

ONTARIO  
SUPERIOR COURT OF JUSTICE  
COMMERCIAL LIST

B E T W E E N:

**CONSTANTINE ENTERPRISES INC.**

Applicant

and

**SAM (180 SAW) LP. 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

**Mizrahi Factum**

June 3, 2024

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Ontario Regional Office  
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# Mizrahi Factum

## I OVERVIEW

1. Sam Mizrahi and the Mizrahi Entities<sup>1</sup> object to the sales process proposed by the receiver.
2. The sales process includes a stalking horse bid submitted by Constantine Enterprises Inc. (“CEI”). The process also gives CEI an unfettered right to determine who can be a bidder, and to withhold consent for any transaction resulting from a bid. CEI is thus both a bidder and the party that can decide who the winning bidder is.
3. This dual role for CEI is inconsistent with fundamental principles governing the role of the receiver. By subdelegating the key decision making power in the sales process to CEI, the process violates the principle that the receiver owes fiduciary duties to act in the best interests of all interested parties, including the debtor.
4. The sales process should be amended to remove this dual role. Either CEI should not be entitled to bid, or CEI should not have a role in determining who the winning bidder is.

## II FACTS

### A. Background

5. Sam Mizrahi and CEI are jointly developing a residential project at 180 Steeles Avenue West (the “180 SAW development”). Mr. Mizrahi owns a one-third share in the project through two entities, Sam M (180 SAW) LP and Sam M (180 SAW) Inc. (collectively, “Mizrahi Entities”). CEI owns the remaining two-thirds share in the project.<sup>2</sup>
6. KSV has been appointed as the receiver and manager of the Mizrahi Entities’ interests in the project (the “Property”).

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<sup>1</sup> The respondents Sam M (180 SAW) LP and Sam M (180 SAW) Inc.

<sup>2</sup> See First Report of the Receiver (180 SAW), p 12, for an organizational chart showing the relationship between these entities [E25]

7. The Receiver has proposed a sales process for the Property. This process was approved on June 21, with concerns raised by counsel for Mr. Mizrahi and the Mizrahi Entities reserved to a hearing on July 9.

## **B. CEI is both bidder and decision-maker**

8. Under the sales process CEI is both a bidder *and* the party that decides who the successful bidder will be.

### **1. CEI is a bidder**

9. CEI is the stalking horse bidder:<sup>3</sup>

2. The key terms and conditions of the Stalking Horse APS are provided below<sup>1</sup>.

a) Purchaser: CEI.

10. The stalking horse bid is automatically considered to be a “Qualified Bid”:

➤ The Stalking Horse APS shall constitute a “Qualified Bid”.

### **2. CEI controls who can bid for and buy the Property**

11. CEI controls who can bid for the Property, and who can ultimately buy the Property.

12. The Property will initially be marketed only to “potentially interested parties which are acceptable to CEI”:<sup>4</sup>

➤ In consultation with CEI and the Receiver, CBRE will prepare a list of potentially interested parties which are acceptable to CEI (the “CEI Acceptable Bidders”).

<sup>3</sup> First Report, Section 4.2, 2(a), p 10 [E23]

<sup>4</sup> Screenshots are from the Summary of Sale Process table in the First Report, p 7-9 [E20]

13. Other potentially interested parties can become a “CEI Acceptable Bidder”—but only with CEI’s consent:

- Any potentially interested party who is not a CEI Acceptable Bidder (a “Potentially Interested Party”) expressing an interest in this opportunity will be presented by the Receiver to CEI for its consent that such party can participate in the Sale Process. With CEI’s consent, such Potentially Interested Party will become a “CEI Acceptable Bidder”. CEI’s consent to a party as a CEI Acceptable Bidder does not obviate the need for CEI’s consent to a final transaction.

14. CEI is not required by the sale process to act reasonably in withholding consent for any interested party to become a “CEI Acceptable Bidder”. Neither the Receiver nor this court are empowered to override CEI’s decision.

15. Only “CEI Acceptable Bidders” can have access to due diligence materials:

- Only CEI Acceptable Bidders (including Potentially Interested Parties who become CEI Acceptable Bidders) who sign a CA will be provided access to confidential information, the CIM and will be allowed to perform due diligence, including meetings with CEI and information that will be made available in the VDR.

16. Only CEI Acceptable Bidders can submit bids:

Any CEI Acceptable Bidder who wishes to make an offer, must submit a binding bid on or before 4 pm (Toronto time), on the date that is 45 days after the Sale Process is approved by the Court (the “Bid Deadline”). To be considered a “Qualified Bid”, offers must provide the following:

17. The winning bid is to be chosen by the Receiver “in consultation with CEI” from among the Qualified Bids:

➤ The Stalking Horse APS shall constitute a “Qualified Bid”. 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.

18. However, CEI has a veto on who can be the successful bidder, because its consent is required for the transaction to close:<sup>5</sup>

- a) given CEI's interests in the General Partner and as a limited partner, its consent is required for any transaction;

19. The sales process does not require CEI to act reasonably in withholding consent, or even to give reasons. Neither the Receiver nor the court are empowered to override CEI's veto power. CEI's power to choose the winning bidder is thus completely unfettered.

### **C. Mizrahi Entities' action against CEI**

20. The Mizrahi Entities have commenced an action against CEI, Edward Rogers and Robert Hiscox alleging among other things, that CEI conspired to deprive the Mizrahi Entities of the opportunity to profit on the 180 SAW development.

21. The action alleges that CEI acted wrongfully by rejecting the sale of 180 Saw to Hyundai Asset Management (“HAM”) for approximately \$200 million, unless Mr. Mizrahi agreed to pay the partnership's losses on a different development, at 128 Hazelton. This demand was contrary to a waterfall agreement establishing the distribution of proceeds of sale and the priority of payments.

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<sup>5</sup> First Report, Section 4.1, ¶2(a), p 9 [E22]



The proposed sale would have resulted in CEI garnering a simple return of approximately 116% on its investment or a 26.2% annual return.

22. Paragraphs 18 and 72 of the Amended Statement of Claim in that action summarize these allegations:

18. The Defendants caused the 180 SAW GP to reject these offers on the 180 SAW project which would generate CEI (and the Sam entities) returns at no less than commercially reasonable rates of returns so that CEI could increase the interest owing on loans advanced to Sam and the Sam entities to be in a position to eliminate Sam M Inc.'s one-third interest and thereby take over 100% of the project, realize 100% of the profits to be garnered on the 180 SAW project, and pursue Sam and the Sam entities for their 180 SAW project debts.

72. On July 14, 2023, Robert advised Sam that CEI would not proceed with the HAM transaction unless Sam entered into a binding agreement to pay 50% of the losses, estimated at that time at more than \$30,000,000. on the 128 Hazelton project. This requirement of CEI was the result of the conspiracy of Edward and Robert to harm the economic interests of Sam by causing the 180 SAW GP to refuse a purchase price on the 180 SAW project at no less than or at the market price, and in excess of CEI's target price, contrary to CEI's, Robert's and 180 SAW GP's fiduciary and good faith duties.<sup>6</sup>

23. Before the hearing of the sales process motion, the Mizrahi Entities asked the receiver for information on the status of negotiations to sell the 180 SAW development to HAM, since representatives of that firm had accessed the data room created for the transaction with HAM on April 4. While the receiver responded to this request, it refused to answer the question.<sup>7</sup>

24. By giving CEI a complete veto over the choice of purchaser, the sales process will enable CEI to take over the Mizrahi Entities' interest in the 180 SAW development, thus achieving the goal that the law suit alleges is CEI's aim.

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<sup>6</sup> Amended Statement of Claim, Appendix A

<sup>7</sup> Letters between counsel, Appendix B

### III ARGUMENT

#### A. CEI has an incentive to reject all bids but its own

25. The sales process constitutes CEI as both a bidder and the party entitled to choose the winning bid. Under the terms of the sales process, CEI can, if it wants, decide that it will only consent to its own bid.

26. The sales process gives CEI a clear incentive to do exactly this; that is, to withhold consent to all bids but its own.

27. This incentive is apparent from the fact that the stalking horse bid is a *floor price* for the Property:<sup>8</sup>

6. The Receiver's recommendation also considers that the Stalking Horse APS provides a floor price for the acquisition of the Property and that the Purchaser is not receiving any bid protections (i.e., a break-fee or expense reimbursement).

28. While the stalking horse bid may be a reasonable price, it remains a floor price; it is anticipated, or at least, hoped, that higher bids will be received.

29. Because CEI is empowered to veto any bid by withholding its consent to the transaction, without any requirement to act reasonably, CEI is empowered to reject any and all bids that are not its own bid. In short, the sales process gives CEI the right to determine that its stalking horse bid will be the successful bid.

30. What is more, any potential bidder, looking at the sales process, will realize that it is *bidding against a party that decides who the successful bidder will be*. In those circumstances, why would any bidder invest any time or resources in reviewing due diligence material and preparing a bid?

#### B. CEI's control over the bidding process is inconsistent with the receiver's fiduciary duties

31. The dual role given to CEI in the sales process is inconsistent with the receiver's fiduciary duties, and constitutes an improper subdelegation of the receiver's powers to CEI.

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<sup>8</sup> First Report, Section 4.3, 6 [E25]

32. A court-appointed receiver is an officer of the court. The receiver is not an agent of the creditor. Rather, the receiver owes fiduciary duties to all interested parties, *including the debtor*. The receiver is “clothed with the mantle” of the court, and the “receiver’s action is the action of the court”.<sup>9</sup>

33. The role that CEI is given in the sales process violates these fundamental principles in two respects.

34. First, by setting CEI up both as a bidder and as the party entitled to choose the winning bid, the sales process favours CEI’s interests over those of all other interested parties, including the debtor.

35. In particular, by giving CEI the ability and an incentive to ensure that its own stalking horse bid is the winning bid, the sale process allows CEI to gain control of the Mizrahi Entities’ one-third share of the 180 Steeles Avenue West project at what may amount to a bargain price. In so doing it fails to maximize recovery for all interested parties, including the Mizrahi Entities.

36. Second, the sales process constitutes a subdelegation of the receiver’s powers under the receivership order to CEI. The receiver, not CEI, should be determining who the acceptable bidders are, and the receiver, not CEI, should have the final say on who wins the bid, subject to court approval.

37. Moreover, unlike the receiver, CEI is not capable of acting as a fiduciary for all interested parties, including the debtor. Rather, CEI has a clear interest—its own commercial interest—in being the successful bidder.

38. This subdelegation is all the more improper because it is a subdelegation of the most important power under the sale process, namely the power to choose the winning bid.

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<sup>9</sup> [Toronto-Dominion Bank v. Usarco Ltd.](#), 196 DLR (4th) 448 (ON CA), ¶28-29. See also [Romspen Investment Corp. v. 1514904 Ontario Ltd.](#), 2010 ONSC 1339; [Page \(Trustee of\)](#), 2002 CanLII 14393 (ON SC)

**IV RELIEF REQUESTED**

39. Mizrahi and the Mizrahi Entities request an order modifying the sale process to remove from CEI all rights to determine who can bid and to withhold consent from the winning bidder.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

July 5, 2024



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Steven Weisz

*/s/ Jerome Morse*

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Jerome Morse



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W. Michael G. Osborne

Counsel for the Mizrahi Entities

*/s/ David Trafford*

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David Trafford

Counsel for Sam Mizrahi

## **SCHEDULE A—AUTHORITIES**

*Toronto-Dominion Bank v. Usarco Ltd.*, 196 DLR (4th) 448 (ON CA).

*Romspen Investment Corp. v. 1514904 Ontario Ltd.*, 2010 ONSC 1339

*Page (Trustee of)*, 2002 CanLII 14393 (ON SC)

**APPENDIX A—AMENDED STATEMENT OF CLAIM**

Court File No.: CV-24-007 17915-0000

**ONTARIO  
SUPERIOR COURT OF JUSTICE**

Electronically Amended on the 8th  
day of April, 2024

pursuant to Rule 26.02(a)

Sarah K Bermiso Digitally signed by Sarah K Bermiso  
Date: 2024.04.08 13:05:12 -04'00'

BETWEEN:

SAM MIZRAHI, MIZRAHI 128 HAZELTON RETAIL INC.,  
SAM M (180 SAW) LP INC., SAM M (180 SAW) INC., AND  
1000041090 ONTARIO INC.

Plaintiffs

- and -

EDWARD S. ROGERS III, ROBERT HISCOX,  
and CONSTANTINE ENTERPRISES INC.

Defendants

**AMENDED STATEMENT OF CLAIM**

TO THE DEFENDANTS

A LEGAL PROCEEDING HAS BEEN COMMENCED AGAINST YOU by the Plaintiffs. The claim made against you is set out in the following pages.

IF YOU WISH TO DEFEND THIS PROCEEDING, you or an Ontario lawyer acting for you must prepare a statement of defence in Form 18A prescribed by the Rules of Civil Procedure, serve it on the plaintiffs' lawyer or, where the plaintiffs does not have a lawyer, serve it on the plaintiffs, and file it, with proof of service in this court office, WITHIN TWENTY DAYS after this statement of claim is served on you, if you are served in Ontario.

If you are served in another province or territory of Canada or in the United States of America, the period for serving and filing your statement of defence is forty days. If you are served outside Canada and the United States of America, the period is sixty days.

Instead of serving and filing a statement of defence, you may serve and file a notice of intent to defend in Form 18B prescribed by the Rules of Civil Procedure. This will entitle you to ten more days within which to serve and file your statement of defence.

IF YOU FAIL TO DEFEND THIS PROCEEDING, JUDGMENT MAY BE GIVEN AGAINST YOU IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU. IF YOU WISH TO DEFEND THIS PROCEEDING BUT ARE UNABLE TO PAY LEGAL FEES, LEGAL AID MAY BE AVAILABLE TO YOU BY CONTACTING A LOCAL LEGAL AID OFFICE.

IF YOU PAY THE PLAINTIFFS' CLAIM, and \$5,000.00 for costs, within the time for serving and filing your statement of defence, you may move to have this proceeding dismissed by the court. If you believe the amount claimed for costs is excessive, you may pay the plaintiffs' claim and \$400 for costs and have the costs assessed by the court.

TAKE NOTICE: THIS ACTION WILL AUTOMATICALLY BE DISMISSED if it has not been set down for trial or terminated by any means within five years after the action was commenced unless otherwise ordered by the court.

Date: April 5, 2024

Issued by E-filed claim

Local Registrar

Address of  
Court office: 330 University Avenue  
Toronto, Ontario

TO: EDWARD S. ROGERS III  
Constantine Enterprises Inc.  
128 Hazelton Avenue, Suite 201  
Toronto ON M5R 2E5

AND

TO: ROBERT HISCOX  
Constantine Enterprises Inc.  
128 Hazelton Avenue, Suite 201  
Toronto ON M5R 2E5

AND

TO: CONSTANTINE ENTERPRISES INC.  
128 Hazelton Avenue, Suite 201  
Toronto ON M5R 2E5



## CLAIM

1. THE PLAINTIFF, SAM MIZRAHI, CLAIMS:

- (i) General Damages in the sum of \$50,000,000.00 for breach of contract, negligence, negligent misrepresentation, breach of fiduciary duty, breach of duty of good faith, unjust enrichment, tortious interference with economic interests and conspiracy to cause economic harm;
- (ii) A declaration that he is not indebted to the Defendants or others with respect to the 128 Hazelton project (defined below);
- (iii) A declaration that he is not indebted to the Defendants or others with respect to the 180 SAW project (defined below);
- (iv) A declaration that no funds are payable by him to the Defendants;
- (v) A declaration and order for contribution and indemnity in respect of all expenses, losses, damages, demands and liabilities of whatsoever kind in his favour in respect of the 128 Hazelton project and the 180 SAW project;
- (vi) Aggravated damages in the sum of \$25,000,000.00;
- (vii) Exemplary or punitive damages in the sum of \$15,000,000.00;
- (viii) Prejudgment interest in accordance with s.128 of the *Courts of Justice Act* (“CJA”) RSO 1990, c. C43 as amended; and
- (ix) Postjudgment interest in accordance with s.129 of the *CJA*.

2. THE PLAINTIFF, MIZRAHI 128 HAZELTON RETAIL INC., CLAIMS:
  - (a) A declaration that Mizrahi 128 Hazelton Retail Inc. has an entitlement to the fee simple ownership of the 128 Retail Unit (defined below) upon payment of \$2,393,000.00 to the 128 Hazelton project (defined below); and
  - (b) A declaration that it is not indebted to the Defendants or others with respect to the 128 Hazelton project.
  
3. THE PLAINTIFF, SAM M (180 SAW) LP INC., CLAIMS:
  - (a) A declaration that it is not indebted to the Defendants or others with respect to the 180 SAW project.
  
4. THE PLAINTIFF, SAM M (180 SAW) INC., CLAIMS:
  - (a) A declaration that it is not indebted to the Defendants or others with respect to the 180 SAW project.
  
5. THE PLAINTIFF, 1000041090 ONTARIO INC., CLAIMS:
  - (a) A declaration that it is not indebted to the Defendants or others with respect to the 128 Hazelton project.
  
6. THE PLAINTIFFS CLAIM:
  - (a) Special damages (estimated) in the sum of \$10,000,000.00.
  - (b) Prejudgment and postjudgment interest on these special damages in accordance with the *CJA*
  - (c) Costs of these proceedings on a substantial indemnity basis; and
  - (d) Such further and other relief as counsel may advise and this Honourable Court permit.

## A. THE PARTIES

7. The Plaintiff, Sam Mizrahi (“Sam”), is an individual residing in the City of Toronto in the Province of Ontario. Sam is the principal of Mizrahi Developments Inc. (“MDI”). MDI is the 50% shareholder of Mizrahi (128 Hazelton) Inc.
8. The Plaintiff, Mizrahi 128 Hazelton Retail Inc. (“Retail Inc.”), is a body corporate, incorporated pursuant to the laws of Ontario. Sam is the principal of Retail Inc.
9. Sam M (180 SAW) LP Inc. (“Sam M Inc.”), is a body corporate, incorporated pursuant to the laws of Ontario. Sam is the principal of Sam M Inc.
10. Sam M (180 SAW) Inc. (“Sam M 180 SAW Inc”), is a body corporate, incorporated pursuant to the laws of Ontario. Sam is the principal of Sam M 180 SAW Inc..
11. 1000041090 Ontario Inc. (“Mizrahi SPV”), is a body corporate, incorporated pursuant to the laws of Ontario. Sam is the principal of Mizrahi SPV.
12. The Defendant, Edward S. Rogers III (“Edward”), is co-founder of the Defendant, Constantine Enterprises Inc. (“CEI”) and the Chairman of Rogers Communications Inc., and resides in the City of Toronto in the Province of Ontario.
13. The Defendant, Robert Hiscox (“Robert”), is co-founder and Chief Executive Officer of CEI, and resides in the City of Toronto in the Province of Ontario.
14. The Defendant, CEI, is a body corporate, incorporated pursuant to the laws of Ontario, and is a private real estate fund which holds itself out to be a company that invests, develops, and manages, real estate, predominantly in the greater Toronto area and southern Ontario. CEI is the 50% shareholder of Mizrahi (128 Hazelton) Inc.
15. Edward owns 90% of the shares of CEI and is the controlling mind of both CEI and 50% of Mizrahi Constantine (180 SAW) Inc. (“180 SAW GP”). Robert owns 10% of the shares of CEI and is the director of 180 SAW GP, and takes direction from Edward to enable Edward to control 50% of 180 SAW GP.

## **B. OVERVIEW**

16. This action arises from the Parties' agreement to develop two real estate projects. Sam utilized various corporate entities to undertake the development of the projects and borrow funds and partner with CEI and its related entities who provided capital to the projects. Edward and Robert utilized CEI to fund the projects and partner with SAM and the Sam entities.
17. Edward and Robert conspired to cause CEI and the 180 SAW GP to undertake the projects in a manner intended to harm the economic interests of Sam and the Sam entities and are therefore liable for conspiracy to cause economic harm and tortious interference with economic interests causing Sam and the Sam entities the losses pleaded herein. These losses were also sustained due to CEI's breach of contracts, negligence, breach of fiduciary duty, and breach of the duty of good faith causing Sam and the Sam entities the losses pleaded herein. Sam and the Sam entities were owed fiduciary and good faith duties by CEI and the 180 SAW GP and when breached, unjustly enriched CEI to the detriment of Sam and the Sam entities. These actionable wrongs entitle the Plaintiffs to the declaratory relief sought.
18. The Defendants knew CEI, not Sam, would incur losses on the 128 Hazelton project. The Defendants refused to realize the profit to be garnered on the 180 SAW project based upon offers Sam solicited, because Sam asserted his legal rights and could not be coerced to agree to indemnify CEI 50% of its losses on the 128 Hazelton project as a condition of accepting the offers on the 180 SAW project. These 180 SAW project offers would have retired all debt Sam owed CEI on the 180 SAW project and earned Sam a profit. The Defendants caused the 180 SAW GP to reject these offers on the 180 SAW project which would generate CEI (and the Sam entities) returns at no less than commercially reasonable rates of returns so that CEI could increase the interest owing on loans advanced to Sam and the Sam entities to be in a position to eliminate Sam M Inc.'s one-third interest and thereby take over 100% of the project, realize 100% of the profits to be garnered

on the 180 SAW project, and pursue Sam and the Sam entities for their 180 SAW project debts. The Defendants therefore were in a position to proceed with a Receivership referable to Sam's one-third interest, and did so, and thereby harmed Sam's reputational interest.

19. The Defendants carried on the business of the 128 Hazelton project so Sam could not reduce the debt he had guaranteed on that project that ranked ahead of CEI's debt, refused to close the sale of the Retail Unit (defined below) to Retail Inc., who was entitled to acquire the Retail Unit at a profit, self-dealt when it acquired a number of units of the 128 Hazelton project at a gain to CEI and Robert and at a loss to the 128 Hazelton project, again putting Sam at risk for the indebtedness he guaranteed and refused to refinance to bring the project to an orderly conclusion and put the project into receivership which will incur costs that also increases the risk of Sam having to pay indebtedness he guaranteed. The Receivership harms Sam's reputational interests.
20. The Defendants' unlawful conduct aforesaid and pleaded herein was undertaken in a manner that was calculated to harm Sam's reputational interests, entitling Sam to an award of aggravated damages.
21. The Defendants' unlawful conduct aforesaid and pleaded herein was high-handed, outrageous, and a contumelious and callous disregard of the rights of Sam and the Sam entities, for which punitive or exemplary damages should be awarded to sanction the Defendants' conduct and deter the like-minded.

## **C. THE PROJECTS**

### **i. 128 Hazelton Project**

22. On or about December 11, 2014, Mizrahi (128 Hazelton) Inc. ("Hazelton Inc.") acquired premises municipally known as 128 Hazelton Avenue in the City of Toronto, and on June 19, 2015, acquired premises municipally known as 126 Hazelton Avenue, to become a 9-story, 20-unit luxury condominium development

project located in the heart of Toronto's Yorkville neighbourhood, with approximately 1,993 square feet of ground floor commercial retail space and three levels of underground parking ("the 128 Hazelton project"). Sam is the President, Secretary, and a director, of Hazelton Inc. and Robert is the Vice President and a director.

23. In conjunction with the acquisition of 126 and 128 Hazelton, on June 19, 2015, Hazelton Inc., Mizrahi Enterprises Inc., and CEI, entered into a credit agreement whereby CEI loaned \$21,000,000.00 to Hazelton Inc. Security for the loan included a general security agreement, a mortgage, a general assignment of rents and leases, and a pledge by Mizrahi Enterprises Inc. of its shares in the capital of Hazelton Inc.. Sam did not provide a personal guarantee of this loan.
24. On June 19, 2015, Mizrahi Enterprises Inc., CEI, and Hazelton Inc., entered into a unanimous shareholders' agreement ("the Shareholders' Agreement"). The shares were owned 50% by Mizrahi Enterprises Inc. (an entity controlled by Sam), and 50% by CEI. The Shareholders' Agreement provided, inter alia, for the purchase of space within the 128 Hazelton project ultimately by Retail Inc. and CEI. On August 13, 2015, Mizrahi Enterprises Inc. transferred its shares in Hazelton Inc. to Mizrahi Developments Inc. ("MDI").
25. On November 29, 2016, Mizrahi Inc. and Hazelton Inc. entered into an agreement of purchase and sale ("APS") for the purchase of unit 1, Level 1 ("the Retail Unit"). On November 10, 2020, this APS was assigned by Mizrahi Inc. to Retail Inc. Similarly, CEI and Hazelton Inc. entered into an APS for units 201 and 205 (now known as 201 and 204).
26. Section 4.1 of the Shareholders' Agreement required funds to be raised by debt. In September 2020, Hazelton Inc. required \$4,200,000.00, and Sam obtained a term sheet from the lender, Kingsett Mortgage Corporation ("Kingsett"). CEI proposed an alternative to Kingsett whereby each of the shareholders would loan \$2,100,000.00 to Hazelton Inc. and such loans would be deposits under the APS for units in the 128 Hazelton project. Since Sam did not want, nor was he required,

to put capital into the 128 Hazelton project, CEI agreed to lend the money to Retail Inc., guaranteed by Sam, to make this loan on substantially the same terms as Kingsett had offered. The term sheet CEI agreed to for the Retail loan specified Hazelton Inc. could repay its loan to Sam free and clear of CEI's security interest so Retail Inc.'s loan from CEI would be fully repaid when Retail Inc. closed on its unit. Similarly, CEI would complete its sale of units 201 and 205 and, at that time, Hazelton Inc. would repay its loan to CEI for these units. The promissory note Retail Inc. gave CEI reflected that the set-off arrangement had to take into account financing ahead of CEI which had to be paid off before the note matured and the Retail Unit transferred by Hazelton Inc.

27. On September 22, 2016, Hazelton Inc. obtained an excess deposit insurance policy from Aviva Insurance Company of Canada ("Aviva") and in connection therewith provided a second charge to Aviva on the 128 Hazelton Project in the sum of \$18,500,000.00. Sam provided a personal guarantee of this indebtedness.
28. On June 27, 2017, DUCA Financial Services Credit Union LTD. ("DUCA") granted a credit facility to Hazelton Inc. in the amount of \$34,460,000.00 ("the DUCA loan"). Both CEI and Aviva postponed their interests to the DUCA loan. Sam provided a personal guarantee of this indebtedness.
29. CEI pressed Sam to include as a term of the Retail loan a requirement that Sam indemnify CEI for 50% of the principal and interest owed to CEI including its existing loan with security for the indemnity in the form of a pledge of Sam's interest in the 180 SAW project. CEI knew and understood Sam had no personal liability for CEI's loans to Hazelton Inc., yet it conducted itself in a manner going forward to obtain such indemnity from Sam that amounts to a breach of the duty of good faith owed Sam and the Sam entities as partners of Robert, Edward, CEI and 180 SAW GP, in the development and construction of the 128 Hazelton project and the development and sale of the 180 SAW project.

ii. 180 SAW Project

30. On December 20, 2018 Mizrahi Real Estate Group Inc. entered into an agreement of purchase and sale (“SAW APS”) for lands and premises municipally known as 180 Steeles Avenue West in the City of Vaughan for \$120,000,000.00, planned for a high-rise mixed-use development on the property consisting of up to 2,196 residential units with heights up to 178.1m for the two towers fronting on Steeles Avenue West and heights up to 113.7m for the two towers without direct frontage on Steeles Ave West, to replace a large plaza and low-rise office building ( “the 180 SAW project”).
31. On April 30, 2019, CEI and Sam M Inc., as limited partners, and 180 SAW GP, as general partner, entered into a partnership agreement to create a limited partnership, Mizrahi Constantine (180 SAW) LP (“180 SAW LP”), to acquire and develop the 180 SAW project for sale. CEI had a two-thirds interest and Sam M Inc. a one-third interest in 180 SAW LP. Sam M 180 SAW Inc. guaranteed certain of the indebtedness of Sam and the Sam entities on the 180 SAW project.
32. Edward and Robert pressed Sam prior to and throughout 2021 including during negotiations of the many December 3, 2021, agreements to agree to absorb 50% of the losses on the 128 Hazelton project. Sam had no such obligation to CEI , Edward, Robert or Hazelton Inc. prior to or as a result of the December 3, 2021, agreements.
33. On December 3, 2021, CEI, Sam M Inc., and 180 SAW GP entered into an Amended Partnership Agreement coincident with closing 180 SAW LP’s acquisition of the lands comprising the 180 SAW project. There were numerous agreements negotiated and finalized on December 3, 2021 to fund and close the acquisition and define the obligations of the parties going forward.
34. In connection with the purchase of the 180 SAW project lands, 180 SAW LP obtained financing from Canadian Western Bank (“CWB”), as agent for a syndicate



of lenders, in the principal sum of \$78,000,000.00 secured by, among other things, a first mortgage on 180 SAW project.

35. In connection with the purchase of the 180 SAW project lands, 180 SAW LP obtained financing from Trez Capital Limited Partnership (“Trez”), who advanced a loan for \$20,000,000.00. secured by, among other things, a second mortgage on the 180 SAW project.
36. CEI contributed capital in the sum of \$8,167,576.65 and Sam M Inc. contributed additional capital in the sum of \$4,083,788.33. Sam M Inc. had invested \$8,300,000.00 in the project before this additional capital payment.
37. Sam M Inc. incurred indebtedness to CEI on the 180 SAW project and, and entered into the Agreement re Direction and Waterfall dated December 3, 2021, (“the Waterfall Agreement”) between CEI, Sam M Inc., 180 SAW LP by its general partner 180 SAW GP, Mizrahi SPV, and Hazelton Inc., establishing an agreed-upon “waterfall” or flow of amounts payable to Sam M Inc. by 180 SAW LP as follows:
  - (i) Default loan obligations of Sam M Inc. to CEI;
  - (ii) Sam 180 SAW loan in the principal amount of \$9,209,071.57;
  - (iii) Sam M Inc. 180 SAW loan in the principal amount of \$4,866,735.00;
  - (iv) Trez Capital loan to Sam M Inc. not to exceed \$5,100,000.00;
  - (v) Sam M Inc.’s capital contributions to 180 SAW LP less any contributed capital that was funded by a default loan;
  - (vi) Amounts owing by Mizrahi Inc. to Hazelton Inc. under the Fee Reimbursement Agreement;
  - (vii) Amounts owing by 180 SAW LP to Hazelton Inc. pursuant to the Development Management Agreement;
  - (viii) Amounts owing to CEI by Sam M Inc. under the Hazelton Deficiency Agreement referred to below; and
  - (ix) The balance, if any, to Sam M Inc.

38. In the case of the obligations enumerated in subparagraph (ii) and (iii), Sam is either the borrower or he personally guaranteed such obligation.
39. On December 3, 2021, when the Amended Partnership Agreement was executed and the purchase of 180 SAW lands closed, Sam M Inc. entered into the Hazelton Deficiency Agreement which specified Sam M inc. would only absorb losses up to 50% of the 128 Hazelton project, payable from its share of the profits on the 180 SAW project.

**D. THE DEFENDANTS UNLAWFULLY CAUSE ECONOMIC HARM TO SAM AND TO THE SAM ENTITIES**

i. 128 Hazelton Project

40. It was clear to the Parties, prior to the execution of the Hazelton Deficiency Agreement, that losses would be sustained on the Hazelton 128 project, estimated at that time to be \$15,000,000.00, and such losses were not payable by Sam or a Sam entity since neither he nor one of his entities had guaranteed the CEI third mortgage which it was known would not be repaid in full. Similarly, the Shareholders' Agreement for the 128 Hazelton project did not require the shareholders to contribute capital to the corporation. Sam M Inc. entered into the Hazelton Deficiency Agreement and the Waterfall Agreement with the expectation that CEI would reasonably conduct itself as a partner on the 180 SAW project, meeting its good faith and fiduciary duties to ensure a reasonable return in the time frame it would take to sell the property. Unknown to Sam at the time of proceeding with 180 SAW project or later, Edward and Robert conspired to cause the 180 SAW GP to use its 50% voting right in the 180 SAW project and CEI's rights as a shareholder and lender in the 128 Hazelton project to harm Sam's interest in the Hazelton 128 project, so as to increase Sam M Inc.'s liability under the Hazelton Deficiency Agreement and the Waterfall Agreement and to expose Sam to liability on his personal guarantee to DUCA, Aviva and CEI on the Retail Inc. loan.

41. CEI, due to the conspiracy of Robert and Edward to harm Sam and the Sam entities' economic interests, consistently took steps to prevent Sam and the Sam entities from repaying loans. It was in CEI's interest to accrue interest on Sam's and Sam-related entities' indebtedness to it, to the detriment of Sam and the Sam entities' interest in breach of the agreements in place. CEI and Robert, as a director of 180 SAW GP, breached both fiduciary duties and good faith duties owed to its partner and its borrower, being Sam and the Sam entities.
42. On July 21, 2023, CEI was put on notice of its bad faith and breach of fiduciary duties referable to the 128 Hazelton project. As of that date, and as early as March 2023, multiple offers had been received from a strongly incented purchaser of "orphaned" 7<sup>th</sup> floor space which, if accepted, would reduce the DUCA indebtedness and provide necessary capital to pay trades to finish the building and avoid a cash call.
43. On July 21, 2023, CEI was also put on notice that CEI's refusal to permit the sale of the Retail Unit was a similar breach of fiduciary duty and bad faith with the same negative consequence pleaded at paragraph 43 42. On May 12, 2023, Sam communicated to CEI that DUCA was prepared to consent to the sale of the Retail Unit which would enable Sam to reduce the interest payable by Retail Inc. and Sam to CEI and the Retail Unit paid for in full on closing.
44. On July 21, 2023, CEI was also put on notice it was in breach of its fiduciary and good faith duties when it failed to honour an agreement reached with Sam that when CEI sold unit 601 CEI would discharge the \$1,500,000.00 Mizrahi SPV loan upon the closing of unit 601. Similarly, CEI had refused to discharge the Mizrahi SPV loan upon the closing of CEI's other retail units, unreasonably preferring its interests to prevent repayment of the Sam entities' indebtedness to CEI, in breach of agreements and fiduciary and good faith duties.
45. In addition to unit 601, CEI and Robert Hiscox, acquired units 201, 204, 401, 402, 403, and 404, at below-market prices, depriving the 128 Hazelton project of additional revenue for upgrades if sold to third parties, and then assigned these

units at a profit to CEI. This self-dealing enriched the Defendants and increased the losses on the 128 Hazelton project, putting Sam at risk to be called upon to respond to his guarantee of the DUCA debt and the Retail Unit.

46. CEI, due to the conspiracy of Robert and Edward to harm Sam's economic interests, breached fiduciary and good faith duties when it refused to refinance to "take out " the expiring DUCA facility.
47. On November 21, 2023, CEI signed a Non-Binding Proposal with Third Eye Capital ("TEC") for the inventory loan required for the 128 Hazelton project. Item (f)(viii) of Appendix A of the proposal specified the usual lender requirement of execution of definitive documentation satisfactory to TEC of postponement, subordination, and standstill of claims of credit parties in respect of other credit parties. Section 3.5 of TEC's standard form of guarantee, also in keeping with usual lender requirements, provided that the guarantor will not exercise any rights of indemnification, contribution, or subrogation, so long as the guarantee is in effect and such rights are terminated in the event of sale, foreclosure, or other disposition, of any equity securities. CEI sought from TEC changes to S. 3.5 to permit CEI guarantors to pursue indemnification, contribution, or subrogation, against the Mizrahi guarantors. On January 11, 2024, predictably TEC refused to make the changes.
48. On January 24, 2024, CEI was advised by Sam that the TEC financing would avoid the appointment of a Receiver and enable CEI to recover \$11,400,000.00 from the 128 Hazelton project that it was unlikely to recover with the appointment of a Receiver.
49. On January 25, 2024, CEI refused to meet to discuss the issue with TEC and Sam and maintained its position advanced two months after signing the proposal, amounting to bad faith. CEI also demanded that the TEC financing proceed on the condition Sam execute a contribution agreement requiring Sam to personally pay specific amounts plus 50% of whatever capital CEI decides is required to fund the Hazelton 128 project and a guarantee indemnity agreement with interest paid at 28%, again in breach of CEI's fiduciary and good faith duties and loan agreements

in place on the 128 Hazelton project. The loan agreement in place, being the Contribution Agreement, was between MDI and CEI with no back stop or guarantee from Sam.

50. On January 19, 2024, DUCA served a Notice of Application for Receivership owing to the filing of a lien on the 128 Hazelton project by CEC Mechanical Inc. (“CEC”). Since TEC was no longer an option to refinance DUCA, Sam repeatedly pursued CEI for a plan on a way forward. On January 27, 2024, when no plan was forthcoming from CEI, Sam outlined a way forward to bond off the CEC lien that was the cause of the default DUCA relied upon for its contended right to a Receivership, pay down of the DUCA debt with immediate closings of suite 701 and the balance of all other units that are available and have occupancy under APS so that DUCA could be paid out in advance of its March 4 return date of its receivership application. The CEC lien could be removed with an Aviva bond in three days and the costs of a Receivership and negative media/public relations avoided. CEI rejected the suggested plan on January 29, 2024, and suggested a meeting to discuss options to take place Friday February 2, 2024. Sam objected to putting off the finding of a solution. On February 6, 2024, CEI announced it had “purchased” the DUCA debt by buying out DUCA and taking an assignment of its rights to include Sam’s personal guarantee, to further the conspiracy of Edward and Robert to cause Sam economic harm since interest on the DUCA indebtedness continues as does interest on the Sam entities’ other indebtedness on the 128 Hazelton project.
51. On February 2, 2024, CEI advised it had, contrary to the Shareholders’ Agreement, unilaterally negotiated a settlement agreement with Ozz Electric that was not in the interests of the 128 Hazelton project. The settlement agreement was deficient since it did not clarify remaining outstanding work to be completed by Ozz Electric, the timing of the works, or the value of the works. CEI was informed the Ozz Electric settlement was not an authorized liability of Hazelton Inc. CEI therefore proceeded to acquire the Ozz Electric claim so the liens were lifted. The cost to do so is CEI’s liability since the Ozz Electric claims should have been bonded at a

fraction of the costs of acquiring the claim and there was merit to a defence of its claims.

52. On February 5, 2024, Robert communicated that CEI would proceed with closing the Retail Unit provided that both the Retail loan was repaid to CEI and the full purchase price required under the APS paid to Hazelton Inc. This was clearly in breach of section 3(d) of the Term sheet of the Retail loan which requires CEI to sign any documentation required to permit the loan set-offs “free and clear of any security interests held by the Lender [CEI] in connection with any other loans made by it [CEI] to ProjectCo”. The Retail loan was to be extinguished upon Retail Inc. closing on the unit. This is a breach of the set-off agreement in place and another instance of CEI’s breach of contract, breach of fiduciary duty, and breach of the duty of good faith, causing Sam’s damages, all in furtherance of Robert and Edward’s conspiracy to harm Sam’s economic interests.
53. On February 14, 2024, CEI purported to make a capital call for the 128 Hazelton project. On February 15, 2024, Sam responded that no additional capital was required to exit the project since the assets of the project were well in excess of the DUCA debt (by approximately \$14.5M) and all other ongoing obligations were met as eight units with a value of \$15.5M were ready to close and the CEC lien could be bonded for \$9,000.00. The defence to the CEC claim has merit.
54. On February 22, 2024, CEI proceeded with a Notice of Application appointing a Receiver naming Hazelton Inc. and Retail Inc. as Respondents. The Receivership comes at substantial costs to the 128 Hazelton project. There is no doubt if CEI had agreed to proceed with Sam’s plans for exiting the 128 Hazelton project in and prior to July 2023, as pleaded in paragraphs 42, 43, and 44, ~~and~~ 45, above, or the TEC refinancing, or Sam’s January 27, 2024, plan pleaded in paragraph 50 above, the Receiver and its substantial attendant costs and damage to Sam’s reputational interest would be avoided. The DUCA debt would be paid in full and Sam’s guarantee of the DUCA debt not called upon. Similarly, the 50% of losses to be sustained on the 128 Hazelton project and payable by Sam out of what

should have been substantial profits on the 180 SAW project would be substantially reduced. Sam therefore seeks to recover from the Defendants any and all amounts payable by Sam pursuant to the DUCA guarantee . In the case of the 50% of losses payable by Sam under the Hazelton Deficiency Agreement, Sam's liability should be reduced by any and all costs associated with the proposed Receivership and the Defendants' failure to carry out Sam's plans as pleaded above or the TEC financing.

ii. 180 SAW Project

55. On December 3, 2021, when Sam M Inc. entered into the Amended Partnership Agreement, it reasonably understood and was entitled to rely upon CEI and Robert, as a Director of the 180 SAW GP, meeting fiduciary and good faith duties with respect to the conduct of the partnership to develop the 180 SAW project. Similarly, on December 3, 2021, when ~~Sam~~, Mizrahi SPV, and Sam M Inc., entered into the Waterfall Agreement, it Sam and the Sam entities reasonably understood and ~~was~~ were entitled to rely upon CEI, Robert and the 180 SAW GP meeting their fiduciary and good faith duties with respect to the conduct of the partnership agreed to for the 180 SAW project, and CEI with respect to the conduct of Hazelton Inc. to develop the 180 SAW project and the 128 Hazelton project respectively. As pleaded in paragraph 44 17, unknown to Sam, Robert and Edward had conspired or would proceed to conspire to unlawfully to use the 50% voting right in 180 SAW GP referable to the 180 SAW project to harm Sam's economic interest. The Defendants did so by rejecting the sale of the 180 SAW project ~~partnership~~ to harm Sam's economic interest. The ~~d~~Defendants did so by refusing to sell the 180 SAW project at a profit and using such refusal as leverage to: (1) coerce Sam to agree to pay 50% of the losses on the 128 Hazelton project: (2) delay any exit on the 180 SAW project to increase Sam's interest liability to CEI, given his indebtedness was at an interest rate of 28% per annum: and (3) eliminate Sam M Inc.'s 1/3 interest in the project, amounting to an unjust enrichment of the Defendants and corresponding deprivation to Sam and the Sam entities.

56. In the case of the attempted coercion referred to in paragraph 55(1) above, it was a breach of the Amended Partnership Agreement, the Hazelton Deficiency Agreement, and the Waterfall Agreement, which taken together established CEI was only entitled to be indemnified by Sam M Inc. for 50% of the losses in the 128 Hazelton project out of profits on the 180 SAW project payable to Sam M Inc. ~~and the Sam entities~~. This attempted coercion pleaded aforesaid also amounted to a breach of the Defendants' fiduciary and good faith duties, when Robert utilized the 50% voting right in the 180 SAW GP to reject the sale of the 180 SAW project. The damages sought for the breach of these contractual, fiduciary, and good faith, duties is the profit Sam M inc. and Sam lost because of the Defendants' refusal to sell as well as other damages outlined below.
57. In the case of the increase in Sam's interest liability pleaded at paragraph 55(2), since it was the breach of the fiduciary and good faith duties of CEI and the conspiracy of Roger and Edward that caused such increase, Sam, Sam M Inc., and Mizrahi SPV, are entitled to a declaration they have no obligation to pay any debt to CEI referable to the 180 SAW project.
58. In the case of the loss of Sam M Inc.'s 1/3 interest pleaded at paragraph 55(3), since it was lost because of the breach of the fiduciary and good faith duties, aforesaid, damages in the amount of the profit to be gained on the 180 SAW project is sought against the Defendants.
59. On April 28, 2023, Robert and Chris Donlan, CEI's Chief Financial Officer, attended an introductory meeting with potential Korean investors in the 180 SAW project arranged by Sam. In early May 2023, CEI clearly and unequivocally communicated to Sam it wanted him to pursue negotiations with the Korean entities Sam had identified as prospective buyers of the 180 SAW project with a target price of \$200,000,000.00. The 180 SAW project had been listed for sale with CBRE in February 2023 and with Cushman in July 2023, and the only enquiry was a preliminary expression of interest at a potential purchase price of \$170,000,000.00 subject to due diligence. Robert caused 180 SAW GP not to



pursue negotiations as a response to this expression of interest, notwithstanding CEI was adamant in its communications with Sam the 180 SAW project had to be sold.

60. By May 8, 2023, Sam confirmed with Hyundai Asset Management, (“HAM”), a Korean entity with vast financial resources, its interest in acquiring the 180 SAW project. Data relevant to the project was requested by HAM for them to review by the end of May when Sam was scheduled to travel to Korea to meet to negotiate the HAM purchase of the 180 SAW project. A “data room” was to be created to enable HAM’s due diligence.
61. On May 26, 2023, Sam arrived in Korea with a mandate from CEI to attempt to obtain a purchase price of \$200,000,000.00 for the 180 SAW project. CEI understood HAM could be interested in a purchase of 100% of the project or an acquisition of less than 100% and a partnership with CEI and Mizrahi going forward.
62. On June 2, 2023, the meeting and negotiations with HAM and Sam concluded. In the period May 6 to June 2, 2023, Sam reported to CEI on a daily basis the progress and terms of negotiations, obtaining CEI’s support for each of the issues raised. The outcome was that HAM committed to draft and deliver an LOI with a purchase price of \$220,000,000.00 for the 180 SAW project that would generate net proceeds to 180 SAW LP of \$200,000,000.00 for a 70% interest in the 180 SAW project going forward and the remaining 30% of the project going forward to be held by CEI and a Mizrahi entity. The issue of the Koreans becoming a partner of CEI and Mizrahi going forward in the 180 SAW project was shared by Sam and approved in principal by CEI whilst Sam was in Korea and meeting with HAM to negotiate the LOI.
63. On June 3, 2023, Sam reported to CEI the terms of the LOI to come from HAM.
64. On June 8, 2023, Robert communicated CEI was only interested in a deal with HAM that provided for CEI’s 100% exit from the 180 SAW project. This was

contrary to all of the communications Sam had received from Chris Donlan, CEI's Chief Financial Officer, the person at CEI he communicated with before going to Korea and whilst in Korea negotiating the LOI. As a result, HAM would understand its LOI would be finalized with CEI (and a Mizrahi entity) going forward as a partner in the 180 SAW project. On June 8, 2023, Sam responded immediately to Robert to point out CEI'S mandate to SAM before going to Korea and confirmed during his daily updates to Chris Donlan ~~was~~ was that CEI was prepared to remain a partner in the 180 SAW project going forward with HAM. CEI agreed to review the LOI when received from HAM.

65. On June 30, 2023, Sam received and forwarded HAM's LOI ("HAM offer").
66. On July 4, 2023, CEI advised HAM it would review the HAM offer and a draft advisory agreement and respond with CEI's mark-up, comments and questions.
67. On July 5, 2023, Edward, Robert, Chris Donlan, and Sam, met with the HAM representative in Toronto at the 180 SAW project site.
68. By July 11, 2023, Sam and the Defendants had communicated on their respective positions on the Waterfall Agreement regarding the flow of funds based upon the HAM offer targeting a closing of the transaction for the end of October 2023.
69. On July 12, 2023, Sam sought a meeting to confirm CEI was in agreement in anticipation of Sam flying to Korea the following week to finalize the terms of agreement on the terms of the HAM offer.
70. On July 14, 2023, Robert advised Sam for the first time CEI required a 100% exit from the 180 SAW project. CEI rejected the HAM offer, in part because only 77% of CEI's interest would be acquired so that CEI retained a 15% interest in the project going forward.
71. The \$200,000,000.00 HAM purchase price for 70% of the project would generate a cash flow such that all the Sam and Sam entities' obligations to CEI set out in the Hazelton Deficiency Agreement and the Waterfall Agreement would be

satisfied. CEI knew the HAM purchase price for a 70% interest in the 180 SAW project was at least no less than market and in excess of CEI's target market price for the 180 SAW project and therefore a commercially reasonable path to follow.

72. On July 14, 2023, Robert advised Sam that CEI would not proceed with the HAM transaction unless Sam entered into a binding agreement to pay 50% of the losses, estimated at that time at more than \$30,000,000. on the 128 Hazelton project. This requirement of CEI was the result of the conspiracy of Edward and Robert to harm the economic interests of Sam by causing the 180 SAW GP to refuse a purchase price on the 180 SAW project at no less than or at the market price, and in excess of CEI's target price, contrary to CEI's, Robert's and 180 SAW GP's fiduciary and good faith duties. Edward and Robert are therefore liable for tortious interference with the economic interests of Sam and the Sam entities in the 180 SAW project since there was no binding agreement for Sam to incur 50% of the losses on the 128 Hazelton project and therefore no justification to reject the HAM offer for that reason.
73. On July 17, 2023, Robert advised that CEI would not advance the negotiations with HAM without the required binding agreement referred to in paragraph 74 72.
74. On July 21, 2023, Sam, on his own behalf and on behalf of the Sam entities, put CEI on notice that, if it failed to cooperate and advance the HAM offer, then CEI took all the risks associated with the rejection of the HAM offer. At that time, CEI understood the HAM offer garnered CEI a simple return of 116% and an annual return of 26.2% on the 180 SAW project. At that time, CEI was also put on notice that its rejection of the HAM offer at or no less than the market price and in excess of CEI's target price because it would not result in paying all of CEI's losses on the 128 Hazelton project was a breach of good faith and fiduciary duties.
75. On July 31, 2023, CEI confirmed it would not proceed with negotiation of the HAM offer without, inter alia, the binding agreement referred to in paragraph 74 72.

76. On September 1, 2023, and in his meetings with Edward on September 9, 2023, Sam offered to purchase CEI's 15% interest in the new 180 SAW entity.
77. On August 11, 2023, Sam again put CEI on notice it took all the risks associated with the rejection of the HAM offer and requested CEI's mark-up and comments on the HAM offer.
78. On August 31, 2023, CEI provided its mark-up and comments on the HAM offer. Sam tried to convince CEI not to pursue a number of its changes.
79. On September 28, 2023, Robert conveyed to HAM the LOI CEI was prepared to agree to for the HAM purchase of the 180 SAW project.
80. On October 1, 2023, HAM rejected the LOI conveyed by CEI.
81. The HAM offer dated June 30, 2023, was at or no less than a market price and in excess of the CEI target price for the 180 SAW project and should have closed by no later than October 31, 2023, and the failure to do so was owing to Edward and Robert's conspiracy to cause economic harm to Sam and the Sam entities' interest, the Defendants' tortious interference with the economic interests of Sam and the Sam entities, and Robert's breach of fiduciary and good faith duties by using the 180 SAW GP 50% vote, causing Sam the damages pleaded herein and entitling Sam M Inc., Sam M 180 SAW Inc., and Mizrahi SPV, the declaratory relief sought.
82. The actionable wrongs pleaded in paragraph 81 have unjustly enriched the Defendants, and the Defendants must disgorge their unjust enrichment to Sam and Sam M Inc.
83. On October 1, 2023, Sam, with a CEI mandate to negotiate with HAM, travelled to Korea in the hope a deal with HAM could be salvaged.
84. On October 20, 2023, HAM delivered a revised LOI ("HAM revised offer"). Sam was prepared to accept the HAM revised offer.

85. On October 25, 2023, the parties met remotely and a revised offer was agreed to and HAM committed to travel to Toronto the following week to finalize the transaction.
86. On November 22, 2023, the LOI to proceed with the HAM revised ~~HAM~~ offer was signed by CEI, Sam, and HAM.
87. On December 11-13, 2023, Edward and Robert, unknown to Sam, travelled to Korea and met with HAM and the investor it represented, Daewoo Engineering and Construction.
88. On December 17, 2023, Sam and Edward met as there were outstanding issues between CEI and Sam and the Sam entities, to be in a position to go ahead with the transaction spelled out in the HAM revised offer.
89. On December 21, 2023, Edward emailed Sam the terms CEI would agree to so the HAM revised offer could proceed and the sale of 180 SAW closed.
90. On December 22, 2023, Edward and Sam met remotely and Sam memorialized the agreement reached on each of the points set out in Edward's December 21, 2023, email. Sam sent Edward an email confirming the agreement reached at the December 22 meeting ("the December 22 Agreement"), immediately following the meeting. The December 22 Agreement enabled the HAM revised offer to proceed to a closing of the sale of the 180 SAW project.
91. On December 22, 2023, Sam's email memorializing the December 22 Agreement was sent to Edward, copied to Robert, Chris Donlan, CEI's lawyer, and the lawyer for Sam and the Sam entities.
92. On January 10, ~~2023~~ 2024, CEI's lawyer sent the draft of an agreement that did not reflect the December 22 Agreement.
93. On January 10, ~~2023~~ 2024, Edward communicated with Sam that he did not reach agreement on December 22, 2023, so Edward resiled from the December 22 Agreement. The failure to honour the December 22 Agreement is a breach of CEI's

contractual, fiduciary, and good faith, duties. The failure to honour the December 22 Agreement was owing to Edward and Robert's conspiracy to cause economic harm to Sam and the Sam entities' interest and their tortious interference with the economic interests of Sam and the Sam entities, Robert's breach of fiduciary, and good faith, duties as a Director of 180 SAW GP, and CEI's contractual obligation causing Sam the damages pleaded herein and entitling Sam M Inc., Sam 180 SAW Inc., and Mizrahi SPV to the declaratory relief sought

94. The actionable wrongs pleaded in paragraph 93 have unjustly enriched the Defendants, and the Defendants must disgorge such unjust enrichment to Sam and Sam M Inc.
95. On February 22, 2024, CEI proceeded with a Notice of Application appointing a Receiver, naming Sam M Inc. and Sam M 180 SAW Inc. as Respondents. The Receivership will incur costs and consequent liabilities for the Respondents. There is no doubt if CEI and the 180 SAW GP had proceeded with the HAM offer or the December 22 Agreement, the Receiver and its attendant costs and the damage to Sam's reputational interest would be avoided. The Respondents in the Receivership application should not incur losses due to the Receivership.

## **E. NEGLIGENCE**

### **i. 128 Hazelton Project**

96. CEI was negligent with respect to the 128 Hazelton project, the particulars of which are as follow:
  - (i) Refusing to proceed with the sale of the Retail Unit;
  - (ii) Refusing to proceed with the sale of the 7th floor unit to Dr. Rakowski in March 2023 and July 2023;
  - (iii) Acquiring units 201, 204, 401, 402, 403, and 404, at below market prices;
  - (iv) Proceeding with the closing on unit 601 without discharging the Mizrahi SPV loan;

- (v) Entering into the TEC non-binding proposal when it had no intention to abide TEC's condition for lending;
- (vi) Failing to agree to section 3.5 of TEC non-binding proposal;
- (vii) Failing to proceed with the TEC refinancing of the DUCA debt;
- (viii) Acquiring the Ozz Electric lien;
- (ix) Failing to bond the CEC lien to avoid the DUCA receivership;
- (x) Failing to close on units with agreements of purchase and sale where purchasers were in occupancy;
- (x) Failing to reasonably price and sell unsold units;
- (xii) Retaining and failing to terminate a broker who had no acumen and demonstrated an inability to sell upscale residential units in the Yorkville market; and
- (xiii) Proceeding with an application for Receivership when there was no reason to do so.

ii. 180 SAW Project

97. CEI was negligent with respect to the 180 SAW project, the particulars of which are as follow:
- (i) Refusing to negotiate when a prospective purchaser in 2022 indicated an interest in acquiring the property for \$170,000,000;
  - (ii) Failing to provide consent to Cushman Wakefield cooperating with HAM's due diligence in early July 2023;
  - (iii) Retaining Avison Young for an appraisal in November 2023 and conveying confidential information that should not have been disclosed to the appraiser harmful to the interests of selling the 180 SAW project to HAM;
  - (iv) Disclosing to consultants confidential financial information not required by the consultant that was harmful to the interests of Sam M Inc. and Sam;
  - (v) Causing continuous delays making data available to HAM during due diligence;

- (vi) Failing to create a functional data room so as to enable HAM to advance its due diligence at an accepted and usual pace;
- (vii) Failing to respond to the HAM offer in a timely manner; and
- (viii) Making disclosures to HAM and Daewoo Engineering and Construction in Korea in December 2023 that were inaccurate and harmful to the interests of Sam and the Sam entities.

## **E. NEGLIGENT MISREPRESENTATIONS**

### **i 128 Hazelton Project**

- 98. CEI negligently misrepresented its intention to refinance the DUCA loan by entering into the TEC non-binding proposal when CEI had no intention to proceed with a refinancing with TEC or any entity.
- 99. CEI negligently misrepresented that it would permit the purchase of the Retail Unit when it had no intention of subordinating its third mortgage to permit Hazelton Inc. to sell the Retail Unit to Retail Inc..
- 100. CEI negligently misrepresented it would agree to discharge the Mizrahi SPV loan when Mizrahi consented to CEI closing its purchase of unit 601 with CEI.

### **ii. 180 SAW Project**

- 101. In December 2021, CEI negligently misrepresented its intention to invest in the 180 SAW project, to facilitate the land acquisition and proceed with a sale of the land rather than stay in the project to build it out. The profitability of Sam M Inc.'s one-third interest would suffer if the project was intended to be a long-term hold and developed and built out given the interest obligation Sam and Sam M Inc. had incurred with CEI to proceed with the 180 SAW project.
- 102. In May 2023, CEI negligently misrepresented its intention to proceed with a deal with HAM on the basis it would partner going forward if that was the best deal that could be negotiated with HAM. CEI knew before and during the May 2023



negotiations Sam conducted with HAM that Sam understood CEI would remain a partner in the project. CEI resiled from that commitment and Sam's credibility with HAM suffered accordingly.

103. In the period from July 2023 through November 2023, CEI negligently misrepresented it would proceed with the HAM offer and the HAM revised offer when its clear intention was to retain the 180 SAW project without Sam. These negligent misrepresentations enabled CEI to run out the clock on Sam M Inc.'s interest by eroding its equity by accrued interest owed to CEI. This negligent misrepresentation would put CEI in the position where following the Receivership of Sam M Inc's one-third position CEI would be free to partner with HAM or other investors on the 180 SAW project thereby unjustly enriching the Defendants.
104. The Defendants owed the Plaintiffs a duty of care. The misrepresentations aforesaid were untrue, inaccurate, or misleading, and the Defendants were negligent in making them. The Plaintiffs reasonably relied on the misrepresentations to their detriment and have suffered damages as a result.

## **F. DAMAGES**

### **i. 128 Hazelton project**

105. As a result of the actionable wrongs pleaded aforesaid, the Plaintiffs, Sam, Retail Inc., and Mizrahi SPV have suffered damages and continue to suffer damages as follow:
  - (i) Lost revenue due to CEI's self-dealing, by the acquisition of units 201, 204, 404 401, 402, 403, and 404, at less than market price and depriving Hazelton Inc. revenue on upgrades estimated in the sum of \$2,000,000.00;
  - (ii) Lost revenue as a result of discounts and reductions CEI agreed to with purchasers without authorization or knowledge of MDI in the sum of \$1,000,000.00;
  - (iii) Interest payments to DUCA and CEI in the sum of \$2,000,000.00;
  - (iv) TEC financing costs in the sum of \$250,000.00;

- (v) The profit on the Retail Unit in the sum of \$1,000,000.00;
- (vi) The costs of the Receiver in the sum of \$1,000,000.00; and
- (vii) The legal costs of the Receiver in the sum of \$250,000.00.

ii. 180 SAW project

106. As a result of the actionable wrongs pleaded aforesaid, the Plaintiffs, Sam and Sam M Inc., have suffered damages and continue to suffer damages as follows:

a. Sam

- (i) The fee entitlement on the HAM offer of \$220,000,000. in the sum of ~~\$9,500,000.00~~ \$5,000,000.00;
- (ii) The profit going forward on the 180 SAW project to be garnered on Sam's 15% interest to be retained in the sum of \$20,000,000.00;
- (iii) The legal and consulting costs and costs incurred to negotiate the HAM offer, the HAM revised offer, and the December 22 Agreement, in the sum of \$3,000,000.00;
- (iv) The costs of the Receiver in the sum of \$1,000,000.00;
- (v) The legal costs of the receiver in the sum of \$250,000.00; and
- (vi) Aggravated damages due to harm to reputational interest in the sum of \$25,000,000.00.

a.b. Sam M Inc.

- (i) The flow of funds in the waterfall from the HAM offer in the sum of \$9,200,000.00;
- (ii) The costs of the Receiver in the sum of \$1,000,000.00; and
- (iii) The legal costs of the Receiver in the sum of \$250,000.00.

107. The full measure of damages and additional expenses in respect of the 128 Hazelton project and the 180 SAW project are not yet fully known but will be proven at trial.
108. The Defendants have been unjustly enriched, as pleaded aforesaid. The Plaintiffs Sam, Retail Inc., Mizrahi SPV, and Sam M Inc., have suffered a corresponding deprivation in respect of these amounts for which there is no juristic reason.
109. The conduct of the Defendants demonstrates a high-handed, outrageous, wanton, and contumelious, disregard for the Plaintiffs' rights and interests, who have, as a result, suffered significant losses, both financial and reputational. An award of exemplary or punitive damages is necessary in the circumstances of this case to punish the Defendants and to deter the like-minded. The conduct of the Defendants exacerbated the economic harm suffered by Sam in the nature of harm to Sam's reputational interests, and the damage Sam sustains when the Mizrahi brand, being the umbrella of the entities Sam utilizes for his various developments, are tarred with the brush of Sam's reputational harm.

The Plaintiffs propose that this action be tried in the City of Toronto.

Date: April 5, 2024  
April 8, 2024

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SAM MIZRAHI et al  
Plaintiffs

-and- EDWARD S. ROGERS III et al  
Defendants

Court File No. CV-24-007 17915-0000

**ONTARIO  
SUPERIOR COURT OF JUSTICE**

PROCEEDING COMMENCED AT  
TORONTO

**AMENDED STATEMENT OF CLAIM**

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## APPENDIX B—LETTERS BETWEEN COUNSEL

June 19, 2024

**VIA E-MAIL**

**Steven J. Weisz**

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**Re: 180 SAW**

Dear counsel:

We understand that a Korean bank, Hyundai Asset Management, is in discussions with Constantine Enterprises Inc. to buy the 180 Steeles Avenue project. In the summer of 2023, Hyundai Asset Management and 180 SAW were in negotiations for a sale of the project with a total purchase price of approximately \$220 million. We understand that negotiations are presently underway for the acquisition of all of or an interest in 180 SAW. For example, a representative of Hyundai Asset Management downloaded materials from the virtual data room on or about April 4.

Accordingly, please provide all information on negotiations with Hyundai, including:

- What is the status of negotiations with Hyundai?
- What are the proposed terms of any deal with Hyundai?

If the receiver is unaware of any such negotiations, we ask that the receiver confirm it will make inquiries of Constantine Enterprises Inc. to ascertain the status of the negotiations or whether agreements are in place or contemplated.

Norton Rose Fulbright Canada LLP  
June 19, 2024  
Page 2

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Yours truly,

Cozen O'Connor LLP



Steven J. Weisz  
SJW:sc

cc. **Jerome Morse**  
**David Trafford**  
Morse Shannon LLP

June 20, 2024

**Privileged and Confidential  
Sent By Email**

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**Attention: Steven Weisz**

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Our reference  
1001284922

Dear Steve:

**Sam M (180 SAW) LP Inc. and Sam M (180 SAW) Inc. (the “Debtors”)**

We are in receipt of your letter dated June 19, 2024 in the above matter.

As you are aware, the motion scheduled for this Friday is to commence a sale process (the “**SAW Sale Process**”) for the interests held by the Debtors. The Receiver expects that all inquiries in respect of the Debtors’ interests will be made through the SAW Sale Process once approved by the Court. The Receiver has spoken with representatives of Constantine Enterprises Inc. about parties who expressed an interest in the “SAW” opportunity prior to the commencement of the receivership proceedings. Discussions with interested parties are confidential. The Receiver will file a report concerning the SAW Sale Process when it recommends a transaction for approval.

Yours very truly,

Norton Rose Fulbright Canada LLP



Jennifer Stam  
Partner

JS/nb

CAN\_DMS: \1005917145\1

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CONSTANTINE ENTERPRISES INC.  
Applicant

-and- SAM (180 SAW LP) INC. et al.  
Respondents

Court File No. CV-124-00715326-00CL

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

PROCEEDING COMMENCED AT  
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