

**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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**FACTUM OF KSV RESTRUCTURING INC.,
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PART I - INTRODUCTION

1. KSV Restructuring Inc. ("**KSV**"), in its capacity as the Court-appointed receiver and manager (in such capacity, the "**Receiver**") of the Property (as defined below), brings this motion seeking an order, approving a sale process (the "**Retail APS Sale Process**") for the sale of the Retail APS (defined below); and approving the agreement of purchase and sale dated June 14, 2024 (the "**Stalking Horse APA**") between KSV, in its capacity as court-appointed Receiver, and Constantine Enterprises Inc. ("**CEI**"), solely for the purpose of constituting the "stalking horse bid" in the Retail APS Sale Process.

2. This factum is being filed in support of the Receiver's motion.

PART II - SUMMARY OF FACTS

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, which consists 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);
- (b) all of the assets, undertakings and properties of Mizrahi (128 Hazelton) Inc. (“**Hazelton**”); and
- (c) all of the assets, undertakings and properties of Mizrahi 128 Hazelton Retail Inc. (“**Retail**”).¹

Hazelton

4. Hazelton is the registered owner of the Real Property, which are certain premises in relation to 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**”).²

5. Hazelton is responsible for development and construction and is currently the registered owner of seven condominium units, and one ground floor commercial retail space, and the parking

¹ First Report of KSV Restructuring Inc. as Receiver and Manager (in such capacity the “**Receiver**”) dated June 14, 2024 (“**First Report**”) at section 1.0, para 1, Motion Record of the Receiver returnable June 21, 2024 (“**MR**”), Tab 2, p 11; Receivership Order dated June 4, 2024, Appendix B to the First Report, MR, Tab 2B, p 30.

² First Report at section 2.1, para 1, MR, Tab 2, p 13.

spaces allocated to the units and the retail space. The development and construction management of the Hazelton Project was performed by Mizrahi Inc.³

Retail

6. Retail is the purchaser of a commercial retail/office unit on level 1 of the Hazelton Project together with four parking spaces and one locker, on the terms and conditions set out therein (the “**Level 1 Unit**”), which unit has not been completed and the sale for which has not closed.⁴

7. CEI is Retail’s only known secured creditor and is owed approximately \$2.8 million pursuant to a promissory note issued by Retail to CEI on November 10, 2020 (the “**Retail Note**”). The Retail Note is secured by a general security agreement given by retail to CEI. The Receiver has received a favourable opinion from its independent legal counsel with respect to the security held by CEI in respect of the Retail Note.⁵

8. The original agreement of purchase and sale for the Level 1 Unit was entered into by Mizrahi Inc. (as purchaser) and Hazelton (as vendor) (the “**Original Retail APS**”). On November 10, 2020, Mizrahi Inc. assigned its interest in the Original Retail APS to Retail. The Original Retail APS was amended by the Receiver to facilitate the sale (the “**Retail APS**”). The changes provide that the unit is to be sold (in its current condition) on an “as is where is” basis. The purchase price for the unit has remained unchanged.⁶

³ First Report at section 2.1, para 2, MR, Tab 2, p 13.

⁴ First Report at section 1.0, para 2(b) and section 2.2, para 1, MR, Tab 2, pp 12-13.

⁵ First Report at section 3.1 – Secured Creditors, paras 1-2, section 3.1 – Retail Note, paras 1 and 3, MR, Tab 2 pp 14-16.

⁶ First Report at section 2.2, para 2, MR, Tab 2, p 14.

The Retail APS Sale Process

9. The purpose of the Retail APS Sale Process is to market for sale the Retail APS and to sell the Level 1 Unit. The Retail APS Sale Process is a stalking horse sale process, pursuant to which the Stalking Horse APA provides a base-line purchase price for the Retail APS, while also enabling the Receiver to test the market to obtain a higher selling price. The completion of the sale of the Retail APS and the Level 1 Unit is contemplated to be contemporaneous.⁷

10. With the consent of CEI, the Receiver has engaged CBRE Limited (“**CBRE**”) to market the Retail APS and Level 1 Unit for sale.⁸

11. The proposed Sale Process is outlined in the first report of the Receiver dated June 14, 2024 (the “**First Report**”). Briefly, the Retail APS Sale Process provides for an approximate 30-day marketing of the Property. CBRE will use traditional methods to sell similar properties in the City of Toronto, including listing it on MLS, email blasts, preparation of a marketing brochure, direct solicitation and signage. The Listing Agent will advise bidders of the Stalking Horse APA and that any offer must be equal to the value of the Stalking Horse APA, plus an initial bid increment of \$50,000.⁹

12. Bidders will be required to submit bids that meet the established bid criteria (as set out in the First Report) by no later than an established bid deadline (approximately 30 days after market introduction). If “Qualified Bids” (other than the Stalking Horse APA) are received, the Receiver may declare one or more Qualified Bids as the successful bid and back up bid or seek further amendments or clarifications to any Qualified Bids including the Stalking Horse APA or establish

⁷ First Report, section 5.0, para 1, MR, Tab 2, p 18.

⁸ First Report, section 5.0, para 2, MR, Tab 2, p 18.

⁹ First Report, section 5.1, paras 1, MR, Tab 2, pp 18-19.

further procedures for determining a successful bid and/or back-up bid, including as many rounds of bidding as determined necessary in the discretion of the Receiver. The successful transaction will be subject to approval of the Court.¹⁰

The Stalking Horse APA

13. Certain key terms and conditions of the Stalking Horse APA are provided below¹¹.

- (a) Purchaser: CEI.
- (b) Purchased Assets: All of Retail's right, title and interest in the Retail APS.
- (c) Excluded Assets: The Seller shall not sell to the Purchaser and the Purchaser shall not purchase from the Seller any assets other than the Purchased Assets.
- (d) Purchase Price: The Purchase Price under the Stalking Horse APA is (i) \$300,000 owing by Retail to the Purchaser on Closing (which is to be satisfied by way of credit bid of a portion of the amount owing by Retail to the Purchaser); and (ii) the amount of the Assumed Liabilities as of Closing, which includes the obligation to purchase the Level 1 Unit for \$2,393,000, subject to customary adjustments for a transaction of this nature.
- (e) Deposit: All offers must include a deposit equal to the sum of 10% of the purchase price for the Retail APS (such portion of the deposit being \$239,300) and 10% of

¹⁰ First Report, section 5.1, paras 1, MR, Tab 2, pp 18-19.

¹¹ Capitalized terms not otherwise defined are defined in the Stalking Horse APA.

the purchase price for the Stalking Horse APA (such portion of the deposit being at least \$35,000).

- (f) Assumed Liabilities: The Purchaser shall assume as of the Closing Date and shall pay, discharge and perform, as the case may be, from and after the Closing Date, all liabilities and obligations of Retail arising in respect of the Retail APS (collectively, the “**Assumed Liabilities**”). The Purchaser covenants to close the transaction under the Retail APS immediately after Closing.
- (g) Closing Date: No later than the day that is 10 days after the date on which the Court grants the Sale Approval and Vesting Order.
- (h) Material Conditions: As follows:
 - (i) no legal or regulatory action or proceeding shall be pending or threatened by any Governmental Authority to enjoin, restrict or prohibit the purchase and sale of the Purchased Assets;
 - (ii) all conditions to closing to purchase the Unit (as defined in the amended Retail APS) under the amended Retail APS (subject to the release of any signed documents from escrow) shall have been either satisfied or waived;
 - (iii) the Court shall have issued the Sale Process Order by no later than June 21, 2024; and
 - (iv) the Court shall have granted the Sale Approval and Vesting Order by no later than 14 calendar days following the transaction being selected as the Successful Bid.

- (i) Acceptance of Successful Bid: The sale of the Purchased Assets to any Successful Bidder by the Receiver is conditional upon the approval of the Successful Bid by the Court.¹²

PART III - STATEMENT OF ISSUES, LAW & AUTHORITIES

14. The only issue to be addressed on the motion is whether the Retail APS Sale Process, including the acceptance of the Stalking Horse APA solely to act as a “stalking horse” in the Retail APS Sale Process, be approved by this Court.

15. The Court has the jurisdiction to approve the Retail APS Sale Process (including the engagement of CBRE) pursuant to, among other things, section 243(1)(c) of the *Bankruptcy and Insolvency Act* R.S.C. 1985, c. B.-3, as amended (the “**BIA**”), which affords the Court broad discretion within court-appointed receiverships.¹³

16. Among the factors to be considered by the Court when considering whether to exercise its discretion in approving a proposed sale process, are those set out in *Royal Bank v Soundair*,¹⁴ namely the following:

- (a) whether the receiver has made a sufficient effort to 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

¹² First Report, section 5.2, paras 1-2, MR, Tab 2, pp 22-23.

¹³ *Bankruptcy and Insolvency Act* R.S.C. 1985, c. B.-3, as amended, section 243(1)(c).

¹⁴ *Royal Bank of Canada v. Soundair Corp.*, [1991 CanLII 2727 \(ON CA\)](#) at para 15.

(d) whether there has been unfairness in the working out of the process.

17. Additional consideration should be given to the following factors, which were outlined in *CCM Master Qualified Fund Ltd. v. blutip Power Technologies Ltd.* [**“CCM”**]¹⁵:

- (a) the fairness, transparency and integrity of the proposed process;
- (b) the commercial efficacy of the proposed process in light of the specific circumstances facing the receiver; and
- (c) whether the sales process will optimize the chances, in the particular circumstances, of securing the best possible price for the assets up for sale.

18. The Retail APS Sale Process should be approved for the following reasons¹⁶:

- (a) the Retail APS Sale Process is reasonable and appropriate at this time and is supported by CEI, being Retail’s most significant and senior ranking stakeholder;
- (b) the Retail APS Sale Process is a fair, open and transparent process developed with input from CBRE, and is intended to canvass the market broadly on an efficient basis to obtain the highest and best price;
- (c) the Retail APS Sale Process is flexible and provides the Receiver with the timelines, procedures and discretion that it believes are necessary to maximize value;

¹⁵ *CCM Master Qualified Fund v. blutip Power Technologies*, [2012 ONSC 1750 \(CanLII\)](#) at para 6.

¹⁶ First Report, section 5.3, para 1, MR, Tab 2, p 23.

- (d) the CBRE marketing process includes procedures commonly used to sell real estate assets, including by KSV in other court-supervised real property sale processes;
- (e) CBRE is a leading national brokerage, with the experience and expertise to market the Retail APS, including significant knowledge of the Toronto market in which the Hazelton Project is located; and
- (f) CBRE's listing fee (4%) is consistent with the market for the sale of condominium units and CEI consents to the amount of the listing fee. The listing fee is a percentage of the total purchase price under the Retail APS plus the successful transaction under the Retail APS Sale Process, which the Receiver considers reasonable in the circumstances.¹⁷

The Stalking Horse APA Should be Accepted

19. The Courts have accepted that a “stalking horse” sale process can be a beneficial mechanism given the degree of certainty it provides to the stakeholders of a business. In *CCM*, Justice Brown confirmed that “the use of stalking horse bids to set a baseline for the bidding process, including credit bid stalking horses, has been recognized by Canadian courts as a reasonable and useful element of a sales process. Stalking horse bids have been approved for use in other receivership proceedings, BIA proposals, and CCAA proceedings.”¹⁸

¹⁷ First Report, section 5.0, para 3, MR, Tab 2, p 18.

¹⁸ *CCM Master Qualified Fund v. blutip Power Technologies*, [2012 ONSC 1750 \(CanLII\)](#) at para 7.

20. In *Boutique Euphoria Inc. (Re)*¹⁹, the Quebec Superior Court set out the following non-exhaustive factors as important considerations in assessing whether a stalking horse bid process in particular should be approved:

- (a) has there been some control exercised at the first stage of the competition (namely that to become the stalking horse bidder) and to what extent? In other words, some assurances should exist that the horse chosen is indeed the right one.
- (b) is there a need for stability within a very short time frame for the debtor to continue operations and the restructuring contemplated to be successful?
- (c) are the economic incentives for the stalking horse bidder, in terms of break up fee, topping fee and overbid increments protection, fair and reasonable?
- (d) are the timelines contemplated reasonable to ensure a fair process at the second stage of the competition, namely that to become the successful over bidder?

21. More recently in *Re DCL Corporation*,²⁰ this Court considered the criteria that had been considered by the BC Court in *Freshlocal Solutions*²¹, and found the following questions relevant to consideration of acceptance of a proposed stalking horse bid: (a) how did the stalking horse agreement arise; (b) what are the stability benefits; (c) does the timing support approval; (d) who supports or objects to the stalking horse agreement; (e) what is the true cost of the stalking horse agreement; and (f) is there an alternative.

¹⁹ *Boutique Euphoria Inc. (Re)*, [2007 QCCS 7129](#) at para 37.

²⁰ *DCL Corporation (Re)*, [2023 ONSC 3686 \(CanLII\)](#) at para 24.

²¹ *Freshlocal Solutions Inc. (Re)*, [2022 BCSC 1616 \(CanLII\)](#) at paras 35-72.

22. In the current circumstances, the Stalking Horse APA provides a floor price for the Retail APS which is satisfactory to the CEI as the only secured creditor of Retail. The Receiver has assessed the reasonableness of the price provided for in the Stalking Horse APA based on the Receiver's discussions with CBRE and presents a reasonable floor price for the Retail APS, when considered in the context of the purchase price of the Level 1 Unit.²²

23. Additionally, the following factors weigh favour of accepting the Stalking Horse APA within the Retail APS Sale Process:

- (a) the Stalking Horse APA is being put forward by CEI, the only known economic stakeholder in these proceedings, whose debt significantly exceeds the stalking horse purchase price;²³
- (b) there is no "cost" to the Stalking Horse APA as it does not include a break fee or expense reimbursement;²⁴
- (c) the Stalking Horse APA provides the opportunity for prospective purchasers to submit offers in excess of the amount of the Stalking Horse APA. It informs the market of the minimum bid required to be successful and will accordingly eliminate opportunistic purchasers who might otherwise perceive an opportunity to acquire the Retail APS (and related real property) at a deep discount;²⁵

²² First Report, section 5.3, paras 1(a) and (c), MR, Tab 2, p 23.

²³ First Report, section 3.1, para 1 and section 5.3, para 1(c), MR, Tab 2, pp 14 and 23.

²⁴ First Report, section 5.3, para 1(b), MR, Tab 2, p 23.

²⁵ First Report, section 5.1, para 1, MR, Tab 2, pp 18-19.

- (d) the transparency around an acceptable purchase price will facilitate an orderly and timely sale process, which will reduce costs, which is the interest of efficiency particularly where CEI is expected to suffer a material shortfall on its debt;²⁶ and
- (e) the likely alternative would be a sale process without a stalking horse – however, in the current circumstances, where there is no break fee or expense reimbursement, there is no prejudice to accepting the Stalking Horse APA.

PART IV - ORDER REQUESTED

24. For these and the other reasons noted above, the Receiver therefore requests an Order substantially in the form of the draft Order included in the Motion Record.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 17th day of June, 2024.



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²⁶ First Report, section 5.3, para 1(d), MR, Tab 2, p 23.

SCHEDULE "A"

LIST OF AUTHORITIES

1. *Royal Bank of Canada v. Soundair Corp.*, [1991 CanLII 2727 \(ON CA\)](#)
2. *CCM Master Qualified Fund v. blutip Power Technologies* [2012 ONSC 1750 \(CanLII\)](#)
3. *Boutique Euphoria Inc. (Re)*, [2007 QCCS 7129](#)
4. *DCL Corporation (Re)*, [2023 ONSC 3686 \(CanLII\)](#)
5. *Freshlocal Solutions Inc. (Re)*, [2022 BCSC 1616 \(CanLII\)](#)

SCHEDULE "B"

TEXT OF STATUTES, REGULATIONS & BY – LAWS

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

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.

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