

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

IN THE MATTER OF 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

**SUPPLEMENTARY RESPONDING MOTION RECORD OF MARIA ATHANASOULIS**

*(Motion Returnable January 16, 2023)*

January 12, 2023

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Court File No. BK-21-02734090-0031

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**SUPPLEMENTAL AFFIDAVIT OF EMILY SEABY  
(Sworn January 12, 2023)**

I, Emily Seaby of the City of Toronto, in the Province of Ontario, MAKE OATH AND SAY:

1. I am a legal assistant with the law firm of Goodmans LLP (“**Goodmans**”), solicitors for Maria Athanasoulis, a creditor in this matter, and as such have knowledge of the matters to which I hereinafter depose, unless otherwise indicated.
2. Attached as Exhibit “A” is a copy of the initial document request sent to Matthew Milne-Smith on April 13, 2022.
3. Attached as Exhibit “B” is a copy of the further document request sent to Harry Fogul and Jeff Larry on May 12, 2022.

4. Attached as Exhibit "C" is a copy of the Letter from counsel for Maria Athanasoulis sent to Robin Schwill, Matthew Milne-Smith and Chenyang Li on November 21, 2022.

**SWORN** before me at the City of Toronto, in the Province of Ontario, on January 12, 2023.



\_\_\_\_\_  
Commissioner for Taking Affidavits  
(or as may be)



\_\_\_\_\_  
**Emily Seaby**

**A**

This is **Exhibit "A"** referred to in the  
Affidavit of Emily Seaby  
sworn before me this  
12<sup>th</sup> day of January 2023



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A Commissioner for Taking Affidavits



**Stothart, Sarah**

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**From:** Dunn, Mark  
**Sent:** Wednesday, April 13, 2022 7:26 AM  
**To:** Milne-Smith, Matthew  
**Cc:** Li, Chenyang; Schwill, Robin; Stothart, Sarah  
**Subject:** YSL Arbitration  
**Attachments:** Fwd: bclMC deal has closed

Mathew,

I am writing to request preliminary production of certain documents, which will assist Ms. Athanasoulis in drafting her pleading. These are primarily documents referenced in the motion materials relating to the proposal, but redacted in the copies provided to us.

Since the sale has closed, we do not believe that there is any need to seal the unredacted copies of the following court material:

- The *pro forma* referenced at exhibit X to the Affidavit of Lue (Eric) Li sworn May 3, 2021 (the "Li Affidavit");
- Copies of the appraisals referenced in Exhibits "CC" to the Li Affidavit
- Copies of the cost documents attached as Exhibit "DD" to the LI Affidavit;
- Copies of the CBRE appraisal effective July 30, 2019 (which may also be included in Exhibit CC above);
- Copies of the CBRE appraisal dated March 16, 2021 and referenced in the Trustee's Third Report.

In addition, I am forwarding an e-mail from Dale & Lessman from August 4, 2017 when the buyout of BclMC's interest in the YSL Project occurred. We would appreciate production of the trust ledger. This is required to assess the profits earned on the project.

To be clear, this is a preliminary document request for documents that will assist with pleading the case. We expect that a process for more complete document disclosure (although still tailored to make it as efficient as possible) will be incorporated into the timeline for the arbitration.

Regards,  
Mark

**Mark Dunn**

He/Him  
Goodmans LLP

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**B**

This is **Exhibit "B"** referred to in the  
Affidavit of Emily Seaby  
sworn before me this  
12<sup>th</sup> day of January 2023



---

A Commissioner for Taking Affidavits

**Stothart, Sarah**

---

**From:** Stothart, Sarah  
**Sent:** Thursday, May 12, 2022 9:27 AM  
**To:** 'hfogul@airdberlis.com'; 'jeff.larry@paliareroland.com'  
**Cc:** Dunn, Mark; 'Milne-Smith, Matthew'; Li, Chenyang  
**Subject:** Athanasoulis v. YSL - Document Request

Good morning,

As you know, we are counsel to Maria Athanasoulis in her claim against YSL (as represented by the Proposal Trustee) for damages for breach of contract. The claim is being adjudicated in an arbitration proceeding that was bifurcated into two stages. Since Ms. Athanasoulis was successful at the liability stage, the parties are now moving forward to the quantification stage to determine the quantum of damages to which Ms. Athanasoulis is entitled.

The quantification stage involves consideration of many issues relating to YSL's actual profits and the profits it would have earned in a "but-for" world. Determination of these issues will require consideration of documents and records that are within the possession and control of YSL, Cresford and Mr. Casey.

The Trustee has advised us that it does not have access to these documents and records.

Accordingly, please produce, by May 19, 2022, the following documents that are relevant to Ms. Athanasoulis' claim:

1. Financial statements for YG Limited Partnership and YSL Residences Inc. (collectively, "YSL");
2. Financing agreements, in draft or final form, relating to the Yonge Street Living Residences condominium tower at Yonge and Gerrard (the "YSL Project");
3. General ledger for YSL;
4. Bank statements for YSL;
5. All pro formas prepared on the YSL Project;
6. Reports or appraisals prepared by any third party, in draft or final form, that comment upon or review the financial status of the YSL Project, including at least:
  - a. Altus Group cost reports
  - b. CBRE appraisals
7. Documents relating to any potential sale processes or offers to purchase the YSL Project or parts thereof (including the two properties adjacent to the YSL Project);
8. Documents relating to any equity investments in the YSL Project, including the total amount invested by the LPs and Fei Han and when it was invested;
9. Documents relating to the purchase of BCIMC's interest in the YSL Project, including the trust ledger prepared in connection with the sale and the refinancing together with documents showing how any excess funds were distributed;
10. Documents relating to the \$20 million loan agreement entered into between OTB Capital Inc. ("OTB"), YSL, 33 Yorkville Residences Inc. and 33 Yorkville Residences Limited Partnership on December 20, 2017;
11. Documents relating to the \$10 million loan issued by OTB to YSL on December 17, 2019;
12. Documents relating to the construction financing agreement between Otera Capital and YSL and its termination;
13. Documents relating to any payments made by YSL or any entities related to Concord to Cresford, Mr. Casey, or any of Cresford's project companies;
14. Documents relating to the lending facility extended by Westmount to YSL, including draw information;
15. Documents relating to the vendor take-back mortgage advanced by BCIMC to YSL;
16. Documents relating to advances made by Timbercreek to YSL, and how they were used;

17. Documents provided to the Trustee to show that Cresford/Casey invested \$38.2 million in YSL, as alleged in the *BIA* proceeding; and
18. Documents showing all payments from Concord (or any related entities) to Mr. Casey, Cresford, or any related entities in connection with the YSL *BIA* proceeding including, without limitation, documents relating to the payment disclosed to the court.

Thank you,

**Sarah Stothart**

(she/her)

Goodmans LLP

416.597.4200

[ssothart@goodmans.ca](mailto:ssothart@goodmans.ca)

[goodmans.ca](http://goodmans.ca)

C

This is **Exhibit "C"** referred to in the  
Affidavit of Emily Seaby  
sworn before me this  
12<sup>th</sup> day of January 2023



---

A Commissioner for Taking Affidavits



Goodmans<sup>LLP</sup>

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mdunn@goodmans.ca

November 21, 2022

**VIA EMAIL**

Our File No.: 200116

Davies Ward Phillips & Vineberg LLP  
155 Wellington Street West  
Toronto ON M5V 3J7

**Attention: Robin Schwill, Matthew Milne-Smith and Chenyang Li**

Dear Sirs/Mesdames:

**Re: Claim Determination Process for the Claim of Maria Athanasoulis**

We are writing in respect of the determination of Ms. Athanasoulis' claim by the Proposal Trustee. We understand that the Proposal Trustee is currently evaluating the appropriate procedure to follow to determine Ms. Athanasoulis' claim in light of the Endorsement of Justice Kimmel dated November 1, 2022 (the "Endorsement").

The following sets out Ms. Athanasoulis' position in respect of the appropriate procedure.

**Clarity is critical: the claim determination process should be approved by the Court**

The Proposal Trustee has made significant efforts to reach procedural consensus with stakeholders, but those efforts have unfortunately not yielded certainty with respect to how the claim will be determined. This matter has been significantly delayed because stakeholders objected to the determination procedure after it had advanced significantly. This should not be allowed to happen again. We therefore respectfully submit that whatever process the Proposal Trustee decides to follow should be incorporated into a Claims Procedure Order obtained on notice to the full service list. This will allow the process to proceed smoothly once settled.

**Phase one of the Arbitration is binding on the Proposal Trustee**

As a preliminary matter, we require confirmation that the determinations made at the first phase of the arbitration before Mr. Horton (the "Arbitration") bind the Trustee and the Debtors. If there is a dispute about this point then we need to know immediately, so that we can take the appropriate steps to address it.

That said, we do not believe there is (or should be) any dispute on this point. The Proposal Trustee executed the Arbitration Agreement with Mr. Horton, and proceeded with the Arbitration on notice to all stakeholders. Justice Kimmel noted that the necessary parties and information were before



Mr. Horton to allow him to make determinations about the existence of the oral profit sharing agreement and the finding of constructive dismissal. She also noted that deviation from the results of an arbitration that the Trustee participated in would be inconsistent with the Arbitration Agreement and the *Arbitration Act*, 1991, S.O. 1991, c. 17. Finally, Justice Kimmel found that the Phase One arbitration findings would be “inputs” and the “factual predicate” on which Ms. Athanasoulis’ claim could be determined. (See generally, paragraphs 49-51, 54, and 93-94 of the Endorsement.)

In light of the foregoing, we ask the Proposal Trustee to confirm that the holdings made by Mr. Horton will be taken as binding inputs in the determination of Ms. Athanasoulis’ claim. Any challenge to the results of the Arbitration ought to be brought forward now or it should not be brought forward at all. This will allow all parties to understand what facts remain to be determined and what facts can be challenged in the Proposal Trustee’s process.

As you know, Ms. Athanasoulis takes the position that Phase 1 of the Arbitration is binding on the LPs as well, and that certain issues they have raised are *res judicata* because they could have been raised at the first phase of the Arbitration. We understand that the LPs dispute this position.

#### **The appeal procedure should be determined as part of the claim procedure**

In its Sixth Report, the Proposal Trustee confirmed that an appeal would be the “inevitable result” of the Proposal Trustee’s allowance or disallowance of Ms. Athanasoulis’ claim (see paragraph 6.0.14). This conclusion is entirely correct. Ms. Athanasoulis takes the position that she is entitled to all of the funds remaining for creditors. The LPs assert that Ms. Athanasoulis is entitled to nothing, and even oppose any payment on her wrongful termination claim.

Given the likelihood of an appeal, all parties should know in advance whether the appeal will proceed as a true appeal or an appeal *de novo*. The claims process will be more efficient if all involved know from the outset what procedure will be followed and can make strategic decisions with a complete understanding of that procedure.

#### **An appeal should proceed *de novo***

We respectfully submit that any appeal of Ms. Athanasoulis’ claim should proceed *de novo*. In the circumstances of this case, limiting the parties to a true appeal would work an injustice.

An appeal *de novo* is appropriate given the nature of the claim and the procedural history to date. Ms. Athanasoulis advances a complex commercial claim that turns on a number of factual and legal disputes. Evidence is required to make the appropriate determination. In such circumstances, Canadian courts have often proceeded by way of an appeal *de novo*.

The Proposal Trustee has already accepted that a full hearing, where all affected parties have an opportunity to present evidence, is the appropriate procedure for resolving Ms. Athanasoulis’ claim. This is the basis on which it entered into the Arbitration Agreement. The Arbitration cannot

proceed, but the merits of a full evidentiary hearing have not changed. An appeal *de novo* would provide many of the procedural advantages offered by the Arbitration, without the technical frailties that prevented the Arbitration from proceeding. It also offers a transparent, expeditious and efficient manner for evaluating Ms. Athanasoulis' claim and any challenges to it.

In addition, the procedural history of this matter provides further justification for an appeal *de novo*. The Proposal Trustee participated in the arbitration process as Ms. Athanasoulis' adversary. Among its various positions, it urged Mr. Horton to find that there were no profits, and that Ms. Athanasoulis' claim should be dismissed. Mr. Horton decided that the arguments raised by the Proposal Trustee were damages arguments that ought to be determined in the second phase of the Arbitration.

The Proposal Trustee is, as a result of the Endorsement, effectively changing from an advocate to an adjudicator. It is therefore tasked with deciding whether the very arguments that it advanced at phase I of the Arbitration and in subsequent informal discussions with counsel are valid. Limiting Ms. Athanasoulis to a true appeal, in these circumstances, would be an injustice. This is not a criticism. Ms. Athanasoulis agreed to the arbitration process and the Proposal Trustee's role in it. The Proposal Trustee made arguments based on its assessment of the facts and the law. Its role changed because of an unforeseen challenge that it opposed. But the fact remains that the Proposal Trustee's prior positions put it in a very difficult position to evaluate Ms. Athanasoulis' claim and any evidence delivered in support of it in a neutral manner.

In our respectful submission, the best way to address this difficulty is to allow an appeal *de novo*.

**If an appeal proceeds *de novo* then there is no need for further valuation evidence**

Assuming that there will be an appeal *de novo*, there is no need at this stage for Ms. Athanasoulis to produce valuation evidence on the damages due to her. The positions articulated to date by the Proposal Trustee for not yet allowing Ms. Athanasoulis' claim do not relate to the value of the YSL Project in December 2019 (when Ms. Athanasoulis says damages should be calculated) or any other time. There is therefore little reason for either Ms. Athanasoulis or the Proposal Trustee to spend time and money on valuation evidence that has little or no likelihood of affecting the Proposal Trustee's determination.

**The LPs should advance their own issues and should serve evidence as soon as possible**

The LPs have raised a number of issues, and previously advised that they intended to bring a motion to determine those issues, whether or not the Arbitration was proceeding. The LPs have now said that they may not bring their motion, depending on what process the Proposal Trustee adopts to resolve Ms. Athanasoulis' claim.

In our view, the issues raised by the LPs do not relate to whether Ms. Athanasoulis' claim is quantified, allowed or disallowed. Ms. Athanasoulis asserts a claim against the Debtors. The LPs



are not parties to the contract that the Debtors breached. They have no independent evidence about the value of the YSL Project or whether it earned profits, on the date of breach or any other date.

The LPs argue, in effect, that Ms. Athanasoulis has a direct legal relationship with them and is subordinated to them or owes damages to them as a result of that relationship.

Pursuant to section 135(1) of the BIA, the Proposal Trustee is tasked with allowing or disallowing Ms. Athanasoulis' claim. It is not tasked with assessing claims made by one stakeholder against another. Those claims should be litigated between Ms. Athanasoulis and the LPs, without the Proposal Trustee's involvement.

### **Ms. Athanasoulis will submit further evidence of actual profit**

Ms. Athanasoulis has consistently alleged that YSL earned a profit, as that term is defined in Mr. Horton's decision. We intend to submit evidence to support that position, and believe that this aspect of Ms. Athanasoulis' claim could be determined by the Proposal Trustee independently of its determination on the balance of the claim. We would be pleased to discuss with you a schedule for the submission of evidence, and for the Proposal Trustee to evaluate the evidence and conduct the necessary evaluation.

In order to facilitate an efficient resolution of this issue, we respectfully request that the Proposal Trustee confirm that its current position on actual profit is accurately summarized in the mediation brief it submitted to Justice Cunningham. This will allow us to address a calculation which was presumably calculated based on information provided by the Debtors.

### **There *may* be an opportunity for a preliminary determination of certain threshold issues**

The Proposal Trustee and the LPs have each raised alleged issues that could potentially be determined by a preliminary motion. These issues are:

- Whether Ms. Athanasoulis' damages should be calculated based on the value of the Profit Share at the time of termination (as Ms. Athanasoulis says) or at the time of trial (as the Proposal Trustee seems to believe);
- Whether Ms. Athanasoulis' claim is in the nature of debt or equity or otherwise subordinate to the claims advanced by the LPs.

To be clear, we are not conceding that any preliminary motion is appropriate. The parties would need to cooperate to ensure that the motion can be heard in a timely way, and that the issues can be fairly determined by way of summary motion. This would require agreement on a defined set of issues and on the evidence that will be required to determine them.

Importantly, we do not believe that a preliminary motion is possible if there are credibility disputes between Ms. Athanasoulis and the LPs. We have asked for the information required to assess this issue, but have not yet received it.

Our client is also not conceding that the result of such a motion would be dispositive. It remains Ms. Athanasoulis' position that the YSL Project earned an actual profit, as the term was defined in Mr. Horton's decision, which can and should be determined independently on any determination on the legal issues noted above.

We would be pleased to discuss the foregoing at your convenience.

Yours truly,

**Goodmans LLP**

A handwritten signature in black ink, appearing to be 'Mark Dunn', enclosed within a circular scribble.

Mark Dunn  
MD/es  
7321225

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  
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Court File No: BK-21-02734090-0031

**ONTARIO  
SUPERIOR COURT OF JUSTICE**

Proceeding commenced at Toronto

**SUPPLEMENTAL AFFIDAVIT OF EMILY SEABY  
(Sworn January 12, 2023)**

**GOODMANS LLP**

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Lawyers for Maria Athanasoulis

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

Court File No: BK-21-02734090-0031

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RECORD OF MARIA ATHANASOULIS**

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