Project would not have been completed until 2025 at the earliest in circumstances where Ms. Athanasoulis was constructively dismissed in December 2019.

### *(i) YSL Has Earned No Profit*

60. The evidence concerning what profits YSL has or has not earned is clear in this case. In exchange for the YSL Project, the Proposal Sponsor paid approximately $290.9 million. Of that amount, $260 million was an assumption of secured and construction lien claims burdening the YSL Project and $30.9 million was the payment of a cash pool to the Proposal Trustee to settle proven claims of unsecured creditors of YSL, with any surplus flowing to the LPs. As the LPs cannot be paid the entire amount they are owed (return of twice their initial capital) out of the remaining funds, there can be no profit in which Ms. Athanasoulis could share.

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64 *Performance Industries Ltd. v. Sylvan Lake Golf & Tennis Club Ltd.*, 1999 ABQB 479, at para. 92.

61. Against this inescapable reality, Ms. Athanasoulis impugns an alleged transaction of $6.6 million between the Proposal Sponsor and Cresford and a transaction for $7.6 million between the Proposal Sponsor and YSL as ill-gotten profits. Neither of these assertions are true.

62. With regard to the $6.6 million transaction, the Proposal Trustee understands that Cresford (Rosedale) Developments Inc., East Downtown Redevelopment Partnership and Oakleaf Consulting Ltd. received the funds in question in connection with certain accounts receivable. Any recourse that Ms. Athanasoulis may have in respect of this transaction is against those entities, and indeed the first two were defendants in the Statement of Claim commenced by her in January 2020.

63. In respect of the $7.6 million transaction, the Proposal Trustee understands that the transaction concerned the sale of lands to the Proposal Sponsor that were not part of the YSL Project. As such, the profits generated on that transaction, if any, are not profits of the YSL Project. And in any event, the $7.6 million figure represents only the sale price of the land – not the profits. The Proposal Trustee understands that YSL incurred a loss on the sale of these lands.[65] As Arbitrator Horton found, the Oral Agreement entitles Ms. Athanasoulis to 20% of the profits earned on the YSL Project.[66] He did not find that Ms. Athanasoulis is entitled to a 20% tax on all sale transactions entered into by YSL.

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65 Letter from Counsel to Proposal Sponsor dated June 15, 2023, at pp. 4-5 [Responding Record, Tab 1(B), pp. 2063-2064].

66 Partial Award of Arbitrator Horton, at para. 191(a) [Motion Record, Vol. 3, Tab 6(2), p. 414].

### *(ii) YSL Would Not Have Earned a Profit if Maria Athanasoulis Remained Employed at Cresford*

64. One of Ms. Athanasoulis's principal arguments on this appeal motion at least implicitly turns on her speculation as to what would have happened with the YSL Project had she not been constructively dismissed by Cresford. She alleges that her Oral Agreement was breached in December 2019 as a result of her constructive dismissal, and asserts that her profit-share claim is in essence a bonus to which she is entitled as part of her pay in lieu of reasonable notice. The argument that she would be entitled to a profit-share interest "bonus" fails for two reasons.

65. First, it is trite law that an employee's damages in respect of wrongful dismissal include only those amounts that the employee would have earned during the reasonable notice period had the employee not been wrongfully dismissed.[67] Ms. Athanasoulis claimed a reasonable notice period of 24 months,[68] which would have expired in December 2021 – four years before the YSL Project was originally scheduled to be completed in 2025.

66. Even if Ms. Athanasoulis were correct that her claim is akin to an employee bonus rather than an equity profit share, she is not entitled to damages for alleged breach of the profit share agreement when she could not have earned this amount had she remained employed during her reasonable notice period. Although Arbitrator Horton found that Ms. Athanasoulis did not need to be "employed" at the time that profits were earned to be entitled to a 20% profit-share, on Ms. Athanasoulis's own theory of the case his decision must be limited by the principles of damages assessment in employment law. If Ms. Athanasoulis's claim were in the nature of a bonus and not equity, then Arbitrator Horton's decision that Ms. Athanasoulis is entitled to "20% of the profits earned on any of Cresford's current and future projects"[69] results in absurdity.

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67 *Matthews v. Ocean Nutrition Canada Limited*, 2020 SCC 26, at para. 49.

68 Proof of Claim, at Appendix B – Statement of Claim, at para. 103 [Motion Record, Vol. 1, Tab 3, p. 83].

69 Partial Award of Arbitrator Horton, at para. 191(b)(i) [Motion Record, Vol. 3, Tab 6(2), p. 414].

67. Ms. Athanasoulis's own argument for a profit share entitlement that is unlimited in time just confirms the equity nature of her claim. If the Oral Agreement has no term length, and claims for damages are unbounded by any principles of certainty or remoteness, Ms. Athanasoulis would have been entitled to make claims on profits of Cresford accruing decades after she left Cresford. Such an entitlement is clearly in the nature of equity not debt. To hold otherwise would be to extend Ms. Athanasoulis's reasonable notice period indefinitely. The Proposal Trustee has received no evidence that would justify such an extraordinary and likely unprecedented result.

68. Second, Ms. Athanasoulis's argument fails because it rests on the false premise that the YSL Project would have been completed by YSL profitably if Ms. Athanasoulis had remained employed. There is no evidence to support that assertion beyond Ms. Athanasoulis's say-so.

69. The fundamental problem facing the YSL Project was a lack of liquidity. YSL did not have funds to continue the development of the YSL Project, let alone complete it. Ms. Athanasoulis worked diligently to bring forward a purchaser for the Project but was unable to do so, and there is no evidence that anything would have been different had she not been constructively dismissed.[70]

70. Moreover, the insolvency of YSL was inevitable. By Ms. Athanasoulis's own account in her forged letters, Mr. Casey obtained financing for various Cresford projects under false pretences. It is no surprise that no one else was willing to lend money to YSL: (i) after all of the other Cresford projects had gone bankrupt; (ii) after lenders had backed out; (iii) in circumstances where a former senior officer was alleging fraud against the principal of Cresford; and (iv) in light

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[70] Ms. Athanasoulis argues that there were attempts to sell Cresford and the YSL Project before she was constructively dismissed and that there would have been similar attempts after the date of her dismissal if she had remained employed. It should be noted, however, that consent of the LPs was required to sell the YSL Project to a third party, and that the LPs had rejected a proposed sale of the YSL Project: see Third Report of the Proposal Trustee dated June 18, 2021, at s. 5.3(4) [Supp. Responding Record, Tab 3, p. 74].

of the economic uncertainty prevailing during a raging global pandemic. As Justice Dunphy described, if the Notice of Intention to Make a Proposal process pursued by YSL was unsuccessful, the secured mortgage lender of the YSL Project – Timbercreek Mortgage Servicing Inc. – would have proceeded with its application (which had been adjourned) to impose a receiver to sell the business of YSL in any event.[71]

71. Simply put, Ms. Athanasoulis could not have prevented the downfall of Cresford and YSL. She cannot claim damages for the loss of a chance that never existed. Even if damages are measured as of the date of the alleged breach, it was reasonable for the Proposal Trustee to conclude that her unliquidated claim was too remote or speculative to be a provable claim. That conclusion of mixed fact and law is entitled to deference.

## D. MS. ATHANASOULIS'S PROFIT-SHARE INTEREST RANKS BEHIND THE LPS

72. Even if Ms. Athanasoulis has a theoretical contingent claim for a theoretical lost opportunity to earn a profit-share, she still has no contingent claim that is provable because the necessary event that must occur to give rise to a debt owing to her is the recovery by the LPs of their full $14.8 million investment in the YSL Project. That is so because Ms. Athanasoulis has admitted multiple times under oath that any entitlement to a profit-share she may have arises only after the return of capital to the LPs. On examination for discovery on January 13, 2022, Ms. Athanasoulis stated:

> Q. Did you discuss anything about how profit would be calculated?
>
> A. It was going to be calculated – you know, in my conversations with Dan, it would be calculated after paying the costs and any […] and after paying the equity to... and specific to YSL and 33 Yorkville, it would be paid after the equity was repaid to the LP investors.[72]

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71 *YG Limited Partnership and YSL Residences (Re)*, 2021 ONSC 5206, at paras. 3-4.

72 Discovery of Maria Athanasoulis, at q. 211 [Responding Record, Tab 1(A), p. 23].

73. Ms. Athanasoulis confirmed the same understanding in her evidence in-chief during phase one of the arbitration:

> Q. Okay. And turning down to the profit listed here on the, on the pro forma, in general terms, how was this calculated on the pro forma?
>
> A. How is the profit calculated? So, basically, it takes your revenue, minuses your costs, **minuses the amount returned on equity**, and the balance is your net profit.
>
> Q. And was Cresford consistent in how it assessed and how it calculated profits?
>
> A. Yes.[73] [emphasis added]

74. She also confirmed the evidence on cross-examination during phase one of the arbitration:

> Q. Once construction of a condominium is complete, you … pay the trades and any fees that might be owing to the kind of management companies that you've described?
>
> A. Sure. You would, you would be paying them along the way, yeah.
>
> Q. And you repay the loans and return equity to investors?
>
> A. Yes.
>
> Q. And it's at this point that you can calculate the actual profits earned by the project, correct?
>
> A. Okay, yes.[74] [emphasis added]

75. Ms. Athanasoulis' evidence concerning her understanding of when her profit-share would be calculated was corroborated by John Papadakis – Cresford's former corporate counsel and a family friend of Ms. Athanasoulis – during his examination for discovery in respect of phase one of the arbitration.[75]

76. Given the reality that the LPs will not be receiving a full return of their equity investment in the YSL Project in any circumstance, the condition precedent to Ms. Athanasoulis's contingent

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73 Direct Examination of Maria Athanasoulis, at p. 153, lines 13-23 [Motion Record, Vol. 3, Tab 6(3), p. 456].

74 Cross-Examination of Maria Athanasoulis, at p. 232, line 24 to p. 234, line 3 [Motion Record. Vol. 3, Tab 6(4), pp. 478-479].

75 Discovery of John Papadakis, at qq. 85-87 [Supp. Responding Record, Tab 10, p.1418].

claim will never come to pass. As such, no debt or liability will ever become owing to Cresford under the B units and accordingly, there is no profit in which Ms. Athanasoulis can participate under the Oral Agreement. It was therefore reasonable for the Proposal Trustee to conclude that Ms. Athanasoulis's profit-share claim is not a provable claim.

## PART V - ORDER REQUESTED

77. The Proposal Trustee requests an order dismissing Ms. Athanasoulis's appeal of its Notice of Disallowance dated August 10, 2023 and awarding it costs of this appeal motion on a partial indemnity basis.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED** this 10th day of November, 2023.

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Lawyers for the Proposal Trustee,
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**SCHEDULE "A"**

**LIST OF AUTHORITIES**

1. *10390160 Canada Ltd. v. Casey*, 2022 ONSC 628
2. *8640025 Canada Inc. (Re)*, 2018 BCCA 93
3. *Athey v. Leonati*, [1996] 3 S.C.R. 458
4. *Bul River Mineral Corporation (Re)*, 2014 BCSC 1732
5. *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65
6. *Credifinance Securities Limited v. DSLC Capital Corp.*, 2011 ONCA 160
7. *Galaxy Sports Inc. (Re)*, 2004 BCCA 284
8. *Maple Leaf Foods Inc. v. Ryanview Farms*, 2022 ONCA 532
9. *Matthews v. Ocean Nutrition Canada Limited*, 2020 SCC 26
10. *Newfoundland and Labrador v. AbitibiBowater Inc.*, 2012 SCC 67
11. *Orphan Well Association v. Grant Thornton Ltd.*, 2019 SCC 5
12. *Performance Industries Ltd. v. Sylvan Lake Golf & Tennis Club Ltd.*, 1999 ABQB 479
13. *Performance Industries Ltd. v. Sylvan Lake Golf & Tennis Club Ltd.*, 2002 SCC 19
14. *Re Canada Deposit Insurance Corp.*, [1992] 3 S.C.R. 558
15. *Re Casimir Capital*, 2015 ONSC 2819
16. *Re Central Capital Corp.* (1996), 27 O.R. (3d) 494
17. *Re Charlestown Residential School*, 2010 ONSC 4099
18. *Return on Innovation v. Gandi Innovations*, 2011 ONSC 5018
19. *Re Sino-Forest Corporation*, 2012 ONCA 816
20. *Rougemont Capital Inc. v. Computer Associates International Inc.*, 2016 ONCA 847
21. *Schnier v. Canada (Attorney General)*, 2016 ONCA 5
22. *Tudor Sales Ltd. (Re)*, 2017 BCSC 119

23. *US Steel Canada Inc. (Re)*, 2016 ONSC 569, affirmed 2016 ONCA 662

24. *YG Limited Partnership and YSL Residences (Re)*, 2021 ONSC 4178

25. *YG Limited Partnership and YSL Residences (Re)*, 2021 ONSC 5206

26. *YG Limited Partnership (Re)*, 2022 ONSC 6138

## SCHEDULE "B"

## TEXT OF STATUTES, REGULATIONS & BY - LAWS

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

**Section 2**

**claim provable in bankruptcy, provable claim** or **claim provable** includes any claim or liability provable in proceedings under this Act by a creditor…

**creditor** means a person having a claim provable as a claim under this Act…

**equity claim** means a claim that is in respect of an equity interest, including a claim for, among others,

(a) a dividend or similar payment,

(b) a return of capital,

(c) a redemption or retraction obligation,

(d) a monetary loss resulting from the ownership, purchase or sale of an equity interest or from the rescission, or, in Quebec, the annulment, of a purchase or sale of an equity interest, or

(e) contribution or indemnity in respect of a claim referred to in any of paragraphs (a) to (d);

**Section 121**

**Claims provable**

(1) All debts and liabilities, present or future, to which the bankrupt is subject on the day on which the bankrupt becomes bankrupt or to which the bankrupt may become subject before the bankrupt's discharge by reason of any obligation incurred before the day on which the bankrupt becomes bankrupt shall be deemed to be claims provable in proceedings under this Act.

**Contingent and unliquidated claims**

(2) The determination whether a contingent or unliquidated claim is a provable claim and the valuation of such a claim shall be made in accordance with section 135. [underlining added]

**Section 135**

**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.

Court File No. BK-21-02734090-0031

IN THE MATTER OF THE BANKRUPTCY AND INSOLVENCY ACT, R.S.C. 1985, c. B-3, AS AMENDED

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

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

PROCEEDING COMMENCED AT
TORONTO

# RESPONDING FACTUM OF THE PROPOSAL TRUSTEE, KSV RESTRUCTURING INC.


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