

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

B E T W E E N:

CONSTANTINE ENTERPRISES INC.

Applicant

- AND -

**SAM M (180 SAW) LP INC. AND
SAM M (180 SAW) 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. KSV Restructuring Inc. ("**KSV**"), in its capacity as the Court-appointed receiver and manager (in such capacity, the "**Receiver**") of the Property (as defined in the Receivership Order, as defined below), brings this motion seeking an order approving a sale transaction (the "**Transaction**") contemplated by an agreement of purchase and sale between Constantine Enterprises Inc. ("**CEI**") and the Receiver dated June 14, 2024 (the "**Stalking Horse APS**") and transferring and vesting all of the right, title and interest in and to the Purchased Assets (as defined in the Stalking Horse APS) to CEI free and clear of all liens, charges, security interests and encumbrances.

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 of the Receiver dated August 20, 2024¹ (the “**Second Report**”).

Background

3. For reference, the following table sets out certain of the parties who are referenced in this factum:

Name	Defined Term	Relationship to the Receivership
Mizrahi Constantine (180 SAW) LP	“ Partnership ”	<ul style="list-style-type: none">• Not subject to the receivership• Owner of the 180 Steeles Project, which owns the 180 Steeles Real Property
Sam M (180 SAW) LP Inc.	“ Mizrahi Partner ”	<ul style="list-style-type: none">• <u>Debtor in the receivership</u>• Owner of 1/3 interest in the Partnership
Mizrahi Constantine (180 SAW) Inc.	“ General Partner ”	<ul style="list-style-type: none">• Not subject to the receivership• General Partner of the Partnership
Sam M (180 SAW Inc.)	“ Mizrahi Shareholder ”	<ul style="list-style-type: none">• <u>Debtor in the receivership</u>• Owner of 50% of the shares in the General Partner

4. The Partnership is the owner of the real property located at 180 Steeles Avenue West, Vaughan, Ontario (the “**180 Steeles Real Property**”). The 180 Steeles Real Property is planned to be a multi-billion-dollar development project consisting of up to 2,196 residential units across four towers (the “**180 Steeles Project**”). The 180 Steeles Project is currently in the early stages

¹ Second Report of KSV Restructuring Inc., in its capacity as the Receiver dated August 20, 2024 (“**Second Report**”), Motion Record of the Receiver (“**MR**”), Tab 2, p 7.

of development, with zoning being pursued to convert the property to its proposed use from its current use as a large retail plaza with over a dozen storefronts and a low-rise office building.²

5. As reflected in the table above, the limited partnership interests in the Partnership are held 1/3 by Mizrahi Partner and 2/3 by CEI. The General Partner of the Partnership, is owned 50% by Mizrahi Shareholder and 50% by CEI.³

6. Pursuant to an order of the Ontario Superior Court of Justice (Commercial List) made on June 4, 2024 (the “**Receivership Order**”), KSV was appointed as the Receiver of the Property. The Property consists of:

(a) Mizrahi Partner’s 1/3 interest in the Partnership; and

(b) Mizrahi Shareholder’s 50% ownership in the General Partner.⁴

7. The Receiver has not been appointed over the Partnership’s assets and accordingly the Receivership Order does not extend to the 180 Steeles Real Property or the 180 Steeles Project.⁵

Secured Debt

8. CEI is the senior secured creditor of Mizrahi Partner and Mizrahi Shareholder. A summary of CEI’s indebtedness is below:⁶

² Second Report at section 2.0, para 1, MR, Tab 2, p 16.

³ Second Report at section 2.0, para 3, MR, Tab 2, p 16.

⁴ Second Report at section 2.0, para 4, MR, Tab 2, p 17.

⁵ Second Report at section 2.0, para 5, MR, Tab 2, p 17.

⁶ Second Report at section 3.1, para 1, MR, Tab 2, p 17. All amounts set out in the table are as of February 29, 2024 and continue to accrue with costs.

(Unaudited)	Debtor	\$
180 SAW Loan Indebtedness (as defined below)	Mizrahi Partner Mizrahi Shareholder	15,547,985
180 SAW Note Indebtedness (as defined below)	Mizrahi Partner Mizrahi Shareholder	10,758,137
SPV Indebtedness (as defined below)	Mizrahi Partner	2,227,851
Default Loan Indebtedness, which continues to accrue, with costs	Mizrahi Partner	444,939
		28,978,912

9. CEI holds security in respect of its indebtedness which includes the Property as collateral. The Receiver has received favourable opinions from its independent legal counsel with respect to the security held by CEI in respect of its indebtedness.⁷

Prior Efforts to Sell the 180 Steeles Project and 180 Steeles Real Property

10. The 180 Steeles Project and the 180 Steeles Real Property were previously marketed for sale as follows:

- (a) the Partnership retained Cushman & Wakefield (ULC) (“**Cushman**”), a national realtor, which conducted a marketing process between August 9, 2022 and October 3, 2022; and
- (b) thereafter, the Partnership retained CBRE Limited (“**CBRE**”) pursuant to a listing agreement dated December 1, 2022. CBRE’s process launched on February 15, 2023 and had a bid deadline of April 12, 2023.⁸

⁷ Second Report at section 3.1, para 3, MR, Tab 2, p 17.

⁸ Second Report at section 4.3, para 1, MR, Tab 2, p 21.

11. Both of the above processes were unsuccessful.⁹

The Sale Process

12. On June 21, 2024, the Court issued an order (the “**Sale Process Order**”) which, among other things, approved:¹⁰

- (a) a sale process for the Property (the “**Sale Process**”), as set out in the Receiver’s First Report to Court dated June 14, 2024;¹¹ and
- (b) an agreement of purchase and sale dated June 14, 2024, between CEI and the Receiver (the “**Stalking Horse APS**”) solely for the purpose of acting as the “stalking horse” in the Sale Process.

13. The purpose of the Sale Process was to market the Property for sale, namely all of the interests and shares of Mizrahi Partner in the Partnership and Mizrahi Shareholder in the General Partner.¹²

14. The Sale Process included a stalking horse, pursuant to which the Stalking Horse APS provided a base-line purchase price for the Property, while also enabling the Receiver to test the market for a superior transaction.¹³

15. Pursuant to the Sale Process Order, the Receiver engaged CBRE to market the Property for sale. CBRE was familiar with the Property, as it as result of its earlier mandate on behalf of the Partnership to sell both the 180 Steeles Project and the 180 Steeles Real Property.¹⁴

⁹ Second Report at section 4.3, para 2, MR, Tab 2, p 21.

¹⁰ Second Report at section 1.0, para 3, MR, Tab 2, p 15.

¹¹ First Report of KSV Restructuring Inc. as Receiver and Manager of Mizrahi (128 Hazelton) Inc. and Mizrahi 128 Hazelton Retail Inc. at section 4.0, Appendix D to the Second Report, MR, Tab 2D, pp 61-63.

¹² Second Report at section 4.0, para 2, MR, Tab 2, p 18.

¹³ Second Report at section 4.0, para 3, MR, Tab 2, p 18.

¹⁴ Second Report at section 4.0, para 4, MR, Tab 2, p 18.

16. Pursuant to the Sale Process Order, CEI, as a secured creditor and partner of the Debtors, was granted consent and consultation rights in the Sale Process. In this regard, prior to the launch of the Sale Process, CEI provided the Receiver with a list of thirty-six real estate development companies with which it was prepared to consent to a sale of the Property (the “**CEI Acceptable Bidders**”).¹⁵

17. The CEI Acceptable Bidders are recognized Canadian real estate development companies that have the experience and expertise to develop a project of the scale and size of the 180 Steeles Project. It was important to CEI that the successful bidder be well-capitalized, have significant real estate development experience, and share a vision for the 180 Steeles Project similar to CEI’s. These attributes would facilitate a constructive working relationship between CEI and the successful bidder in advancing the 180 Steeles Project.¹⁶

18. CBRE launched the Sale Process on June 25, 2024. Its marketing efforts included, among other things:¹⁷

- (a) sending Property-specific email campaigns to over 1,280 contacts weekly, and including the campaigns in CBRE’s “Tuesday Availability” email to over 1,270 contacts weekly;
- (b) directly contacting each of the CEI Acceptable Bidders at the request of the Receiver;

¹⁵ Second Report at section 4.0, para 5, MR, Tab 2, p 18.

¹⁶ Second Report at section 4.0, para 6, MR, Tab 2, p 18.

¹⁷ Second Report at section 4.1, para 1, MR, Tab 2, pp 18-19.

- (c) advertising the opportunity in the Greater Toronto Area edition of *Novae Res Urbis*, a planning and development journal, on the following four dates: (i) June 28, 2024; (ii) July 3, 2024; (iii) July 19, 2024; (iv) July 24, 2024;¹⁸
- (d) posting and promoting the Property on CBRE lead broker Mike Czestochowski's LinkedIn page with over 17,353 industry contacts, and on CBRE broker Lauren White's LinkedIn page with over 1,842 industry contacts on July 4, 2024 when the property launched and again on July 18, 2024, the date that the offer submission date was announced;
- (e) making information available in a virtual data room to qualified purchasers provided they first sign a Confidentiality Agreement; and
- (f) mailing brochures with a personalized letter and a Confidentiality Agreement to a targeted and approved buyers list.

19. During the Sale Process, in addition to the CEI Acceptable Bidders, nine parties who were not initially CEI Acceptable Bidders expressed an interest in participating in the Sale Process. CEI provided its consent to all but two of these parties participating in the Sale Process. The two parties that were not admitted were not known to CBRE, CEI or the Receiver. The Receiver requested that CBRE perform additional due diligence on these parties; however, neither party responded to CBRE's request for further information regarding their qualifications and capabilities to complete a transaction. As a result, neither party was permitted to participate in the Sale Process.¹⁹

¹⁸ Second Report at section 4.1, para 1, MR, Tab 2, p 18. On the latter two dates, the advertisement contained the offer submission date.

¹⁹ Second Report at section 4.1, para 3, MR, Tab 2, p 20.

20. The Sale Process Order contemplated a bid deadline 45 days from the launch of the Sale Process. On July 16, 2024, CBRE advised interested parties that bids were to be submitted no later than by 4:00 p.m. (EDT) on August 8, 2024 (the “**Bid Deadline**”).²⁰

21. No offers were submitted by the Bid Deadline and the Stalking Horse APS was deemed the successful bid in the Sale Process.²¹

The Stalking Horse APS

22. The Stalking Horse APS, as approved by the Sale Process Order, includes the following provisions, among others:²²

- (a) Purchaser: CEI
- (b) Purchased Assets: the Property
- (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 is \$8,000,000, plus applicable taxes, if any, which will be satisfied by way of a credit bid.
- (e) Closing Date: no later than the day that is 10 days after the date on which the Court grants the approval and vesting order.
- (f) Material Conditions:

²⁰ Second Report at section 4.1, para 5, MR, Tab 2, p 20.

²¹ Second Report at section 4.1, para 6, MR, Tab 2, p 20.

²² Second Report at section 4.2, para 1, MR, Tab 2, pp 20-21. Capitalized terms used in this paragraph and not otherwise defined have the meaning given to them in the Stalking Horse APS.

- (i) by no later than June 21, 2024, or the first available Court date thereafter, the Court shall have entered and issued the Sale Process Order;
- (ii) on Closing, the Sale Process Order shall not have been stayed, varied in any material respect or set aside;
- (iii) the Court shall have issued the AVO by no later than 14 calendar days, or the first available Court date thereafter, following the Transaction being selected as the Successful Bid; and
- (iv) 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 and no injunction against closing the Transaction.

Transaction Value

23. There are mortgages on the 180 Steeles Real Property in the principal amount of \$78 million owing to a syndicate of lenders led by Canadian Western Bank (“**CWB**”) and \$20 million owing to CEI.²³

24. The purchase price for the Property under the Stalking Horse APS is \$8 million. The sum of the CWB and CEI mortgage debt, along with the implied equity value resulting from the amount of the Stalking Horse APS, results in a Transaction value of approximately \$122 million, excluding any other costs and liabilities associated with the 180 Steeles Project.²⁴

PART III - STATEMENT OF ISSUES, LAW & AUTHORITIES

²³ Second Report at section 4.4, para 1, MR, Tab 2, p 21.

²⁴ Second Report at section 4.4, para 2, MR, Tab 2, p 21. Approximately \$98 million for the sum of the CWB and CEI mortgage debt plus \$24 million of implied equity value, before considering any other liabilities.

The Court has the Jurisdiction to Approve the Transaction

25. Pursuant to Section 100 of the *Courts of Justice Act*,²⁵ as amended and section 243(1) of the *Bankruptcy and Insolvency Act*,²⁶ the Court has the jurisdiction to grant the proposed vesting order.

26. Further, 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.²⁷

The Approval and Vesting Order should be Granted

27. The Receiver now seeks approval of the Transaction and the vesting of the Purchased Assets in and to CEI in accordance with the terms and conditions of the Stalking Horse APS.

28. In determining whether to approve a transaction and grant a vesting order in the context of a receivership, Ontario courts have consistently applied the following four factors set out by the Ontario Court of Appeal in *Royal Bank of Canada v. Soundair Corp.*:²⁸

- (a) whether the party made a sufficient effort to obtain the best price and to not act improvidently;
- (b) the interests of all parties;
- (c) the efficacy and integrity of the process by which the party obtained offers; and
- (d) whether the working out of the process was unfair.

²⁵ *Courts of Justice Act*, R.S.O. 1990, c. C.43, as amended, [s 100](#).

²⁶ *Bankruptcy and Insolvency Act*, R.S.C., 1985, c. B-3, as amended, [s 243\(1\)](#).

²⁷ *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.

²⁸ [1991 CanLII 2727 \(ONCA\)](#) at para 16.

29. The *Soundair* factors are satisfied in the present case and therefore the proposed vesting order should be granted for the following reasons:

- (a) the Sale Process was conducted in a fair and transparent manner in accordance with the terms of the Sale Process Order, including the marketing process and the timelines established by that process;
- (b) CBRE (i) has extensive experience selling real estate in the Greater Toronto Area; (ii) advertised the Property through conventional methods for a listing of this nature; (iii) performed a wide canvassing of this opportunity, as evidenced by the CBRE Report; and (iv) directly contacted the CEI Approved Bidders;
- (c) CBRE, with the consent of the Receiver and CEI, permitted an additional seven bidders into the process, in an effort to secure the highest and best offer. Only two bidders were excluded from the Sale Process as they did not respond to CBRE's request for further information concerning their ability to complete a transaction;
- (d) the 180 Steeles Project and the 180 Steeles Real Property were previously marketed for sale by Cushman and CBRE. Neither processes resulted in an acceptable transaction;
- (e) CBRE is of the view that continuing to market the Property will not result in a superior transaction; and
- (f) CEI consents to the Transaction.

30. Deference is to be afforded to the Receiver in respect of the Transaction. Unless there is a violation of the *Soundair* principles or other exceptional circumstances, the Court should defer

to the Receiver's recommendation to sell a debtor's assets.²⁹ The Sale Process and its implementation were neither improvident nor unfair. There are no exceptional circumstances that would lead this Court to depart from the Receiver's recommendation. Therefore, the Receiver respectfully submits that the proposed vesting order should be granted.

PART IV - ORDER REQUESTED

31. For these and the other reasons noted above, the Receiver therefore requests that this Honourable Court grant an Order substantially in the form of the draft Order included in the Motion Record.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 22nd day of August, 2024.



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²⁹ *Ibid*, at p 10; *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.

SCHEDULE "A"

LIST OF AUTHORITIES

1. *8527504 Canada Inc. v. Liquibrands Inc.*, 2015 ONSC 5912
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. *Elleway Acquisitions Ltd. v. 4358376 Canada Inc.*, 2013 ONSC 7009
5. *North American Tungsten Corporation Ltd. (Re)*, 2016 BCSC 12
6. *Royal Bank of Canada v. Soundair Corp.*, 1991 CanLII 2727

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. R.S.O. 1990, c. C.43, s. 100.

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.

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