

**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 (a) approving a sale process (the "**Sale Process**") for the sale of the Property; and (b) approving an agreement of purchase and sale dated June 14, 2024 (the "**Stalking Horse APS**") between the Receiver and Constantine Enterprises Inc. ("**CEI**"), as purchaser, solely for the purpose of constituting the "stalking horse bid" in the Sale Process.

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

PART II - SUMMARY OF FACTS

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">• Debtor in the receivership• 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">• Debtor in the Receivership• 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 high-rise mixed-use development consisting of up to 2,196 residential units with heights of up to 178.1 metres for two towers which are contemplated to front Steeles Ave West, and with heights up to 113.7 metres for two towers that do not front Steeles Avenue West (the **"180 Steeles Project"**). The 180 Steeles Project is currently in the early stages 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.¹

¹ First Report of KSV Restructuring Inc., as Receiver and Manager (in such capacity, the **"Receiver"**) dated June 14, 2024 (the **"First Report"**) at section 2.0, para 1, Motion Record of the Receiver returnable June 21, 2024 (**"MR"**), Tab 2, p 12.

5. 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.²

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.³

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.⁴

Secured Debt

8. Constantine is the senior secured creditor of Mizrahi Partner and Mizrahi Shareholder. A summary of CEI’s indebtedness is below⁵:

(Unaudited) ⁶	Debtor	\$
180 SAW Loan Indebtedness	Mizrahi Partner Mizrahi Shareholder	15,547,985
180 SAW Note Indebtedness	Mizrahi Partner Mizrahi Shareholder	10,758,137
SPV Indebtedness	Mizrahi Partner	2,227,851
Default Loan Indebtedness	Mizrahi Partner	444,939
		<u>28,978,912</u>

² First Report at section 2.0, para 3, MR, Tab 2, p 12.

³ First Report at section 2.0, para 4, MR, Tab 2, p 12.

⁴ First Report at section 2.0, para 5, MR, Tab 2, p 12.

⁵ First Report at section 3.1, para 1, MR, Tab 2, p 13.

⁶ Capitalized terms used in this factum and not otherwise defined have the meaning given to them in the First Report. All amounts set out in the table are as of February 29, 2024 and continue to accrue with costs.

9. CEI holds security in respect of its indebtedness which includes the Property. 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

The Sale Process

10. The purpose of the Sale Process is to market the Property for sale. The proposed Sale Process includes a stalking horse, pursuant to which the Stalking Horse APS provides a base-line purchase price for the Property, while also enabling the Receiver to test the market to obtain a superior transaction.⁸

11. Subject to Court approval, the Receiver intends to engage CBRE Limited (“**CBRE**”) to market the Property for sale. CBRE is a leading international real estate brokerage, with relationships with major developers in the Greater Toronto Area and globally. CBRE is familiar with the Property as it was retained by the Partnership in November 2022 to sell the 180 Steeles Project and the related real property. As discussed below, the Receiver understands that prior sale processes for the 180 Steeles Project were unsuccessful.⁹

12. The proposed Sale Process is outlined in the first report of the Receiver dated June 14, 2024 (the “**First Report**”). Briefly, the Sale Process provides for a marketing and sale of the Property over a 6-8 week period with a bid deadline that is 45 days after the sale process is approved by the Court, during which CBRE, in consultation with the Receiver, will advertise and market for sale, the Property. It is anticipated that a list of “CEI Acceptable Bidders” will be developed in conjunction with CEI, as any purchaser of the Mizrahi Partner and Mizrahi

⁷ First Report at section 3.1, para 2, MR, Tab 2, p 13.

⁸ First Report at section 4.0, paras 1-2, MR, Tab 2, p 16.

⁹ First Report at section 4.0, para 3, MR, Tab 2, p 16.

Shareholder interests will be CEI's partner in the Partnership and the General Partner. In the event that other bidders express an interest in the opportunity during the Sale Process, they may be permitted to participate with the consent of CEI. Bids must adhere to the bid criteria set out in the Sale Process and be received by the established bid deadlines. Among other things, the bid criteria requires that the Successful Bidder become party to the Shareholders Agreement and Partnership Agreement. In addition, the form of purchase agreement that will be provided to CEI Acceptable Bidders to submit their bids will include a provision that requires the purchaser of the Partnership interest to execute a guarantee in favour of the mortgages over the 180 Steeles Property in the same form provided by Mizrahi Group entities.¹⁰

13. Upon receipt of the bids from CEI Acceptable Bidders, CBRE and the Receiver, in consultation with CEI, may declare one or more CEI Acceptable Bidder(s) as the successful bid, and/or back up bid, or seek further amendments or clarifications to any bids including the Stalking Horse APS or establish 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. Upon completion of this process, the Receiver will select the successful bidder, in consultation with CEI, and will thereafter seek Court approval of the transaction.¹¹

The Stalking Horse APS¹²

14. Certain key terms and conditions of the Stalking Horse APS are provided below¹³.

(a) Purchaser: CEI.

¹⁰ First Report at section 4.1, para 1, MR, Tab 2, pp 16-18.

¹¹ First Report at section 4.1, para 1, MR, Tab 2, pp 18.

¹² The following description is for information purposes only. Readers should refer to the terms of the Stalking Horse APS itself, which is attached as Appendix "C" to the First Report.

¹³ Capitalized terms used in this paragraph and not otherwise defined are defined in the Stalking Horse APS.

- (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, 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: as follows:
 - (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 approving, among other things, (a) the Sale Process; and (b) the Stalking Horse APS as the sole “stalking horse bid” pursuant to the Sale Process, which Sale Process Order shall be in form and substance satisfactory to the Seller and the Purchaser, each acting reasonably;
 - (ii) on Closing, the Sale Process Order shall not have been stayed or varied in any material respect or set aside;
 - (iii) the Stalking Horse APS being selected as the Successful Bid;
 - (iv) the Court shall have issued the Sale Approval and Vesting Order by no later than 14 calendar days following the Transaction being selected as the Successful Bid; and

- (v) 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.
- (g) Termination: among other reasons, the Stalking Horse APS may be terminated automatically and immediately if it is not selected as the Successful Bid, or Back-Up Bid, or if the Seller completes a Superior Transaction with a party other than the Purchaser or an affiliate of the Purchaser.
- (h) 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.¹⁴

PART III - STATEMENT OF ISSUES, LAW & AUTHORITIES

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

16. The Court has the jurisdiction to approve the 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.¹⁵

¹⁴ First Report at section 4.2, para 2, MR, Tab 2, pp 19-20.

¹⁵ *Bankruptcy and Insolvency Act* R.S.C. 1985, c. B.-3, as amended, section 243(1)(c).

17. 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*,¹⁶ 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
- (d) whether there has been unfairness in the working out of the process.

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

- (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.

19. The Sale Process should be approved for the following reasons:

- (a) the Sale Process is reasonable and appropriate at this time and is supported by CEI, being the Debtors' only known secured creditor;

¹⁶ *Royal Bank of Canada v. Soundair Corp.*, [1991 CanLII 2727 \(ON CA\)](#) at para 15.

¹⁷ *CCM Master Qualified Fund v. blutip Power Technologies*, [2012 ONSC 1750 \(CanLII\)](#) at para 6.

- (b) the Sale Process is a fair, open and transparent process and is intended to canvass the market broadly to obtain the highest and best price;
- (c) the Sale Process is flexible and provides the Receiver with the timelines, procedures and discretion that it believes are necessary to maximize value;
- (d) CBRE is a leading national brokerage, with the experience and expertise to market the Property, including significant knowledge of the GTA market in which the 180 Steeles Project is located and with reach to global markets. CBRE is familiar with the property given its prior mandate;
- (e) CBRE has relationships with the major developers who may have an interest participating as an owner of the 180 Steeles Project;
- (f) the Sale Process recognizes the rights and interests of CEI; and
- (g) the Sale Process provides an opportunity to identify a new owner for the Property with the financial ability to make the required contributions to advance the development of the 180 Steeles Project.¹⁸

The Stalking Horse APS Should be Accepted

20. 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

¹⁸ First Report at section 4.4, para 1, MR, Tab 2, p 21.

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.”¹⁹

21. In *Boutique Euphoria Inc. (Re)*²⁰, 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?

22. More recently in *Re DCL Corporation*,²¹ this Court considered the criteria that had been considered by the BC Court in *Freshlocal Solutions*²², 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

¹⁹ *CCM Master Qualified Fund v. blutip Power Technologies*, [2012 ONSC 1750 \(CanLII\)](#) at para 7.

²⁰ *Boutique Euphoria Inc. (Re)*, [2007 QCCS 7129](#) at para 37.

²¹ *DCL Corporation (Re)*, 2023 [ONSC 3686 \(CanLII\)](#) at para 24.

²² *Freshlocal Solutions Inc. (Re)*, [2022 BCSC 1616 \(CanLII\)](#) at paras 35-72.

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.

23. In the current circumstances, the Stalking Horse APS provides a floor price for the Mizrahi Partner and Mizrahi Shareholder interests, which is satisfactory to CEI (the only secured creditor of these interests). The Receiver has assessed the reasonableness of the price provided for in the Stalking Horse APS based on the Receiver's discussions with CBRE, as discussed below.²³

24. The Receiver considered the reasonableness of the purchase price of the Stalking Horse APS given based on the prior sale efforts of two national realtors, Cushman & Wakefield ULC and CBRE, both of which were unsuccessful, and the implied value stalking horse bid for the 180 Steeles Project (\$122 million)²⁴, including in comparison to the purchase paid by the Partnership for the 180 Steeles Project, which was a better market for real estate than the present market. Accordingly, the Receiver believes that \$8 million is reasonable as a floor price for the Mizrahi Partner and Mizrahi Shareholder interests.²⁵

25. The Receiver also considered that there are two mortgagees on the 180 Steeles Property, one of which (the Trez mortgage) is in arrears as of the date hereof. A stalking horse sale process provides certainty of a sale, which will assist to bring stability to the situation.²⁶

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

²³ First Report at section 4.4, para 1(c), MR, Tab 2, p 21.

²⁴ Before considering unsecured and other liabilities.

²⁵ First Report at section 4.3, paras 4-5, MR, Tab 2, p 21.

²⁶ First Report at section 4.3, para 3, MR, Tab 2, p 21.

- (a) the Stalking Horse APS is being put forward by CEI, the only known economic stakeholder in these proceedings, whose debt significantly exceeds the stalking horse purchase price;²⁷
- (b) there is no “cost” to the Stalking Horse APS as it does not include a break fee or expense reimbursement;²⁸
- (c) the Stalking Horse APS provides the opportunity for prospective purchasers to submit offers in excess of the amount of the Stalking Horse APS. 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 Property at a deep discount;²⁹
- (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;³⁰ 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 APS.

PART IV - ORDER REQUESTED

27. For these and the other reasons noted above, the Receiver therefore requests an Order

²⁷ First Report at section 3.1, para 1 and section 4.4, para 1(c), MR, Tab 2, pp 13 and 21.

²⁸ First Report at section 4.4, para 1(b), MR, Tab 2, p 21.

²⁹ First Report at section 4.1, para 1, MR, Tab 2, pp 16-18.

³⁰ First Report at section 4.4, para 1(d), MR, Tab 2, p 22.

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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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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