

Court File No.: CV-24-00715321-00CL

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

B E T W E E N:

**CONSTANTINE ENTERPRISES INC.**

Applicant

- AND -

**MIZRAHI (128 HAZELTON) INC. AND  
MIZRAHI 128 HAZELTON RETAIL INC.**

Respondents

**IN THE MATTER OF AN APPLICATION UNDER SUBSECTION 243(1) OF THE  
BANKRUPTCY AND INSOLVENCY ACT, R.S.C. 1985, C. B-3, AS AMENDED, AND  
SECTION 101 OF THE COURTS OF JUSTICE ACT, R.S.O. 1990, C. C.43, AS AMENDED**

**FACTUM OF KSV RESTRUCTURING INC.,  
IN ITS CAPACITY AS COURT-APPOINTED RECEIVER**

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**PART I - INTRODUCTION**

1. This factum is filed in support of a motion by KSV Restructuring Inc. ("**KSV**"), in its capacity as the Court-appointed receiver and manager (in such capacity, the "**Receiver**") of: (a) certain condominium units located at 126 Hazelton Avenue, Toronto, Ontario and 128 Hazelton Avenue, Toronto, Ontario (as legally described in the Receivership Order, defined below) (the "**Real Property**"); and (b) all of the assets, undertakings and properties of Mizrahi (128 Hazelton) Inc. ("**Hazelton**") and Mizrahi 128 Hazelton Retail Inc. ("**Retail**", together with Hazelton, the "**Debtors**"), or either of them, acquired for, or used in relation to a business carried on by the Debtors (the "**Property**"), or either of them, including all proceeds thereof, to seek approval of, among other things:

### *Retail APS and Level 1 Unit*

- (a) approving a transaction (the “**Retail APS Transaction**”) contemplated by an agreement of purchase and sale dated June 14, 2024 (the “**Stalking Horse APA**”) between the Receiver and Constantine Enterprises Inc. (“**CEI**”) for the purchase and sale of the Retail APS (defined below) and vesting all of Retail’s right, title and interest in and to the Retail APS to CEI;
- (b) approving a transaction (the “**Level 1 Unit Transaction**”) for the sale of the Level 1 Unit (defined below) contemplated by the Retail APS, to be assigned to Hazy Holdings Inc. (“**Hazy Holdings**”) pursuant to an agreement of purchase and sale dated as of August 20, 2024 between CEI and Hazy Holdings (the “**Assignment Agreement**”) and a consent to assignment agreement dated as of August 20, 2024 among CEI, Hazy Holdings, and the Receiver, and vesting all of Hazelton’s right, title and interest in and to the Level 1 Unit to Hazy Holdings;
- (c) sealing the confidential appendix (the “**Confidential Appendix**”) to the second report of the Receiver dated August 20, 2024<sup>1</sup> (the “**Second Report**”) pending the closing of the Level 1 Unit Transaction or further order of the Court;

### *Second Floor Units*

- (d) approving transactions (the “**Second Floor Transactions**”) contemplated by (a) an agreement of purchase and sale between Hazelton and CEI dated December 8, 2016, as amended (as amended, the “**201 APS**”); and (b) an agreement of purchase and sale between Hazelton and CEI dated December 8, 2016, as amended (as amended, the “**204 APS**”, and together with the 201 APS, the

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<sup>1</sup> Second Report of KSV Restructuring Inc., in its capacity as the Receiver dated August 20, 2024 (the “**Second Report**”), Motion Record of the Receiver returnable August 30, 2024 (“**MR**”), Tab 2, p 13.

“**Second Floor APAs**”) for the sale of Unit 201 and Unit 204 (as both terms are defined below and collectively, the “**Second Floor Units**”) to CEI and vesting all of Hazelton’s right, title and interest in and to the Second Floor Units to CEI; and

*Unit 403*

- (e) approving a transaction (the “**Unit 403 Transaction**” and collectively with the Retail APS Transaction, the Level 1 Unit Transaction and the Second Floor Transactions, the “**Transactions**”) contemplated by the 403 APS (defined below) for the sale of Unit 403 (defined below), as assigned by CEI to Murad Shibeli (“**Shibeli**”) and subsequently assigned by Shibeli to Fawzia Ahmed Gashut (“**Gashut**”), and vesting all of Hazelton’s right, title and interest in and to (a) the 403 Purchased Assets (as defined below) to Gashut; and (b) the Assigned Parking Spot (as defined below) to CEI.

**PART II - SUMMARY OF FACTS**

- 2. Further background in these proceedings is set out the Second Report. Capitalized terms used herein and not otherwise defined have the meaning given to them in the Second Report.

**Background**

- 3. Pursuant to an order of the Ontario Superior Court of Justice (Commercial List) (the “**Court**”) made on June 4, 2024 (the “**Receivership Order**”) KSV was appointed as receiver and manager of the Property.<sup>2</sup>

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<sup>2</sup> Second Report at section 1.0, para 1, MR, Tab 2, p 15.

## *Hazelton*

4. Hazelton is the registered owner of certain premises (the “**Real Property**”), which consist of a nearly complete nine-storey, 20-unit luxury condominium development project located in Toronto’s Yorkville neighbourhood with approximately 1,993 square feet of ground floor commercial retail space and three levels of underground parking (the “**Hazelton Project**”).<sup>3</sup>

2. Hazelton is responsible for the development and construction of the Real Property. Hazelton is currently the registered owner of the Level 1 Unit, the Second Floor Units, Unit 403, four additional condominium units, and the parking spaces and lockers allocated to the units.<sup>4</sup>

3. The shares in the capital of Hazelton are owned 50% by Mizrahi Developments Inc. (“**Mizrahi Inc.**”) and 50% by CEI.<sup>5</sup> CEI is a Toronto-based private real estate fund that has assisted in the financing of the Hazelton Project since 2015.<sup>6</sup> Mizrahi Inc. is controlled by Sam Mizrahi.<sup>7</sup>

4. Prior to these proceedings, the development and construction management of the Hazelton Project was performed by Mizrahi Inc.<sup>8</sup>

## *Retail*

5. Retail’s only known asset is the Retail APS, pursuant to which it is entitled to purchase the Level 1 Unit for a purchase price of \$2,393,000.<sup>9</sup> CEI has security over all of the assets of Retail including the Retail APS pursuant to a general security agreement, which among other

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<sup>3</sup> Second Report at section 2.0, para 1, MR, Tab 2, p 19.

<sup>4</sup> Second Report at section 2.0, para 2, MR, Tab 2, p 19.

<sup>5</sup> Second Report at section 2.0, para 3, MR, Tab 2, p 19.

<sup>6</sup> First Report of KSV Restructuring Inc. as Receiver and Manager of Mizrahi (128 Hazelton) Inc. and Mizrahi 128 Hazelton Retail Inc. at section 3.1, para 1 (“**First Report**”), Appendix D to the Second Report, MR, Tab 2D, p 71.

<sup>7</sup> Second Report at section 2.0, para 3, MR, Tab 2, p 19.

<sup>8</sup> Second Report at section 2.0, para 4, MR, Tab 2, p 19.

<sup>9</sup> Second Report at section 2.1, para 2, MR, Tab 2, p 19.

things, secures an obligation of Retail to CEI pursuant to a note in the aggregate principal amount of \$2,174,130.<sup>10</sup>

### *The Retail APS Sale Process*

6. On June 21, 2024, the Court granted an order in these proceedings (the “**Retail APS Sale Process Order**”) which, among other things, approved:

- (a) a sale process for the marketing and sale of the Retail APS and the Level 1 Unit (the “**Retail APS Sale Process**”); and
- (b) the Stalking Horse APA solely for the purposes of acting as the stalking horse bid.<sup>11</sup>

7. Pursuant to the Retail APS Sale Process Order, CBRE Limited (“**CBRE**”) was retained by the Receiver to market the Level 1 Unit for sale.<sup>12</sup>

8. CBRE launched the Retail APS Sale Process on June 24, 2024.<sup>13</sup> CBRE’s marketing efforts included, among other things:

- (a) posting the listing for the property on the multiple listing service and providing marketing material to over 3,000 prospective purchasers;
- (b) marketing the listing on social media and advertising the opportunity in *The Globe and Mail* newspaper on July 2 and 4, 2024;
- (c) making information available to interested parties in a virtual data room provided they first sign a confidentiality agreement; and

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<sup>10</sup> First Report at section 3.1, paras 1 and 3, Appendix D to the Second Report, MR, Tab 2D, p 71.

<sup>11</sup> Second Report at section 1.0, para 3, MR, Tab 2, p 16.

<sup>12</sup> Second Report at section 3.0, para 2, MR, Tab 2, p 20.

<sup>13</sup> Second Report at section 3.0, para 3, MR, Tab 2, p 20.

(d) arranging tours of the Level 1 Unit and responding to due diligence requests from interested parties.<sup>14</sup>

9. Fifteen parties conducted due diligence on the opportunity.<sup>15</sup> Bidders were required to submit bids that met established bid criteria (the “**Bid Criteria**”) by no later than an established bid deadline, which was approximately thirty days after the commencement of the Retail APS Sale Process (the “**Bid Deadline**”).<sup>16</sup>

10. Three offers were submitted on or following the Bid Deadline, none of which satisfied the requirements of the Bid Criteria. None of the bids were for more than the value of the Stalking Horse APA (being a total of \$2,693,000, comprised of \$300,000 under the Stalking Horse APA and \$2,393,000 under the Retail APS).<sup>17</sup>

11. CEI subsequently advised it is prepared to close on the Stalking Horse APA and assign the Retail APS to the next highest bidder, such bidder being Hazy Holdings, who submitted an offer for \$2,300,000 for the Level 1 Unit.<sup>18</sup> CEI agreed to provide consideration of \$93,000 for the Level 1 Unit, being the difference between the Hazy Holdings offer price and the original Level 1 Unit purchase price.<sup>19</sup>

12. As result, the Receiver, CEI, CBRE and Hazy Holdings negotiated transactions, pursuant to which the Retail APS and the Level 1 Unit will be conveyed as follows:

(a) CEI will complete the Stalking Horse APA for the purchase price of \$300,000 by way of a credit bid;

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<sup>14</sup> Second Report at section 3.0, para 3, MR, Tab 2, p 20.

<sup>15</sup> Second Report at section 3.0, para 5, MR, Tab 2, p 21.

<sup>16</sup> First Report at section 5.1, para 1, Appendix D to the Second Report, MR, Tab 2D, p 75.

<sup>17</sup> Second Report at section 3.0, para 6, MR, Tab 2, p 21.

<sup>18</sup> Second Report at section 3.0, paras 7 and 8, MR, Tab 2, p 21.

<sup>19</sup> Second Report at section 3.0, para 8(d), MR, Tab 2, p 21.



- (b) CEI will assign the right, title, and interest in the Retail APS to Hazy Holdings pursuant to the Assignment Agreement;
- (c) Hazy Holdings will complete the purchase of the Level 1 Unit pursuant to the Retail APS for \$2,300,000;
- (d) CEI will pay \$93,000, by way of credit bid, being the difference between the assumed liabilities under the Retail APS and the amount of Hazy Holding's offer; and
- (e) Court approval is to be sought within fourteen calendar days of the transaction being selected as the successful bid in the Retail APS Sale Process Order or such other date as agreed by Hazy Holdings.<sup>20</sup>

13. CEI is owed over \$2.8 million by Retail on a secured basis.<sup>21</sup> The Receiver has received a favourable opinion from its independent legal counsel in respect of the security held by CEI.<sup>22</sup>

14. Both transactions are subject to approval of the Court but do not contain any other material conditions.<sup>23</sup>

### *The Second Floor Transactions*

15. The Second Floor APAs provide for the purchase and sale of:

- (a) unit 201, together with one parking spot and one locker (collectively, "**Unit 201**"); and

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<sup>20</sup> Second Report at section 3.0, para 8, MR, Tab 2, p 21.

<sup>21</sup> First Report at section 3.1, para 1, Appendix D to the Second Report, MR, Tab 2D, p 76.

<sup>22</sup> First Report at section 3.1, para 2, Appendix D to the Second Report, MR, Tab 2D, p 76.

<sup>23</sup> Second Report at section 6.0, para 4, MR, Tab 2, p 24.

(b) unit 204 (formerly unit 205), together with three parking spots and one locker (collectively, “**Unit 204**”).

16. The combined purchase price for the Second Floor Units is \$3.196 million, which will be satisfied by way of a credit bid by CEI.<sup>24</sup> The Second Floor Units were completed as office space and are presently occupied by CEI for this purpose.<sup>25</sup>

17. CEI provided the Receiver with an appraisal of the Second Floor Units prepared by Simon & Associates Ltd. (“**Simon**”) dated July 26, 2024 (the “**Simon Appraisal**”). Simon was retained by CEI’s lender, Royal Bank of Canada. According to the Simon Appraisal, the current market value of the Second Floor Units is \$3.2 million versus the combined purchase price of \$3.196 million pursuant to the Second Floor APAs.<sup>26</sup>

18. The purchase price for the Second Floor Transactions will be satisfied by way of a credit bid. CEI is owed over \$44 million by Hazelton on a secured basis.<sup>27</sup> The Receiver has received a favourable opinion from its independent legal counsel in respect of the security held by CEI.<sup>28</sup>

19. CEI intends to complete the purchase of the Second Floor APAs immediately following Court approval of those transactions, if approved.<sup>29</sup>

#### *The Unit 403 Transaction*

20. Unit 403 is a completed residential condominium, which includes two parking spots (the “**Parking Spots**”) and one locker (collectively, “**Unit 403**”).<sup>30</sup>

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<sup>24</sup> Second Report at sections 3.1 and 3.2, paras 2(g) and (1)(e), MR, Tab 2, pp 22, 23.

<sup>25</sup> Second Report at section 3.1, para 2(h); and Second Report at section 3.2, para 1(e), MR, Tab 2, p 23.

<sup>26</sup> Second Report at section 6.0, para 3, MR, Tab 2, p 24.

<sup>27</sup> First Report at section 3.1, para 1, Appendix D to the Second Report, MR, Tab 2D, p 76.

<sup>28</sup> First Report at section 3.1, para 2, Appendix D to the Second Report, MR, Tab 2D, p 76.

<sup>29</sup> Second Report at section 6.0, para 4, MR, Tab 2, p 24.

<sup>30</sup> Second Report at section 1.1, para 1(d), MR, Tab 2, p 17.

21. CEI entered into an agreement of purchase and sale dated November 18, 2016, as amended (as amended, the “**403 APS**”) to purchase Unit 403 from Hazelton for \$2,208,800. CEI also paid \$103,680 for upgrades.<sup>31</sup>

22. Prior to these proceedings, CEI retained Ferrow Real Estate Inc. (“**Ferrow**”) to list Unit 403 and a similar unit, unit 404 (“**Unit 404**”), for sale. Ferrow is familiar with Hazelton through its relationships with CEI’s executives. Edward Rogers and Robert Hiscox, both directors and officers of CEI, indirectly own an interest in Ferrow.<sup>32</sup>

23. In addition, the Receiver has been advised that Ferrow previously sold units 401, 402 and 601 of the Real Property (each of which were arm’s length transactions) and is currently listing units 801 and 802. Unit 403 was initially listed for sale by Ferrow in January 2022 and has been listed by Ferrow since then.<sup>33</sup>

24. The proposed transaction with Gashut was identified through Ferrow’s marketing efforts. The Receiver understands that Shibeli and Gashut are related.<sup>34</sup>

25. Pursuant to an assignment of agreement of purchase and sale between CEI and Shibeli dated July 7, 2024 (the “**403 Assignment Agreement**”), and a consent and amendment agreement among CEI, Shibeli, and the Receiver (the “**403 Consent and Amendment Agreement**”), CEI agreed to assign its interest in the 403 APS to Shibeli for \$2,450,000. Shibeli (as subsequently assigned to Gashut) agreed to assign his entitlement to one of the Parking Spots to CEI (the “**Assigned Parking Spot**”). The Receiver has been advised by CEI that, as partial

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<sup>31</sup> Second Report at section 7.0, para 3, MR, Tab 2, p 25.

<sup>32</sup> Second Report at section 7.0, para 3, MR, Tab 2, p 25.

<sup>33</sup> *Ibid*; Second Report at section 7.0, paras 3 and 5, MR, Tab 2, pp 25, 26.

<sup>34</sup> Second Report at section 7.0, para 6, MR, Tab 2, p 26.

consideration for the assignment of the 403 APS, it was agreed that the Assigned Parking Spot would be assigned to CEI.<sup>35</sup>

26. Pursuant to an amending agreement to the 403 Consent and Amending Agreement among Gashut, CEI, Shibeli, and the Receiver dated August 14, 2024, Shibeli agreed to assign his interest in the 403 APS to Gashut.<sup>36</sup>

27. In accordance with the terms of the 403 Assignment Agreement, Gashut, on behalf of Shibeli, paid a deposit of \$121,000, which is presently being held in trust by Ferrow.<sup>37</sup>

28. As result, Unit 403 will be conveyed as follows:

- a) Unit 403 is being purchased in its current state, on an “as is, where is” basis and the Receiver is not required to perform additional work;
- b) Unit 403 is being sold without any material representations, on terms consistent with an insolvency transaction;
- c) title to the Assigned Parking Spot will be assigned to CEI;
- d) the remaining assets of Unit 403, excluding the Assigned Parking Spot (the “**403 Purchased Assets**”), shall vest in Gashut;
- e) the sale of Unit 403 is subject to Court approval; and

the Receiver is required to use its commercially reasonable efforts to seek Court approval of the sale on or before August 19, 2024, subject to Court availability.<sup>38</sup>

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<sup>35</sup> Second Report at section 1.1, para 1(d)(i), MR, Tab 2, p 17.

<sup>36</sup> Second Report at section 1.1, para 1(d)(ii), MR, Tab 2, p 17.

<sup>37</sup> Second Report at section 7.0, para 6, MR, Tab 2, p 26.

<sup>38</sup> Second Report at section 7.0, para 7, MR, Tab 2, p 26.

### **PART III - STATEMENT OF ISSUES, LAW & AUTHORITIES**

#### ***The Court has the Jurisdiction to Approve the Transactions***

29. Pursuant to Section 100 of the *Courts of Justice Act*,<sup>39</sup> as amended and section 243(1) of the *Bankruptcy and Insolvency Act*,<sup>40</sup> the Court has the jurisdiction to grant the proposed vesting orders.

30. Further, in respect of the Transactions that involve a credit bid, it is well established that in Canadian insolvency law that a secured creditor is permitted to credit bid its debt instead of providing cash consideration.<sup>41</sup>

#### ***The Court Should Approve the Transactions***

31. The factors for the Court to consider in determining whether the Transactions should be granted are set out in *Royal Bank of Canada v Soundair*.<sup>42</sup> *Soundair* states that a Court should consider:

- (a) whether the receiver has made a sufficient effort to obtain the best price and has not acted improvidently;
- (b) whether the interests of all parties have been considered;
- (c) the efficacy and integrity of the process by which offers are to be obtained; and
- (d) whether there has been unfairness in the working out of the process.

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<sup>39</sup> *Courts of Justice Act*, R.S.O. 1990, c. C.43, as amended, [s 100](#).

<sup>40</sup> *Bankruptcy and Insolvency Act*, R.S.C., 1985, c. B-3, as amended, [s 243\(1\)](#).

<sup>41</sup> *Elleway Acquisitions Ltd. v. 4358376 Canada Inc.*, [2013 ONSC 7009](#) (Commercial List) at para 38; *8527504 Canada Inc. v. Liquibrands Inc.*, [2015 ONSC 5912 \(Commercial List\)](#) at para 20, ref'g leave to appeal [2015 ONCA 916](#); and *North American Tungsten Corporation Ltd. (Re)*, [2016 BCSC 12](#) at para 24.

<sup>42</sup> [1991 CanLII 2727 \(ON CA\)](#) at para 15 [“*Soundair*”].

32. Deference is to be afforded to the Receiver in regard to the Transactions. Unless there is a violation of the *Soundair* principles or other exceptional circumstances, the court should uphold the business judgment of the Receiver.<sup>43</sup> As affirmed by the Court in *Soundair*:

If the court were to reject the recommendation of the Receiver in any but the most exceptional circumstances, it would materially diminish and weaken the role and function of the Receiver both in the perception of receivers and in the perception of any others who might have occasion to deal with them. It would lead to the conclusion that the decision of the Receiver was of little weight and that the real decision was always made upon the motion for approval. That would be a consequence susceptible of immensely damaging results to the disposition of assets by court-appointed receivers.<sup>44</sup>

In this case, there are no exceptional circumstances which would justify rejecting the Receiver's recommendation in respect to each of the Transactions.

*The Retail APS Transaction and Level 1 Unit Transaction Should be Approved*

33. The Retail APS Transaction and the Level 1 Unit Transaction should be approved for the following reasons:

- (a) the Retail APS Sale Process was carried out on a basis consistent with the Retail APS Sale Process Order (other than as noted in respect of the Bid Deadline, which the Receiver does not believe affected the outcome of the Retail APS Sale Process);<sup>45</sup>

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<sup>43</sup> *Crown Trust Co. et al. v. Rosenberg et al.*, [1986 CanLII 2760](#) at para 83; *9-Ball Interests Inc. v. Traditional Life Sciences Inc.*, [2012 ONSC 2788](#) at para 28; and *Business Development Bank of Canada et al v. 1673747 Ontario Inc. et al.*, [2013 ONSC 286](#) at para 38.

<sup>44</sup> *Soundair* at para 21.

<sup>45</sup> Second Report at section 4.0, para 1(a), MR, Tab 2, p 23.

- (a) CBRE (i) has extensive experience selling retail real estate in the Greater Toronto Area (particularly this listing team); (ii) advertised the Level 1 Unit through conventional methods for a listing of this nature; (iii) performed a wide canvassing of the opportunity; and (iv) directly solicited parties which it believed may have an interest in this opportunity;
- (b) the Level 1 Unit was marketed for a sufficient amount of time to canvass the market, in accordance with the timeframes established by the Retail APS Sale Process Order;
- (c) CBRE does not believe that a superior offer is likely to be generated from a continued marketing of the Level 1 Unit;
- (d) Hazy Holding's offer was the best offer received in the Retail APS Sale Process (outside of the Stalking Horse APA);
- (e) CEI, Hazelton's primary secured creditor and Retail's only secured creditor, consents to the Level 1 Unit Transaction; and
- (f) completing the Stalking Horse APA and the sale to Hazy Holdings achieves the same economic outcome as completing the transactions contemplated by the Stalking Horse APA.

*The Second Floor Transactions Should be Approved*

34. The Second Floor Transactions should be approved for the following reasons:
- (a) the Second Floor APAs are unconditional and can be closed immediately following Court approval, if the Court approves the Second Floor Transactions;

- (b) the Second Floor Units are presently occupied by CEI and there is no basis on which the Second Floor APAs could be terminated, as the Second Floor Units are completed, occupied, there are no closing conditions and the purchase price of the Second Floor Units is consistent with market, based on an arm's length appraisal;
- (c) a marketing process for the Second Floor Units would result in professional fees and transaction costs, which would require the purchase price for the Second Floor Units to significantly exceed the purchase price pursuant to the Second Floor APAs to achieve the same economic outcome;
- (d) CEI, as the assignee of the DUCA Commitment owed by Hazelton, is the creditor that would most directly benefit from a superior transaction. CEI consents to the completion of the sale of the Second Floor Transactions in accordance with the Second Floor APAs;<sup>46</sup> and
- (e) CEI has provided the Receiver with a written undertaking to pay any and all amounts that rank in priority to it, as required by the Receiver, in accordance with the terms of the undertaking.<sup>47</sup>

*The Unit 403 Transaction Should be Approved*

35. The Unit 403 Transaction should be approved for the following reasons:

- (a) Unit 403 was originally listed for sale by Ferrow in January 2022 and has been listed for sale since then;

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<sup>46</sup> Second Report at section 6.1, para 1(d), MR, Tab 2, p 25.

<sup>47</sup> Second Report at section 6.0, para 4, MR, Tab 2, p 24.



- (b) Unit 404, a similar unit, was initially listed for sale by Ferrow in January 2023 and remains listed for sale;
- (c) the stigma associated with Hazelton’s receivership proceedings is unhelpful to maximizing value for the unsold units at this time, including for Unit 403;
- (d) the transaction for Unit 403 resulted from the best offer received through Ferrow’s marketing efforts of Unit 403;
- (e) the Gashut offer is acceptable to CEI, as assignor of the 403 APS and as secured creditor;
- (f) the assignment of the Assigned Parking Spot to CEI is in partial consideration for CEI agreeing to assign the 403 APS to Shibeli (and subsequently to Gashut) and does not diminish the consideration payable in respect of Unit 403; and
- (g) the purchase price per square foot for Unit 403 is in the range of recent comparable sale transactions.<sup>48</sup>

***The Court Should Seal the Confidential Appendix***

36. The Receiver seeks approval to seal the Confidential Appendix to the Second Report, which contains the CBRE Report and Offer Summary, pending further order of the Court or upon the completion of sale of the Level 1 Unit.

37. In *Sierra Club of Canada v Canada (Minister of Finance)*,<sup>49</sup> the Supreme Court of Canada (“SCC”) held that courts should exercise their discretion to grant sealing orders where: (a) the order is necessary to prevent a serious risk to an important interest, including a commercial

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<sup>48</sup> Second Report at section 7.0, para 9, MR, Tab 2, p 26.

<sup>49</sup> [2002 SCC 41](#) at para 53 [“*Sierra Club*”].

interest, because reasonable alternative measures will not prevent the risk; and (b) the salutary effects of the order outweigh its deleterious effects, including the effects on the right to free expression, which includes public interest in open and accessible court proceedings.

38. More recently in *Sherman Estate v Donovan*,<sup>50</sup> the SCC modified the test from *Sierra Club* without altering its essential elements. According to *Sherman Estate*, a person asking a court to exercise its discretion in a way that limits the ‘open court’ presumption must establish that:

- (a) court openness poses a serious risk to an important public interest;
- (b) the order sought is necessary to prevent this serious risk to the identified interest because reasonably alternative measures will not prevent this risk; and
- (c) as a matter of proportionality, the benefits of the order outweigh its negative effects.

39. Within the context of insolvency proceedings, it is common to seal confidential or commercially sensitive documents to protect the interests of debtors.<sup>51</sup>

40. The Confidential Appendix contains commercially sensitive information about CBRE’s marketing of the Level 1 Unit and a summary of the offers received for the Level 1 Unit.<sup>52</sup>

41. In the circumstances, the sealing of the Confidential Appendix until further order of the Court or the completion of the Level 1 Unit Transaction is the least restrictive means to maintain the confidentiality of this commercially sensitive information, as (a) the disclosure of the details of the other bids may negatively impact the sale of the Level 1 Unit if the sale to Hazy Holdings does

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<sup>50</sup> [2021 SCC 25](#) at para 38 [*“Sherman Estate”*].

<sup>51</sup> *Ontario Securities Commission v Bridging Finance Inc.*, [2021 ONSC 4347](#) at paras 23-28; and *Laurentian University of Sudbury*, [2021 ONSC 1453](#) at paras 13-14.

<sup>52</sup> Second Report at section 3.0, para 10, MR, Tab 2, p 22.

not close; and (b) it is necessary to maximize recoveries in these proceedings and to maintain the integrity and confidentiality of the Retail APS Sale Process.

42. Accordingly, the Receiver submits that the salutary effects of sealing the Confidential Appendix until the closing of the Level 1 Unit Transaction or further order of the Court outweigh the deleterious effects of restricting access to the Confidential Appendix during this period. Therefore, the Receiver submits that the requested sealing of the Confidential Appendix is appropriate.

#### **PART IV - ORDER REQUESTED**

43. For the reasons set out above, the Receiver respectfully requests that this Court:

- (a) approve the Transactions and grant the approval and vesting orders in respect to the Transactions; and
- (b) seal the Confidential Appendix.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED** this 22<sup>nd</sup> day of August, 2024.



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## **SCHEDULE "A"**

### **LIST OF AUTHORITIES** 8527504 *Canada Inc. v. Liquibrands Inc.*, 2015 ONSC 5912

(Commercial List)

2. *9-Ball Interests Inc. v. Traditional Life Sciences Inc.*, 2012 ONSC 2788
3. *Business Development Bank of Canada et al v. 1673747 Ontario Inc. et al.*, 2013 ONSC 286
4. *Crown Trust Co. et al. v. Rosenberg et al.*, 1986 CanLII 2760
5. *Elleway Acquisitions Ltd. v. 4358376 Canada Inc.*, 2013 ONSC 7009 (Commercial List)
6. *Laurentian University of Sudbury*, 2021 ONSC 1453
7. *North American Tungsten Corporation Ltd. (Re)*, 2016 BCSC 12
8. *Ontario Securities Commission v Bridging Finance Inc.*, 2021 ONSC 4347
9. *Royal Bank of Canada v. Soundair Corp.*, 1991 CanLII 2727 (ON CA)
10. *Sherman Estate v Donovan*, 2021 SCC 25
11. *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41 (CanLII), [2002] 2 SCR 522

## **SCHEDULE "B"**

### **TEXT OF STATUTES, REGULATIONS & BY - LAWS**

#### ***COURTS OF JUSTICE ACT*** **R.S.O. 1990, C. C.43**

##### ***Vesting orders***

**100** A court may by order vest in any person an interest in real or personal property that the court has authority to order be disposed of, encumbered or conveyed.

#### ***BANKRUPTCY AND INSOLVENCY ACT*** **R.S.C., 1985, c. B-3**

##### ***Court may appoint receiver***

**243 (1)** Subject to subsection (1.1), on application by a secured creditor, a court may appoint a receiver to do any or all of the following if it considers it to be just or convenient to do so:

- (a)** take possession of all or substantially all of the inventory, accounts receivable or other property of an insolvent person or bankrupt that was acquired for or used in relation to a business carried on by the insolvent person or bankrupt;
- (b)** exercise any control that the court considers advisable over that property and over the insolvent person's or bankrupt's business; or
- (c)** take any other action that the court considers advisable.

CONSTANTINE ENTERPRISES INC. -and-  
Applicant

MIZRAHI (128 HAZELTON INC.) AND  
MIZRAHI 128 HAZELTON RETAIL INC.

Respondents

Court File No.: CV-24-00715321-00CL

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**ONTARIO  
SUPERIOR COURT OF JUSTICE  
COMMERCIAL LIST**

PROCEEDING COMMENCED AT  
TORONTO

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**FACTUM OF KSV RESTRUCTURING INC.,  
IN ITS CAPACITY AS COURT-APPOINTED RECEIVER**

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