

**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 THE RECEIVER  
Returnable December 18, 2024  
(Receiver's Discharge)**

**NORTON ROSE FULBRIGHT CANADA LLP**  
222 Bay Street, Suite 3000  
Toronto, ON M5K 1E7  
Fax: 416.216.3930

**Jennifer Stam LSO#: 46735J**  
Tel: 416. 202.6707  
jennifer.stam@nortonrosefulbright.com

**Lauren Archibald LSO#: 87151U**  
Tel: 416.278.3787  
lauren.archibald@nortonrosefulbright.com

Lawyers for the Receiver

**TO: THE SERVICE LIST**

**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 THE RECEIVER**

**TABLE OF CONTENTS**

PART I - INTRODUCTION ..... 1

PART II - SUMMARY OF FACTS..... 3

PART III - ISSUES, LAW & ANALYSIS..... 7

PART IV - ORDER REQUESTED ..... 9

**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 THE RECEIVER  
(Receiver's Discharge)**

**PART I - INTRODUCTION**

1 KSV Restructuring Inc. ("**KSV**"), in its capacity as the Court-appointed receiver and manager (in such capacity, the "**Receiver**") of: (i) all partnership interests in Mizrahi Constantine (180 SAW) LP (the "**Partnership**") owned by Sam M (180 SAW) LP Inc. ("**Mizrahi Partner**"); and (ii) all shares in the capital of Mizrahi Constantine (180 SAW) Inc. (the "**General Partner**") owned by Sam M (180 SAW) Inc. ("**Mizrahi Shareholder**", and together with Mizrahi Partner, the "**Debtors**"), and in respect of both (i) and (ii) all dividends, distributions, and proceeds therefrom and substitutions therefor (collectively, the "**Property**"), brings this motion requesting the following relief, among other things:

- (a) Approving the activities of the Receiver as addressed in the First Report of the Receiver dated June 14, 2024 (the “**First Report**”), the Supplement to the First Report of the Receiver dated July 8, 2024 (the “**Supplement to the First Report**”), the Second Report of the Receiver dated August 20, 2024 (the “**Second Report**”), the Supplement to the Second Report of the Receiver dated September 13, 2024 (the “**Supplement to the Second Report**”), and the Third Report of the Receiver dated December 10, 2024<sup>1</sup> (the “**Third Report**”, and collectively with the First Report, the Supplement to the First Report, the Second Report, and the Supplement to the Second Report, the “**Reports**”);
- (b) Approving the fees and disbursements of the Receiver as set out in the affidavit of Robert Kofman sworn December 10, 2024 (the “**Kofman Affidavit**”) and the fees and costs of its counsel, Norton Rose Fulbright Canada LLP (“**NRFC**”) as set out in the affidavit of Jennifer Stam sworn December 7, 2024 (the “**Stam Affidavit**”) for the period of time set out therein, as well as the fees and disbursements of the Receiver and NRFC estimated to be incurred to the effective time of discharge, such amount estimated not to exceed \$50,000 (including HST, the “**Fee Accrual**”);
- (c) Authorizing the Receiver to distribute any surplus funds from the Fee Accrual to Constantine Enterprises Inc. (“**CEI**”);
- (d) Discharging KSV as the Receiver of the Property in these proceedings (the “**Proceedings**”); and

---

<sup>1</sup> Third Report of KSV Restructuring Inc., in its capacity as the Court-appointed receiver and manager (the “**Receiver**”), dated December 10, 2024 (the “**Third Report**”), Motion Record of the Receiver dated December 10, 2024 (“**MR**”), Tab 2.

- (e) Releasing the Receiver, upon the filing of the Discharge Certificate (as defined below), from any and all liability, save and except for its gross negligence or willful misconduct.

2 The facts with respect to this motion are more fully set out in the Third Report. Capitalized terms used herein but otherwise undefined have the respective meanings given to them in the Third Report. Dollar amounts referred to herein are in Canadian dollars.

## **PART II - SUMMARY OF FACTS**

### *Background*

3 Pursuant to an order of the Ontario Superior Court of Justice (Commercial List) (the “**Court**”) dated June 4, 2024 (the “**Receivership Order**”), KSV was appointed as receiver and manager of the Property, which consisted of the following:

- (a) Mizrahi Partner’s interest in the Partnership; and
- (b) Mizrahi Shareholder’s shares in the General Partner.<sup>2</sup>

4 Prior to the closing of the Transaction (as defined below), the limited partnership interests in the Partnership were held one-third by Mizrahi Partner and two-thirds by CEI, and the shares in the capital of the General Partner were held 50% by Mizrahi Shareholder and 50% by CEI.<sup>3</sup>

5 CEI is also a secured creditor of the Debtors.<sup>4</sup>

---

<sup>2</sup> Third Report, section 1.0, para 1, MR, Tab 2, p 12.

<sup>3</sup> Third Report, section 2.0, para 3, MR, Tab 2, p 15.

<sup>4</sup> Third Report, section 3.1, para 1, MR, Tab 2, p 16.

## The Transaction

6 The primary purpose of the Proceedings was to conduct a sale process for the Property (the “**Sale Process**”).<sup>5</sup> On June 21, 2024, the Court issued an Order which, among other things, approved:

- (a) the Sale Process; 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.<sup>6</sup>

7 No offers were submitted by the bid deadline and the Stalking Horse APS was declared the successful bid in the Sale Process. On September 20, 2024, the Court issued an Order approving, among other things, the sale of the Property to CEI pursuant to the Stalking Horse APS (the “**Transaction**”).<sup>7</sup>

8 The Transaction closed on November 14, 2024. The purchase price of \$8 million was satisfied by way of credit bid.<sup>8</sup> As a result of the closing of the Transaction, the Property vested in CEI.

9 Following completion of the Transaction, as of November 14, 2024, the Debtors owe CEI the principal amount of \$18,898,763 in respect of the 180 SAW Loan and \$10,408,481 in respect of the 180 SAW Note, plus applicable interest accruing after that date and fees and expenses incurred before and accruing after that date.<sup>9</sup>

---

<sup>5</sup> Third Report, section 1.0, para 2, MR, Tab 2, p 12.

<sup>6</sup> Third Report, section 1.0, para 3, MR, Tab 2, p 12.

<sup>7</sup> Third Report, section 1.0, paras 5-6, MR, Tab 2, p 12.

<sup>8</sup> Third Report, section 4.0, paras 1-2, MR, Tab 2, p 16.

<sup>9</sup> Third Report, section 4.0, para 3, MR, Tab 2, p 17.

The Remaining Activities

10 The Proceedings are now largely complete subject to the completion of a small number of outstanding matters (the “**Remaining Activities**”) as outlined in the Third Report. Upon completion of the Remaining Activities, the Receiver will file a discharge certificate (the “**Discharge Certificate**”).<sup>10</sup>

**PART III - ISSUES, LAW & ANALYSIS**

11 The issues to be determined in connection with this motion are whether this Court should:

- (f) authorize the discharge of the Receiver upon the filing of the Discharge Certificate;
- (g) release the Receiver from any and all liability, save and except for gross negligence or wilful misconduct on the Receiver’s part;
- (h) approve the Receiver’s activities detailed in the Reports;
- (i) approve the fees and disbursements of the Receiver and its counsel for the period ending November 30, 2024, as well as the Fee Accrual; and
- (j) authorize the Receiver to distribute any surplus funds from the Fee Accrual to CEI.

12 For the reasons that follow, the Receiver submits that each of these issues should be answered in the affirmative.

The Receiver Should be Discharged

13 The Receiver recommends that it is discharged upon the filing of the Discharge Certificate, as once the Receiver has completed the Remaining Activities, it will have completed its mandate as contemplated by the Receivership Order, the other Orders in the Proceedings, and the

---

<sup>10</sup> Third Report, section 5.0, paras 1-2, MR, Tab 2, p 17.

*Bankruptcy and Insolvency Act*.<sup>11</sup> This Court has recognized that a receiver may be discharged once it has completed the substance of its mandate.<sup>12</sup>

14 The proposed Order provides that the Receiver shall retain such capacities for the performance of such incidental duties as may be required to complete the administration of the Proceedings and the Receiver shall continue to have the benefit of the provisions of all Court Orders made in the Proceedings. The Receiver is of the view that this provision is appropriate, as it will allow it to address any issues that may arise following its discharge. Furthermore, this is a customary provision in the model discharge order adopted by the Commercial List User's Committee (the "**Model Discharge Order**").

*The Receiver Should be Released*

15 The proposed Order contemplates that, upon the filing of the Discharge Certificate, the Receiver will be released from any and all liability that it has or may hereafter have by reason of, or in any way arising out of, the acts or omissions of KSV while acting in its capacity as the Receiver, save and except for any gross negligence or wilful misconduct on the Receiver's part (the "**Release**").

16 This Court has stated that, "in the absence of any evidence of improper or negligent conduct," a release should be granted.<sup>13</sup> In the present case, there is no such evidence of gross negligence or willful misconduct by the Receiver. The Release is also consistent with the release provided in the Model Discharge Order.<sup>14</sup>

---

<sup>11</sup> *Bankruptcy and Insolvency Act*, [RSC, 1985, c B-3](#).

<sup>12</sup> See *Ed Mirvish Enterprises Ltd v Stinson Hospitality Inc.* (2009), [2009 CanLII 55113](#) at para 8 [*Ed Mirvish*].

<sup>13</sup> *Pinnacle v Kraus*, [2012 ONSC 6376](#) at para 47.

<sup>14</sup> See *ibid*.



17 Furthermore, the Receiver believes the Release is appropriate in the circumstances for the following reasons:

- (a) the Receiver has faced opposition and allegations at various points in the Proceedings from the Debtors and Mr. Mizrahi;
- (b) the granting of the Release will permit the Receiver to complete its mandate, including the distribution of any remaining balance of the Fee Accrual to CEI; and
- (c) the Receiver's conduct and activities throughout the course of the Proceedings have been consistent with its mandate under the Receivership Order and the other Orders issued in the Proceedings.

*The Activities of the Receiver Should be Approved*

18 In *Re Target Canada Co.*, the Court noted that there are good policy and practical reasons to grant the approval of a court-appointed officer's report and the activities described therein.<sup>15</sup> In this case, the activities detailed in the Reports were carried out in good faith by the Receiver, undertaken with efficiency and reasonableness, and served the best interests of the Debtors and their stakeholders.

*The Receiver's and NRFC's Fees and Disbursements, as well as the Fee Accrual, Should Be Approved*

19 The total fees of the Receiver, as set out in the Kofman Affidavit, are \$126,936.38 (excluding disbursements and HST). The total fees of NRFC, as set out in the Stam Affidavit, are \$112,459.25 (excluding disbursements and HST).<sup>16</sup>

---

<sup>15</sup> *Re Target Canada Co.*, [2015 ONSC 7574](#) at para 22; see also *Laurentian University of Sudbury*, [2022 ONSC 2927](#) at para 13.

<sup>16</sup> Third Report, section 7.0, paras 1-2, MR, Tab 2, p 18.

20 The question for this Court in deciding to approve KSV's fees and disbursements in its capacities as the Receiver and those of its counsel is whether the fees were "fair and reasonable in all the circumstances," with an emphasis on "what was accomplished, and not on how much it took."<sup>17</sup> This Court has provided a non-exhaustive list of factors to consider when determining whether the fees and disbursements are fair and reasonable, including, among other things, the time spent and the cost of comparable services when performed in a prudent and economical manner.<sup>18</sup>

21 The Receiver is of the view that the hourly rates charged by NRFC are consistent with the rates charged by other law firms practicing in the area of insolvency in the Toronto market, and that the overall fees charged the Receiver are reasonable and appropriate in the circumstances.<sup>19</sup>

22 The Receiver is also of the view that the Fee Accrual is reasonable and appropriate in the circumstances to cover its fees and the fees of NRFC from December 1, 2024 to the filing of the Discharge Certificate, which have primarily been, or will be, incurred in connection with preparing for the hearing of this motion returnable December 18, 2024.<sup>20</sup>

*The Receiver Should be Authorized to Distribute Any Surplus Funds to CEI*

23 If there is any surplus funds remaining from the Fee Accrual after the filing of the Discharge Certificate, the Receiver will distribute those funds to CEI (the "**Distribution**") as partial repayment of the remaining secured indebtedness owing to CEI. Orders granting distributions are routinely issued by Canadian courts in receivership proceedings,<sup>21</sup> and no party will be prejudiced if the Receiver is authorized to make the Distribution.

---

<sup>17</sup> *Bank of Nova Scotia v Diemer*, [2014 ONCA 851](#) at para 45.

<sup>18</sup> *Re Nortel Networks Corporation et al*, [2017 ONSC 673](#) at para 14.

<sup>19</sup> Third Report, section 7.0, para 6, MR, Tab 2, p 18.

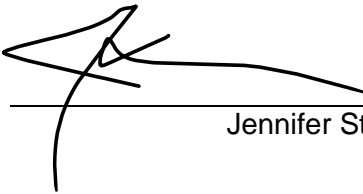
<sup>20</sup> Third Report, section 7.0, para 7, MR, Tab 2, p 18.

<sup>21</sup> See *In the Matter of the Receivership of LXR Produits De Luxe International Inc., LXR Canada Inc., and Groupe Global LXR Inc.*, [Court File No. 500-11-062928-235 \(Receiver Discharge Order dated September 20, 2024\)](#) at para 12.

**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 proposed Order included in the Motion Record.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED** this 11<sup>th</sup> day of December, 2024.



---

Jennifer Stam

**NORTON ROSE FULBRIGHT CANADA LLP**  
222 Bay Street, Suite 3000  
Toronto, ON M5K 1E7  
Fax: 416.216.3930

**Jennifer Stam, LSO#: 46735J**  
Tel: 416.202.6707  
[jennifer.stam@nortonrosefulbright.com](mailto:jennifer.stam@nortonrosefulbright.com)

**Lauren Archibald LSO#: 87151U**  
Tel: 416.278.3787  
[lauren.archibald@nortonrosefulbright.com](mailto:lauren.archibald@nortonrosefulbright.com)

Lawyers for the Receiver

## **SCHEDULE “A”**

### **LIST OF AUTHORITIES**

1. *Bank of Nova Scotia v Diemer*, 2014 ONCA 851
2. *Ed Mirvish Enterprises Ltd v Stinson Hospitality Inc. (2009)*, 2009 CanLII 55113
3. *In the Matter of the Receivership of LXR Produits De Luxe International Inc., LXR Canada Inc., and Groupe Global LXR Inc.*, Court File No. 500-11-062928-235 (Receiver Discharge Order dated September 20, 2024)
4. *Laurentian University of Sudbury*, 2022 ONSC 2927
5. *Pinnacle v Kraus*, 2012 ONSC 6376
6. *Re Nortel Networks Corporation et al*, 2017 ONSC 673
7. *Re Target Canada Co.*, 2015 ONSC 7574

Applicant

Respondents

---

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

Proceeding commenced at Toronto

---

**FACTUM  
(DISCHARGE ORDER)**

---

**NORTON ROSE FULBRIGHT CANADA LLP**  
222 Bay Street, Suite 3000, P.O. Box 53  
Toronto, ON M5K 1E7

**Jennifer Stam, LSO#: 46735J**  
Tel: 416.202.6707  
jennifer.stam@nortonrosefulbright.com

**Lauren Archibald, LSO#: 87151U**  
Tel: 416.278.3787  
lauren.archibald@nortonrosefulbright.com

Lawyers for the Receiver