Court of Appeal File No. COA-24-CV-0550
Court File No. BK-21-02734090-0031

COURT OF APPEAL FOR ONTARIO

IN THE MATTER OF THE *BANKRUPTCY AND INSOLVENCY ACT*,
R.S.C. 1985, c. B-3, as amended

IN THE MATTER OF THE NOTICES OF INTENTION TO MAKE A PROPOSAL OF YG LIMITED PARTNERSHIP AND YSL RESIDENCES INC.

APPEAL BOOK AND COMPENDIUM OF THE APPELLANTS, THE CLASS A LPS

June 7, 2024

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B E T W E E N:

INDEX

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COURT OF APPEAL FOR ONTARIO

IN THE MATTER OF THE *BANKRUPTCY AND INSOLVENCY ACT*, R.S.C 1985, c. B-3 AS AMENDED

IN THE MATTER OF THE NOTICES OF INTENTION TO MAKE A PROPOSAL OF YG LIMITED PARTNERSHIP AND YSL RESIDENCES INC

NOTICE OF APPEAL

THE APPELANTS, YongeSL Investment Limited Partnership, 2124093 Ontario Inc., SixOne Investment Ltd., E&B Investment Corporation, TaiHe International Group Inc., 2504670 Ontario Inc., 8451761 Canada Inc. and Chi Long Inc. (the "**Class A LPs**"), **APPEAL** to the Court of Appeal from the Order of the Honourable Justice Jessica Kimmel (the "**Motion Judge**") of the Superior Court of Justice (Commercial List) dated March 19, 2024, at the City of Toronto, Ontario (the "**Order**"),

THE APPELLANTS ASK that this Court set aside the Order and replace it with an order that:

1. Affirms the Proposal Trustee's disallowance of Ms. Athanasoulis' Profit-Sharing Claim;

2. In the alternative, declares that the Profit-Sharing Agreement is unenforceable;

3. If leave to appeal is required, grants leave to appeal from the Order pursuant to section 193 (e) of the *Bankruptcy and Insolvency Act* ("***BIA***");

4. Awards the Appellants the costs of the motion below and this appeal; and

5. Grants such further and other relief as the Appellants may request and this Court may deem just.

THE GROUNDS OF APPEAL are as follows:

6. The Motion Judge erred by:

   (a) restricting the Class A LPs' standing to a single issue despite the Motion Judge's own prior order that gave directions regarding the issues that the Class A LPs had standing to address; and

   (b) declining to determine all of the Class A LPs' arguments that the Profit-Sharing Agreement (defined below) was unenforceable, despite her holding that the Profit-Sharing Agreement was enforceable and binding on the Class A LPs for all purposes, including separate litigation commenced against Ms. Athanasoulis; and

   (c) failing to find that the Profit-Sharing Agreement was unenforceable as it was an undisclosed self-dealing agreement entered into between Ms. Athanasoulis and the General Partner (defined below), each being fiduciaries to the limited partnership, and wrongly finding that there was no evidence showing that the Profit-Sharing Agreement was not on market terms and therefore breached the LP Agreement (defined below).

7. The Motion Judge's errors led to the anomalous result where a fiduciary can enforce a secret agreement for their own benefit and to the detriment of vulnerable beneficiaries. This decision has negative implications for the rights and obligations of fiduciaries and beneficiaries in limited partnerships and should be set aside.

8. The Class A LPs also adopt and rely on the grounds set out in the Proposal Trustee's Notice of Appeal dated March 28, 2024. The appeals should be heard together.

Background to the parties

9. The debtors YG Limited Partnership (the "**Partnership**") and YSL Residences Inc. (together, the "**Debtors**") are members of the "**Cresford**" group, a real-estate developer. They were formed to develop and construct the YSL Project.

10. The Class A LPs are the outside arms-length investors who invested $14.8 million in the Partnership. They are at risk of losing their entire investment if Ms. Athanasoulis' claim in this proposal proceeding is accepted.

11. The Respondent, Maria Athanasoulis ("**Ms. Athanasoulis**") was the former President and Chief Operating Officer of Cresford and one of two individuals who controlled the Partnership through its general partner. She was the "face" of Cresford to investors and the primary person dealing with the Class A LPs both before and after they made their investments in the partnership.

12. At all times, the Class A LPs were entirely reliant on Cresford for information. At all times prior to and after their investment, the Class A LPs were told by Cresford, including specifically by Ms. Athanasoulis, that they would recover their investment and guaranteed return on investment (100% return) prior to any profits being paid to Cresford. The Class A LPs relied on these representations.

13. Ms. Athanasoulis now claims she is owed $18 million from the Partnership on account of an oral agreement (the "**Profit-Sharing Agreement**") with Cresford's owner, Daniel

Casey, pursuant to which she claims 20% of the profits of all of Cresford's developments. It is undisputed that the Profit-Sharing Agreement was never disclosed to or ratified by the Class A LPs. Ms. Athanasoulis claims she is entitled to $18 million on account of unrealized "profits" as a former insider of Cresford and fiduciary of the Partnership despite the fact it would extinguish any recovery by the arm's length Class A LPs.

14. The Class A LPs supported the Proposal Trustee's disallowance of the Profit-Sharing Claim and made independent arguments as to why the Profit-Sharing Agreement was unenforceable due to: (i) the terms of the Amended and Restated Limited Partnership Agreement (the "**LP Agreement**"), (ii) breaches of fiduciary duty (by both Ms. Athanasoulis and the general partner entity she controlled) and (iii) misrepresentations (by Ms. Athanasoulis).

Background to the proceeding

15. In 2021, the Debtors commenced this *BIA* proceeding as a pre-packaged liquidation designed primarily to benefit Cresford. The Debtors' original proposal would have seen Cresford extract approximately $22 million from the YSL Project. Unsecured creditors would have recovered a maximum of 58% of their claims. Under the original proposal, the Class A LPs would have lost their entire investment.

16. The Class A LPs opposed the Debtors' motion for court approval of that original proposal. The Court agreed that the original proposal was not made in good faith or designed to benefit the general body of creditors. The Court refused to sanction the original proposal but gave the Debtors an opportunity to put forward a new proposal. The new proposal, which was ultimately approved by the court (the "**Proposal**"), did not cap unsecured

creditor recovery. Indeed, unsecured creditors may yet recover 100% of their claims. The Class A LPs may yet recover a significant portion of their investment in the YSL Project although they will not realize any return.

17. By way of the Proposal, the Debtors transferred the YSL Project lands to Concord Properties Developments Corp. ("**Concord**"), another developer.

Ms. Athanasoulis' Profit-Sharing Claim

18. The Proposal Trustee and Ms. Athanasoulis originally agreed to a bifurcated arbitration of her Profit-Sharing Claim. The first phase of that arbitration resulted in a finding that Ms. Athanasoulis had an agreement with Cresford whereby she would share in the profits of the YSL Project (the Profit-Sharing Agreement).

19. Certain issues ***were not*** decided at the arbitration, including whether the Profit-Sharing Claim:

    (a) is an equity claim;

    (b) has any value at all;

    (c) is unenforceable given (i) the terms of the LP Agreement, (ii) the fiduciary duties owed by Ms. Athanasoulis and the Partnership's general partner (the "**General Partner**") to the Partnership and the Class A LPs, (iii) Ms. Athanasoulis' knowing assistance in the General Partner's breach of its fiduciary duties and/or (iv) Ms. Athanasoulis misrepresentations to the Class A LPs; and

    (d) is payable before the Class A LPs are repaid in full.

21. The Class A LPs and Concord were not invited to participate in the Arbitration, nor were they parties to the arbitration agreement between the Proposal Trustee and Ms. Athanasoulis. Once they learned of the outcome, they took steps to challenge the Proposal Trustee's right to arbitrate Ms. Athanasoulis' claim. Those steps are summarized in a November 1, 2022, decision in this proceeding. In that decision, the Motion Judge directed the Proposal Trustee determine and value Ms. Athanasoulis' claim.

The Motion Judge's procedural directions

22. The parties were unable to agree on the procedure for the Proposal Trustee's adjudication of Ms. Athanasoulis' claim and any subsequent appeal, so the Proposal Trustee brought a motion for directions. By decision dated February 10, 2023, the Motion Judge set the procedure for the determination of the claim. She gave directions that the Class A LPs had standing on the appeal, limited to the following issues:

    (a) the impact of the prohibition contained in the LP Agreement on non-arm's length agreements, such as the Profit-Sharing Agreement;

    (b) the enforceability of the Profit-Sharing Agreement; and

    (c) the priority/subordination of the Profit-Sharing Claim to the Class A LPs' recovery of their initial investments based on alleged breaches of contractual and fiduciary duties and alleged misrepresentation.

23. In connection with that confirmed standing, the Class A LPs submitted evidence and made submissions relevant to their issues. Ms. Athanasoulis had the opportunity to, and did, respond to that evidence and submissions. She did not cross-examine the Class A LPs.

24. The Proposal Trustee disallowed the Profit-Sharing Claim and Ms. Athanasoulis appealed.

The Motion Judge erred and allowed Ms. Athanasoulis' appeal

25. In reviewing the Proposal Trustee's treatment of the Profit-Sharing Claim, the Motion Judge made errors. The Proposal Trustee has appealed from the Order given those errors. As noted above, the Class A LPs adopt and support the Proposal Trustee's grounds of appeal and intend to ask that the appeals from the Order be heard together.

26. In addition, the Motion Judge made the errors identified below.

Restriction of the Class A LPs' standing

27. The Motion Judge declined to determine the Class A LPs' arguments on the basis that they "fall outside the scope of the standing that was granted to" the Class A LPs. The Motion Judge erred by improperly interpreting and applying her earlier decision where the Motion Judge gave directions for the appeal and granted standing to the Class A LPs to address specific issues in response to Ms. Athanasoulis' claim, including issues that the Proposal Trustee did not address or where it deferred to the Class A LPs.

28. The Motion Judge incorrectly held that the Class A LPs' standing was limited to "matters relating to the validity and enforceability of the Profit-Sharing Agreement having regard to the provisions and restrictions under the agreements that the LPs were party to, such as the LPA and the Management Agreements".

29. This conclusion is irreconcilable with the Motion Judge's prior directions and order. The Motion Judge did not give any notice to the Class A LPs that the standing they were

afforded would be varied and narrowed significantly, nor did the Motion Judge given any reasons for failing to follow her earlier directions and order. The Motion Judge further erred by narrowing the Class A LPs' standing on the basis that their issues regarding the enforceability of the Profit-Sharing Agreement were "extraneous to the Trustee's Disallowance" when her earlier directions and order expressly granted standing to the Class A LPs to address "any unique or added perspective or submissions that they have that are not advanced by the Proposal Trustee, or that the Proposal Trustee defers to the LPs on".

30. Had the Motion Judge heard the Class A LPs' arguments, the Motion Judge would have concluded that:

(a) Ms. Athanasoulis breached her fiduciary duties by failing to disclose the existence of the Profit-Sharing Agreement to the Class A LPs;

(b) the General Partner breached its fiduciary duty to the Class A LPs in entering into the secret Profit-Sharing Agreement with Ms. Athanasoulis, and Ms. Athanasoulis knowingly assisted in that breach; and

(c) Ms. Athanasoulis made misrepresentations to the Class A LPs that induced them to make investments in the Partnership.

31. Any one of those conclusions would have led the Motion Judge to determine that the Profit-Sharing Agreement was unenforceable, and the Profit-Sharing Claim was therefore not a provable claim.

The Motion Judge erred in not determining the Class A LPs' Arguments

32. The issues of breach of fiduciary duty, knowing assistance and misrepresentation raised by the Class A LPs are inextricably interwoven with the enforceability of the Profit-Sharing Agreement. The Motion Judge erred in concluding that the Profit-Sharing Agreement was enforceable without considering the Class A LPs' arguments.

33. As a result, the Motion Judge determined that the Profit-Sharing Agreement was enforceable in a vacuum. She considered only the terms of the LP Agreement and accompanying Sales Management Agreement dated February 16, 2016. She failed to consider the fiduciary duties and partnership relationships that established the context in which Ms. Athanasoulis sought to enforce her Profit-Sharing Claim. She failed to consider the well-established law that imposes disclosure obligations on a fiduciary if they seek to benefit from a self-dealing transaction.

34. The Motion Judge compounded this error by concluding that the issue would become *res judicata* and the Class A LPs would be estopped from arguing that the Profit-Sharing Agreement was unenforceable in another proceeding, including in separate and existing litigation that had been commenced by certain Class A LPs against Ms. Athanasoulis and the general partner.

35. The effect of the Motion Judge's decision is to deprive the Class A LPs the right to be heard in any forum on key issues where their interests are directly prejudiced. The issues of breach of fiduciary duty, misrepresentation and knowing assistance are inextricably interwoven with the issues of enforceability, validity and priority of the Profit-Sharing Agreement. The Motion Judge erred in law by making her findings on the latter issues

binding on the Class A LPs in this and other proceedings while refusing to decide issues that have a direct bearing on the enforceability, validity and priority of the Profit-Sharing Agreement, which the Class A LPs had properly raised in front of her.

The Motion Judge erred in finding no breach of the LP Agreement

36. The Motion Judge also erred in finding that the Profit-Sharing Agreement was not captured by the prohibition in the LP Agreement against non-arm's length agreements. Ms. Athanasoulis was a "Related Party", as that term is used in the LP Agreement because she was an officer of the General Partner and its affiliates. The Profit-Sharing Agreement was a non-arm's length agreement.

37. In addition to the fundamental problem that the Profit-Sharing Agreement was kept secret from and prejudices the Class A LPs, the agreement was not on market terms. The Motion Judge committed palpable and overriding error when she ignored the evidence tendered by the Class A LPs that the Profit-Sharing Agreement was not on "market terms" and instead incorrectly found that the Class A LPs presented no evidence on the point.

38. The Motion Judge also erred by not concluding that the Profit-Sharing Agreement was in direct breach of provisions of the LP Agreement and subscription agreements that required payment to the Class A LPs of the entire amount of their investments plus the guaranteed return (100%) before any profit was paid to Cresford or its affiliates. That "waterfall" was confirmed by Ms. Athanasoulis when the Class A LPs were induced to make their advances to the Debtors. As a result, the Class A LPs were entitled to receive $29.6 million before any profits were paid to any Cresford affiliate or representative.

39. Had the Motion Judge not made the errors described above, she would have found that the Profit-Sharing Agreement is invalid and unenforceable with respect to the Partnership.

THE BASIS OF THE APPELLATE COURT'S JURISDICTION IS:

40. An appeal lies to the Court of Appeal from the Order pursuant to s. 183(2) of the *BIA* and s.193(a) and (c), or alternatively (e), of the *BIA*.

41. Pursuant to s.193(a) of the *BIA*, the Class A LPs may appeal the Order without leave. The Order affects their future rights over the residual cash pool held by the Proposal Trustee.

42. Pursuant to s.193(c) of the *BIA*, the Class A LPs may appeal the Order without leave. The property involved in the appeal exceeds ten thousand dollars. Ms. Athanasoulis' Profit-Sharing Claim is for $18 million. The property involved in the appeal meets the statutory minimum.

43. Alternatively, if leave to appeal is required, the Class A LPs seek leave to appeal pursuant to s.193(e) of the *BIA* and ask that the motion for leave be heard at the same time as the appeal.

44. This appeal involves matters of general importance to bankruptcy matters and to the administration of justice as a whole, including whether a director or officer of a limited partnership should be allowed to profit from circumventing their duties to the limited partners by entering into a secret side agreement with the general partner that subordinates the limited partners' interest to those of the directors or officers, without disclosure same to the limited partners.

45. The Order being appealed from expressly and finally determines the Class A LPs' rights and claims in other litigation and it would be manifestly unfair if they had no right to appeal the Motion Judge's errors.

46. The appeal is *prima facie* meritorious, as set out above, and this proceeding will not be unduly delayed by this appeal. The outcome of the appeal may in fact eliminate the need for any further steps in this proceeding, such as the valuation of Ms. Athanasoulis' claim.

47. The Class A LPs ask that this appeal be heard at the same time as the Proposal Trustee's appeal from the Order.

April 2, 2024

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IN THE MATTER OF *THE BANKRUPTCY AND INSOLVENCY ACT*, R.S.C. 1985, c. B-3 AS AMENDED.

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COURT OF APPEAL FOR ONTARIO
IN BANKRUPTCY AND INSOLVENCY

PROCEEDING COMMENCED AT TORONTO

NOTICE OF APPEAL

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ABC - 21

Court File No. BK-21-02734090-0031

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

THE HONOURABLE	)	TUESDAY, THE 19TH
	)	
JUSTICE KIMMEL	)	DAY OF MARCH, 2024

IN THE MATTER OF THE *BANKRUPTCY AND INSOLVENCY ACT*, R.S.C. 1985, C. B-3 AS AMENDED

AND IN THE MATTER OF THE NOTICES OF INTENTION TO MAKE A PROPOSAL OF YG LIMITED PARTNERSHIP AND YSL RESIDENCES INC. OF THE CITY OF TORONTO, IN THE PROVINCE OF ONTARIO

ORDER

THIS MOTION, made by the Moving Party, Maria Athanasoulis, for an Order allowing an appeal of the Notice of Disallowance issued by the Responding Party, KSV Restructuring Inc. (the "**Proposal Trustee**"), on August 10, 2023 was heard on December 18 and 22, 2023 at the court house, 330 University Avenue, Toronto, Ontario, M5G 1R7.

ON READING the motion record dated September 8, 2023, supplementary motion record dated October 31, 2023, factum of the Moving Party dated October 27, 2023, reply factum of the Moving Party dated December 13, 2023, oral argument compendium of the Moving Party dated December 18, 2023, supplementary oral argument compendium of the Moving Party dated December 22, 2023, joint factum of the Class A Limited Partners ("**Class A LPs**") dated November 22, 2023, oral argument compendium of the Class A LPs dated December 15, 2023, costs outline of the Moving Party dated December 28, 2023, the two costs outlines of the Class A LPs dated December 18, 2023, responding record of the Proposal Trustee dated October 16, 2023, supplemental responding record

of the Proposal Trustee dated November 10, 2023, second supplemental responding record of the Proposal Trustee dated December 14, 2023, factum of the Proposal Trustee dated November 10, 2023, oral argument compendium of the Proposal Trustee dated December 15, 2023, and costs outline of the Proposal Trustee dated December 18, 2023.

ON HEARING the submissions of counsel for the Moving Party, counsel for the Proposal Trustee, and counsel for both groups of Class A LPs.

1. **THIS COURT ORDERS** that the Notice of Disallowance of the "**Profit Share Claim**" (as defined in paragraph 3(b) of the reasons for decision reported at *YG Limited Partnership and YSL Residences Inc. (Re)*, 2024 ONSC 1617 (the "**Reasons**")) dated August 10, 2023 is set aside.

2. **THIS COURT DECLARES** that the Profit Share Claim is not an equity claim, and is a provable claim within the meaning of s. 121(1) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3.

3. **THIS COURT ORDERS** that the Profit Share Claim is entitled to priority over the claims asserted by the Class A LPs.

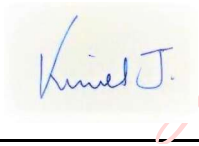
4. **THIS COURT DECLARES** that the Profit Share Claim against "**YSL**" (as defined in paragraph 1 of the Reasons) is a valid claim and ought to be allowed in an amount to be determined by further order of this court or by such other process as the court may direct.

5. **THIS COURT ORDERS** that the Moving Party shall be paid forthwith costs of this motion in the amount of $169,715.93 plus applicable taxes and total disbursements of $6,812.08 (inclusive of HST) by the Proposal Trustee, subject to further directions from

the court to be provided at a case conference, if requested, regarding by whom, in what proportions and from what source these costs are to be paid.

6. **THIS COURT DIRECTS** that the parties shall arrange a case conference before Justice Kimmel for the purpose of making submissions and receiving directions regarding the process for determination of the amount (valuation) of the Profit Share Claim. Concord Properties Development Corp. (or its counsel) shall also attend this case conference.

7. **THIS COURT DECLARES** that the ongoing civil proceedings among and between the Moving Party and the Class A LPs and members of the "**Cresford Group**" (as defined in paragraph 1 of the Reasons) may continue, subject only to the determinations in the Reasons regarding the validity, provability and priority of the Profit Share Claim.



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IN THE MATTER OF THE NOTICES OF INTENTION TO MAKE A PROPOSAL OF YG LIMITED PARTNERSHIP AND YSL RESIDENCES INC. OF THE CITY OF TORONTO, IN THE PROVINCE OF ONTARIO

Court File No. BK-21-02734090-0031

SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

PROCEEDING COMMENCED AT
TORONTO

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ABC - 25

CITATION: YG Limited Partnership and YSL Residences Inc. (Re), 2024 ONSC 1617
COURT FILE NO.: BK-21-02734090-0031
DATE: 20240319

SUPERIOR COURT OF JUSTICE – ONTARIO (COMMERCIAL LIST)

RE: IN THE MATTER OF THE BANKRUPTCY AND INSOLVENCY ACT, R.S.C. 1985, c. B-3, as amended

IN THE MATTER OF THE NOTICES OF INTENTION TO MAKE A PROPOSAL OF YG LIMITED PARTNERSHIP AND YSL RESIDENCES INC. OF THE CITY OF TORONTO, IN THE PROVINCE OF ONTARIO

BEFORE: KIMMEL J.

COUNSEL: *Mark Dunn and Brittni Tee,* Lawyers for the Appellant, Maria Athanasoulis

Matthew Milne-Smith and Chenyang Li, Lawyers for the Proposal Trustee, KSV Restructuring Inc.

Shaun Laubman, Lawyers for 2504670 Canada Inc., 8451761 Canada Inc. and Chi Long Inc.

Alexander Soutter, Lawyers for 2576725 Ontario Inc., Yonge SL Investment Limited Partnership, 2124093 Ontario Inc., E&B Investment Corporation, SixOne Investment Ltd., Taihe International Group Inc.

HEARD: December 18 and 22, 2023

ENDORSEMENT
(APPEAL FROM DISALLOWANCE OF CLAIM)

The Appeal

[1] The debtor YSL Residences Inc. ("YSL") owned a development property (upon which it was intended that an 85-story retail and condominium complex in downtown Toronto would be built in two stages, the "YSL Project"). YSL was the general partner and held the YSL Project as bare trustee for the YG Limited Partnership ("YG"). Maria Athanasoulis was employed by YSL and the Cresford group of companies, owned and controlled by Daniel Casey and his family members (the "Cresford Group").

[2] YSL and YG filed a Proposal under the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (the "BIA") and were deemed bankrupt on April 21, 2021. The Proposal Trustee, KSV Restructuring Inc. ("Proposal Trustee"), was appointed in the context of the Proposal proceedings.

[3] Maria Athanasoulis filed a proof of claim against YSL for two unsecured claims (together, the "Athanasoulis Claim"):

a. $1 million in respect of damages for wrongful (constructive) dismissal (the "Wrongful Dismissal Claim"); and

b. $18 million in respect of damages for breach of an oral agreement that Ms. Athanasoulis would be paid 20 percent of the profits earned on the YSL Project (the "Profit Share Claim").

[4] In accordance with the established claims procedure,

a. On March 30, 2023, the Proposal Trustee delivered to Ms. Athanasoulis notice that it would accept her Wrongful Dismissal Claim in the amount of $880,000.39.

b. On August 10, 2023, the Proposal Trustee delivered to Ms. Athanasoulis a Notice of Disallowance of her $18 million Profit Share Claim (the "Disallowance").

[5] The Proposal Trustee's partial allowance of the Wrongful Dismissal Claim has not been challenged. This is an appeal (by way of motion under the BIA) from the Proposal Trustee's Disallowance in full of Ms. Athanasoulis' $18 million Profit Share Claim.

[6] Ms. Athanasoulis moves for an order setting aside the Disallowance of her Profit Share Claim and directing a reference to quantify the value of her damages, and ancillary relief with respect to the validity, value and priority of that claim, among other relief. The Disallowance is ordered to be set aside and certain of the other requested relief is granted (as detailed at the end of this endorsement), for the reasons that follow.

The Proposal Proceedings

[7] YG and YSL (together in the context of these proceedings referred to as "YSL" or the "Debtor") filed Notices of Intention to Make a Proposal under the BIA, which were procedurally consolidated pursuant to an Order dated May 14, 2021. The original filing and deemed date of bankruptcy was on April 30, 2021.

[8] An Amended Third Proposal dated July 15, 2021 (the "Proposal") was supported by the unsecured creditors of the Debtors and approved by this court on July 16, 2021. Under the Proposal, the Proposal Trustee was authorized to deal with various claims against the Debtor, some of which (such as the Athanasoulis Claim) were disputed.

[9] The Proposal provided that Concord Properties Developments Corp. (the "Sponsor") would acquire the YSL Project in exchange for three principal forms of consideration: (i) the Sponsor would assume 100% liability for of all secured creditor claims and construction lien claims; (ii) the Sponsor would pay to the Proposal Trustee a pool of cash of $30.9 million to be distributed to unsecured creditors with proven claims; and (iii) any residual amounts left unclaimed from the cash pool to be distributed to equity stakeholders through the limited partners or as they may direct in accordance with the limited partnership agreements.

[10] These equity stakeholders include the Class A limited partners (unitholders) of the YG Limited Partnership (the "LPs"). The LPs include 2504670 Canada Inc., 8451761 Canada Inc. and Chi Long Inc. (collectively sometimes referred to as the "250 LPs"), and 2576725 Ontario Inc., Yonge SL Investment Limited Partnership, 2124093 Ontario Inc., E&B Investment Corporation, SixOne Investment Ltd., and Taihe International Group Inc. The LPs collectively advanced $14.8 million to the Debtors in exchange for Class A Preferred units in YG Limited Partnership.

[11] The Athanasoulis Claim is an unsecured claim that, if proven, would be funded from the $30.9 million pool of cash that has been set aside to satisfy proven unsecured creditor claims.

[12] Dunphy J. made the following findings (in *YG Limited Partnership and YSL Residences (Re)*, 2021 ONSC 5206, 93 C.B.R. (6th) 139) at the time the Proposal was approved:

a. Whatever questions there may be regarding the solvency of the debtors from the perspective of the realizable value of their assets, there can be no question of the insolvency of the debtors from a liquidity point of view: secured and unsecured claims alike are overdue and unpaid and the debtors have no means to satisfy their claims in a timely way. Lien claims are more than a year in arrears for the most part while all forbearance periods have expired for the secured debt (para. 17).

b. The Proposal does not answer the question of what the value of the project might have been had the project been offered on the open market in a competitive process (para. 21).

c. This project is, at its core, a hard asset consisting of real estate, a bundle of approvals and a hole in the ground. There is no goodwill to speak of. It has been held in limbo for much more than a year (para. 33(a)).

[13] Dunphy J. made certain findings in his decision not to approve an earlier proposal put forward by the Debtors, in *YG Limited Partnership and YSL Residences (Re)*, 2021 ONSC 4178, 93 C.B.R. (6th) 109 as follows:

a. Few things are more precious in the restructuring business than time. YG LP was able to "purchase" more than a year of time with the forbearance arrangements that it worked out. That precious time appears to have been devoted solely to finding transactions that offered the greatest level of benefits for the Cresford group of companies (para. 76).

b. There was a window of time to find an out-of-court solution, but it would appear that the debtors have squandered it (para. 82).

The Arbitration

[14] The Proposal Trustee and Ms. Athanasoulis agreed to submit the Athanasoulis Claim to arbitration. The arbitration was to proceed in two stages. The first stage proceeded and Arbitrator William Horton issued an initial award on March 22, 2022 (the "Arbitral Award") in which he held that an oral Profit Sharing Agreement had been entered into as a term of Ms. Athanasoulis' employment (the "Profit Sharing Agreement") entitling her to 20% of the profits earned on all

current and future Cresford projects, including the YSL Project.[1] This Profit Sharing Agreement was expected to represent fair compensation for her existing and expected future contributions to the profitability of the projects.

[15] Arbitrator Horton found that the Profit Sharing Agreement was not a standalone agreement. It was an existing part of an integral contract of employment that had been acted on by both sides for fifteen years as Ms. Athanasoulis worked her way up through the ranks of the Cresford Group.

[16] The Arbitrator found the key terms of the Profit Sharing Agreement as they pertain to the YSL Project to be the following:

a. Profits were to be calculated, on a good faith basis, based on the pro forma budgets prepared by Cresford using revenues less expenses for each project (updated from time to time as expenses were incurred and circumstances evolved). It was understood that the realized profits for each project would ultimately have to be accounted for with third party investors.

b. Profits could not be artificially reduced by "bad faith" transactions.

c. It was expected to take several years (possibility 5–7 years) in the normal course to complete a project like the YSL Project. This implied a mutual commitment on both sides.

d. Ms. Athanasoulis' profit-share interest was to be paid by YSL.

e. The Profit Share was to be paid to Ms. Athanasoulis when profits were earned, usually at the completion of a project.

f. There was no requirement that Ms. Athanasoulis remain employed at the time that a profit was earned.

[17] Arbitrator Horton made certain findings about Ms. Athanasoulis' employment history with the Cresford Group. She began working at the Cresford Group in 2004 as a Manager, Special Projects. She had limited prior education or experience. By 2013 she had worked her way up to one of the two senior officer positions reporting directly to the founder, president and sole director, Daniel Casey. She served as an officer of various companies in the Cresford Group and was the Vice President and Secretary of YSL.

[1] The Arbitrator found that there had been an earlier profit sharing agreement dating back to 2014 to pay Ms. Athanasoulis an agreed upon 10% of the profits from a successfully completed project that was then expanded to cover other future projects and eventually increased to 20%.

[18] Arbitrator Horton found that Ms. Athanasoulis was constructively dismissed by YSL in December 2019. She was, at the time of her termination in December 2019, the President and COO of the Cresford Group, and an employee and officer of YSL.

[19] The Proposal Trustee and Ms. Athanasoulis agree that they are bound by the findings made by the Arbitrator in the Arbitral Award.

[20] In her testimony during the Arbitration, Ms. Athanasoulis testified in response to questions about the terms of the oral Profit Sharing Agreement and specifically about how the profit would be calculated under that agreement: "it would be calculated after paying the [specific project] costs and after the equity was repaid to the LP investors."

[21] In the second stage of the Arbitration, the Proposal Trustee and Ms. Athanasoulis had intended (and agreed) that the Arbitrator would determine any damages payable arising out of his findings in the first stage (as reflected in the Arbitral Award) regarding the Profit Sharing Agreement and Ms. Athanasoulis' constructive dismissal, corresponding with her Profit Share Claim and her Wrongful Dismissal Claim.

[22] However, after the first stage Arbitral Award was released, as a consequence of opposition raised by the LPs and the Sponsor (who had not been privy to the original submission to arbitration), this court ordered in the Funding Decision (described below) that the second phase of the Arbitration would not proceed. Instead, the court directed the Proposal Trustee to determine the Athanasoulis Claim. It is the Proposal Trustee's initial determination, and Disallowance, of the Profit Share Claim that is the subject of this appeal.

The Funding Decision: Directions for the Proposal Trustee to Determine the Athanasoulis Claim

[23] The Sponsor's obligation to fund administrative fees and expenses incurred by the Proposal Trustee in connection with the resolution of the Athanasoulis Claim was determined in a November 1, 2022 endorsement: *YG Limited Partnership (Re)*, 2022 ONSC 6138, 5 C.B.R. (7th) 389 (the "Funding Decision").

[24] The Funding Decision determined that the Sponsor was not obligated to fund phase two of the arbitration in which Ms. Athanasoulis and the Proposal Trustee had agreed to participate. That conclusion was reached on the basis that phase two of the proposed arbitration improperly delegated to the Arbitrator the responsibility of determining the Athanasoulis Claim. Neither the Sponsor nor the LPs had been privy to the submission to Arbitration. For different reasons, they each objected to the Arbitration proceeding to phase two.

[25] The Funding Decision directed the Proposal Trustee to determine and value the Athanasoulis Claim in a timely and principled manner based on the findings in the Arbitral Award and building on them. Upon the request of the Proposal Trustee, the court provided advice and directions concerning the process for determining of the Athanasoulis Profit Share Claim and any appeal therefrom (the "Claim Procedure"). See *YG Limited Partnership (Re)*, 2023 ONSC 4638 (the "Claims Procedure Endorsement").

[26] The LPs were granted standing to participate in the Claim Procedure for the determination of the Profit Sharing Claim and any appeal thereof, subject to the discretion and further direction of the appeal judge. The rationale and terms for the standing granted to the LPs is described at paragraphs 55 and 56 of the Claims Procedure Endorsement:

> [55] Here, the LPs have been afforded standing to provide evidence and make submissions to the Proposal Trustee in connection with the Notice of Determination regarding the "provability" of the Profit Share Claim. They have a unique perspective to offer with respect to their argument that the Profit Share Agreement should be found to be unenforceable because it is contrary to the Limited Partnership Agreement (a ground not relied upon by the Proposal Trustee but raised and therefore forms part of the record for appeal purposes that Ms. Athanasoulis must respond to).
>
> [56] The LPs may also have a unique perspective on the preliminary question of whether the Profit Share Agreement can be enforced in the face of Ms. Athanasoulis' admissions that she agreed with the LPs that they would be paid out before her. These unique perspectives have been placed before the Proposal Trustee; Ms. Athanasoulis will be permitted to respond to and challenge them, and they will be "in play" on any appeal.

[27] The Proposal Trustee had indicated that there were threshold issues that it wished to raise that did not involve an in-depth valuation of the Profit Share Claim and that might be dispositive. The parties agreed that they should not be required to go to the expense of fully briefing the valuation issues, with experts if deemed appropriate, until those threshold issues had been considered.

[28] That is how the Proposal Trustee has proceeded, leading to its Disallowance of the Profit Share Claim. The Claims Procedure Endorsement (at paras. 44 and 63) indicated that it was not expected that there would be any material or submissions at this time regarding the future oriented (or "but-for") damages, whether calculated at the repudiation date or the date of bankruptcy. If Ms. Athanasoulis is successful on her appeal of any disallowance of the Profit Share Claim, the Claims Procedure Endorsement directs the parties to make an appointment for a case conference to seek directions about the process for the determination of the more complex valuation questions that may require expert input.

The Grounds for the Disallowance and Grounds of Appeal

[29] Following the Funding Decision and the Claims Procedure Endorsement, and the implementation of the procedures contemplated thereby, the Proposal Trustee issued its Notice of Disallowance in respect of the Athanasoulis Claim. The Proposal Trustee's stated grounds in the Notice of Disallowance for disallowing the Profit Share Claim were that:

a. It is not a debt obligation or liability of YSL but rather, in substance, an equity claim, that is not a provable claim under the BIA.

b. There was no profit to be shared, because none had been earned by YSL as of the date of either the termination of Ms. Athanasoulis' employment (December 2019) or the date of bankruptcy (April 2021). Ms. Athanasoulis cannot claim a share of a non-existent profit.

c. Further, to the extent it is based upon projected future profitability, it is a contingent claim for a lost profit share that is far too remote to be capable of being considered a provable claim. Nor can it be the subject of any meaningful and reasonable computation, and it is thus valued at zero.

d. It is subordinated to the LPs' entitlements because she was only to receive her share of the profits when Cresford did, which would occur only after the LPs had been repaid their capital and earned their entire preferred return. The LPs have not, and due to lack of available funds will not, receive all such amounts.

[30] The following errors are identified in Ms. Athanasoulis' September 8, 2023 Notice of Motion appealing from the Trustee's Disallowance of her Profit Share Claim:

a. The Trustee erred in its conclusion that the Profit Share Claim is not a claim provable in bankruptcy, having erroneously characterized it as:

   i. "in substance" an "equity claim" without regard to the statutory definition of an "equity claim" in the BIA, which provides that an equity claim can exist if, and only if, it is "in relation to" an "equity interest";

   ii. a contingent claim that is too speculative or remote.

   (Collectively, the "Provable Claim Errors")

b. The Trustee erred in valuing the Profit Share Claim at zero:

   i. based on the erroneous assumption that Ms. Athanasoulis is only entitled to 20% of the actual profits earned by YSL or that YSL is capable of earning, taking into consideration its subsequent insolvency, whereas damages for breach of contract must put the injured party in the position she would be in if the other party had met its contractual obligations, calculated at the time of the breach or repudiation of the contract without regard to subsequent events;

   ii. without even attempting to calculate either YSL's revenues or expenses to determine its profits earned on the relevant date (of repudiation), despite the existence of contemporaneous evidence about the prospect of a sale of the YSL Project or YSL's contemporaneous pro forma projections that indicated YSL's expectation of profits at that time.

   (Collectively, the "Claim Valuation Errors")

c. The Trustee erred in concluding that Ms. Athanasoulis is not entitled to be paid anything unless and until the LPs are paid in full, thereby subordinating her Profit Share Claim to the LPs equity claims.

(The "Subordination Error")

[31] The alleged errors addressed in the written and oral submissions made on behalf of Ms. Athanasoulis on the appeal generally fall within the originally identified above three categories of errors identified in the Notice of Motion on appeal. These core errors are focused on the extricable errors of law that were identified during oral submissions and subject to review on the standard of correctness. To the extent that they depend upon mixed errors of fact and law, Ms. Athanasoulis argues that they reflect unreasonable findings and palpable and overriding errors that warrant this court's intervention.

Economic/Financial Implications

[32] The available pool of funds set aside upon the sale to the Sponsor under the approved Proposal will be paid first to satisfy accepted claims of all unsecured creditors with proven claims and then the remaining balance will be paid to the LPs. The total amount of other unsecured claims is not yet known, but the Proposal Trustee does not expect them to come close to the available $30.9 million in the pool. The estimate at the time of this appeal was that the total of other unsecured claims that the Trustee has accepted add up to approximately $14.9 million. However, even if the Profit Share Claim is not allowed (or valued at or close to zero) and the LPs receive the balance of the pool of available funds, it is not expected to cover the full amount of their claims.

[33] If Ms. Athanasoulis is found to have a provable claim, the available pool of funds will be distributed *pro rata* to her (based on the value of her claim once determined) and to the other unsecured creditors whose claims have been allowed. If the Profit Share Claim is allowed and is valued at or close to what has been claimed, the other unsecured creditors will receive something (although possibly not the full amount of their allowed claims) but it is not expected that the LPs will be repaid any of their investments in this scenario.

[34] The "either or" scenario comes down to the competing claims of the LPs and Ms. Athanasoulis if her Profit Share Claim is allowed and is valued as she suggests. However, there are variables in the valuation of the Profit Share Claim that could lead to amounts being paid to both, for example under the alternative valuation scenario that Ms. Athanasoulis proposes of $7.8 million the unsecured creditors (including Ms. Athanasoulis) and the LPs may all receive something from the pool.

The Standard of Review

[35] The parties agree that is a "true appeal" of the Proposal Trustee's determination.

[36] Although a reasonableness standard of review was suggested by both Ms. Athanasoulis and the Proposal Trustee as one that may apply in Ontario, I have concluded that the appropriate standard of review is palpable and overriding error absent an extricable question of law, which is reviewable on a correctness standard. See *8640025 Canada Inc. (Re)*, 2018 BCCA 93, 8 B.C.L.R. (6th) 225 at para. 65. See also *Re Casimir Capital*, 2015 ONSC 2819, 25 C.B.R. (6th) 149, at para.

33 regarding the standard of review for extricable errors of law. Ms. Athanasoulis has the onus of demonstrating such errors.

[37] Earlier cases dealing with the standard of review of a decision of a trustee disallowing a claim under the BIA on a reasonableness standard (including cases in Ontario, such as *Re Charlestown Residential School*, 2010 ONSC 4099, 70 C.B.R. (5th) 13, at para. 17) followed the earlier case of the British Columbia Court of Appeal, in *Galaxy Sports Inc. (Re)*, 2004 BCCA 284, 29 B.C.L.R. (4th) 362, at paras. 39 and 43. It was brought to the court's attention in the course of the full briefing on this appeal that the line of reasoning emanating from *Galaxy Sports* has been superceded by the later decision of the same (BC) Court of Appeal in *864*.

[38] While the decision in *864* deals specifically with appeals from decisions of claims officers under the *Companies' Creditors Arrangement Act* ("CCAA"), applying the same standard of review to appeals brought in respect of determinations of claims made pursuant to s. 135(4) of the BIA would accord with the Supreme Court of Canada's directive that CCAA and BIA proceedings should be treated as one "integrated body of insolvency law". See *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60 at paras. 76–78.

[39] The Ontario Court of Appeal has made reference to the standard of review of determinations of BIA claims applied in *Galaxy Sports*, but also observed that "reasonableness" standard has not been explicitly adopted in Ontario. See, for example, *Credifinance Securities Limited v. DSLC Capital Corp.*, 2011 ONCA 160, 277 O.A.C. 377, at paras. 24–27). The Supreme Court's decision in *Canada v. Vavilov*, 2019 SCC 65, [2019] 4 S.C.R. 653 which held that statutory appeals from administrative decision makers are subject to the ordinary appellate review standard as opposed to a reasonableness standard, supports the evolved reasoning of the British Columbia Court of Appeal in the more recent decision in *864*.

[40] Ms. Athanasoulis contends that there are errors of law underpinning all of the grounds of appeal, which are reviewable on the standard of correctness. Ms. Athanasoulis further contends that to the extent any errors are not found to be reviewable on the correctness standard because they are dependent upon factual determinations or the application of the law to the facts, those errors fail under both the reasonableness and the palpable and overriding error standards.

[41] The following analysis applies the standard used in *864* of palpable and overriding error to any of the identified errors not found to be extricable errors of law (which are reviewed applying the standard of correctness). However, the outcome would have been the same if the errors not subject to the correctness standard had been reviewed on the reasonableness standard.

Summary of Outcome

[42] Ultimately, while the court does so cautiously and only sparingly, I have concluded that the grounds for the Disallowance are predicated upon a fundamental and extricable error in the mischaracterization of the nature of the Profit Share Claim as an equity claim contingent upon existing or future profits that have not been, and will now never be, realized. This mischaracterization of the Profit Share Claim has led to further compounding errors, in that the Disallowance also failed to properly consider and assess the type of loss that the Profit Share Claim seeks to recover, which is in damages for breach of contract that crystalized when Ms.

Athanasoulis was constructively dismissed in December 2019 (once she accepted the repudiation and sued for damages).

[43] As a result of these mischaracterizations of the nature of the Profit Share Claim and the type of loss that it entails, the Proposal Trustee did not to attempt to value it. That is the valuation exercise that the Claims Procedure Decision contemplated might be required if the threshold "provability" determinations were found to be in error, which they have been.

[44] The Profit Share Claim must now be valued, even if it might be difficult to do so and might depend upon expert inputs to quantify her damages. It is not guaranteed that the result of that process will be that its value is established at, or even near, the levels that Ms. Athanasoulis has claimed; however, that exercise cannot be avoided by the Proposal Trustee's threshold determinations that were predicated upon fundamental mischaracterizations of the nature of the Profit Share Claim and the appropriate timing and measure of the loss.

[45] The court understands why the Proposal Trustee proposed to proceed in the manner it did, by its initial determination of the Profit Share Claim based on somewhat complex threshold "provability" considerations that might have saved considerable time and expense had the Proposal Trustee's characterizations been correct in law. However, they were not. The Profit Share Claim is significant, and its ultimate determination has implications for other creditors (not just the LPs). Thus, the further time and effort to determine this claim will need to be invested by the Proposal Trustee.

[46] The court also understands why the Proposal Trustee and Ms. Athanasoulis originally agreed to arbitrate the Athanasoulis Claims given the complexity of the issues underlying the necessary determinations. However, that is water under the bridge in light of the objections raised by the Sponsor and the LPs in conjunction with the Funding Decision (and the later Process Decision). Whether this procedure of having the Proposal Trustee do its best to determine and value the Athanasoulis Claims and then have the court review those determinations on appeal proves to be less expensive remains to be seen, but, absent further agreement, this is the process that the parties are now engaged in. It is more transparent for the stakeholders.

Analysis: Allege Errors of the Proposal Trustee in the Notice of Disallowance

[47] Each of the categories of errors alleged by Ms. Athanasoulis to have been made by the Proposal Trustee will be addressed in turn, followed by a discussion of the additional points raised by the LPs that do not come directly within the parameters of the alleged errors.

A) The Provable Claim Errors

[48] Did the Proposal Trustee err in its conclusion that the Profit Share Claim is not a claim provable in bankruptcy, on the basis that:

a. it is "in substance" an "equity claim"; and/or

b. it is a contingent unliquidated claim that is too speculative or remote.

[49] A "provable claim" is defined in s. 121(1) of the BIA, which provides: "All debts and liabilities, present or future, to which the bankrupt is subject on the day on which the bankrupt becomes bankrupt ... shall be deemed to be claims provable in proceedings under this Act."

[50] Sections 121(2) and 135(1.1) or the BIA require the Proposal Trustee to determine whether any contingent claim or unliquidated claim is a provable claim, and, if it is a provable claim, to value it.

Equity Claim

[51] An equity claim is not a debt or liability and is not a provable claim under the BIA.

[52] An "equity claim" is defined in s. 2 of the BIA to be a claim "that is in respect of an equity interest." Section 2 of the BIA states that an equity interest means "a share in the corporation, or warrant or option or another right to acquire a share in the corporation...".

[53] When a word or phrase is defined with reference to what it "means" that has been held to signal that this definition is intended to be exhaustive, in accordance with well-accepted principles of statutory interpretation. See *Entertainment Software Association v. Society of Composers, Authors and Music Publishers of Canada*, 2012 SCC 34, [2012] 2 S.C.R. 231, at para. 42; *Alexander College Corp. v. R.*, 2016 FCA 269, 410 D.L.R. (4th) 299, at para 14.

[54] The definition of "equity claim" in s. 2 goes on to provide, by way of example, a non-exhaustive list of types of equity claims, including a claim for a dividend, return of capital, redemption or retraction, monetary loss resulting from the ownership, purchase or sale of an equity interest, or a claim for contribution or indemnity in respect of these other types of claims. However, all of these examples are tied to the originally essential component of the definition that it be "a claim that is in respect of an equity interest", meaning a share (or warrant or option to acquire a share).

[55] The Trustee asserts in its Notice of Disallowance that it "does not consider it relevant that Ms. Athanasoulis does not hold equity in YSL". Its position on this appeal is that the Profit Share Claim is "in substance" an equity claim. It argues that since the Profit Share Claim is derivative of the residual "profit" or equity that would be left for the owners (the Class B Unitholders) it is a claim inextricably linked to and therefore in respect of an ownership interest even if not itself an ownership interest.

[56] The Proposal Trustee relies on the Ontario Court of Appeal's decision in *Sino-Forest Corporation (Re)*, 2012 ONCA 816, 114 O.R. (3d) 304, at para. 44, which states that the term equity interest should be given an expansive meaning. In that case, the claim by the auditors for contribution and indemnity was derivative of a claim against them by corporate shareholders (equity holders). A claim for contribution and indemnity in respect of a claim for a monetary loss resulting from the ownership, purchase or sale of shares falls squarely within the examples of equity claims expressly provided for in the definition of equity claims under s. 2 of the BIA. In *Sino Forest*, the Court's expanded view was in its recognition that the auditors' claim grounded in a cause of action for breach of contract did not change its essential character as a claim for contribution and indemnity in respect of shareholder (equity) claims.

[57] In each case cited by the Proposal Trustee where a claim has been found to be an equity claim, it was in some way related to a direct or indirect equity interest within the meaning of the BIA.

a. *Sino-Forest* concerned a claim for contribution and indemnity relating to a shareholder class action.

b. *Bul River Mineral Corporation (Re)*, 2014 BCSC 1732, 16 C.B.R. (6th) 173 concerned a shareholder's claim against the debtor that had been reduced to a court judgment before the bankruptcy filing.

c. *Return on Innovation v. Gandi Innovations*, 2011 ONSC 5018, 83 C.B.R. (5th) 123 involved a claim relating to the recovery of a $50 million dollar equity investment through an arbitration.

d. *US Steel Canada Inc. (Re)*, 2016 ONSC 569, 34 C.B.R. (6th) 226 concerned a claim relating to the recovery of loans advanced by the parent company/sole shareholder of the debtor.

e. *Tudor Sales Ltd. (Re)*, 2017 BCSC 119, 44 C.B.R. (6th) 45 concerned a claim relating to advances made by a shareholder of the debtor and its sole officer and director.

f. *YG Limited Partnership and YSL Residences (Re)*, 2021 ONSC 4178, 93 C.B.R. (6th) 109 (Dunphy J.'s judgment declining to approve the proposal, referred to earlier) concerned claims brought by parties related to Cresford that had an equity interest in the YSL Project.

[58] The suggested approach of the Proposal Trustee relies upon *Re Central Capital Corp.* (1996), 27 O.R. (3d) 494 (C.A.), at para. 67 and *Re Canada Deposit Insurance Corp.* [1992] 3 S.C.R. 558). These cases were decided before there was a statutory definition of "equity claim". They seek to characterize a claim as debt or equity by looking at "the surrounding circumstances to determine whether the true nature of the relationship is that of a shareholder who has equity or whether it is that of a creditor owed a debt or liability by the company". In *Sino-Forest* (at para. 53) the court stated that the statutory definition of equity claim "is sufficiently clear to alter the pre-existing common law". Thus, the earlier approach adopted in these cases is not instructive.

[59] Even if profit sharing has equity features, there is no evidence or suggestion that the Profit Sharing Agreement granted, or in any way relates to the granting of, shares or rights to acquire shares in YSL or any of the Cresford Group of companies to Ms. Athanasoulis. There is no evidence or finding that Ms. Athanasoulis was a shareholder or held any right to become a shareholder. Nor is her claim for contribution and indemnity in respect of ownership or equity rights.

[60] The only connection to equity or ownership is her acknowledgement that the Profit Share Claim is to be calculated as a percentage of the profits that would otherwise be payable to the

Cresford Group Class B unitholders[2] comprised of Mr. Casey and his family members (the ultimate owner/developer of the YSL Project and the Cresford Group). Ms. Athanasoulis' testimony at the Arbitration was that the profit under the Profit Sharing Agreement "would be calculated after paying the [specific project] costs and after the equity was repaid to the LP Investors". She testified that profits were to be calculated as revenues less expenses, consistent with the YSL Project pro formas, which included among the other expenses or project costs the repayment of funds advanced by the LPs.

[61] A claim by terminated employees for damages in respect of incentive-based compensation, including where such compensation is calculated with reference to sales or profitability, can be, and has been, successfully pursued as a claim for damages against a bankrupt company. See *Noble v. Principal Consultants Ltd. (Trustee of)*, 2000 ABCA 133, 17 C.B.R. (4th) 274, at paras. 41–42.

[62] The fact that the parties chose to tie the quantification of the amounts payable under the Profit Sharing Agreement to the YSL's (and the Cresford Group') performance (profits, after deducting, or net of, amounts payable to the LPs) does not transform a contractual obligation or debt to Ms. Athanasoulis into an equity claim within the meaning of the BIA, even if the practical effect of this would have been that payments under the Profit Sharing Agreement in the normal course would be made after payments to the LPs.

[63] The present situation did not arise in the normal course and was not specifically contemplated when the Profit Sharing Agreement was made. As the Arbitral Award found (at para. 147), "it is not essential to the enforceability of the agreement that every option regarding the calculation of profits be affirmed or negated" at the time it is made.

[64] The definition of equity claim under the BIA is clearly and unequivocally a claim in respect of shares or rights to acquire shares in a company. There is no suggestion that the Profit Share Claim is in respect of that type of interest. At best, it is a claim to be calculated based on the residual profits remaining in YSL that would otherwise be available to be distributed or paid to the Cresford Group, the ultimate owners or equity holders. The calculation of this claim based on profits is separate and distinct from a claim in respect of shares or the right to acquire shares.

[65] The concept of an equity claim "in substance" was introduced into the Notice of Disallowance by the Proposal Trustee. There is no concept of an equity claim "in substance" under the BIA, even giving the definition of equity claim an expansive meaning.

[66] The Proposal Trustee made an extricable error in law by expanding the definition of "equity claim" under the BIA to a claim that is not in respect of an equity interest (shares or the right to

[2] These Cresford Group members are referred to by the parties sometimes as shareholders and sometimes as unitholders, but always with the understanding that they have the status of shareholders or equity holders for purposes of this decision.

acquire shares or an ownership interest in YSL) within the meaning of s. 2 of the BIA. This determination is reviewable on the standard of correctness.

[67] Having regard to the definitions of "equity claim" and "equity interest" under the BIA, I find that the Profit Share Claim is not an equity claim within the meaning of the BIA.

ii. Contingent vs. Unliquidated Damages Claim and Remoteness

[68] There are two aspects to the Proposal Trustee's determination that the Profit Share Claim is a contingent claim that is too speculative or remote. The first requires consideration of the distinction between a contingent claim and an unliquidated claim. The second requires consideration of the remoteness of damages more generally.

[69] The cases relied upon by the Proposal Trustee dealing with contingent claims that were found to be too remote and speculative to be provable claims in a bankruptcy are all claims that were contingent upon a future uncertain event that had not yet occurred and was not inevitable. As the Supreme Court held in *Newfoundland and Labrador v. AbitibiBowater Inc*., 2012 SCC 67, [2012] 3 S.C.R. 443, at para. 36, the determination of whether such contingent claims are provable claims depends on "whether the event that has not yet occurred is too remote or speculative". See also *Orphan Well Association v. Grant Thornton Ltd.*, 2019 SCC 5, [2019] 1 S.C.R. 150, at para. 138.

[70] Here, the hypothetical contingency that the Proposal Trustee relies upon was whether any profits would be earned by YSL or any other entities in the Cresford Group: unless and until there were profits (calculated after repayment of the amounts advanced by the LPs), there would be nothing to share under the Profit Sharing Agreement. That hypothetical contingency assumes the continuation of the Profit Sharing Agreement.

[71] However, the Arbitrator found that Ms. Athanasoulis' employment contract was repudiated in December 2019 and found that the Profit Sharing Agreement was part of that integral contract of employment (and her employment compensation). The Arbitrator also found that her entitlement to compensation under the Profit Share Agreement was not dependent upon her continued employment (in other words, that compensation could not be avoided by her termination). While no express finding was made that the Profit Share Agreement was breached, it follows from these findings that the Profit Sharing Agreement, an integral part of her employment contact, was also repudiated when she was constructively dismissed.

[72] Ms. Athanasoulis accepted the repudiation by YSL in early January 2020 and she sued YSL (and others) for breach of contract and damages, including damages in respect of the Profit Sharing Agreement, in January 2020.[3] In her January 21, 2020 Statement of Claim she claimed

[3] Little was said in the course of submissions about the parallel civil proceedings between Ms. Athanasoulis and the Cresford Group and between the LPs and the Cresford Group and Ms. Athanasoulis, although it was generally agreed

damages for, among other things, breach of the Profit Sharing Agreement equal to 20% of what she estimated the anticipated profits would be on all projects, the most significant of which was YSL.

[73] Until there was a breach, the Profit Sharing Agreement would remain in place and any claim for payment under that agreement might reasonably be considered to be contingent upon profits actually being earned (to be calculated based on revenues less expenses, where expenses would include any amounts payable to the LPs). It might have been open to Ms. Athanasoulis not to accept the repudiation of the Profit Sharing Agreement and let it continue even though she was no longer employed by YSL and wait to be paid in the normal course, but she clearly did the opposite, as evidenced by her civil claim for damages for breach of that agreement commenced in January 2020.[4]

[74] As a matter of law, the accepted repudiation of the Profit Sharing Agreement converted a future right to receive actual profits if and when earned into a current right to receive damages for breach of contract. Once converted to a damages claim, the "normal course" that Ms. Athanasoulis would be paid once the profits had been earned, usually at the end of a project, no longer applied. Rather, the Profit Share Claim became an unliquidated claim for damages for breach of contract that would presumptively be assessed at the time of repudiation. This is explained in more detail later in this endorsement.

[75] The Proposal Trustee made an extricable error in law by characterizing the Profit Share Claim, which is a claim for unliquidated damages for breach of contract, as a contingent claim dependent upon actual profits having been or being earned.

[76] The erroneous characterization of the Profit Share Claim as a contingent claim led the Proposal Trustee to the further erroneous determination that it, as contingent claims often are, was too remote and speculative to be a "provable" claim under the BIA.[5]

[77] I turn to the second aspect of the remoteness of the Profit Share Claim. Even if not a contingent claim dependent upon an event that has not occurred, unliquidated claims are still subject to quantification and related considerations of remoteness or speculation.

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that those proceedings would be subject to arguments of *res judicata* and estoppel if determinations are made on this appeal in respect of any overlapping issues involving the same parties.

[4] Even if the Profit Sharing Agreement continued, the Profit Share Claim might still have been a provable claim. The court in *Abitibi* held (at para. 34) that "the broad definition of "claim" in the BIA includes *contingent and future* claims that would be unenforceable at common law or in the civil law."

[5] If a claim is contingent, the claimant must demonstrate sufficient certainty that the contingency will occur during the relevant period for the damages calculation. See *Abitibi* at para. 36 and 84 and *Confederation Treasury Services Ltd., Re* (1997), 96 O.A.C. 75 (C.A.), at para. 4.

[78] The court in *Abitibi* specifically found at para. 34 (in the context of a CCAA proceeding) that a court (in that case, the CCAA court) assessing unliquidated claims in statutory insolvency proceedings "has the same power to assess their amounts as would a court hearing a case in a common law or civil law context." The Profit Share Claim should be viewed under the same lens in terms of its provability.

[79] The Court of Appeal explained in *Schnier v. Canada (Attorney General)*, 2016 ONCA 5, 128 O.R. (3d) 537, at para. 49, that "a creditor's inability to enforce a claim bears directly on the creditor's ability to prove its claim under the BIA. In order to be a provable claim within the meaning of BIA s. 121, a claim must be one recoverable by legal process". Ms. Athanasoulis says her Profit Share Claim is recoverable by legal process, and that was the very course she was following by the lawsuit that she commenced in January 2020.

[80] In *Schnier*, the court found the opposite because the claim in that case was dependent upon the outcome of ongoing tax proceedings. The Proposal Trustee seeks to analogize the Profit Share Claim (said to be dependent upon the outcome of litigation that Ms. Athanasoulis had commenced following her wrongful dismissal from YSL, and thus contingent in that sense) to the situation in *Schnier*. The analogy is not apt, for various reasons including that:

a. *Schnier* was about whether the special provisions of the BIA regarding income-tax driven bankruptcies applied to unpaid tax assessments that were being appealed. The trustee had found that the tax claim in question was not provable. That finding was not challenged (at para. 14). The court conducted a detailed review of the statutory scheme and concluded that those rules were not meant to be triggered by contingent tax claims that the trustee has determined to be unproven (see paras. 24–50 and 73).

b. The mere fact that a disputed claim is in litigation but has not yet resulted in a judgment cannot be sufficient to render a claim unprovable under the BIA. If that were the case, it would mean that anyone who claims to have been wronged by a debtor would be disqualified from making a claim in a bankruptcy proceeding if they had not been able to obtain a pre-BIA judgment.

c. Through the Arbitration, it has already been established in this case that there was an oral Profit Sharing Agreement that was part of Ms. Athanasoulis' employment agreement, that she was wrongfully (constructively) dismissed in December 2019 and that her Profit Sharing Agreement did not depend upon her continuing to be employed. Her claim for damages arising out of the breach of that agreement is a claim that is recoverable by legal process even if that legal process has not yet run its course.

[81] The Proposal Trustee considered the potential for damages associated with the Profit Share Claim insofar as that might inform the assessment of whether it is too remote or speculative to be a provable claim. Even if it is not a contingent claim, the Proposal Trustee determined that the Profit Share Claim is too remote and speculative to qualify as a provable claim because it seeks:

a. a share of the profits in a failed project that never did, and never will, generate any profits; and

b. profits to be calculated on the basis of an agreed formula that assumes that the amounts owing to the LPs will be treated as expenses and netted out of the calculated profits even though they have not been paid and are not expected to be paid in full under any scenario.

[82] The Proposal Trustee points to the earlier findings of Hainey J. (in an insolvency proceeding involving a different Cresford entity) and Dunphy J. in this proceeding that Ms. Athanasoulis' Profit Share Claim was too speculative or remote to be valued for voting purposes. However, those earlier determinations were made at a time when there was uncertainty about the existence of the Profit Sharing Agreement and about whether Ms. Athanasoulis had been wrongfully terminated from her employment. Those aspects of the claim are no longer subject to speculation. I do not consider those earlier assessments to be determinative of the question of whether the Profit Share Claim is too remote or speculative to be provable. That must be independently assessed in the context of the Disallowance.

[83] The Proposal Trustee's rationales for the Profit Share Claim being too remote or speculative (above) are, in part, a function of its original error in having failed to recognize it to be an unliquidated damages claim for breach of contract. This resulted in a compounding further extricable error of law because it led the Proposal Trustee not to consider the well-established legal principle that damages for breach of contract are presumptively to be calculated at the date of breach. See *Kinbauri Gold Corp. v. Iamgold International African Mining Gold Corp.* (2004), 192 O.A.C. 24 (C.A.), at para. 125; see also *Kipfinch Developments Ltd. v. Westwood Mall (Mississauga) Limited*, 2010 ONCA 45, 260 O.A.C. 110, at para. 15; *Baud Corp., N.V. v. Brook* (1978), [1979] 1 S.C.R. 633, at p. 648.

[84] The value of the promised performance is measured by evaluating what would have happened if the contract had been performed. The correct approach is illustrated in *Performance Industries Ltd. v. Sylvan Lake Golf & Tennis Club Ltd.*, 2002 SCC 19, [2002] 1 S.C.R. 678. In that case, one party to an option agreement breached the contract and, as a result, the other party lost the opportunity to develop the land. The Supreme Court of Canada upheld the trial judge's award of the profits that the wronged party would have made. In *Sylvan* no one actually earned profits. But that did not matter.

[85] The Proposal Trustee points out in response to these submissions on the appeal that the presumptive date for assessing damages (as of the date of the breach) is not an absolute. The Court of Appeal has departed from this presumptive date in appropriate circumstances, such as in *Maple Leaf Foods Inc. v. Ryanview Farms*, 2022 ONCA 532, at paras. 35 and 41. In that case, it was found that the assessment of damages at the date of breach would not fairly reflect a party's loss in light of intervening events rendering the loss suffered to be more uncertain, such that it would not be just to burden the breaching party with more than its fair share of the liability.

[86] On this appeal, the Proposal Trustee suggested that it considered that the COVID-19 pandemic, record inflation, rapidly increasing interest rates, the state of the real estate market and the fact that YSL became insolvent and entered into these proposal proceedings all would have

adversely affected the profitability of YSL even if Ms. Athanasoulis had never been constructively dismissed. Thus, the consideration of what would have happened if the Profit Share Agreement had not been repudiated still would lead to the conclusion that the prospect of any damages is too remote and speculative for there to be any provable loss.

[87] Ms. Athanasoulis points out that these considerations were not all set out in the stated grounds for the Disallowance of her Profit Share Claim and would, at most, be factors that might be considered in the eventual valuation of her Profit Share Claim, but not grounds for the Disallowance without any attempt to value it.

[88] As previously outlined, absent a breach and in the normal course Ms. Athanasoulis would have been paid out of YSL's earned profits, and the timing of the actual payments to the LPs and to Ms. Athanasoulis would have followed the completion of the YSL Project. However, when YSL repudiated the Profit Share Agreement and the repudiation was accepted as of January 2020, Ms. Athanasoulis' future right to receive a 20% share of earned profits was converted into a current right to receive damages for breach of contract. If the appropriate approach to the assessment of damages had been adopted, speculation and concerns about the remoteness of those future events (the actual profits that may or may not be earned, and the order in which they might have been distributed in the normal course) might not be relevant at all to the determination of the Profit Share Claim under the BIA, but even if relevant at the valuation stage, those concerns would not be determinative at this threshold "provability" stage in the face of the presumptive valuation date.

[89] There are two branches to remoteness in assessing damages, that have to do with the type of loss at issue. In *The Rosseau Group Inc. v. 2528061 Ontario Inc.*, 2023 ONCA 814 at paras. 68–70, the Court of Appeal reminds us that damages will not be considered to be too remote and may be recovered if:

a. In the "usual course of things", they arise fairly, reasonably, and naturally as a result of the breach of contract; or

b. They were within the reasonable contemplation of the parties at the time of contract.

Damages that fall outside of either branch are not recoverable because they are too remote.

[90] Importantly, the Court of Appeal explains in *The Rosseau Group* (at para. 70) that "the remoteness test deals with the 'type' of loss that is recoverable, while the measure is about how it is quantified." The type of loss at issue here is in respect of the lost opportunity to contribute to and eventually share in the profits that the parties anticipated would eventually be earned by YSL when the YSL Project was completed. The remoteness concerns identified by the Proposal Trustee are in respect of the measure of the damages, not the type of loss.

[91] There is a well-established legal principle that a party should not be denied damages just because those damages are difficult to calculate or measure. See *General Mills Canada Ltd. v. Maple Leaf Mills Ltd*., 52 C.P.R. (2d) 218 (Ont. H. Ct.), at para. 4; *Gould Outdoor Advertising Co. v. Clark*, [1994] O.J. No. 3094 (Gen. Div.), at para. 26. In such cases, damages are assessed with a broad axe and a sound imagination. See *Colonial Fastener Co. Ltd. v. Lightning Fastener Co. Ltd*., [1937] S.C.R. 36, at p. 44; *Apotex Inc. v. Eli Lilly and Company*, 2018 FCA 217, 161 C.P.R.

(4th) 411, at para. 142; *Janssen Inc. v. Teva Canada Limited*, 2016 FC 593, 141 C.P.R. (4th) 1, at para. 69. This is an issue for another day in these proceedings.

[92] The Proposal Trustee's consideration of subsequent events in its determination that the Profit Share Claim is not a provable claim under the BIA was an extricable error of law. While those subsequent events may be relevant to the measure or calculation of the ultimate loss, to say that they affect the type of loss and render it so remote as to be unprovable results in a misapplication of the law of remoteness.

[93] The bar for establishing a provable claim is low and only requires that a claimant proves that there is an "air of reality" to their claim. See *Oil Lift Technology Inc. v. Deloitte & Touche Inc.*, 2012 ABQB 357, 98 C.B.R. (5th) 77, at para. 18. There is an air of reality to the Profit Share Claim, particularly since the Arbitrator has determined that: the Profit Sharing Agreement existed, it was a key element of Ms. Athanasoulis' employment contract, Ms. Athanasoulis was constructively terminated from her employment in December 2019, but the Profit Sharing Agreement was not dependent upon her continuing to be employed. The fact that a claim involves some complexity in quantification is not a bar to it being a provable claim.

[94] Considering the Profit Share Claim in its proper light (which the Proposal Trustee did not do as a result of its previously identified errors), I find it to be a provable claim.

B) The Valuation Errors

[95] Ms. Athanasoulis alleges that it was an error for the Proposal Trustee to value her Profit Share Claim at zero based on the determination that there was no profit to share, as at the date of the breach (December 2019), the date of these insolvency proceedings (April 2021) or two years after the breach when her claimed employment termination notice period ran out (December 2021), because doing so was predicated on the absence of any actual, earned profits on any of these dates.

[96] It is alleged that the Proposal Trustee erred in valuing the Profit Share Claim at zero:

a. Based on the erroneous assumption that Ms. Athanasoulis is only entitled to 20% of the actual profits earned by YSL or that YSL is capable of earning in light of its insolvency and the Proposal, whereas damages for breach of contract must put the injured party in the position she would be in if the other party had met its contractual obligations, calculated at the time of the breach or repudiation of the contract;

b. Without even attempting to calculate either YSL's revenues or expenses to determine its profits earned on the relevant date (of repudiation);

c. Without considering contemporaneous evidence (on the repudiation date) about the prospect of a sale of the YSL Project or YSL's contemporaneous pro forma projections for continued development that indicate a reasonable expectation of profits.

[97] The Arbitrator's finding that Ms. Athanasoulis' employment contract, of which the Profit Sharing Agreement was found to have been an integral part, was breached in December 2019 crystalized her claim for damages for breach of the Profit Sharing Agreement. No assessment was

undertaken of what her loss was as of that date, to put her in the position she would have been in if the Profit Sharing Agreement had not been breached in December 2019. The Proposal Trustee did not undertake this exercise because her losses were assumed to be zero given that no profits have been or will be earned by YSL. This approach built upon the previously described errors in the mischaracterization of the Profit Share Claim. Much of the same analysis applies to here to the Valuation Errors, as was applied to the Provable Claim Errors discussed in the previous section of this endorsement.

[98] The Proposal Trustee's answer to this, when considered from a claim valuation (as opposed to provability) perspective, is to treat the Profit Share Claim as part of the Wrongful Dismissal Claim, such that Ms. Athanasoulis would only be entitled to reasonably foreseeable amounts payable under the Profit Sharing Agreement during her claimed termination notice period (specified in her statement of claim issued in January 2020 to be two years). This approach was adopted based on the case of *Matthews v. Ocean Nutrition Canada Ltd.*, 2020 SCC 26, [2020] 3 S.C.R. 64, at para. 49 involving a terminated employee whose profit sharing agreement was found to have been limited to actual profits earned during the notice period. Since the YSL Project was not completed and no profits were earned or paid out by it during that notice period, nor would the parties have expected them to be given the usual five to seven year completion period for a project such as the YSL Project, the Proposal Trustee maintains that there could be no damages or losses suffered as a result of the repudiation of the Profit Share Agreement.

[99] However, there is an important distinguishing feature of this case compared to *Matthews*. In *Matthews*, the profit sharing was expressly tied to his continued employment (see para. 63). In *Matthews*, there was a long-term incentive plan that required the claimant to be employed full time at time of triggering event (sale), but he had been constructively terminated 13 months before (para. 18).

[100] The Proposal Trustee's position is that the Arbitrator's finding that entitlements under the Profit Sharing Agreement are not dependent upon Ms. Athanasoulis' continued employment with YSL (or equivalent notice period) should not give her an indefinite claim to 20% of any and all profits earned, beyond the notice period. However, this position is not tied to any finding of fact or legal principle.

[101] Conversely, even if Ms. Athanasoulis had been given two-years working notice and her employment had then terminated, it is not a given that her entitlements under the Profit Sharing Agreement would have automatically ended. The preservation of entitlement under the Profit Sharing Agreement is consistent with the Arbitrator's finding that the Profit Sharing Agreement was intended to recognize her past and continuing contributions and was not just an incentive for future contributions. The Arbitrator expressly found that YSL could not eliminate Ms. Athanasoulis' claim by terminating her and could not reduce her share to zero after her prior years of contributions in the form of advance sales, etc. simply by terminating her employment on notice (at para. 160). It follows from these findings of the Arbitrator that, unlike in *Matthews*, the termination notice period is not determinative of the Profit Share Claim.

[102] Further, the fact that these voluntary insolvency proceedings occurred is not evidence that they were inevitable. Dunphy J. specifically found that the effort to sell or refinance the YSL Project that culminated in the earlier proposal was "indelibly tainted" by Mr. Casey's self-interest

(see *YG Limited Partnership and YSL Residences (Re)*, 2021 ONSC 4178, 93 C.B.R. (6th) 109, at para. 76).

[103] The Proposal Trustee's determination that, with no profits having been earned during the two-year notice period or thereafter, the damages for the repudiation of the Profit Share Claim are zero, was an extricable error of law. In order to justify this conclusion, the Trustee departed from the law of damages for breach of contract.

[104] The Trustee also relies upon equity, by arguing that it is not "just and reasonable" to calculate profits on the repudiation date because "no profit had been earned" and the LPs had not been repaid. This is not grounded in any authority, but if relevant at all it would arise in the context of the calculation of the loss and valuation of the claim, not at this threshold stage before any attempt has been made to value the Profit Share Claim. That too was an extricable error of law.

[105] Even if the Valuation Errors involve a misapplication of the law to the facts, which might be viewed as mixed errors rather than extricable errors of law, those errors were palpable and overriding in this case.

[106] In this vein, in addition to the extricable legal errors, Ms. Athanasoulis argues that there is evidence to contradict the Proposal Trustee's underlying factual assumptions. The failure to consider that evidence is reviewable on a standard of palpable and overriding error (or reasonableness). However, given the findings to this point, there is no need to go into an in-depth analysis of what are errors of fact and mixed fact and law.

[107] The primary point that is made by Ms. Athanasoulis at this stage is that the Proposal Trustee has not done any in-depth analysis to attempt to assess the damages as at the date of repudiation. It is sufficient for purposes of this appeal to have identified that there will be points of contention to be considered when the Profit Share Claim is valued, for example:

a. According to Ms. Athanasoulis, when she was terminated the YSL Project had progressed significantly. The YSL Project was purchased for $157 million but was appraised in July 2019 for $375 million. YSL had invested approximately $241 million in the project. YSL's October 2019 pro forma, which had been vetted by experienced third party professionals, forecast a profit of close to $200 million. Even the Proposal Trustee's third report implies YSL was profitable. Further, Ms. Athanasoulis points to contemporaneous evidence about the prospect of a sale of the YSL Project. According to her testimony, there was a buyer for the YSL Project that would have yielded profits, who Casey inexplicably rejected around the time of her wrongful dismissal. She claims that, at that time, YSL was fine financially and that it was other Cresford projects that were in trouble.

b. The Proposal Trustee points to a letter that Ms. Athanasoulis wrote in December 2019 about ongoing financial issues. She has since admitted that there were statements made in that letter that were untrue and she has apologized for sending it. However, the Proposal Trustee says it is evidence from Ms. Athanasoulis herself about the dire financial situation that YSL and the Cresford Group were in at that time.

c. The Proposal Trustee urges the court to look at other contemporaneous evidence that had been in the Arbitration record to counter the evidence Ms. Athanasoulis put forward and the anticipated profitability of the YSL Project at the time of the Profit Sharing Agreement. The Proposal Trustee points to high-level financial information that it says demonstrates that YSL was underwater in December 2019 (and that is consistent with its eventual insolvency). Ms. Athanasoulis objected to the Proposal Trustee's last-minute reliance upon this evidence, that was not a stated basis for the Disallowance of her Profit Share Claim and that she claims is selective and unreliable. For example, certain of the reports referenced had been previously ruled to be unreliable by Dunphy J. and another expresses opinions about the value of the YSL Project as at May 2021 which is after the December 2019 repudiation date.

[108] At this stage in these proceedings where the damages have been bifurcated in accordance with the court's earlier Claims Procedure Endorsement, it is sufficient for Ms. Athanasoulis to have demonstrated that damages could be calculated (based on either actual profits earned as of the date of contract repudiation or "but-for", future oriented profits calculated, possibly with the assistance of expert evidence, as at that date), since it was not intended that there be a valuation of the Profit Share Claim at this stage. The very existence of this evidentiary controversy is itself reason to require a more fulsome damages assessment, as the Claims Procedure Endorsement provides for.

[109] Sufficient grounds have been established to satisfy me that the damages valuation phase should proceed.

C) Subordination Error

[110] Ms. Athanasoulis' testimony at the Arbitration that the profit under the Profit Sharing Agreement "would be calculated after paying the [specific project] costs and after the equity was repaid to the LP Investors" led the Proposal Trustee to conclude that the Profit Share Claim was an equity claim that was subordinated to the equity claims of the LPs. For the reasons previously indicated, the Profit Share Claim does not come within the BIA definition of "equity claim". Not all entitlements calculated on the basis of profits are equity claims. The formula used to calculate the amount of an entitlement is also not determinative of the priority of a claim in a bankruptcy. Here, the calculation of the entitlement under the Profit Sharing Agreement was to be based on a percentage of funds distributable to the owners (equity holders) whose claims were subordinated to the LPs. That does not mean that the Profit Share Claim was subordinated.

[111] The LPs assert that Ms. Athanasoulis (and others) told them that they would be paid ahead of the Cresford Group , who were themselves Class B unitholders. However, Ms. Athanasoulis was not a shareholder. Nor did she enter into any agreement directly with the LPs to subordinate her claims or interests to theirs.

[112] The Proposal Trustee made an extricable error of law when it found the Profit Share Claim to be subordinated to the equity claims of the LPs and that Ms. Athanasoulis is not entitled to be paid anything unless and until the LPs are paid in full, in the absence of any agreement between Ms. Athanasoulis and the LPs to subordinate her claims to theirs.

[113] This error originated from the same incorrect determination that led to earlier errors, namely that all claims calculated based on profits are equity claims. It was further compounded by the incorrect conclusion that by agreeing with YSL and the Cresford Group that the profits to which the 20% profit sharing would be applied would be calculated net of amounts to be paid to the LPs, Ms. Athanasoulis had agreed to subordinate her entitlements under the Profit Sharing Agreement to the claims of the LPs claims for insolvency and BIA purposes.

[114] It is common ground that each LP holds an "equity claim" within the meaning of the BIA. The BIA provides that every creditor who does not hold an "equity claim" is entitled to be paid before any creditor that has an equity claim. These statutory priorities were ignored by the Proposal Trustee because of the error in mis-characterizing the Profit Share Claim (entitlements under the Profit Sharing Agreement) as an equity claim.

D) Other Identified Errors

[115] Other errors were identified by Ms. Athanasoulis. However, the appeal can be decided based on the identified extricable errors of law (above).

The Unique Perspective of the LPs on the Validity/Enforceability of the Profit Sharing Agreement

[116] The LPs argue that there are specific provisions in two contracts that they entered into that render the Profit Sharing Agreement unenforceable, namely that the Profit Sharing Agreement:

a. breaches s. 3.6(b) of the Amended and Restated Limited Partnership Agreement dated August 4, 2017 (the "LPA") that prohibits non-arm's length transactions with a "Related Party" (meaning the Affiliates of the General Partner in the sense of controlling or controlled by or under common control with, YSL and their officers and directors, employees and shareholders) other than on market terms; and

b. breaches s. 3.2 of the Sales Management Agreement dated February 16, 2016 (the "Management Agreement") that prohibits any compensation being paid to the corporation or its Affiliates (defined under the LPA to be the Affiliates of the General Partner in the sense of controlling or controlled by, or under common control with, YSL) that is not specifically provided for in that agreement (and there is no reference to the Profit Sharing Agreement).

[117] These are the matters that the LPs were granted standing to address in the Claims Procedure Endorsement. They provided their submissions to the Proposal Trustee on these (and other) issues. These grounds were not adopted or relied upon by the Proposal Trustee as a reason for its Disallowance of the Profit Share Claim. There is no reviewable error by the Proposal Trustee in relation to the LPs' submissions.

[118] In terms of the merits of the LPs arguments if they are to be addressed *de novo*, there is no evidentiary foundation for the suggestion that Ms. Athanasoulis is an Affiliate of YSL that would render the Profit Sharing Agreement to be offside of s. 3.2 of the Management Agreement. Ms. Athanasoulis maintains that she was neither a shareholder nor an affiliate of the Cresford Group and was never represented to be such in any written or oral presentation made to the LPs, nor is it

apparent on what legal basis a declaration of unenforceability would be the appropriate remedy for such a breach, in any event. The alleged breaches of Management Agreement appear to have been an after-thought (not mentioned in the LPs' factum on this appeal). There is no basis upon which to find that the Profit Sharing Agreement was a breach of the Management Agreement.

[119] It has also not been established that the Profit Sharing Agreement constitutes a prohibited Related Party agreement under s. 3.6(b) of the LPA. The Profit Sharing Agreement was entered into before the LPA, although the percentage of shared profits increased after the LPA was signed). The LPs claim not to have been told about either the original or amended Profit Sharing Agreement. The Profit Sharing Agreement was found by the Arbitrator to be binding and enforceable as between the parties to it, YSL and Ms. Athanasoulis.

[120] The LPs have presented no evidence to establish that the Profit Sharing Agreement was not on market terms. The Arbitrator found that there was "nothing disproportionate, in the realm of executive compensation," about the Profit Sharing Agreement, in light of Ms. Athanasoulis' value and contributions to the YSL Project (and the Cresford Group's other projects). The evidence before the Arbitrator was that a third party marketing company would have charged 1.5% of sales and expected to have been paid earlier. The LPs were not party to the Profit Sharing Agreement and complain that they were not party to the Arbitration and should not be bound by findings made by the Arbitrator. If the LPs had wanted the court to revisit that determination for purposes of this appeal that would have required some further direct evidence.

[121] There is no basis upon which the court could or should conclude based on the record on this appeal that the Profit Sharing Agreement is unenforceable as a result of the alleged breaches of the LPA and the Sales Management Agreement. These arguments raised by the LPs do not affect the court's determinations earlier in this endorsement that the Profit Sharing Claim is a provable claim and should be valued.

Additional Issues Raised by the LPs

[122] The LPs claim that the Profit Sharing Agreement was a "secret" undisclosed agreement. They assert that she made misrepresentations by omission (by not disclosing the existence and terms of the Profit Sharing Agreement). They claim that statements made by Ms. Athanasoulis regarding the priority of payments to the LPs over any payments out to Cresford Group members were misleading if they were not intended to include payments to Ms. Athanasoulis, who they (rightly or wrongly) understood to be a member of the Cresford Group. They say they were induced to advance funds as a result of these representations. They assert that even if she owed no duty to them directly, she knowingly assisted in the alleged misrepresentations made to them by others.

[123] The LPs rely on cases that extend fiduciary disclosure duties and duties not to self-deal to general partners and their directors and officers such as *Naramalta Development Corp. v. Therapy General Partner Ltd.* 2012 BCSC 191, at paras. 63–64 and 71–72; *OSC v. Go-to Developments Holdings Inc.* (October 31, 2023), Toronto, CV-21-00673521(S.C.), *per* Steele J.; *Advanced Realty Funding Corp. v. Bannink* (1979), 27 O.R. (2d) 193 (C.A.); and *Extreme Venture Partners Fund 1 LP v. Varma*, 2021 ONCA 853, 24 B.L.R. (6th) 38, at paras. 74 and 86–89, leave to appeal refused.

[124] Ms. Athanasoulis denies that the existence of the Profit Sharing Agreement renders her statements about the Cresford Group to be untrue or misleading. Further, she denies any duty to make disclosure and argues that this situation (that she and the LPs would be competing for the same pool of funds) was not reasonably foreseeable. In any event, these alleged misrepresentations are not properly raised in the context of the Proposal Trustee's determination of the validity and quantum of the Profit Share Claim.

[125] The 250 LPs have commenced a separate lawsuit against Ms. Athanasoulis, and others, asserting claims against them personally in respect of the alleged misrepresentations and breaches of fiduciary and other duties arising out of the failure to disclose her Profit Sharing Agreement to them. All of the LPs have raised these issues with the Proposal Trustee as further grounds for disallowing her Profit Share Claim, but their allegations were not among the grounds relied upon in the Disallowance.

[126] While the 250 LPs confirmed that there would be a *res judicata* or estoppel argument against re-litigating these claims in another context if the court decides these issues in this appeal, there remains the more fundamental concern that these issues fall outside of the scope of the standing that was granted to the LPs in the context of the Profit Share Claim, which was to raise issues that they were uniquely situated to address relating to the determination of that claim. Those issues include matters relating to the validity and enforceability of the Profit Share Agreement having regard to the provisions and restrictions under the agreements that the LPs were party to, such as the LPA and the Management Agreement. Those grounds have been addressed in the preceding section of this endorsement.

[127] The other claims of the LPs, which include an estoppel argument arising out of the alleged misrepresentations and breaches of duties by Ms. Athanasoulis, or her alleged knowing assistance of breaches by others, are not properly adjudicated in the context of the determination and valuation of the Profit Share Claim. Further, Ms. Athanasoulis points out that the LPs have not put forward evidence of their reliance on the representations to enable any ruling to be made in their favour.

[128] The mere allegation of an "omission" to make disclosure is not sufficient to determine their claims in the circumstances of this case. Not only is there a dispute about Ms. Athanasoulis' status as a member of the "Cresford Group", but the LPAs expressly preclude reliance upon extra-contractual representations. The facts surrounding these allegations against Ms. Athanasoulis are not settled, which could explain why this was not one of the reasons relied upon by the Proposal Trustee in the disallowance of the Profit Share Claim. This case is distinguishable from *OSC v. Go-To Developments Holdings Inc.*, at paras. 10-16; 25-26 that the LPs seek to rely upon, involving alleged misrepresentations made by a director and shareholder.

[129] This is not the forum for determining those other claims by the LPs. The determination of those claims involves contentious factual disputes and credibility assessments. The issues raised by the LPs cannot be properly adjudicated in a summary fashion on a paper record in the context of this appeal. Ultimately, these are matters that are more properly addressed between Ms. Athanasoulis and the LPs outside of the context of these insolvency proceedings. It would not be reasonable or appropriate for the court to attempt to determine the LPs' claims for breach of fiduciary duty and misrepresentation, etc. on this appeal.

[130] These claims by the LPs (for alleged misrepresentations, breaches of fiduciary and other duties, estoppel and knowing assistance) are extraneous to the Trustee's Disallowance and to any future valuation of the Profit Share Claim. It may be that the valuation of the Profit Share Claim for purposes of the BIA process could have some bearing upon those other claims, but that is an issue for another day and another court.[6]

[131] However, findings have been made regarding the enforceability and validity of the Profit Sharing Agreement and the subordination issue for purposes of the determination of priority of claims in these BIA proceedings and will be binding upon the LPs in any future proceedings.

Valuation and Damages

[132] At paragraph 63 of the Claims Procedure Endorsement, the court clarified that:

> To be clear, it is not expected that there will be any material or submissions at this time regarding the Future Oriented Damages (whether calculated at the repudiation date or the Proposal date). If Ms. Athanasoulis is successful on appeal of any disallowance of the Profit Share Claim, the parties shall make an appointment for a case conference before me (if my schedule permits within the time frame requested) to seek directions about the process for the determination of the more complex valuation question that will likely require expert input.

[133] Since Ms. Athanasoulis has succeeded on her appeal of the Disallowance, the Profit Share Claim needs to be valued. The Profit Share Claim is a claim for unliquidated damages for the breach of the Profit Sharing Agreement in December 2019 that was accepted in January 2020 (by correspondence and eventually the issuance of a statement of claim seeking to recover damages for this breach, among other damages). The April 30, 2021 bankruptcy date may also be relevant to this determination. The relevance and impact of intervening events remains an open question. Expert inputs may be appropriate on this and other points. That will be for Ms. Athanasoulis and the Proposal Trustee to decide.

[134] Ms. Athanasoulis has provided sufficient foundational evidence to satisfy the court that, while it may be difficult, efforts should be made to value the Profit Share Claim. As previously directed, the parties shall arrange to attend before me on a case conference at which proposals will be made and directions will be provided regarding the process for the valuation of the Profit Share Claim.

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[6] The same may be true for the ongoing litigation that Ms. Athanasoulis has commenced against Mr. Casey regarding the alleged breaches of his fiduciary and other duties to attain, or at least maintain, the profitability of the YSL Project (and other Cresford Group projects) and to keep the YSL Project out of insolvency.

[135] At that case conference, directions may also be provided regarding any continued participation of the LPs, whose standing was granted for purposes of this stage because of unique perspectives that they might provide on the question of the validity or enforceability of the Profit Sharing Agreement (discussed later in this endorsement). It is not apparent that they have any unique perspective or entitlement to participate in the valuation of the Profit Share Claim, any more so than the other unsecured creditors who may also be impacted by that determination and who have not been granted standing. No standing arises merely from an economic interest in the outcome of the Proposal Trustee's determination (or valuation) of a proof of claim in these proceedings. See *YG Limited Partnership and YSL Residences Inc. (Re)*, 2023 ONCA 50, at para.19

Costs

[136] The parties have now uploaded their Bills of Costs or Costs Outlines referable to this appeal.

[137] All costs are presented on a partial indemnity basis. The amounts certified are as follows:

a. By the Proposal Trustee, $100,000 in fees (for approximately 157 lawyer hours, excluding the time of students and clerks) plus disbursements and applicable taxes, for a total of $114,745.85;

b. By the 250 LPs, approximately $62,927.21 in fees (for approximately 145 lawyer hours) inclusive of applicable taxes;

c. By the other LPs, $77,377.69 in fees (for approximately 190 lawyer hours), inclusive of applicable taxes;

d. By Ms. Athanasoulis, $193,612.50 in fees (for in excess of 400 lawyer hours) plus applicable disbursements and taxes, for a total of $231,057.19. By my estimation, approximately $24,000 of these fees claimed were for the earlier Jurisdiction Motion heard on October 17, 2022 and $13,000 of these fees claimed were for the Claims Procedure motion heard on January 16, 2023.

[138] At the hearing of the appeal, in the event that the court allows the appeal and sets aside the Disallowance the Proposal Trustee and LPs asked that any award of costs be deferred until after damages have been determined and the Profit Share Claim has been valued, on the premise that there still may be no, or a lower, amount attributed than has been claimed. It was also submitted that Ms. Athanasoulis should not be permitted to claim costs incurred for the earlier Jurisdiction and Claims Procedure motions.

[139] In that event, Ms. Athanasoulis asked for her costs to be fixed and ordered payable forthwith. She argues that this is consistent with the principles under r. 57 and that the only relevant prior costs ruling was that she was denied the right to claim costs thrown away relating to the work that had been done in respect of phase two of the Arbitration which the court ordered be terminated in the Funding Decision and replaced with this Claims Procedure.

[140] The total partial indemnity costs of Ms. Athanasoulis of just over $231,000 is just slightly less than the combined total costs of the Proposal Trustee and LPs of just over $240,000. The total lawyer hours are less for Ms. Athanasoulis compared to the aggregate lawyer hours on the opposing side. On that basis, there is no need for the court to get into a line-by-line review of the amounts claimed, hours spent or hourly rates. All parties were represented by excellent counsel who charged accordingly for their work. Ms. Athanasoulis had to address the arguments raised from all perspectives.

[141] Ms. Athanasoulis is a private individual who is funding this dispute regarding her Profit Share Claim herself. She was facing, as a result of the Disallowance, the complete loss of her $18 million Profit Share Claim. As a result of her success on this appeal she can now pursue that claim through the next valuation stage.

[142] The issues are important to Ms. Athanasoulis and to the other creditors of YSL from a financial perspective. She, also has reputational issues at stake. The private arbitration process that she and the Proposal Trustee had agreed to for the determination of the Athanasoulis Claims was derailed part way through as a result of objections raised by the Sponsor and the LPs, and through no fault of her own. While the bifurcation of the damages/valuation means there will be another stage, this stage dealing with the provability of the Profit Share Claim was decided in favour of Ms. Athanasoulis and she is entitled, as the successful party, to her partial indemnity costs as claimed.

[143] Costs associated with the damages/valuation stage will be separately determined and, if Ms. Athanasoulis is not successful at that stage, there may be cost consequences for her at that time. However, I do not agree that she should be deprived of any award of costs associated with this appeal and with the motion that determined the Claims Procedure that got the parties to this point. I do agree that the costs of the earlier Jurisdiction Motion (that resulted in the Funding Decision dealing with the Arbitration) should not be included and I have deducted those fees from the total partial indemnity fees that I am awarding to Ms. Athanasoulis, fixed in the amount of $169,715.93 plus applicable taxes and total disbursements of $6,812.08 (inclusive of HST).

[144] These costs have been determined in the exercise of my discretion under s. 131 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43 and with regard to the applicable factors under r. 57 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, including those discussed above and the principles of proportionality and indemnity.

[145] I did not hear any submissions about whether these costs are sought only from the Proposal Trustee or if any party takes the position that some should be paid by the LPs. Unless there are submissions that any party wishes to make on that point (in which case, a case conference may be arranged to speak to this issue), I order the partial indemnity costs fixed at the amount of $169,715.93 plus applicable taxes and total disbursements of $6,812.08 (inclusive of HST) to be paid to Ms. Athanasoulis by the Proposal Trustee forthwith. If there are submissions to be made about the source of funds to be used by the Proposal Trustee to pay those costs, I may be spoken to about that as well.

Order and Final Disposition

[146] The following orders, declarations and directions are made or granted based on the relief requested in Ms. Athanasoulis' Notice of Motion on appeal:

a. The Proposal Trustee's Disallowance of the Profit Share Claim dated August 10, 2023 is set aside;

b. The Profit Share Claim is declared not to be an equity claim, and to be a provable claim within the meaning of s. 121(1) of the BIA;

c. The Profit Share Claim is entitled to priority over the claims asserted by the LPs;

d. Maria Athanasoulis' Profit Share Claim against YSL is declared to be a valid claim and ought to be allowed in an amount to be determined by further order of this court or by such other process as the court may direct;

e. Maria Athanasoulis shall be paid forthwith her partial indemnity costs of this motion/appeal from the Disallowance fixed in the amount of $169,715.93 plus applicable taxes and total disbursements of $6,812.08 (inclusive of HST), subject to further directions from the court to be provided at a case conference, if requested, regarding by whom, in what proportions and from what source these costs are to be paid;

f. The parties shall arrange a case conference before me for the purpose of making submissions and receiving directions regarding the process for the determination of the amount (valuation) of the Profit Share Claim. The Sponsor (or its counsel) shall also attend this case conference as it may have implications for the ongoing funding of administrative and other expenses of the Proposal Trustee associated with the determination of the Profit Share Claim;

g. The ongoing civil proceedings among and between Ms. Athanasoulis and the LPs and members of the Cresford Group may continue, subject only to the determinations herein regarding the validity, provability and priority of the Profit Share Claim.

[147] This endorsement and the orders, declarations and directions contained in it shall have the immediate effect of a court order without the necessity of a formal order being taken out, although any party may take out a formal order if so advised by following the procedure under r. 59.

Kimmel J.

Date: March 19, 2024

FORM 77

Notice of Disallowance of Claim, Right to Priority or Security *or* Notice of Valuation of Claim
(Subsection 135(3) of the *Bankruptcy and Insolvency Act*)

TAKE NOTICE THAT:

As Licensed Insolvency Trustee acting IN THE MATTER OF THE NOTICES OF INTENTION TO MAKE A PROPOSAL OF YG LIMITED PARTNERSHIP AND YSL RESIDENCES INC. (collectively, "**YSL**"), KSV Restructuring Inc. (the "**Trustee**") has disallowed the unsecured claim of Maria Athanasoulis, in part, pursuant to subsection 135(2) of the *Bankruptcy and Insolvency Act* (the "**BIA**"), for the reasons set out below.

Your Proof of Claim, as filed with the Trustee, claims:

1. $1 million in respect of damages for wrongful dismissal (the "**Wrongful Dismissal Claim**"); and

2. $18 million in respect of damages for breach of an oral agreement that YSL would pay Ms. Athanasoulis 20% of the profits earned on the YSL project (the "**Profit Share Claim**").

In determining your claims, the Trustee has reviewed and is relying on the following, which represents the support and record for your claim:

1. the Proof of Clam, as filed;

2. all material on the record in these proposal proceedings to date, together with all material on the record in the proceedings by the limited partners of YG Limited Partnership (the "**LPs**") against YSL Residences Inc. et al. in Court file numbers CV-21-00661386-00CL and CV-21-00661530-00CL;

3. the partial arbitration award of Mr. William G. Horton (the "**Arbitrator**") dated March 28, 2022 (the "**Partial Award**");

4. all material filed and produced, and all testimony given, in the "Phase 1" arbitration (the "**Arbitration**") before the Arbitrator; and

5. all submissions and evidence received by the Trustee from counsel to the LPs, counsel to Concord Properties Developments Corp., the sponsor of YSL's proposal (the "**Proposal Sponsor**"), counsel to YSL, and counsel to Ms. Athanasoulis in respect of any information requests of the Trustee and all related examination and cross-examination transcripts.

Wrongful Dismissal Claim

Pursuant to a Notice of Disallowance of Claim dated March 30, 2023, the Trustee determined to allow the Wrongful Dismissal Claim in the amount of $880,000 as an unsecured claim.

Profit Share Claim

The Trustee has determined to disallow the Profit Share Claim in full for several, independent reasons that follow.

Equity Not Debt

Pursuant to the Partial Award, the Arbitrator found that Ms. Athanasoulis had a profit share agreement (the "**PSA**") that entitled her to 20% of the profits earned on any current and future projects of the Cresford group of companies ("**Cresford**"), including YSL. The Arbitrator also found that: (a) profits were to be calculated, on a good faith basis, based on the *pro forma* budgets prepared by Cresford in respect of each project; (b) Ms. Athanasoulis' share of the profits was to be paid by the relevant owner that earned the profit; (c) profits were to be shared when earned, usually at the completion of a project; and (d) there was no requirement that Ms. Athanasoulis remain employed at the time that a profit was earned.[1] The Trustee accepts the findings of the Arbitrator.

Section 121 of the BIA provides as follows:

> All debts and liabilities, present or future, to which the bankrupt is subject on the day on which the bankrupt becomes bankrupt or to which the bankrupt may become subject before the bankrupt's discharge by reason of any obligation incurred before the day on which the bankrupt becomes bankrupt shall be deemed to be claims provable in proceedings under this Act.

An entitlement to a share of the profits earned by YSL (*i.e.*, the relevant owner) is not a "provable claim" pursuant to the BIA. It is not a debt obligation of YSL but rather, in substance, an equity entitlement. Profits are, by definition, the difference between the amount earned and the amount incurred in buying, operating, or producing something. It is the amount remaining for distribution to the owners of the enterprise after the payment of all expenses and other costs. This is also reflected on YSL's *pro forma* budgets. As such, the Trustee has determined that the PSA, which is an agreement to share in the profits earned by the owner of the YSL project is, in substance, not a debt or liability of YSL.

Ms. Athanasoulis has taken the position that her claim under the PSA crystallized in December 2019 when her employment was terminated, and that YSL was subject to this debt when these proposal proceedings were commenced.

The Trustee disagrees. In the particular circumstances of this case, it is not just and reasonable to calculate profits on the date of Ms. Athanasoulis' termination in circumstances where the Project was in its pre-construction phase, no actual profit had been earned, and (as described in more detail below) the LPs had not received the full return of capital and profit to which they were entitled in preference to Cresford pursuant to the terms of the Limited Partnership Agreement for YG Limited Partnership, which sets out the scheme of distribution to stakeholders.

[1] Partial Award of Arbitrator Horton dated March 28, 2022, at para. 166.

Finally, as explained further below, and consistent with the "waterfall" set out in the Limited Partnership Agreement for YG Limited Partnership, Ms. Athanasoulis always understood that the LPs were entitled to receive the return of their capital and preferred equity return before she could earn a profit share, and that the LPs' investment was in the nature of equity. As debt always ranks before equity, the fact that Ms. Athanasoulis' claim ranked behind the equity claim of the LPs means that by definition her claim must also be in the nature of equity. Ms. Athanasoulis argues that she is not a partner of YSL and therefore cannot participate as a unitholder. This is not relevant to the analysis, as the PSA entitled her to be compensated based on any profits earned after the LPs were paid in full. To date, the LPs have not received any return of capital.

No Profits Earned by YSL

The Arbitrator held that Ms. Athanasoulis' share of profits resulting from the YSL project was "to be paid by the relevant Owner that earned the profit",[2] meaning a profit must have been earned for her to have a monetary claim.

As of the date that these proposal proceedings were initiated, YSL had not completed the YSL project. Indeed, the initial excavation phase of the YSL project was not yet complete and the construction schedule as of October 2019 contemplated that the YSL project would not be completed until 2025, at the earliest. Accordingly, as of the date of either the termination of Ms. Athanasoulis' employment or the date of the proceedings, the YSL project was in its early stages of development. No profit had been earned by the YSL project and, therefore, there was no profit earned by Cresford. Ms. Athanasoulis is only entitled to be compensated based on a share of Cresford's profit.

Without prejudice to the Trustee's determination that any claim based on the PSA is not a provable claim, to the extent that Ms. Athanasoulis relies upon the projected profitability of the YSL project as a contingent claim for a lost profit share, the Trustee values such a contingent and unliquidated claim at zero. The assumptions required to determine such a possible amount over such a long time horizon are far too speculative and the alleged damages far too remote to be capable of being considered a provable claim or the subject of any meaningful and reasonable computation. Indeed, the market conditions for real estate have changed materially since the outset of these proceedings, including as a result of a dramatic increase in interest rates, which affects, at least, financing costs, and the sale of condominiums.

In addition to the foregoing, the Trustee notes that an affiliate of the Proposal Sponsor became the owner of the YSL project upon implementation of the Proposal. Accordingly, even if the YSL project is successfully brought to completion, despite all of the intervening events challenging such an outcome, any profits earned on the YSL project will not accrue to the relevant owner, *i.e.*, YSL. Ms. Athanasoulis is not entitled to claim a profit-share under the PSA for amounts earned by the Proposal Sponsor's affiliate, which is not a party to the PSA.

Moreover, the LPs made a total capital contribution of $14.8 million to YG Limited Partnership in exchange for Class A Preferred Units. Pursuant to the Limited Partnership agreement for YG Limited Partnership, the LPs are entitled to a preferred return equal to 100% of their capital contribution from the proceeds of the YSL project. Once the LPs are repaid their capital contribution plus their preferred return, any remaining proceeds from the YSL project would be paid to the Class B unit holder, being Cresford (Yonge) Limited Partnership, a Cresford entity. Depending on the resolution of the remaining disputed claims in these proposal proceedings, the

[2] Partial Award of Arbitrator Horton dated March 28, 2022, at para. 166(c).

most that would be available for distribution to the LPs is approximately $16 million,[3] which is less than the amount of their capital contribution plus their preferred return. Accordingly, the disposition of the YSL project in these proceedings also will not result in any profit earned by Cresford.

Ms. Athanasoulis provided evidence in the Arbitration that "profit" pursuant to her PSA is determined by taking revenue, minus costs, minus the amount returned to the LPs, "and the balance is your net profit".[4] Again, on this basis, there is no profit earned by YSL.

To the extent that Ms. Athanasoulis claims that she is entitled to a share of unrealized hypothetical gains on the YSL project as of the date of her dismissal, the Trustee notes that this is contrary to an essential term of the PSA established by the Arbitrator. The Arbitrator found that profits were to be calculated based on certain *pro forma* financial statements prepared from time to time in connection with the YSL project, but only payable when earned at the completion of the YSL project. There is no dispute that the *pro formas* would be revised continuously throughout the life of the YSL project in order to take into account actual events that transpired. Ms. Athanasoulis cannot claim a share in profits based on an unrealized vision of the YSL project that, as we now know, will never materialize, because Cresford no longer owns the project and no profits had been earned at the date she was terminated.

Finally, the Trustee is aware that Ms. Athanasoulis advances, as an alternative theory of her claim, that Cresford actually earned profits as a result of the transactions with the Proposal Sponsor related to these proposal proceedings. Many of the factual bases of this claim are disputed by the LPs, the Proposal Sponsor, and YSL. The Trustee does not believe that it is necessary to resolve those factual disputes in order to determine Ms. Athanasoulis' claim because regardless of the disputed factual allegations made by Ms. Athanasoulis, the YSL project did not generate a profit for Cresford for the reasons set out elsewhere in this Notice. It is uncontested, and indeed admitted, that Ms. Athanasoulis was only to receive her share of the profits when Cresford did—after the LPs had been repaid their capital and earned their entire preferred return. It is also uncontested that the LPs have not, and due to lack of available funds will not, receive all such amounts. As a result, by definition Cresford cannot have earned a profit, and Ms. Athanasoulis cannot claim a share of a non-existent profit.

Profit Share Claim is Subordinated

In connection with the Arbitration, Ms. Athanasoulis admitted three times under oath – in discovery, in direct examination, and on cross-examination – that any entitlement to a profit-share she may have would arise only after the LPs are repaid their original investment.

[3] Assuming that claims filed by CBRE, Zhang and Athanasoulis claims are all disallowed. As of the date of this notice, the appeal by certain of the LPs regarding the claim of CBRE was dismissed by the Court of Appeal for Ontario and therefore that claim is likely to be accepted for approximately $1.2 million. It is unknown whether the LPs will seek leave to appeal in respect of this decision. If the claims of CBRE and Zhang are allowed, as now appears likely, the maximum amount that would be available for distribution to the LPs would be approximately $13.8 million.

[4] Transcript of Direct Examination of Ms. Athanasoulis on February 22, 2022, page 153, lines 13-23 (emphasis added).

On examination for discovery on January 13, 2022, Ms. Athanasoulis stated:

> Q. Did you discuss anything about how profit would be calculated?
>
> A. It was going to be calculated -- you know, in my conversations with Dan, it would be calculated after paying the costs and any... and after paying the equity to... and specific to YSL and 33 Yorkville, it would be paid after the equity was repaid to the LP investors.
>
> Q. You said specific to YSL and 33 Yorkville that you discussed with Dan that profit would be after equity paid to limited partners. So is it right if I understand that Clover and Halo, that was not the definition of profit that you discussed?
>
> A. Clover and Halo didn't have limited partners. So it was after the equity was... like, the equity of -- Dan's equity was repaid.[5]

Ms. Athanasoulis confirmed the same understanding in her evidence in-chief during Phase 1 of the Arbitration:

> Q. Okay. And turning down to the profit listed here on the, on the pro forma, in general terms, how was this calculated on the pro forma?
>
> A. How is the profit calculated? So, basically, it takes your revenue, minuses your costs, minuses the amount returned on equity, and the balance is your net profit.
>
> Q. And was Cresford consistent in how it assessed and how it calculated profits?
>
> A. Yes.[6]

She also confirmed the same evidence on cross-examination at Phase 1 of the Arbitration:

> Q. Once construction of a condominium is complete, you register the condominium with the Condominium Authority of Ontario. Do I have that right?
>
> A. Correct. I mean, you register it with -- yes. You register it with the authorities that -- the city.
>
> Q. Right. And we talked about registration before. I'm just trying to make sure we have it clear what that means. And then, once it's registered, you turn the building over to the condominium corporation for that particular property, right?
>
> A. Yes.

[5] Transcript of Discovery of Ms. Athanasoulis on January 13, 2022, qq. 211-212.

[6] Transcript of Direct Examination of Ms. Athanasoulis on February 22, 2022, page 153, lines 13-23.

Q. And you collect the balances due from purchasers, and you sell any remaining units that might be in the building?

A. Yes.

Q. And then you pay the trades and any fees that might be owing to the kind of management companies that you've described?

A. Sure. You would, you would be paying them along the way, yeah.

Q. And you repay the loans and return equity to investors?

A. Yes.

Q. And it's at this point that you can calculate the actual profits earned by the project, correct?

A. Okay, yes.[7]

As the LPs will not be receiving a full return of their equity investment in the YSL project, it is unclear to the Trustee how Ms. Athanasoulis can make a successful claim for a share in profits amount when she has admitted repeatedly that her Profit Share Claim would be calculated after a full return of equity to the LPs. Ms. Athanasoulis asserts that her claim is in the nature of debt for breach of contract, not equity, and that she held no equity in the YSL project. The Trustee does not consider it relevant that Ms. Athanasoulis did not hold equity in YSL, as her claim was contingent on profit being earned and then participating in a share of profits distributed to Cresford after full repayment to the LPs. In the Trustee's view, her claim is disguised as a debt claim while in substance it is an equity claim.

AND FURTHER TAKE NOTICE that if you are dissatisfied with our decision in disallowing your claim in whole or in part (or a right to rank or your security or valuation of your claim), you may appeal to the court within the 30-day period after the day on which this notice is served, or within any other period that the court may, on application made within the same 30-day period, allow.

Dated at Toronto, this 10th day of August, 2023.

KSV RESTRUCTURING INC.,
in its capacity as the proposal trustee
for YG LIMITED PARTNERSHIP AND
YSL RESIDENCES INC.
by

Name: Robert Kofman
Title: President

[7] Transcript of Cross-Examination of Ms. Athanasoulis on February 23, 2022, page 232, line 24 to page 234, line 3.

Bankruptcy and Insolvency Act ("Act")

Proof of Claim

(Section 50.1, 81.5, 81.6, Subsections 65.2(4), 81.2(1), 81.3(8), 81.4(8), 102(2), 124(2), 128(1), and Paragraphs 51(1)(e) and 66.14(b) of the Act)

All notices or correspondence regarding this claim must be forwarded to the following address:

Creditor Name:	**Maria Athanasoulis**	Telephone:	**(416) 849-6895 (Counsel)**
Address:	**Creditor:** **44 Glenallan Rd, North York, Ontario, M4N 1G8** **Counsel to Creditor:** **Goodmans LLP** **3400 - 333 Bay Street, Toronto, Ontario, M5H 2S7**	Fax:	**(416) 979-1234 (Counsel)**
		Email:	mdunn@goodmans.ca (Counsel) cfox@goodmans.ca (Counsel)

Account No.: _____

In the matter of the bankruptcy (or the proposal, or the receivership) of **YG Limited Partnership and YSL Residences Inc.** and the claim of **Maria Athanasoulis**, creditor.

I, **Maria Athanasoulis**, of **North York, Ontario**, do hereby certify:

1. That I am a creditor of the above-named debtors.

2. That I have knowledge of all the circumstances connected with the claim referred to below.

3. That the debtor was, at the date of bankruptcy, (or the date of the receivership, or in the case of a proposal, the date of the notice of intention or of the proposal, if no notice of intention was filed), namely the 30th day of April, 2021, and still is, indebted to the creditor **in the amount of $19 million, as described in Schedule "A" hereto and in the Statement of Claim attached as Schedule "B".** ~~in the sum of $, as specified in the statement of account (or affidavit) attached and marked Schedule "A", after deducting any counterclaims to which the debtor is entitled. (The attached statement of account or affidavit must specify the vouchers or other evidence in support of the claim.)~~

4. (Check and complete appropriate category.)

☒ A. UNSECURED CLAIM (AFFECTED CLAIM) OF $ **[See Schedule A and Appendix B hereto.]**
(other than as a customer contemplated by Section 262 of the Act)
That in respect of this debt, I do not hold any assets of the debtor as security and
(Check appropriate description.)

☐ Regarding the amount of $ 19,000,000 I do not claim a right to a priority.

☐ Regarding the amount of $ _____ I claim a right to a priority under Section 136 of the Act.
(Set out on an attached sheet details to support priority claim.)

☐ B. SECURED CLAIM OF $ _____
That in respect of this debt, I hold assets of the debtor valued at $ as security, particulars of which are as follows:
(Give full particulars of the security, including the date on which the security was given and the value at which you assess the security, and attach a copy of the security documents.)

☐ C. CONSTRUCTION LIEN CLAIM OF $ _____
That in respect of this debt I have registered a lien on title to the Debtors' real property in accordance with the *Construction Act* (Ontario), particulars of which are as follows:
(Give full particulars of the lien, including the date on which the lien was registered and the value secured by such lien, and attach a copy of any relevant documents, including any statement of claim).

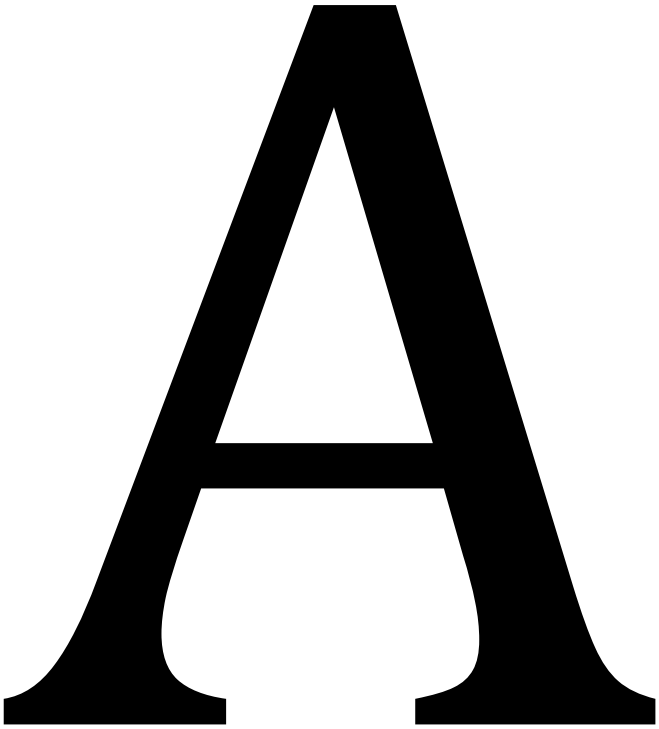
5. That, to the best of my knowledge, I am (or the above-named creditor is) (or am not or is not) related to the debtor within the meaning of Section 4 of the Act, and have (or has) (or have not or has not) dealt with the debtor in a non- arm's-length manner.

6. That the following are the payments that I have received from, the credits that I have allowed to, and the transfers at undervalue within the meaning of Subsection 2(1) of the Act that I have been privy to or a party to with the debtor within the three months (or, if the creditor and the debtor are related within the meaning of Section 4 of the Act or were not dealing with each other at arm's length, within the 12 months) immediately before the date of the initial bankruptcy event within the meaning of Subsection 2(1) of the Act:
(Provide details of payments, credits and transfers at undervalue.)

Dated at **North York**, this **10th** day of **June**, **2021**.

Witness

Creditor Authorized Signatory



SCHEDULE "A" TO THE PROOF OF CLAIM OF MARIA ATHANASOULIS

A. Ms. Athanasoulis' Action Against Cresford

1. Maria Athanasoulis is the former President and Chief Operating Officer of Cresford (Rosedale) Developments Inc. and its affiliates and subsidiaries (collectively, "**Cresford**"), including the debtors, YG Limited Partnership and YSL Residences Inc. (together, "**YSL**" or the "**YSL Debtors**"). She is also the Plaintiff in the Action having Court File No. CV-20-00635914-00CL (the "**Action**") against Cresford, including YSL.

2. The Action seeks (among other things) damages for wrongful dismissal and damages for breach of an oral agreement that the owner of each Cresford project, including YSL, would pay Ms. Athanasoulis 20% of the profits earned on each project (the "**Profit Sharing Agreement**").

B. The Profit Sharing Agreement

3. The Profit Sharing Agreement was an agreement entered into between Ms. Athanasoulis and the owners of each Cresford development project (the "**Owners**"). The YSL Debtors own Yonge Street Living Residences (the "**YSL Project**"), and they are bound by the Profit Sharing Agreement.

4. The terms of the Profit Sharing Agreement were negotiated between Ms. Athanasoulis and Mr. Dan Casey who was, at the time, the sole officer and director of each of the Owners, including the YSL Debtors.

5. The YSL Debtors are bound by the Profit Sharing Agreement. In fact, the YSL Debtors specifically admitted that they are bound by the Profit Sharing Agreement in their Statement of Defence and Counterclaim.

(i) The Terms of the Profit Sharing Agreement

6. The terms of the Profit Sharing Agreement were initially negotiated in 2014. The parties agreed that each Owner would pay Ms. Athanasoulis 10% of the profits earned on each project undertaken by an Owner (each, a "**Project**") when the Project was completed and profits were realized.

7. In November 2014, Ms. Athanasoulis drafted an employment agreement based on a form of agreement that Cresford had used for another employee. The draft employment agreement prepared by Ms. Athanasoulis, which is attached as **Appendix "A"**, specified (among other things) that Ms. Athanasoulis' entitlement under the Profit Sharing Agreement would not be extinguished if Ms. Athanasoulis left Cresford or was terminated by it. Ms. Athanasoulis provided the draft agreement to Mr. Casey, but does not recall whether Mr. Casey signed it. Ms. Athanasoulis does not have a signed copy of the agreement.

8. The draft agreement is between Ms. Athanasoulis and "Cresford Developments." Although each Owner is not specifically named in the draft agreement, it was these Owners that had the ability to pay a share of the profits. "Cresford Developments" did not have any right to receive profits from the Owners, and it therefore had no ability to pay these profits to Ms. Athanasoulis. Ms. Athanasoulis and Mr. Casey agreed that the obligation to pay profits would rest with the Owners.

9. In 2015, Ms. Athanasoulis and Mr. Casey agreed that the Profit Sharing Agreement would be amended to provide that Ms. Athanasoulis would receive 15% of the profits earned on each project.

10. In October 2018, the parties (including the YSL Debtors) agreed that Ms. Athanasoulis' entitlement would increase to 20% of the profits earned on each Project. This included the YSL Project.

11. In late 2018 and early 2019, Ms. Athanasoulis also pressed Mr. Casey to properly document the Profit Sharing Agreement. Ms. Athanasoulis and Mr. Casey agreed that John Papadakis, a lawyer with Blaney McMurtry LLP, would reduce the terms of the Profit Sharing Agreement into a formal agreement.

12. The terms of the Profit Sharing Agreement were discussed and confirmed at a meeting with Mr. Papadakis on February 16, 2019. Specifically, Mr. Casey and Ms. Athanasoulis both confirmed during the meeting that:

(a) Although it had never been reduced to writing, the Profit Sharing Agreement was an existing agreement that had been in place since 2014;

(b) Under the Profit Sharing Agreement, Ms. Athanasoulis was entitled to 20% of the profits earned on each of the Projects, including the YSL Project; and

(c) The Profit Sharing Agreement was an agreement between Ms. Athanasoulis and each Owner, including the YSL Debtors.

13. Ms. Athanasoulis never received a written Profit Sharing Agreement for her review and approval. She does not know why a written copy of the Profit Sharing Agreement was not provided to her, since Mr. Casey promised that it would be.

14. Although Ms. Athanasoulis was entitled to be paid a share of the YSL Debtors' profits, she was never a shareholder of the YSL Debtors.

(ii) The YSL Debtors' repudiation of the Profit Sharing Agreement

15. As noted, Ms. Athanasoulis commenced the Action, which seeks (among other things) a declaration that she is entitled to 20% of the profits earned on each of Cresford's Projects including the YSL Project. In their Defence and Counterclaim, the Defendants (including the YSL Debtors) admit the existence of the Profit Sharing Agreement but claim that Ms. Athanasoulis' entitlement was conditional on her continued employment by Cresford. They claim that Ms. Athanasoulis effectively waived her rights under the Profit Sharing Agreement by accepting her constructive termination (which is described below).

16. By refusing to honour or acknowledge the Profit Sharing Agreement, the YSL Debtors repudiated the essential terms of that agreement, thereby crystallizing Ms. Athanasoulis' claim against them for breach of contract. The YSL Debtors are liable for the damages caused by their repudiation of the Profit Sharing Agreement.

(iii) Damages for breach of the Profit Sharing Agreement

17. Ms. Athanasoulis is entitled to damages that will put her in the position that she would occupy but-for the YSL Debtors' breach of the Profit Sharing Agreement. Specifically, she is entitled to compensation for the lost opportunity to receive 20% of the profits from the YSL Project.

18. As described in detail in Ms. Athanasoulis' Statement of Claim, a copy of which is attached as **Appendix "B"**, as of the date of YSL's repudiation of the Profit Sharing Agreement, YSL was in a positon to earn substantial profits. In fact, Cresford's internal documents forecast a profit of in excess of $90 million as of February 2020. Thus, as of the date of the YSL Debtors' repudiation

of the Profit Sharing Agreement, Ms. Athanasoulis' claim under that agreement was worth approximately $18 million.

C. Wrongful termination claim

(i) Cresford's wrongful termination of Ms. Athanasoulis

19. The corporate defendants in the Action (including the YSL Debtors) are all part of a group of companies engaged in the development, construction, marketing and sale of condominiums in Toronto, Ontario using the brand name Cresford.

20. Ms. Athanasoulis was hired by Cresford in 2004, and worked in progressively more senior positions thereafter. These positions are described in more detail in Ms. Athanasoulis' Statement of Claim.

21. Until 2014, Ms. Athanasoulis earned a salary of $300,000 plus benefits. Recognizing Ms. Athanasoulis' value, Mr. Casey agreed to (among other things) increase her salary to $500,000 per annum in 2014 and pay her 0.15% of Cresford's sales on every project going forward.

22. As described in Ms. Athanasoulis' Statement of Claim, Ms. Athanasoulis discovered how Mr. Casey had funded Cresford's business, and the need for significant further funding in 2018. She urged Mr. Casey to find stable funding for Cresford so it could complete the Projects and comply with its lending agreements. She worked diligently to help him do so, but made it clear she would not help him deceive lenders, contractors or anyone else. As more time passed, and the issues grew more serious, Ms. Athanasoulis' efforts to convince Mr. Casey to address the issues became more urgent and forceful.

23. Despite Ms. Athanasoulis' efforts, Mr. Casey took no steps to rectify the situation.

24. Ms. Athanasoulis, and other members of Cresford's management, asked Mr. Casey to clarify these issues. Mr. Casey provided no meaningful response. Instead, he instructed his litigation lawyer, Allan O'Brien, to write to Ms. Athanasoulis to accuse her of breaching her fiduciary duties to Cresford. Mr. O'Brien provided no particulars to support this allegation because there was no such breach.

25. Mr. Casey then prohibited Ms. Athanasoulis from communicating with any of Cresford's lenders, and indicated that he alone would speak to these lenders.

26. Mr. Casey then went further still, and advised that he alone would deal with *all* of Cresford's key stakeholders, including contractors. He also told Cresford's staff, who previously reported to Ms. Athanasoulis, that they would now report to him directly.

27. Mr. Casey's actions stripped Ms. Athanasoulis of essentially all of her responsibilities as Cresford's president and COO. She was terminated in all but name. On December 20, 2019, Mr. Casey even told Cresford staff that Ms. Athanasoulis was gone and would not be returning. He said that Cresford would be better and stronger without her.

28. Mr. Casey refused to formalize this termination because he was concerned about how Cresford's key stakeholders, including contractors, lenders, investors and employees, would react.

29. All of this put Ms. Athanasoulis in an impossible situation. She was nominally an officer of Cresford (and a director of YSL Residences Inc.) but had no ability to understand or affect how Cresford conducted business. She had good reason to believe that Mr. Casey planned to take steps that would violate Cresford's legal obligations and potentially expose her to personal liability.

30. The conduct described above, and set out in more detail in Ms. Athanasoulis' Statement of Claim, constituted repudiation of Ms. Athanasoulis' employment contract, and constructive termination of her employment by Cresford. By letter dated January 2, 2020, Ms. Athanasoulis wrote to accept this repudiation.

(ii) Damages for wrongful termination

31. Ms. Athanasoulis was constructively dismissed without notice or cause. The Defendants, including the YSL Debtors, are liable for damages in an amount equal to what Ms. Athanasoulis would have earned during the notice period to which she was entitled. Ms. Athanasoulis is entitled to 24 months' notice, having regard to:

(a) **Character of employment:** Ms. Athanasoulis was Cresford's most senior employee except for Mr. Casey, with overall responsibility for virtually all aspects of Cresford's business except financing. In that capacity, she successfully executed some of the most ambitious development and construction projects in Canada;

(b) **Age and length of employment:** Ms. Athanasoulis worked at Cresford for 16 years and was 42 years old at the time of her termination;

(c) **Availability of similar employment:** similar employment is not currently available to Ms. Athanasoulis and will not be available to her for the foreseeable future. There are only a handful of developers in Canada that execute projects of the type, size and scope that Ms. Athanasoulis worked on while she was at Cresford. These developers already have presidents. As a result, Ms. Athanasoulis is unlikely to find comparable employment for at least 24 months.

(iii) Punitive and exemplary damages

32. As described above, and in the Statement of Claim, Ms. Athanasoulis was terminated because she insisted that Mr. Casey deal honestly with Cresford's stakeholders. Cresford's actions demonstrate a wanton and contumelious disregard for Ms. Athanasoulis' rights and warrant an award of punitive and exemplary damages. Those actions also caused significant mental and emotional distress to Ms. Athanasoulis such that an award of aggravated damages is also warranted.

(iv) YSL's liability for wrongful termination

33. Ms. Athanasoulis was simultaneously employed by each of the Cresford companies, including the YSL Debtors. They are jointly and severally liable for her wrongful termination.

34. Ms. Athanasoulis did not have a written employment agreement. Accordingly, YSL's liability is determined by the common law.

35. Cresford functioned as a single, integrated unit under the ultimate control of Mr. Casey. Each Cresford company operated form the same premises, and all were marketed as being part of the same entity. Each Cresford company had the same director and shareholder, Mr. Casey.

36. One important aspect of Cresford's integrated business was Mr. Casey's practice of moving funds between companies to meet liabilities. Mr. Casey routinely directed Cresford's accounting personnel to use funds belonging to one company to satisfy debts owed by another.

37. Cresford was in the business of buying, developing, marketing and selling new condominiums. Each new condominium project was owned by one of the Owners, and Ms. Athanasoulis provided her services directly to each of the Owners. Although the Owners sometimes paid fees to other Cresford entities, there was no written management agreement setting

out what fees would be paid and when. The timing and quantum of the fee payments were determined by Ms. Casey.

38. In light of the foregoing, the YSL Debtors and the other Cresford companies are common employers who are jointly and severally liable with the other Defendants in the Action for Ms. Athanasoulis' wrongful termination damages.

7173246

B

APPENDIX "A"

THIS AGREEMENT, made as of **1st** day of **November**, 2014,

BETWEEN:

Cresford Developments

(the "Employer")

-and-

Maria Athanasoulis

(the "Employee")

The Employee and the Employer wish to confirm a change to the compensation terms governing the terms and conditions of employment.

THEREFORE THE EMPLOYER AND THE EMPLOYEE AGREE AS FOLLOWS:

TITLE:

The Employer is employing the Employee as the President of Marketing and Sales.

Salary:

The Salary of the Employee will be $500,000 per annum, payable bi-monthly less applicable statutory deductions. In addition, the Employee will participate in the group benefit plan provided by the Employer as amended from time to time. The Employee will be entitled to leave as required for absence due to illness.

The Employee will be eligible for bonus payments earned at the registration of the condominium declaration of each development as well as bonus on gross revenue sold. The specific process for allocation of the bonus will be determined and agreed upon by the Employer and the Employee and outlined in schedule "B" of this agreement.

Other Benefits:

The Employer will pay the Employee a monthly vehicle allowance of $1200 (less statutory deductions). The Employee will be responsible for the cost of his vehicle, including insurance and gas. The Employer will pay the monthly allowance on a bi-montly basis.

The Employer will provide a cellular phone to the Employee.

The Employer will reimburse the employee for all reasonable travel and other business expenses incurred while carrying out his responsibilities on behalf of the Employer, upon presentation of appropriate receipts for the expenses claimed.

The Employer will reimburse the Employee for the cost of memberships in business related professional associations, provided these membership fees are approved in advance by the Employer.

Annual Leave:

The Employee is entitled to 5 weeks vacation with pay.

Performance Review:

The performance of the Employee will be reviewed on an annual basis based on criteria agreed upon by the Employee and the Employer at the beginning of the year subject to review, and based on the agreed duties to be performed by the Employee as outlined in schedule "A".

The Employee's annual performance will be reviewed at the end of each calendar year and at that time the Employer and the Employee may make amendments to this contract and to compensation at their mutual agreement.

Termination of Employment:

The Employee's employment may be terminated as follows:

1. By the Employee at any time upon providing the employer with 6 weeks notice in writing; or

2. By the Employer at any time for just cause, without notice; or

3. By the Employer without cause upon ten months notice or, bi-monthly pay in lieu thereof, subject to the following. In the event of the employee finding comparable alternative employment, the employee will be paid 50% of the balance owing on the remainder of the termination payment from the date of commencement of such employment to the end of the notice period herein. The Employee agrees that he will advise the Employer forthwith upon finding such comparable employment.

4. Bonus payments will be paid in full at the completion of any project in the construction phase if employee's employment is terminated.

Confidential Information:

It is essential to the success of the Employer that the business and affairs of the Employer be kept in the strictest confidence. Therefore, the Employee shall not at any time nor in any manner, except where authorized or required by law or by the Employer, divulge, disclose or communicate to any person, firm or corporation any information concerning any matters affecting or relating to the enterprise of the Employer, including without limiting the generality of the foregoing, any information concerning the

Employers products and product designs, customer lists, the prices it obtains or has obtained from the sale of, or at which it sells or has sold its products, types and kinds of raw materials used by it, the suppliers and costs thereof, the manner of its operation, its marketing, product development and other plans, its manufacturing and other processes and any financial affairs of the Employer.

Company Property:

The Employee agrees that upon termination of his employment, all property belonging to Employer will be returned immediately.

Amendment of Agreement:

Any amendment to this agreement must be in writing and signed by both parties.

Dated at Toronto this ___ day of October, 2014

Witness

Per: Dan Casey, President & C.E.O "Employer"

Cresford Developments Inc.

Witness

Per: Maria Athnasoulis "Employee"

SCHEDULE 'A"

The following outlines the terms agreed to for bonus between the employer and the employee.

1) A $500,000 bonus will be paid upon the final registration of 1000 Bay Condominiums
2) A $500,000 bonus will be paid upon the final registration of CASA 2 Condominiums
3) A $500,000 bonus will be paid upon the final registration of CASA 3 Condominiums
4) A bonus of 10% of final profits will be paid upon the final registration of VOX Condominiums
5) A bonus of 10% of final profits will be paid on final closing on any future site Cresford acquires
6) A bonus of 0.15% on the gross sales of each project marketed by Cresford will be paid on construction start for sales earned to date, with the balance after construction start paid on final closing

C

APPENDIX "B"

Electronically issued
Délivré par voie électronique : 21-Jan-2020
Toronto

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:

MARIA ATHANASOULIS

Plaintiff

- and -

CRESFORD (ROSEDALE) DEVELOPMENTS INC., EAST DOWNTOWN REDEVELOPMENT PARTNERSHIP, THE CLOVER ON YONGE INC., THE CLOVER ON YONGE LIMITED PARTNERSHIP, 33 YORKVILLE RESIDENCES INC., 33 YORKVILLE RESIDENCES LIMITED PARTNERSHIP, 480 YONGE STREET INC., 480 YONGE STREET LIMITED PARTNERSHIP, YG LIMITED PARTNERSHIP, YSL RESIDENCES INC., YSL RESIDENCES LIMITED PARTNERSHIP, 50 CHARLES STREET LIMITED, 50 CHARLES STREET LIMITED PARTNERSHIP and DANIEL C. CASEY

Defendants

STATEMENT OF CLAIM

TO THE DEFENDANTS

A LEGAL PROCEEDING HAS BEEN COMMENCED AGAINST YOU by the Plaintiff. 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 Plaintiff's lawyer or, where the Plaintiff does not have a lawyer, serve it on the Plaintiff, 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.

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 January 21, 2020 Issued by _____
Local Registrar

Address of court office: Superior Court of Justice
330 University Avenue, 7th Floor
Toronto ON M5G 1R7

TO: **NELLIGAN O'BRIEN PAYNE LLP**
50 O'Connor Street, Suite 300
Ottawa, ON K1P 6L2

Allan R. O'Brien LSO No.: 15326T

allan.obrien@nelliganlaw.ca
Tel 613.231.8224
Fax 613.788.3654

Counsel to the Defendants

CLAIM

1. The Plaintiff, Maria Athanasoulis, claims against the Defendants for:

   (a) A declaration that the Defendants wrongfully terminated Ms. Athanasoulis;

   (b) Damages for wrongful dismissal in the amount of $1,000,000;

   (c) A declaration that Ms. Athanasoulis is entitled to 20% of the profits earned by each of the Projects (as defined below);

   (d) Damages in the amount of $48 million, representing the value of the entitlement referenced in (c) above;

   (e) Damages for defamation, in an amount to be provided prior to trial;

   (f) Punitive, aggravated and exemplary damages;

   (g) Pre and post judgment interest; and

   (h) Such further and other relief as this Court deems just.

PART I. BACKGROUND

A. THE DEFENDANTS' BUSINESS

(i) Cresford

2. The corporate defendants (collectively, "**Cresford**") are all part of a group of companies engaged in the development, construction, marketing and sale of condominiums in Toronto, Ontario using the brand name Cresford.

3. Cresford's corporate predecessors were founded by the Defendant, Daniel C. Casey, approximately 40 years ago. However, until approximately 2014, Cresford and its predecessors focused on small and medium-sized condominium developments.

4. Since 2014, Cresford has developed a reputation for developing and building large luxury condominium communities, largely as a result of the Plaintiff's efforts (which are described below). It has completed some of the largest and most ambitious condominium development and construction projects in the Greater Toronto Area.

5. Each of Cresford's development and construction projects is owned by a separate legal entity. That entity purchases the land where the relevant project is to be built, obtains the required permissions, markets the project to proposed purchasers, hires contractors to build the project and takes all of the other steps to convert real estate into a major condominium development.

6. The staff required to complete this work, including Ms. Athanasoulis, were paid by East Downtown Redevelopment Partnership ("**EDRP**"). However, EDRP does not own any real estate or conduct any active business. Cresford employees, including Ms. Athanasoulis, provided services directly to the entities that owned, developed and built Cresford's projects.

(ii) Ms. Athanasoulis was critical to Cresford's success

7. Ms. Athanasoulis joined Cresford in 2004 as its Manager, Special Projects. Although she had not previously worked in real estate, she quickly demonstrated a talent for marketing development projects. In 2005, she was promoted to Vice President of Sales and Marketing.

8. In 2012, Ms. Athanasoulis was promoted again to President, Sales and Marketing. In that capacity, she reported directly to Mr. Casey. Over time, her role expanded to include virtually all aspects of Cresford's business except for land acquisition and project finance. In 2018, Ms. Athanasoulis was promoted again to President and Chief Operating Officer ("**COO**") around the time that Ted Dowbiggin, the President of Cresford Capital, resigned.

(iii) The real estate development and construction process

9. Condominium development and construction projects are complex, and each is unique to some extent. However, certain steps are common to virtually all projects. The builder/developer must:

(a) identify an attractive development site;

(b) negotiate an agreement to purchase the site;

(c) hire third parties to design the proposed project;

(d) obtain the municipal permissions required to build the proposed project, which often involves a long and extensive review and approval process. The process of obtaining these approvals is typically called the "development process";

(e) market condominium units to purchasers. These purchasers provide a deposit (or a series of deposits) to secure their purchases;[1]

[1] These deposits must be insured before they can be used to fund construction costs. The deposit insurer guarantees that the deposits will be repaid to purchasers if the units are not built, and registers a mortgage on title to protect itself against the risk of repayment.

(f) hire contractors to supply the labour and materials required to build the project; and

(g) register the condominium and transfer control of it to the condominium corporation.

10. Importantly, the vast majority of revenues earned on a project are not released to the builder/developer until construction is complete and the condominium is registered. This means that the builder/developer must fund development and construction costs using both debt and equity.

(iv) Mr. Casey was responsible for providing or securing the equity that Cresford required

11. In recent years, Mr. Casey has had very little involvement in Cresford's day to day operations. He rarely attended Cresford's offices and was largely unaware of – and uninvolved in – Cresford's business except for financing matters and cost overruns. Unlike other aspects of the business, which were operated by Ms. Athanasoulis, Mr. Casey always kept control of Cresford's financing and limited Ms. Athanasoulis' access to information about it.

12. As noted above, almost all of the revenue from a condominium development is earned after the condominium is built and registered. Almost all of the costs required to complete the development must be incurred before then. Real estate development projects, and particularly the large-scale projects that Cresford has pursued recently, have substantial (and complex) funding needs.

13. Cresford, like all major developers, secures third party mortgage financing to fund a significant portion of its construction and development costs. Lenders agree to fund based on a detailed budget prepared for each project and carefully monitor costs. A project inspector reviews

detailed information to ensure that funds are properly used and the project can be completed in accordance with the original budget. If the project inspector identifies cost overruns, then the owner of the project must immediately provide the required funds. The Altus Group ("**Altus**") is the project inspector on Cresford's current projects.

14. In addition, lenders rely on the financial position of the project owner in deciding to advance funds. As a result, the loan agreements all prohibit further borrowing without prior consent from the lender.

15. Cresford's lenders required that the owner of each project make a significant equity investment before funds were advanced. Mr. Casey's primary role at Cresford was to provide or secure these equity investments. The investments were critical. In order to complete its projects, Cresford needed a stable source of equity funds. Without such funds, Cresford could not meet its commitments to lenders, construction contractors, consultants, brokers, purchasers and other stakeholders.

16. Mr. Casey represented to Ms. Athanasoulis that he was a wealthy and successful businessman. Ms. Athanasoulis believed that Mr. Casey had the ability to make the investments that Cresford's business required.

17. As described below, these funds either did not exist or Mr. Casey was not prepared to invest them in Cresford's business. Mr. Casey was unwilling or unable to provide the equity funding that Cresford required. This failure threatened (and continues to threaten) the viability of Cresford's business.

18. Importantly, prior to the fall of 2018, Ms. Athanasoulis was not responsible for acquiring development sites or financing the purchase and construction of projects. Ted Dowbiggin, the President of Cresford Capital, was responsible for site acquisitions and finance until his resignation effective August 31, 2018. Mr. Dowbiggin reported directly to Mr. Casey, and together, they were solely responsible for financing Cresford's acquisition and development activities. Finance activities were separated from the rest of Cresford's operations. Ms. Athanasoulis and her team had little information about how Mr. Casey and Mr. Dowbiggin financed projects and what they communicated to lenders.

19. Thus, Ms. Athanasoulis was responsible for executing Cresford's projects successfully but was not responsible for how those projects were financed, did not participate in communications with lenders and did not know what Mr. Casey did (and did not) tell lenders.

(v) Cresford's recent success

20. Although Ms. Athanasoulis developed (and has) significant expertise in every aspect of the real estate development and construction business, she has a unique talent for designing and marketing residential condominium units to purchasers. As a result, Cresford was able to sell a large volume of condominium units quickly and for premium prices. Every condominium must pre-sell units worth a minimum amount before construction loan funding will be advanced – typically 65% or more of the total project revenue. Cresford's most recent projects have met their targets very quickly.

21. As importantly, Ms. Athanasoulis built Cresford into a recognized luxury condominium brand. Satisfied customers bought units in multiple Cresford projects, and the real estate brokers

that represented Cresford's target customers trusted Cresford to keep its promises. This allowed Cresford to charge premium prices for its units. Few, if any, Canadian developers have the sort of reputation that Ms. Athanasoulis built for Cresford.

22. Put simply, Ms. Athanasoulis was the driving force behind Cresford's success. In the last five years alone, Cresford has sold more than 3,000 condominium units and generated revenues in excess of $2.5 billion. In the process, she built a reputation (both for herself and for Cresford) for dealing honestly and fairly with consultants, construction contractors and real estate agents.

(vi) Ms. Athanasoulis' compensation

23. Mr. Casey recognized Ms. Athanasoulis' value. He knew that Ms. Athanasoulis was the key to Cresford's success and, over the years, he offered her significant incentives to remain at Cresford.

24. In 2014, Ms. Athanasoulis supervised the design, marketing and sales on the Vox project at Yonge and Wellesley in Toronto, as she had done on several previous projects. The Vox project met its sales targets with ease, and the project was a success. Moreover, because of Ms. Athanasoulis' sales and marketing expertise, Cresford saved the substantial cost of a third party marketing company. A third party marketing company would have charged Cresford more than $3 million to market only the Vox project, but Ms. Athanasoulis was paid only $300,000 per annum, plus a payment equal to 0.15% of Cresford's sales on every project, to market all of Cresford's projects and fulfill her other duties. Ms. Athanasoulis realized that she could earn much more working as a contractor for Cresford and other developers.

25. Recognizing Ms. Athanasoulis' value, Mr. Casey agreed to increase her salary to $500,000 per annum in 2014 and pay her 0.15% of Cresford's sales on every project going forward. Most importantly, after the Vox project, Mr. Casey agreed that Ms. Athanasoulis would be entitled to 15% of the profits earned on all projects launched by Cresford thereafter as well as an additional $500,000 at registration of each of the active projects (i.e., 1000 Bay, Casa II and Casa III). Following the successful launch of YSL, Mr. Casey increased the percent of profits that Ms. Athanasoulis was to be entitled to from 15% to 20%. In an effort to assist with monthly cash flow, Ms. Athanasoulis never drew her increased salary. Mr. Casey knew this, and knew that Ms. Athanasoulis was still owed her increased salary.

26. Ms. Athanasoulis worked closely with Mr. Casey, and trusted him to protect her interests. As a result, their agreement was not immediately reduced to writing. Ms. Athanasoulis launched three more very successful projects in 2015, 2016 and 2017.

27. After the successful launch of YSL (as defined below) in October 2018, Ms. Athanasoulis realized that the services she provided to Cresford on its four most recent projects had saved it approximately $37.5 million on fees that would otherwise have been paid to a third party marketing consultant. She asked Mr. Casey to memorialize his agreement to pay her 20% of the profits on existing projects. She subsequently attended a meeting with Mr. Casey and John C. Papadakis, Cresford's corporate lawyer. At the meeting, Mr. Casey confirmed that Ms. Athanasoulis was entitled to 20% of the profits generated by Cresford's projects and asked Mr. Papadakis to document the agreement.

28. Ms. Athanasoulis did not receive the agreement that Mr. Papadakis was instructed to draft. She did not press for a written agreement, however, because Mr. Casey had confirmed her entitlement several times and she trusted him.

29. As described below, her trust was misplaced.

PART II. CRESFORD'S CASH CRISIS

A. CRESFORD'S CURRENT PROJECTS

30. In recent years, Cresford has focused on large condominium developments in or near downtown Toronto. Cresford currently has four active condominium developments (collectively, the "**Projects**"):

(a) The Clover on Yonge ("**Clover**"), a 44 story condominium located near Yonge and Bloor. Clover is owned by Clover on Yonge Inc. ("**Clover Inc.**") in its capacity as General Partner of Clover on Yonge Limited Partnership ("**Clover LP**"). Clover LP is beneficially owned by entities related to or controlled by Mr. Casey;

(b) Halo Residences on Yonge ("**Halo**"), a 38 story condominium tower located on Yonge Street between Wellesley and Carlton in Toronto. Halo is owned by 480 Yonge Street Inc. ("**Halo Inc.**"), the general partner of 480 Yonge Street Limited Partnership ("**Halo LP**"). Halo LP is, in turn, beneficially owned by entities related to or controlled by Mr. Casey;

(c) The Residences of 33 Yorkville ("**33 Yorkville**"), a condominium with one 64-story tower and one 41-story tower. 33 Yorkville is owned by 33 Yorkville

Residences Inc. ("**33 Yorkville Inc.**"), in its capacity as general partner of 33 Yorkville Residences Limited Partnership ("**33 Yorkville LP**"). There are two classes of limited partnership units in 33 Yorkville LP. The Class A limited partnership units are held by 20 third parties, who collectively invested $75 million. These investments are described in more detail below; and

(d) Yonge Street Living Residences ("**YSL**"), an 85-story condominium tower located at the corner of Yonge and Gerrard in Toronto. YSL is owned by YSL Residences Inc. ("**YSL Inc.**"), in its capacity as general partner of YG Limited Partnership ("**YSL LP**"). YSL LP is beneficially owned by entities controlled by or related to Mr. Casey and third party investors.

31. Revenue from the project will not be realized unless and until the Projects are completed. In order to complete the Projects, Cresford must meet its obligations to lenders, contractors and other stakeholders. This requires access to funding that Cresford does not currently have.

B. MR. CASEY'S FAILURE TO MAKE (OR SECURE) EQUITY INVESTMENTS

32. As noted above, each lender required that Cresford (or Mr. Casey) invest significant equity into each Project. Ms. Athanasoulis only role in these equity investments was to introduce potential investors to Mr. Casey.

33. Mr. Dowbiggin resigned from Cresford in August 2018. Around the time of Mr. Dowbiggin's resignation, Ms. Athanasoulis learned, for the first time, that Cresford was woefully underfunded on Clover and Halo. Cresford did not have the funds required to complete the Projects, and Mr. Casey did not have a plan to secure the funds it needed.

34. Mr. Casey and Mr. Dowbiggin initially directed Ms. Athanasoulis to reach out to CBRE, a well-known commercial real estate brokerage, to explore the possibility of selling the land owned by YSL Inc. Mr. Casey hoped to earn a gross profit on the sale of $80-$100 million and use that profit to fund cost overruns on the Clover and Halo projects.

35. Given the scale of the YSL Project, the pool of potential buyers was quite small. CBRE reached out to the most likely purchasers, but did not find an interested buyer. Accordingly, the only alternative was to design, market and sell the project in order to make it viable. Ms. Athanasoulis worked tirelessly in September and October to launch the YSL Project quickly. This work paid off, and the YSL launch was a huge success. Among other things, the purchasers were contracted to pay approximately $140 million in deposits on YSL units.

36. Ms. Athanasoulis continued to work with Mr. Casey to try to find a solution to Cresford's cash issues. However, in the summer of 2019 she learned that Mr. Casey's own financial position was far more precarious than he had claimed.

37. Worse still, Ms. Athanasoulis learned in the fall of 2019 that Cresford had made significant misrepresentations to its lenders. When Ms. Athanasoulis pressed Mr. Casey to make the equity investments the business required and to deal honestly with lenders, she was stripped of her responsibilities and constructively terminated.

(i) Mr. Casey's secret loans

38. Cresford did not actually make many of the equity investments that it was contractually required to make, and claimed to have made. Instead, Mr. Casey represented to lenders that funds borrowed from a third party lender, OTB Capital Inc. ("**OTB**"), were equity investments made by

Mr. Casey or entities that he controlled. These so-called equity investments were, in fact, high interest financing that was specifically prohibited by the applicable loan documents. OTB's loans are secured by every piece of collateral that Mr. Casey could offer, including the unsold retail and residential condominium units in the Clover and Halo projects. Neither Ms. Athanasoulis nor the affected lenders were aware of this.

39. Specifically, Ms. Athanasoulis learned that Mr. Casey had borrowed money from OTB in or around 2014. She also knew that Cresford had to make substantial monthly interest payments to OTB. This was a significant burden on Cresford's cashflow, since interest on most loans in the real estate development industry is capitalized and paid at the end of the project.

40. Ms. Athanasoulis did not, however, know the details of Mr. Casey's arrangements. Most importantly, she did not know what Mr. Casey had told lenders about OTB. She assumed that Mr. Casey had disclosed the nature of his relationship with OTB to existing and prospective lenders, as he was required to do. Shortly before her termination (which is described below), she learned that he had not.

(ii) Clover

41. Mr. Casey's scheme is illustrated by the funding of Clover. Pursuant to a commitment letter dated April 27, 2016 (the "**Clover Loan Agreement**"), British Columbia Investment Management Corporation ("**QuadReal**") agreed to provide Clover Inc. with:

(a) a construction financing and letter of credit facility in the amount of approximately $175 million, which was to be secured by a first mortgage charge; and

(b) a third mortgage facility in the amount of approximately $30 million (including a $9 million interest reserve).

42. The Clover Loan is managed by QuadReal Property Group ("QuadReal"), a real estate company owned by BC IMC.

43. The Clover Loan Agreement required that the borrower, Clover Inc., invest equity of approximately $20.6 million before any funds could be advanced. The Clover Loan Agreement prohibited any other financing without the prior written consent of QuadReal, but it allowed Clover Inc. to register *its own* mortgage on title to secure the equity investment it was required to make.

44. Clover Inc. represented to QuadReal that it made the required equity investment, and registered a mortgage on title in favour of Cresford Financial Limited ("**CFL**"). Once it was satisfied that this investment had been made, QuadReal began to advance funds.

45. Unbeknownst to QuadReal, and to Ms. Athanasoulis, neither Clover Inc. nor any other entity related to Mr. Casey invested $20.6 million in Clover. Most of the so-called equity investment was borrowed from OTB.

46. Specifically, OTB lent CFL $17 million. The loan was guaranteed by Clover Inc., Mr. Casey and a host of other Cresford companies. CFL pledged all of its shares to OTB until OTB's loan was repaid. Accordingly, the mortgage registered by CFL secured OTB's loan and was effectively controlled by OTB.

47. Put simply, the majority of the "equity" in the Clover project was actually high interest secured debt.

(iii) Halo

48. Mr. Casey made substantially identical arrangements relating to Halo, without the knowledge of Ms. Athanasoulis or QuadReal.

49. By commitment letter dated November 24, 2016 (the "**Halo Loan Agreement**"), QuadReal agreed to fund a first mortgage construction loan (including a $2 million letter of credit facility) in the amount of approximately $159 million and a third mortgage mezzanine loan in the amount of approximately $29 million to fund the Halo Project. The Halo Loan Agreement required that Halo Inc. invest equity of $13.6 million before any loan advances were made, and prohibited any other borrowing by Halo Inc. without QuadReal's prior consent. Halo Inc. was, however, allowed to register a mortgage to secure its own equity investment in the Project.

50. Halo Inc. did not make the equity investment required of it. By Loan Agreement dated November 30, 2016, Cresford Equities Inc. ("**Cresford Equities**") agreed to borrow $10.1 million from OTB. This amount was guaranteed by, among other companies, Halo Inc.

51. Cresford Equities registered a fifth mortgage against the lands owned by Halo Inc. However, Cresford Equities pledged all of its shares to OTB until the loan was repaid. Thus, the fifth mortgage that was meant to secure Cresford's equity was in fact registered to secure OTB's loan. None of this was shared with Ms. Athanasoulis, or QuadReal.

(iv) 33 Yorkville

52. The budget submitted to lenders in respect of 33 Yorkville required an equity investment of approximately $75 million. Mr. Casey approached Ms. Athanasoulis and asked her to identify third party investors who might fund some of this commitment. As a result of Cresford's

reputation for successful projects, and her own close relationships with a number of potential investors, Ms. Athanasoulis was able to introduce Mr. Casey to investors that ultimately purchased $75 million worth of limited partnership units in 33 Yorkville LP (the "**33 Yorkville Investors**"). She trusted Mr. Casey to make appropriate arrangements and disclose those arrangements to the lenders. This did not happen.

53. Without Ms. Athanasoulis' knowledge, Mr. Casey represented to QuadReal that the 33 Yorkville Investors had invested approximately $20.5 million in 33 Yorkville and that Cresford and/or Mr. Casey had made the balance of the equity investment required.

(v) YSL

54. YSL is Cresford's largest project to date, with its most complex funding structure. The purchase price and early stage project costs were funded by a $100 million first mortgage from Timbercreek Financial Corp. ("**Timbercreek**") and a deposit insurance facility in the amount of $120 million from Westmount Guarantee Services Inc. ("**Westmount**") that was arranged after the success of the YSL launch to repay a prior mortgage that had come due. Timbercreek's first mortgage was to be repaid using a first mortgage construction loan from Otera Capital Inc. ("**Otera**") in the amount of approximately $623 million (the "**YSL Construction Loan**"). The YSL Construction Loan was arranged after the successful launch of YSL.

55. The YSL Construction Loan required equity of $75 million. Mr. Casey represented to lenders that these funds had been raised from equity investments in YSL LP. Mr. Casey and YSL Inc. guaranteed that the investments would be repaid with interest.

56. Indeed, Mr. Casey and YSL Inc. even agreed to grant one of the so-called limited partners, 247625 Ontario Inc. ("**247 Inc.**") a mortgage over the YSL lands to secure its $20 million "equity" investment. Mr. Casey told Cresford's staff that he had personally borrowed the funds from 247 Inc. to invest in YSL, but this is not true. YSL Inc.'s corporate predecessor borrowed the funds, and YSL Inc. is liable for them. Although the mortgage has not yet been registered on title, the funds advanced by 247 Inc. (like the so-called equity investments in Halo and Clover described above) were high interest secured debt in all but name.

C. CRESFORD'S MANAGEMENT IDENTIFIES CASH SHORTFALLS

57. Beginning in mid-2018, Cresford's management team identified significant cash shortfalls in the Clover and Halo projects. In late 2018, after the launch of YSL, a cash shortfall was identified in the 33 Yorkville Project. Each of these projects could (and still can) be completed successfully. But each project requires additional equity funding, and Mr. Casey has been unwilling or unable to provide or secure that funding.

(i) Clover cash shortfall

58. Clover is currently under construction. Construction costs are funded through the Clover Construction Loan, which is described above. These costs are carefully monitored by Altus, the project inspector hired by QuadReal (although paid by Clover Inc.). Clover Inc. must provide detailed information about the status of construction, and the projected cost to complete the project, in order to secure the advances that it needs to pay contractors. Clover Inc. is responsible for cost overruns, and if projected costs exceed the original budget, then Clover Inc. must fund the increased costs before further funds will be advanced.

59. As noted, Clover is a 44-story condominium tower. Clover Inc. (through its contractors and suppliers) had to purchase a significant volume of steel and other material in order to build the project. In 2018, the price of steel and other construction materials increased significantly, primarily as a result of tariffs imposed by the United States. At the same time, unions representing the workers required to build Clover negotiated new agreements that significantly increased labour costs. These factors significantly increased the cost of building the Clover project, and all of the other condominium developments in Toronto.

60. In addition, the original construction schedule proposed for the Clover project was very aggressive. After construction began, it became clear that the original schedule was unrealistic. The delay further increased construction and project costs.

61. By the fall of 2018, Ms. Athanasoulis, and the rest of Cresford's senior management team, advised Mr. Casey that Clover would require an additional $50 million to complete construction. Though this additional funding requirement would mean that no profit would be earned on this project, all lenders, trades and costs would be paid in full and Cresford could continue as a going concern with a solid reputation. Cresford funded some of the Clover obligations using fees earned on other projects, but a shortfall of $37 million remains.

(ii) Halo cash shortfall

62. Cresford faces a similar cash shortfall on the Halo project, for substantially the same reasons. Halo construction costs increased substantially as a result of the increased costs of steel and other materials. In addition, the aggressive schedule originally proposed for the Halo project proved unachievable.

63. Halo Inc. awarded a number of construction contracts in November 2018. When the contracts were awarded, Cresford's management estimated that the total overrun would be $45 million. Some of the shortfall has been funded using fees earned on other projects, leaving a $38 million funding shortfall for the Halo project. Though this additional funding requirement would mean that no profit would be earned on the Halo project, all lenders, trades and costs would be paid in full, and Cresford could continue as a going concern with a solid reputation.

(iii) 33 Yorkville cash shortfall

64. In late 2018, Cresford's construction team hired a third party peer review cost consultant, CB Ross, to assess the construction budget for 33 Yorkville to confirm the magnitude of anticipated cost overruns. As a result of this review, the projected cost of the project that had been presented by the construction team was confirmed. Based on the new estimate, 33 Yorkville is facing a cash shortfall of approximately $65 million. Though an additional $65 million funding requirement would mean that only nominal profit would be earned on this project, all lenders, trades and costs would be paid in full, and Cresford could continue as a going concern with a solid reputation.

(iv) Casa III

65. As noted, Mr. Casey used funds earned from earlier projects to fund overruns on later projects. One of these earlier projects was Casa III, a luxury condominium that was owned by 50 Charles Street Limited and registered in August 2018. Funds earned from Casa III were used to pay amounts due on other projects, which left Casa III without the funds required to make the final payments that it owed. The final work on Casa III, which will cost approximately $4.5 million,

cannot be completed. The owner of Casa III already owes approximately $5 million to construction contractors and real estate contracts. It is unable to fund either the outstanding payables or the construction required to complete the project, leaving the building and landscaping unfinished for the past two years.

(v) Mr. Casey proved unwilling or unable to address Cresford's cash flow issues

66. Mr. Casey was unwilling or unable to provide an adequate solution – or any solution – to Cresford's cash flow problems. As noted, Mr. Casey told Ms. Athanasoulis for years that he had substantial assets available to him. Mr. Casey refused to use these funds (if they existed) to fund Cresford's business. The only funds invested in Clover, Halo, 33 Yorkville and YSL were generated from earlier projects that Cresford completed but these projects did not generate nearly enough cash to satisfy the requirements.

67. But taking funds from predecessor projects did not solve the problem. Instead, it caused the cash flow problem to grow and spread. For example, real estate brokers that were owed commissions for previously completed projects (including Cresford's own brokers, employed by Cresford Real Estate Corporation) are owed approximately $5 million.

(vi) Cresford's cash flow crisis worsened

68. The understanding of the overall cash flow issues grew significantly worse over time. The projected cash shortfall across Casa III, Clover, Halo and 33 Yorkville ballooned to a combined $150 million. Projects were unable to pay contractors what they were owed as payments came due on Casa III and Halo. Clover and 33 Yorkville would soon have the same issue, because Cresford did not have a plan in place, and because Mr. Casey was unwilling to use funds available

to him personally, to fund the contracts it had entered into. These contractors pressed Cresford's construction staff (who reported to Ms. Athanasoulis) for payment. As the situation grew worse, contractors demanded answers from Ms. Athanasoulis. She did not have those answers. In addition, Cresford could not enter into new construction contracts because it did not have the ability to fund the resulting costs.

(vii) Mr. Casey could not or would not help solve Cresford's cash problems

69. As noted, Mr. Casey had repeatedly represented to Ms. Athanasoulis that he had access to significant funds. Ms. Athanasoulis believed that Mr. Casey could use some of this wealth to solve Cresford's cash problems. In the summer of 2019, however, Mr. Casey told Ms. Athanasoulis that he had substantial mortgages registered against both his cottage and home. Ms. Athanasoulis began to suspect that Mr. Casey was not as wealthy as he claimed, and that he would not be able to contribute the funds that Cresford required.

70. Ms. Athanasoulis' concerns about Mr. Casey were exacerbated by his lavish lifestyle. He told her in the summer of 2019 that he required between $4 million and $5 million annually to maintain his lifestyle, and Ms. Athanasoulis learned that funds needed by Cresford had been used for personal purposes. As noted, Cresford had used fees earned on earlier projects to fund some of the cost overruns on later projects. But Mr. Casey prioritized his own interests over Cresford's. For example, in February 2019, when Cresford was desperate for cash, he took approximately $750,000 from Casa III (which should have been used to pay creditors) to buy a house for his son.

(viii) The Defendants conduct caused significant mental and emotional harm

71. This caused Ms. Athanasoulis significant stress and anxiety. Ms. Athanasoulis had spent years building Cresford's reputation with Toronto's largest and most reliable contractors and real estate brokers. She developed close personal and professional relationships with many of these contractors and brokers. Her hard work and critical relationships were threatened by Cresford's inability to pay contractors and brokers on time, or at all. She also worried about how contractors and brokers would react when they learned that there were no funds available to pay them. She worried about what would happen to purchasers who had trusted Cresford and paid deposits on condominium units. She worried about what would happen to Cresford's staff if funding was not secured.

(ix) Potential purchaser to solve Cresford's cash flow crisis

72. Ms. Athanasoulis worked diligently to solve Cresford's financial difficulties. She explored a number of potential solutions once it became clear Mr. Casey could not or would not provide the funds that Cresford desperately needed. In the course of these discussions, Mr. Casey suggested that he would consider selling the business to solve the cash flow crisis.

73. Ms. Athanasoulis was ultimately introduced to a well-known Toronto businessman who expressed an interest in buying Cresford's four ongoing projects and other assets. The potential purchaser was, however, only interested in Cresford if Ms. Athanasoulis stayed with the company and continued to operate its business. Mr. Casey was of the same opinion and agreed the opportunity should be explored.

74. Ms. Athanasoulis discussed the potential sale with Mr. Casey and he authorized her to continue discussions with the potential purchaser. The potential purchaser signed a non-disclosure agreement, and began to evaluate Cresford's business.

75. The potential purchaser offered Ms. Athanasoulis an interest in the business to incentivize her to participate in the transaction and remain with Cresford after the sale.

76. Ms. Athanasoulis told Mr. Casey that, if the purchase was completed, she would have an interest in the purchaser. He did not object, nor did he suggest that Ms. Athanasoulis' potential interest with the purchaser would interfere with her continued role at Cresford.

77. Discussions with the purchaser progressed to the point that the potential purchaser provided Mr. Casey with a non-binding letter of intent ("LOI") setting out the terms of a potential deal in December 2019. The proposed transaction would have addressed Cresford's cash flow issues, injected the proper required equity by paying out the high interest loans and investors, and generated a significant personal profit for Mr. Casey. But Mr. Casey did not accept, or even negotiate to improve, the LOI.

(x) Mr. Casey tries to conceal Cresford's cash flow crisis

78. Instead of completing the proposed purchase, or pursuing an alternative solution to Cresford's cash crisis, Mr. Casey focused on concealing that crisis from lenders and other stakeholders.

79. As noted above, Halo Inc. had an obligation to provide Altus with copies of all of its construction contracts. This allowed Altus to (among other things) identify cost overruns. In

October 2018, Cresford hired Verdi Inc. ("**Verdi**") to perform concrete forming work on the Halo project. The Verdi contract created a cash shortfall of approximately $4.5 million. Instead of funding this overrun with equity (or finding outside funding), Mr. Casey directed Cresford's staff to withhold the Verdi contract and all progress bills from Altus. This was a breach of the Halo Loan Agreement. It was also very short-sighted. Verdi erected a large crane on the Halo site, which is prominently located on Yonge Street, to complete its work. It is only a matter of time before Altus sees the crane, identifies the breach of contract and notifies the affected lenders.

80. The cash flow issues on 33 Yorkville are also urgent. The applicable loan agreements require that 75% of the remaining construction contracts be awarded by January 1, 2020. Awarding these contracts would crystallize cost overruns in the approximate amount of $65 million, and 33 Yorkville Inc. would have to fund these overruns. Mr. Casey had no plan in place to fund the overruns, so he instructed Cresford's construction staff to delay awarding the contracts. This breached the 33 Yorkville loan agreements. It is also short-sighted, since the contracts will still need to be awarded, and the cost overruns will need to be addressed.

81. In addition, contractors and real estate brokers already working on the Projects have not been paid on time. The owners of these projects owe approximately $20 million to contractors and real estate brokers. Many of these amounts are significantly overdue. Mr. Casey has no funding in place to pay the contractors, and several have threatened to sue and/or register liens in accordance with the *Construction Lien Act* if they are not paid immediately.

D. CONSTRUCTIVE TERMINATION

82. As soon as Ms. Athanasoulis discovered how Mr. Casey had funded Cresford's business, and the need for significant further funding, she urged Mr. Casey to find stable funding for Cresford so it could complete the Projects and comply with its lending agreements. She worked diligently to help him do so, but made it clear she would not help him deceive lenders, contractors or anyone else. As more time passed, and the issues grew more serious, Ms. Athanasoulis' efforts to convince Mr. Casey to address the issues became more urgent and forceful.

83. Despite Ms. Athanasoulis' efforts, Mr. Casey took no steps to rectify the situation.

84. Instead of focusing on the projects that required cash, Mr. Casey told Ms. Athanasoulis that Cresford's sole priority was to satisfy the conditions precedent on the YSL Construction Loan. In order to access that funding, YSL Inc. had to enter into an agreement to sell the retail component of YSL. This was the final funding condition, so once a suitable purchaser was found YSL could access the first tranche of the YSL Construction Loan.

85. As is standard, funds advanced pursuant to the YSL Construction Loan can only be used to fund construction costs on YSL. Thus, funding the YSL Construction Loan would do nothing at all to help Cresford's overall cash position unless YSL diverted funds to other projects. Such diversions would be fraud.

86. Ms. Athanasoulis raised this concern with Mr. Casey, but did not receive a meaningful response. Instead, Mr. Casey sent a non-binding letter of intent purporting to relate to the sale of the retail component of YSL directly to YSL's construction lender, Otera. The letter of intent did not satisfy the condition of the YSL Construction Loan, since an actual agreement of purchase and

sale was required, no one (including Cresford's management) knew who the purchaser was and the transaction contemplated by the letter of intent did not satisfy the requirements of the YSL Construction Loan in any event. The YSL Construction Loan required that the deposit on the retail component be available to fund construction costs, and such use was prohibited by the letter of intent Mr. Casey provided.

87. Ms. Athanasoulis, and other members of Cresford's management, asked Mr. Casey to clarify these issues. Mr. Casey provided no meaningful response. Instead, he instructed his litigation lawyer, Allan O'Brien, to write to Ms. Athanasoulis and accuse her of breaching her fiduciary duty by interfering with YSL Inc.'s attempts to close the YSL Construction Loan. Mr. O'Brien provided no particulars to support this allegation, because there was no interference.

88. Otera was, understandably, confused by Mr. Casey's e-mail. Ms. Athanasoulis had been responsible for Cresford's relationship with Otera since early 2019, so Otera asked to speak with her. Mr. Casey prohibited her from communicating with Otera, or any other lender, and indicated that he alone would speak to Cresford's lenders.

89. Mr. Casey then went further still, and advised that he alone would deal with *all* of Cresford's key stakeholders including contractors and lenders. He also told Cresford's staff, who previously reported to Ms. Athanasoulis, that they would now report to him directly.

90. Mr. Casey's actions stripped Ms. Athanasoulis of essentially all of her responsibilities as Cresford's president and COO. She was terminated in all but name. But Mr. Casey refused to formalize this termination because he was concerned about how Cresford's key stakeholders, including contractors, lenders, investors and employees, would react.

91. All of this put Ms. Athanasoulis in an impossible situation. She was nominally an officer of Cresford (and a director of YSL Inc.) but had no ability to understand or affect how Cresford conducted business. She had good reason to believe that Mr. Casey planned to take steps that would violate Cresford's legal obligations and potentially expose her to personal liability.

92. The conduct described above constituted repudiation of Ms. Athanasoulis' employment contract, and constructive termination of her employment by Cresford. By letter dated January 2, 2020, Ms. Athanasoulis wrote to accept this repudiation.

E. DEFAMATION

93. Ms. Athanasoulis' January 2, 2020 letter indicated that she would like to negotiate an amicable separation from Cresford and that, while negotiations were ongoing, she would tell third parties only that she was no longer with Cresford and that all inquiries relating to Cresford should be directed to Mr. Casey.

94. Ms. Athanasoulis did what she said she would do. When lenders, contractors and other stakeholders contacted her, she referred them to Mr. Casey and said nothing about Cresford's business.

95. Unfortunately, Mr. Casey followed the opposite path. Before Ms. Athanasoulis accepted Cresford's repudiation, Mr. Casey began telling lies meant to harm her reputation and blame her for Cresford's cash flow issues. His false and defamatory statements continued after Ms. Athanasoulis' termination.

96. On December 21, 2019, Mr. Casey told the potential purchaser – who was also Ms. Athanasoulis' potential business partner – that "people" had invented Cresford's cash crisis to further their own financial interests. Mr. Casey's statement obviously referred to Ms. Athanasoulis, since she was the only person in a position to "create" the cash flow crisis and then profit from it. Mr. Casey's statement was, in essence, an allegation that Ms. Athanasoulis committed a grievous breach of her duties as President by harming Cresford to further her own interests.

97. In addition, on January 2, 2020, Mr. Casey told members of Cresford's staff that Ms. Athanasoulis had caused Cresford's cash crisis by selling condominium units for less than they were worth. This, too, was defamatory.

98. Mr. Casey's defamatory campaign continued. After terminating Ms. Athanasoulis, Mr. Casey hired Ted Dowbiggin, the former president of Cresford Capital. He told Mr. Dowbiggin that Ms. Athanasoulis had devalued Cresford so that she could buy it. Mr. Dowbiggin relayed Mr. Casey's false allegations to Cresford personnel and others.

99. On January 7, 2020, Mr. Casey met again with the prospective purchaser. At that meeting, Mr. Casey repeated his allegations against Ms. Athanasoulis. He claimed again that "people" had "hidden" Cresford's profits for their own benefit. It was clear to the potential purchaser that Mr. Casey was referring to Ms. Athanasoulis, and alleging again that she had breached her duties to Cresford in order to further her own financial interests.

100. Ms. Athanasoulis has spent many years building a stellar reputation in the real estate development industry. She is known to be a talented executive who conducts business honestly.

This reputation is very valuable. Indeed, because of her reputation, Ms. Athanasoulis had the opportunity to acquire an interest in Cresford's business if the purchase transaction described above was completed. That reputation is particularly important now, since Ms. Athanasoulis has been terminated by Cresford and must now seek new opportunities in the industry.

101. Mr. Casey's statements harmed – and were meant to harm – Ms. Athanasoulis' reputation. Mr. Casey's false allegations that she betrayed him would, if believed, make it difficult or impossible for Ms. Athanasoulis to do business with the potential purchaser or other business partners. Potential new employers would, of course, never hire an executive who had tried to destroy her previous employer so its business could be purchased at a discount.

102. Mr. Casey's statements are unquestionably defamatory. They are also entirely false. Ms. Athanasoulis did not – and would not – do anything to harm Cresford. Cresford's cash crisis was (and is) real. It was caused by Mr. Casey's own failure to inject equity into the business, and the secret high interest loans he took out to fool lenders into thinking he had made the equity injections he agreed to make.

F. COMPENSATORY DAMAGES

(i) Notice period

103. Ms. Athanasoulis was constructively dismissed without notice or cause. The defendants are liable for damages in an amount equal to what Ms. Athanasoulis would have earned during the notice period that she was entitled to. Ms. Athanasoulis is entitled to 24 months' notice, having regard to:

(a) **Character of employment:** Ms. Athanasoulis was Cresford's most senior employee except for Mr. Casey, with overall responsibility for virtually all aspects of Cresford's business except financing. In that capacity, she successfully executed some of the most ambitious development and construction projects in Canada;

(b) **Age and length of employment:** Ms. Athanasoulis worked at Cresford for 16 years and is 42 years old;

(c) **Availability of similar employment:** similar employment is not currently available to Ms. Athanasoulis and will not be available to her for the foreseeable future. There are only a handful of developers in Canada that execute projects of the type, size and scope that Ms. Athanasoulis worked on while she was at Cresford. These developers already have presidents. As a result, Ms. Athanasoulis is unlikely to find comparable employment for at least 24 months.

(ii) Profit and revenue shares owed

104. As noted, Ms. Athanasoulis was entitled to $500,000 per annum, plus benefits. She also was entitled to 0.15% of all revenue earned by Cresford on new projects during her notice period.

105. In addition, and most importantly, Ms. Athanasoulis continued to dedicate her time, energy and talent to Cresford's business because Mr. Casey agreed to pay her 20% of the profits yielded by that business. She is entitled to 20% of all the profits earned by Cresford on the Projects. The Projects are expected to yield profits of $242 million, with a majority of this coming from YSL, and Ms. Athanasoulis is entitled to 20% of those profits, which are equal to $48 million.

G. PUNITIVE AND EXEMPLARY DAMAGES

106. As described above, Ms. Athanasoulis was terminated because she insisted that Mr. Casey deal honestly with Cresford's stakeholders. Cresford's actions, and those of Mr. Casey, demonstrate a wanton and contumelious disregard for Ms. Athanasoulis' rights and warrant an award of punitive and exemplary damages. Those actions also caused significant mental and emotional distress to Ms. Athanasoulis, and an award of aggravated damages is also warranted.

January 21, 2020

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Plaintiff Defendants

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

Proceeding commenced at Toronto

STATEMENT OF CLAIM

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Court File No. B-21-02734090-0031

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

IN THE MATTER OF THE *BANKRUPTCY AND INSOLVENCY ACT*,
R.S.C. 1985, c. B-3, as amended

IN THE MATTER OF THE NOTICES OF INTENTION TO MAKE A PROPOSAL OF
YG LIMITED PARTNERSHIP AND YSL RESIDENCES INC.

Claim of Maria Athanasoulis against
YG Limited Partnership and YSL Residences Inc.

NOTICE OF MOTION
(Appeal of disallowance of claim)

Maria Athanasoulis will make a motion to the Court on a date to be fixed by way of appeal from the disallowance by the Trustee of her claim against YG Limited Partnership and YSL Residences Inc. in the bankruptcy proposals of YG Limited Partnership and YSL Residences Inc.

PROPOSED METHOD OF HEARING: The motion is to be heard:

☐ In writing under subrule 37.12.1 (1);

☐ In writing as an opposed motion under subrule 37.12.1 (4);

☒ In person;

☐ By telephone conference;

☐ By video conference.

THE MOTION IS FOR:

(a) A declaration setting aside the determination of the proposal trustee, KSV Advisory Inc. ("**Trustee**") dated August 10, 2023 (the "**Determination**");

(b) A declaration that Maria Athanasoulis' Claim (as defined below) against YG Limited Partnership and YSL Residences Inc. (together "**YSL**") is a valid claim and ought to be allowed in an amount to be determined by further order of this Court;

(c) An Order directing a reference to determine the profits that Ms. Athanasoulis would have earned but-for YSL's breach of contract;

(d) An Order valuing the Claim in an amount equal to 20% of the amount determined in the reference referenced in (c) above;

(e) In the alternative to (c) and (d) above, an Order allowing the Claim in the amount of 20% of YSL's actual profits (calculated based on actual revenues less actual expenses) which are equal to $7.8 million or such other amount as the Court may determine;

(f) A declaration that the Claim is not an equity claim, and is a provable claim within the meaning of section 121(1) of the *Bankruptcy and Insolvency Act* ("**BIA**");

(g) A declaration that the Claim is entitled to priority over the claims asserted by limited partner investors in YSL (the "**LPs**");

(h) Costs of this motion on a substantial indemnity basis; and

(i) Such further or other order as to this Honourable Court may seem just.

THE GROUNDS FOR THE MOTION ARE:

A. OVERVIEW

0. Maria Athanasoulis brings this motion to appeal the Trustee's determination that $18 million of her claim (defined above as the "**Claim**") against YSL should be valued at $0.[1] Ms. Athanasoulis has already established through binding arbitration that she had the right to receive 20% of the profits earned by YSL as part of her oral employment agreement (the "**Agreement**"), and that YSL had a contractual obligation to maximize the profits earned on the large and successful real estate development that it owned (the "**YSL Project**").

[1] The Trustee allowed Ms. Athanasoulis' related $1 million wrongful termination claim in the amount of $880,000. This aspect of the Trustee's determination is not being appealed.

1. Ms. Athanasoulis also proved that YSL breached the Agreement by constructively terminating her employment. Justice Dunphy previously found in these proceedings that YSL tried to enrich its principal, Daniel Casey, instead of maximizing the value of the YSL Project. This, too, was a breach of the Agreement. YSL's efforts to enrich Mr. Casey culminated in a bankruptcy proposal that should never have been required (because the YSL Project could have been sold for a significant profit through an open and honest marketing process) and rested on misleading evidence about the value of the YSL Project and the expenses that YSL had actually incurred.

2. Damages for breach of contract must put the injured party in the position she would occupy but-for the breach. In this case, Ms. Athanasoulis is entitled to the amount that she would have earned if YSL had honoured the Agreement *and* maximized the value of the YSL Project.

3. YSL's breaches caused enormous losses. YSL's financial projections, which were vetted by a leading cost consulted, forecast $200 million in profits. More importantly, the YSL Project was *already* worth approximately $100 million more than YSL had invested in it when YSL repudiated the Agreement. Even after YSL destroyed most of the value of the YSL Project in its attempt to enrich Mr. Casey, YSL *still* earned a profit (calculated based on actual revenue less actual expenses, based on YSL's records) of *at least* $35 million.

4. Despite all of this, the Trustee concluded that the Claim is worth *nothing*. This is not—and cannot be—correct.

5. The Trustee reached the wrong conclusion, because it applied the wrong principles. In fact, it disregarded the well-established legal principles that apply to Ms. Athanasoulis' claim, and failed to analyze key evidence submitted to it. The Trustee:

(a) concluded that Ms. Athanasoulis suffered no damages without applying—or even referencing—the legal principles that govern the assessment of damages for breach of contract;

(b) concluded that the YSL Project did not earn a profit without calculating—or even considering—what revenue YSL earned and what expenses it paid;

(c) concluded that Ms. Athanasoulis' claim was an equity claim by explicitly *rejecting* the definition of "equity claim" in the *BIA*;

(d) concluded that certain third party investors who held limited partnership units in YSL (defined above as the "**LPs**") were entitled to priority over Ms. Athanasoulis without any legally coherent justification for its conclusion.

6. If the Trustee had considered the relevant evidence, and applied the correct legal principles, then it would have concluded that Ms. Athanasoulis' claim was worth $18 million or more.

B. Background facts

(i) YSL and Cresford

7. Ms. Athanasoulis was, until December 2019, the President and COO of a group of companies engaged in the development, construction, marketing and sale of condominiums in Toronto using the brand name "Cresford." Cresford was founded by Daniel Casey, and owned by companies and trusts that he controlled.

8. Each of Cresford's development and construction projects was owned by a separate legal entity. That entity purchased the land where the relevant project was to be built, obtained the required permissions, marketed the project to proposed purchasers, hired contractors to build the project, and took all of the other steps to convert real estate into a major condominium development. Ms. Athanasoulis' role extended to overseeing each of Cresford's individual project companies as well.

9. The Claim concerns Yonge Street Living Residences (the previously-defined "**YSL Project**"), an 85-story condominium tower located at the corner of Yonge and Gerrard in Toronto. The YSL Project was owned by YSL.

(ii) YSL's limited partners

10. The YSL Project was Cresford's largest project. To raise capital for the YSL Project and fund the buyout of a joint venture interest held by a major pension fund, Mr. Casey decided to solicit outside investment from limited partners.

11. The LPs purchased Class "A" Units in YG Limited Partnership ("**YSL LP**"). Cresford Yonge Limited Partnership ("**Cresford LP**"), an entity controlled by Mr. Casey and/or his family trusts, owned all of the Class "B" Units. YSL LP is the beneficial owner of the YSL Project.

12. Ms. Athanasoulis did not hold any interest in, or contract with, Cresford LP. She did not otherwise hold any units in YSL LP. She did not receive (and was not entitled to receive) any units, or other equity interest, in YSL.

(iii) YSL's success

13. YSL had achieved significant progress on the YSL Project by December 2019. It had (among other things) obtained all of the approvals required to build the YSL Project and pre-sold approximately $650 million worth of condominium units at record-setting prices under Ms. Athanasoulis' leadership. It had negotiated fixed-price contracts for the majority of its expenses, so it had certainty about construction costs.

14. This progress yielded tangible financial gains. By July 2019, the YSL Project was valued at $375.5 million, approximately $125 million more than YSL had invested into it. YSL's internal projections, which had been vetted by leading external consultants, forecasted profits of close to $200 million.

(iv) Cresford's collapse

15. Cresford's other major projects suffered significant cash flow problems in 2019, which culminated in insolvency proceedings in the spring of 2020. These proceedings, and the lender investigations that preceded them, uncovered serious financial wrongdoing at Cresford. This Court found, among other things, that Cresford entities kept two sets of books in order to hide information from lenders.

16. YSL did not face similar financial issues. It was properly capitalized and, according to Mr. Casey, had "everything going for it."

17. Ms. Athanasoulis discovered Cresford's financial issues in 2019, and pressed Mr. Casey to take concrete steps to address Cresford's funding issues and preserve value for all stakeholders.

Mr. Casey refused, and constructively terminated Ms. Athanasoulis. YSL denied that it entered into the Agreement, or owed anything to Ms. Athanasoulis.

(v) YSL breached its agreement with Ms. Athanasoulis by terminating her

18. After a contested arbitration between Ms. Athanasoulis and the Trustee, Arbitrator William Horton (the "**Arbitrator**") found that:

(a) YSL and Ms. Athanasoulis entered into a valid agreement to pay Ms. Athanasoulis 20% of the profits earned on the YSL Project;

(b) Profits were to be calculated as revenues less expenses;

(c) YSL was obliged to work to maximize the profits earned on the YSL Project; and

(d) YSL had repudiated the Agreement by constructively terminating Ms. Athanasoulis' employment in December 2019.

(vi) YSL breached the Agreement by destroying the value of the YSL Project with efforts to enrich Mr. Casey

19. YSL's repudiation of the Agreement had important consequences. It converted Ms. Athanasoulis' future right to receive 20% of the profits the YSL Project actually earned into a present right to be paid the damages caused by YSL's repudiation.

20. On a more practical level, YSL's termination of Ms. Athanasoulis—and a number of other Cresford staff—left Mr. Casey and a small group of loyalists free to pursue their own interests. Instead of maximizing and, if necessary, realizing the value of the YSL Project, Mr. Casey caused YSL to embark on a campaign to enrich him.

21. YSL undeniably breached its obligation to maximize the profits from the YSL Project. Justice Dunphy found, in these Proposal proceedings, that efforts to sell or refinance the YSL Project in 2020 and 2021 were "indelibly tainted" by Mr. Casey's self-interest. Justice Dunphy specifically found that in the year between Cresford terminating Ms. Athanasoulis and agreeing to sell the YSL Project, "good faith took a back seat to self-interest." There was no effort to market the YSL Project to all potential purchasers. There was no marketing campaign at all. There was,

instead, a laser focus on two potential purchasers (first Empire and then Concord) who were prepared to negotiate a transaction that would benefit Mr. Casey at the expense of other stakeholders.

22. The management of the YSL Project between December 2019 (when Ms. Athanasoulis was terminated) and July 2021 (when YSL's proposal under the *BIA* was accepted) had one goal: to enrich Mr. Casey and the entities he controlled. This was a breach of the Agreement.

(vii) YSL's insolvency proceedings

23. Mr. Casey's efforts culminated in these proposal proceedings. The initial proposal made by YSL and the Proposal Sponsor, an affiliate of Concord Developments, contemplated payments to Cresford totaling more than $20 million. Despite creating a previous *pro forma* that forecast substantial profits, Concord submitted a *pro forma* in support of the Proposal that suddenly forecast a loss. Concord and YSL also tendered a highly suspect appraisal, which inexplicably assumed that the YSL Project would be substantially smaller than it was approved to be.

24. Justice Dunphy refused to approve its initial proposal, because it was tainted by Mr. Casey's attempt to enrich himself and was supported by unreliable evidence.

25. YSL and the Proposal Sponsor tendered an amended proposal, which was approved on July 16, 2021 (the "**Proposal**"). Justice Dunphy *did not* find that the Proposal offered fair value of the YSL Project. The Proposal was approved because, by the time it came before the Court, creditors had not been paid for more than one year and Justice Dunphy found it would be unfair to force these creditors to wait through a prolonged sales process.

26. As part of the Proposal, Concord acquired the YSL Project and set aside a pool of $30.9 million to satisfy creditor claims. The Proposal Trustee was responsible for resolving disputed claims against YSL. By this appeal, Ms. Athanasoulis seeks her share of these funds.

C. Procedural History

(i) Ms. Athanasoulis wins the first phase of a bifurcated arbitration

27. Ms. Athanasoulis' claim was, by its nature, ill-suited to summary determination in a traditional claims process. The Agreement was oral, and its terms were disputed. Valuing the claim involved a host of legal and factual complexities.

28. After the Proposal was approved, Ms. Athanasoulis and the Trustee agreed to a bifurcated arbitration process to determine her claim within the Proposal, in which liability issues would be determined in the first phase and issues relating to the quantification of Ms. Athanasoulis' damages would be determined in the second phase. At this stage, no one alleged that Ms. Athanasoulis held an equity claim or that she was subordinate to the LPs.

29. The first phase of the arbitration proceeded over four days in February 2022 (the "**Arbitration**"). Ms. Athanasoulis succeeded at the first phase of the Arbitration. The Arbitrator found that the Agreement was binding and that Ms. Athanasoulis was entitled to 20% of the profits from the YSL Project. The Arbitrator also found that YSL had repudiated the Agreement by constructively terminating Ms. Athanasoulis.

(ii) Challenges to the Arbitration

30. Shortly after the Arbitrator's award was released, the LPs and Concord objected to the arbitration process on the basis that it was too expensive and that the Proposal Trustee did not have the jurisdiction to agree to it. The LPs claimed, for the first time, that they were entitled to be paid in priority to Ms. Athanasoulis. No such claim was made before Ms. Athanasoulis spent substantial sums on the Arbitration.

31. By Endorsement dated November 1, 2022, Justice Kimmel found that the second phase of the arbitration could not proceed. Her Honour ordered the Trustee to establish a new process for determining Ms. Athanasoulis' Claim (the "**Jurisdiction Decision**").

32. By Endorsement dated February 10, 2023, Justice Kimmel established a procedure for determining Ms. Athanasoulis' claim, as well as a procedure for any appeal from the Trustee's determination of the claim (the "**Process Decision**"). Pursuant to the Process Decision,

Ms. Athanasoulis' entitlement to damages was to be determined by the Trustee. The Trustee's determination is subject to appeal pursuant to the *BIA*.

33. The Jurisdiction Decision and the Process Decision dramatically altered the Trustee's relationship to Ms. Athanasoulis' claim. The Trustee participated in the Arbitration as Ms. Athanasoulis' adversary, and stated—clearly and repeatedly—that Ms. Athanasoulis had not suffered any damages. But the Jurisdiction Decision required that the Trustee change from advocate to adjudicator. In practice, the Trustee was called on to determine whether Ms. Athanasoulis' damages theory was correct or whether *its own* position on damages should be preferred.

(iii) The Draft Notice of Disallowance and Ms. Athanasoulis' submissions

34. Before the Process Decision was issued, and Ms. Athanasoulis tendered evidence or argument to support her damages claim, the Trustee issued a "Draft Notice of Disallowance" explaining why it believed that Ms. Athanasoulis was not entitled to any payment in respect of the Claim.

35. Since February 2023, Ms. Athanasoulis delivered close to one hundred pages of written argument supported by thousands of pages of supporting evidence. Among other things, Ms. Athanasoulis demonstrated—based on YSL's own accounting records—that YSL had earned a substantial profit. YSL's records showed expenses totalling approximately $265 million, including payments of approximately $11 million to Cresford that have not been adequately explained and may not be valid project costs. YSL earned revenues of approximately $305.4 million, including the sale of the YSL Project to Concord for an implied purchase price of $291 million.

36. Some aspects of Ms. Athanasoulis' costs and revenue analysis were disputed by Cresford and/or the LPs. But Cresford did not provide *any* evidence that YSL's *actual* expenses exceeded its revenue. In fact, Cresford's primary response to Ms. Athanasoulis was to argue that certain expenses had been properly accrued for accounting purposes even though they were never paid. Unpaid expenses are not expenses at all, and they are not relevant to Ms. Athanasoulis' entitlement.

(iv) The Trustee did not accept any of Ms. Athanasoulis' submissions, and did not consider most of them

37. In any event, the Proposal Trustee appears to have largely disregarded both Ms. Athanasoulis' submissions and the responses to those submissions.

38. The Trustee issued its Disallowance on August 10, 2023, the Trustee issued a Notice of Disallowance setting out its determination of the value of Ms. Athanasoulis' Claim (the "**Disallowance**"). The Trustee did not make any material change to the reasoning or conclusions articulated in the Draft Notice of Disallowance.

39. The Disallowance makes no reference at all to critical aspects of Ms. Athanasoulis' argument. The Proposal Trustee did not provide any meaningful response to Ms. Athanasoulis' primary legal argument, which is that her damages must be calculated based on what would have happened but-for YSL's breach of contract. Nor did it adequately address her alternative argument that she was entitled to payment even if that payment is calculated based on actual profits. It did not reach any conclusion, or conduct any apparent analysis, to determine whether YSL had actually earned profits.

D. GROUNDS OF APPEAL

40. The Trustee denied that Ms. Athanasoulis is entitled to anything, apart from the previously approved wrongful dismissal damages, for three reasons:

(a) The Trustee asserted that the Claim is an "equity claim" that is not "provable" pursuant to the *BIA*, without regard for the *BIA* requirement that an "equity claim" be in "respect of" an "equity interest";

(b) The Trustee concluded that no profits were earned by YSL, without considering either YSL's revenue or its expenses; and

(c) The Trustee concluded that Ms. Athanasoulis' claim was "subordinated" to the LPs, without finding that there was any agreement between Ms. Athanasoulis and the LPs.

41. The Disallowance is, with respect, deeply flawed. It should be set aside.

(i) The Trustee should have applied well-established legal principles to the established facts

42. The Arbitrator's award, together with the well-established principles that apply to all breach of contract claims, provide a clear path for the Trustee. The Trustee ought to have calculated damages that put Ms. Athanasoulis in the position that she would be in but-for YSL's breaches of the Agreement. Based on the findings of the Arbitrator, and Justice Dunphy, this means that the Trustee ought to have considered what would have happened if YSL had honoured the Agreement *and* worked to maximize the value of the YSL Project. Ms. Athanasoulis is entitled to damages equal to the difference between what she actually was paid (nothing) and what she would have been paid if YSL had honoured the Agreement.

43. This analysis would, necessarily, have resulted in the conclusion that Ms. Athanasoulis' claim had significant value. All of the contemporaneous evidence supports the conclusion that, but-for YSL's breaches of the Agreement, the YSL Project would have yielded substantial profits either from a sale or continued development.

44. Contemporaneous valuation evidence, which was reviewed and accepted by third parties, shows that the YSL Project was worth $375 million at the time of termination and that YSL had incurred expenses of approximately $241 million. But-for the breach, these profits would have been realized. Ms. Athanasoulis' entitlement under the Agreement was, therefore, worth approximately $26 million (being 20% of the difference between $375 million and $241 million: $375 million - $241 million = $134 million. $134 million x 20% = $26.8 million)

45. The Trustee did not reference, or engage with, this analysis. It simply assumed that Ms. Athanasoulis' entitlement is limited to 20% of the actual profits earned by YSL.

46. Once the Trustee had valued Ms. Athanasoulis' contract, in accordance with the ordinary rules of damages, it should then have considered whether Ms. Athanasoulis' claim is subordinate to the LPs' claims in accordance with the priority scheme set out in the *BIA*. As detailed below, Ms. Athanasoulis is a creditor, and the LPs are equity claimants. Ms. Athanasoulis is entitled to priority.

47. Ms. Athanasoulis is a creditor. The Claim is based on an action for breach of contract. YSL agreed to pay Ms. Athanasoulis 20% of the profits that it earned. The Agreement was meant to induce Ms. Athanasoulis to remain at Cresford and continue to drive the YSL Project (and Cresford's other projects) forward. YSL repudiated the Agreement, and Ms. Athanasoulis accepted that repudiation. After the repudiation, in December 2019, Ms. Athanasoulis had a valid—and valuable—claim for breach of contract. She provided services, and YSL failed to pay what it agreed to pay for those services. The Claim is a debt within the meaning of the *BIA*.

48. Conversely, Ms. Athanasoulis does not advance an equity claim. Critically, Ms. Athanasoulis *did not* have any equity interest in YSL. She was an employee. Nothing more. According to the *BIA*, an "equity claim" must be "in respect of" an "equity interest". The Claim has no connection to any "equity interest," which the *BIA* defines to include shares, warrants, or options in YSL. No one alleges that Ms. Athanasoulis held any equity interest. The Claim is not "in relation to" any such interest. This is a complete answer to the allegation that Ms. Athanasoulis has an "equity claim" that is not provable in this proceeding.

49. The *BIA* therefore provides a clear answer to the priority issue. Ms. Athanasoulis is a creditor and she is entitled to priority over the equity claims advanced by the LPs.

E. The Trustee's errors

50. The Trustee's fundamental error is that it concluded—before considering any meaningful argument from Ms. Athanasoulis—that the LPs *should be* paid before Ms. Athanasoulis. The Trustee concluded that, since the LPs *have not* been paid then Ms. Athanasoulis *cannot* be paid. This conclusion drives essentially every aspect of its determination. But it does not rest on any sound legal theory or evidentiary basis.

51. More importantly, the Trustee's approach to the Claim was simply wrong. The Trustee was tasked with valuing Ms. Athanasoulis' claim. That valuation is *separate* from any determination about Ms. Athanasoulis' priority relative to the LPs.

(i) Ms. Athanasoulis' Claim is a provable claim, not an equity claim.

52. The Trustee concluded that the Claim is an equity claim that is not provable in bankruptcy. As noted above, the *BIA* sets clear criteria for identifying an equity claim. Ms. Athanasoulis does not meet that criteria. Despite this, the Trustee concluded that the Claim is an equity claim. The Trustee even said explicitly that it "does not consider" Ms. Athanasoulis' lack of an equity interest relevant because Ms. Athanasoulis' claim is "in substance" an "equity claim".

53. With respect, the Trustee is bound by the statutory definition of an "equity claim". An equity claim can exist if—and only if—it is "in relation to" an "equity interest". The Trustee cannot ignore the definition because it has decided that Ms. Athanasoulis' claim *should* be an equity claim.

54. As found by the Arbitrator, the compensation contemplated by the Agreement was intended to incentivize Ms. Athanasoulis' extraordinary contributions to the Cresford Group. Like most other forms of recoverable incentive-based compensation, the parties chose to tie the quantification of this compensation to the company's performance. This does not transform the "true nature" of this compensation from a contractual obligation into an equity claim.

(ii) The Profit Sharing Claim should not be valued at zero—Ms. Athanasoulis suffered damages of $26 million or, in the alternative, $7.8 million

55. The Trustee concluded that there were "no profits earned by YSL". With respect, this conclusion is infected by two fundamental errors.

56. First, the Trustee disregards the well-established principles that govern the assessment of damages. The Trustee assumes that Ms. Athanasoulis is only entitled to the *actual* profits earned by YSL in connection with the Proposal. But the Trustee is wrong about *how* damages are to be assessed.

57. Damages for breach of contract must put the injured party in the position she *would* occupy if the other party had met its contractual obligations. The Trustee has not made any attempt to assess what position Ms. Athanasoulis would occupy but-for the breach. It has simply assumed that Ms. Athanasoulis is limited to 20% of YSL's actual profits.

58. Second, and in the alternative, even if Ms. Athanasoulis is only entitled to 20% of actual profits, valuing her claim requires a calculation of YSL's actual revenue and actual expenses. The Trustee concluded that Ms. Athanasoulis' claim had no value without evaluating *either* YSL's revenue *or* its expenses.

59. If the Trustee had performed the required calculation, it would have concluded that YSL earned substantial profits

60. In determining that YSL earned no profits, the Trustee has conflated *profits* with *cash on hand*. The Trustee assumes that because YSL did not have cash after the Proposal closed, it did not earn a profit. But profit is calculated based on revenue less expenses, not cash on hand. The Trustee has not conducted any apparent analysis with respect to *why* YSL did not have cash available to pay Ms. Athanasoulis and the LPs. The assumption underlying its analysis is not valid.

(iii) The Claim is not subordinate to the LPs' claims

61. The Trustee's Disallowance also concluded that Ms. Athanasoulis is not entitled to be paid anything unless and until the LPs are paid in full.

62. There is no basis for this conclusion. It is wrong. Ms. Athanasoulis never agreed to subordinate her claim to the LPs' claims. In fact, Ms. Athanasoulis and the LPs had no agreement or legal relationship with each other at all. Ms. Athanasoulis' entitlement is independent from—and not affected by—the LPs' entitlements *vis-à-vis* YSL.

63. The Trustee does not claim that Ms. Athanasoulis agreed to subordinate her position to the LPs' position. Its conclusion is based entirely on her testimony at the Arbitration, and in discoveries conducted in advance of the Arbitration, about how profits would be calculated.

64. None of the supposed admissions referenced by the Trustee or the LPs have the legal effect apparently attributed to them by the Trustee or the LPs. Ms. Athanasoulis testified at the Arbitration about the terms of the Agreement and specifically about how she expected profits to be calculated. She testified that profits were to be calculated as revenues less expenses, consistent with the YSL Project *pro formas*. Within that equation, repayment of investors, including the LPs,

was among the expenses or project costs that would be deducted before determination of the profits from which Ms. Athanasoulis was promised to be paid.

65. It is true that, if YSL had not breached the Agreement, Ms. Athanasoulis would have been paid after YSL's profits crystalized. The LPs may have been paid before her, or they may have been paid after her. There is no agreement one way or the other. Either way, this is a matter of *timing*—not priority. Ms. Athanasoulis *never* agreed to subordinate her interests to the LPs. No one involved in negotiating the Agreement says that she did.

66. More importantly, YSL dramatically altered Ms. Athanasoulis' entitlement when it repudiated the Agreement. It converted a *future* right to receive *actual* profits into a *current* right to receive *damages* for breach of contract. If this insolvency had not occurred, Ms. Athanasoulis would likely have been awarded (and paid) her damages before the YSL Project was complete and the LPs were paid.

F. The LPs' Standing in this Appeal Should Be Limited to the Issues Outlined in the Process Decision

67. As described above, the LPs have raised separate objections to Ms. Athanasoulis' claims and allegations about why they should recover ahead of Ms. Athanasoulis. But the LPs were not parties to the Agreement, or any agreement with Ms. Athanasoulis. Ms. Athanasoulis and the LPs assert separate claims against YSL. Ms. Athanasoulis respectfully submits that the LPs' allegations have nothing to do with her entitlement to damages.

68. The Process Decision directs that, subject to the discretion of the appeal judge, the LPs' standing on Ms. Athanasoulis' appeal of the Trustee's Disallowance is limited. The Process Decision provides that the LPs' submissions are to be limited to: (a) the impact of the prohibition contained in the Limited Partnership Agreement on non-arm's length agreements; (b) the question of the enforceability of the Profit Sharing Claim; and (c) the priority or subordination of the Profit Sharing Claim to the LPs' recovery of their initial investment based on alleged breaches of contractual and fiduciary duties and alleged misrepresentations. The LPs can advance these allegations, if they choose to. But they have no standing simply to repeat or support submissions

made by the Trustee. There is no basis on which to depart from the considered reasons of Justice Kimmel in the Process Decision.

THE FOLLOWING DOCUMENTARY EVIDENCE will be used at the hearing of the motion:

(a) The Proof of Claim of Maria Athanasoulis;

(b) The affidavit of Maria Athanasoulis dated May 5, 2023;

(c) Submissions of Maria Athanasoulis dated May 5, 2023;

(d) The Brief of Documents submitted by Maria Athanasoulis to the Proposal Trustee dated May 5, 2023;

(e) Transcript of the Cross-Examination of David Mann held June 21, 2023;

(f) Transcript of the Cross-Examination of Maria Athanasoulis held June 15, 2023;

(g) Letter dated July 5, 2023 providing answers to undertakings given on the cross-examination of Maria Athanasoulis together with the attachments thereto;

(h) The Notice of Disallowance of the Proposal Trustee dated August 10, 2023; and

(i) Such further and other evidence as the parties may submit and this Honourable Court may allow.

DATE: September 8, 2023

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IN THE MATTER OF THE *BANKRUPTCY AND INSOLVENCY ACT*, R.S.C. 1985, c. B-3, AS AMENDED

Court File No. B-21-02734090-0031

AND IN THE MATTER OF THE NOTICES OF INTENTION TO MAKE A PROPOSAL OF YG LIMITED PARTNERSHIP AND YSL RESIDENCES INC.

ONTARIO SUPERIOR COURT OF JUSTICE (COMMERCIAL LIST)

Proceeding commenced at Toronto

NOTICE OF MOTION

(Appeal of Disallowance of Claim)

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Consolidated Court File No. 31-2734090

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

IN THE MATTER OF THE BANKRUPTCY AND INSOLVENCY ACT,
R.S.C. 1985, c. B-3, as amended
IN THE MATTER OF THE NOTICES OF INTENTION
TO MAKE A PROPOSAL OF
YG LIMITED PARTNERSHIP AND YSL RESIDENCES INC.
Claim of Maria Athanasoulis against
YG Limited Partnership and YSL Residences Inc.

ARBITRATION PROCEEDINGS HEARD BEFORE
ARBITRATOR WILLIAM G. HORTON
held via Arbitration Place Virtual
on Tuesday, February 22, 2022, at 9:32 a.m.

VOLUME 1

CONDENSED TRANSCRIPT WITH INDEX

APPEARANCES:

Mark Dunn	on behalf of the Claimant
Sarah Stothart	
Matthew Milne-Smith	on behalf of the Respondent
Chenyang Li	for KSV Restructuring Inc.
Robin Schwill	in its capacity as the proposal trustee

ALSO PRESENT:

Angela Yu
Hannah Johnson

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Page 159

perspective -- sorry, we're going to skip ahead to after the launch of the YSL project in 2019. What -- and I'm going to ask you your understanding of the profit sharing agreement or the agreement at that time. Who were the parties to the agreement?

A. To the profit sharing agreement?

Q. Correct.

A. All the individual condominium owners of each project.

Q. Okay. And is that something that you discussed with Mr. Casey?

A. Yes, we discussed that in, in the meeting of 2019 with John Papadakis.

Q. Did you discuss it other than in the meeting of 2019 with John Papadakis?

A. Well, I mean, I would assume that one would understand that Cresford Developments was not a company, and all the individual projects filed into a corporate structure that I didn't necessarily completely understand who owned what, et cetera. So, I mean, each individual project was the project that I had a deal with in making my profit.

Q. Okay. But just to come back to my original question, what -- did you have a

Page 160

discussion about that issue with Mr. Casey, apart from the discussion that you had with Mr. Papadakis?

A. That each individual project?

Q. Right.

A. It was just something that was known and assumed.

Q. Okay. And did you have -- what discussions, if any, did you have with Mr. Casey about how profits were going to be calculated?

A. We would use the project pro forma for each project.

Q. And is that something you discussed with Mr. Casey?

A. Yes.

Q. Okay.

A. Like --

Q. Sorry, go ahead.

A. I mean, just like how else would you know what the profits are of each project? Like, we had a pro forma on each project that was distributed on a monthly basis, and that was the project -- profit for each project.

Q. Okay. And what was your understanding of when the profit share was going to be paid?

Page 161

A. So the profit share would be paid at the end of a project when it's complete.

Q. Okay. And did you have any discussion about what would happen if you were terminated or resigned from Cresford?

A. No. Because I didn't think that that would be something we would need to discuss.

Q. Okay. If Mr. Casey had asked you to agree that if you were terminated by Cresford, that your profit sharing entitlement would go away, would you have been prepared to agree to that?

A. No.

Q. Why not?

A. Well, it wasn't something that I agreed to in terms of the sales and marketing fee that I would earn, and all of my work was -- the amount of work that I put into a project, it was something that a lot of it was front end. And you know, in order for these projects to be a success, a lot of it was front loaded. So, I mean, in terms of getting the project marketed, sold, negotiating the contracts to get it into construction, that would have been an integral stage in the understanding what the profit would be, generally, because you would

Page 162

have the contingencies in place to take care of, of any extras. But, I mean, I didn't -- I would never agree to forgo my profit for all the work that I was doing.

Q. Okay. And did you ultimately take steps to document the agreement?

A. So we took steps together to document the agreement in 2019 with John Papadakis, who was our corporate lawyer at the time. We asked for a meeting at our offices to put the existing agreement in writing.

Q. Okay. I just want to pause for a second. You mentioned Mr. Papadakis. Do you have any relationship with Mr. Papadakis, other than him being Cresford's lawyer?

A. Yes, he's a friend, and -- he's a friend, and I'm also the godparent to his child by marriage.

Q. What does that mean, the godparent by marriage?

A. My husband has a relationship with John.

Q. Okay. And what's the nature of that relationship?

A. So his -- John -- my

Page 163

husband's parents were John's godparents. And so Chris, my husband, then became the best man and godparent to his child -- first child.

Q. Okay. And so what prompted you in 2019 to decide to document this arrangement?

A. So, I mean, it had been -- it had come up over the years several times. In 2019, it was a moment in time where YSL had become very profitable. And it was under construction, the sales had been achieved. We were negotiating to get a construction mortgage. And, you know, it was time that Dan provide me with the paperwork to ensure that I had my profit properly documented.

But it was also a time that for, for succession planning, if something were to happen to Dan, I was operating the business; I was the face of Cresford; I was the one who created the brand and the market knew me as Cresford. And it was something that we thought was important, because if something did happen to Dan health-wise, that the business carry forward and completed, so that both his estate and myself could finish the projects and, and nobody could step in and have the ability to derail me from earning my profits.

Q. Okay. So returning to this

Page 164

meeting, what was your understanding with respect to who Mr. Papadakis represented?

A. He represented Cresford.

Q. Okay. And did you have a lawyer at the meeting?

A. I did not have a lawyer at the meeting.

Q. And why not?

A. I didn't think I needed one. I would have engage my own lawyers after I had received formal paperwork.

Q. Okay. And when did the meeting take place?

A. So the meeting took place on a Saturday, because we were talking about my employment and profit numbers, which, you know, it just made sense to have it on a Saturday, where there wouldn't be many people around. And so we had it, you know, at the Cresford offices.

Q. Okay. So describe for me, as best you can, what you recall being discussed at the meeting?

A. So we went through all of the various components to my employment contract. I talked about just what I was owed, and in terms of

Page 165

each project what the profit was, which was 20 percent. But also, my sales commission, how each company owed me the profit, and my arrangements were with all the individual companies, and talked about just how it would work in terms of ensuring that both my interests were protected, and so were Dan's.

Q. Okay. And did you discuss what percentage of profit you were entitled to?

A. Yes. We discussed the ongoing arrangement of 20 percent.

Q. Okay. And did you discuss at the meeting who would pay you the profits?

A. All the individual entities, all the project companies of each condominium.

Q. Okay. And did you have at the meeting, to the best that you can recall, a list of who those entities were?

A. No. We talked about each project name and John wrote them down. And, and he received all of those names after the meeting, all of the various legal names.

Q. Okay. Did you have a discussion about what would happen in the event that any of the companies -- or any of the projects were sold?

Page 166

A. No.

Q. Okay. And did you discuss at the meeting how profits were to be calculated?

A. Each project pro forma had its own -- each project had its own pro forma. The profits were based on the actual pro forma for each project.

Q. Okay. And how many meetings did you have on this topic?

A. We had one meeting at the office.

Q. And so is that the meeting that you just told me about?

A. Yes.

Q. Okay. Did you have a further meeting at the office?

A. No.

Q. Or anywhere, sorry. Did you follow-up with Mr. Casey or Mr. Papadakis to ask -- sorry, let me take a step back. Did you ever receive a draft of the agreement?

A. No.

Q. Okay. Did you follow-up with Mr. Casey or Mr. Papadakis about the draft of agreement?

Consolidated Court File No. 31-2734090

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

IN THE MATTER OF THE *BANKRUPTCY AND INSOLVENCY ACT*,
R.S.C. 1985, c. B-3, AS AMENDED

AND IN THE MATTER OF THE NOTICES OF INTENTION
TO MAKE A PROPOSAL OF
YG LIMITED PARTNERSHIP AND YSL RESIDENCES INC.

AFFIDAVIT OF MARIA ATHANASOULIS
Sworn May 5, 2023

I, Maria Athanasoulis, of the City of Toronto, in the Province of Ontario, make oath and say:

1. I am the former President and Chief Operating Officer of a group of companies that operated using the brand name Cresford Developments (collectively, "**Cresford**"), including YG Limited Partnership and YSL Residences Inc. (together, "**YSL**"). As such, I have personal knowledge of the matters deposed to herein.

2. I swear this affidavit in order to provide information to the Proposal Trustee (the "**Trustee**") in support of my claim (the "**Claim**") in the above-captioned bankruptcy proposal proceedings (the "**Proposal**"). I have reviewed the Trustee's draft Notice of Disallowance of my Claim and the Joint Brief to the Trustee filed by the LPs (as defined below), and respond in this affidavit to various factual inaccuracies and characterizations contained within those documents.

3. The facts stated in this affidavit are based on my direct knowledge, unless I state otherwise. Where I do not have direct knowledge of the matters set out below, I have stated the source of my knowledge and believe it to be true.

(b) The agreement began in 2014, and automatically applied to each Cresford project that began after that date (including the YSL Project);

(c) Initially, the agreement was calculated based on 10% of a project's profits, but this was subsequently increased to 20%, including for the YSL Project;

(d) Profits are usually (but not always) earned at the end of a project;

(e) My entitlement to profits was not conditional on being employed by Cresford when the profits were earned.

12. I have, for convenience, called these terms the Profit Share Agreement, but they were actually a critical part of my employment agreement with Cresford.

13. Mr. Casey and I agreed that profits would be calculated as project revenues less project expenses, consistent with Cresford's *pro formas* maintained for each project. The *pro forma* on a project was an evolving document that began with a series of assumptions about what costs and revenues would be. As the project progressed, and actual costs were incurred or revenues earned, the *pro forma* would be updated to include actual information.

14. In the years following the creation of the Profit Share Agreement, my responsibilities at Cresford continued to grow until I managed the majority of Cresford's day-to-day operations. In addition to controlling Cresford's sales and marketing efforts, I was generally responsible for executing Cresford's projects successfully, including customer service and property management, supervising construction of Cresford's projects, and managing its relationships with trades.

however, unable to get approval for its original plan and decided to pursue a single-tower condominium. BcIMC did not want to participate in this modified project with a single tower, and accordingly sought to sell its interest in YSL. When Cresford purchased BcIMC's interest in 2017, the valuation of the YSL Project used for the purchase was $207.6 million. This was despite the original purchase price of $157.5M.

20. The YSL Project was Cresford's "crown jewel". It was Cresford's largest project and required an equity investment of approximately $75 million. To raise capital for the YSL Project, Mr. Casey decided to solicit outside investment from limited partners to fund the buyout of BcIMC's interest.

21. In my various roles leading sales and marketing for Cresford, I had cultivated relationships with a number of investors who bought condominium units in Cresford projects, as well as the real estate agents that represented those investors. Mr. Casey was aware of these relationships and requested that I reach out to my contacts to see if any of them might be interested in investing in the YSL Project.

22. I proceeded to reach out to potential investors and real estate agents who were familiar with Cresford. Among the investors and real estate agents I contacted were Paul Lam, Yuan (Michael) Chen, and Lue (Eric) Li (collectively, the **"LP Affiants"**).

23. I knew each of the LP Affiants in the context of our mutual business in the real estate and development industry. I met both Mr. Li and Mr. Chen in 2015, at separate industry conferences, and would occasionally connect with them socially and at various industry events.

24. My relationship with Mr. Lam was longer, and I considered him a friend. Mr. Lam had a long relationship with Cresford, having been involved in the purchase of many units in many Cresford projects in his capacity as a real estate agent.

25. Based on my interactions with the LP Affiants and the context in which we met, I understood each of them to be sophisticated and experienced participants in the real estate industry. I further understood that the LPs were themselves sophisticated and experienced real estate investors. Most or all of the LPs had purchased units in other Cresford projects before investing in YSL.

26. When I informed the LP Affiants about the investment opportunity offered by the YSL Project, each of them expressed interest and enthusiasm. After our initial conversations, the LP Affiants facilitated discussions with others whom they thought might also be interested in investing. I also understood that these clients with whom the LP Affiants were dealing were wealthy and sophisticated investors who were able to properly evaluate whether their investment in YSL met their objectives.

27. Collectively with the LP Affiants, these investors ultimately purchased the Class "A" Units in the YSL Project and became the LPs.

E. Meetings with the LPs

28. In their materials, the LP Affiants have described me as the "face" of Cresford. I agree that I introduced the LP Affiants to the YSL Project and participated in meetings about potential investments.

29. However, it was clear to all involved that Mr. Casey, and not me, was the sole principal of Cresford. Mr. Casey set the terms of the LPs' investment, and Mr. Casey personally guaranteed

that investment. When I communicated with the LP Affiants about the possibility of investing in YSL, I was communicating the terms set by Mr. Casey as I understood them. My meetings with the LP Affiants occurred in my capacity as Cresford's President of Sales & Marketing, and my role was accordingly limited to providing an overview of the YSL Project and my perspective on its expected sales performance.

30. Over the period from January to August 2017, I met with the LP Affiants about the YSL Project, including the meetings referenced in the LP Affiants' affidavits with Mr. Li at Second Cup and at the Cresford office; with Mr. Chen at the Cresford office; and with Mr. Lam and his existing clients where I introduced them to Mr. Casey.

31. Beyond these discussions, I also introduced the LPs to Mr. Casey and Cresford's then-VP of Accounting, Howard Ng. It was Mr. Casey and Mr. Ng who were primarily responsible for directing and drafting the terms of the LPs' investments and the preparation of the Limited Partnership Agreement ("**LPA**"), Subscription Agreement Form, Power of Attorney and Acknowledgement ("**Subscription**"), or other documents attached to the LP Affiants' affidavits.

F. The Investor Presentation

32. The Cresford Group put together a slide-deck presentation that summarized, at a high level, the investment opportunity in the YSL Project (the "**Investor Presentation**"). At my meetings with the LPs, I would sometimes use the Investor Presentation as a discussion prompt and summarize orally the same information contained within it.

33. The Investor Presentation emphasized Mr. Casey's role as the sole owner and directing mind of the Cresford Group. It touted his "leadership" and "vast business experience." My name did not appear anywhere in the Investor Presentation.

34. One of the slides provided an "Overview of Investment" and explained that Cresford was projecting that "the investor will receive its invested capital along with an investment return of 100% of the invested capital". I echoed that message in my discussions with the LPs.

35. Another slide provided a Pro Forma Income Statement for the YSL Project, which outlined several categories of project costs but did not go into detail about them. The LPs did not ask me for details of any of its contractual arrangements, its employee compensation arrangements, or anyone else who might be entitled to payment by YSL.

G. No representation that the "Cresford Group" would not be paid

36. At paragraph 8 of his affidavit, Mr. Li claims that he was assured that the LPs would be paid in full before the "Cresford Group" would receive any "return". As described below, Cresford LP agreed that it would not receive any return on its investment before the LPs received their return. This was described in the Investor Presentation and set out in the LP Agreement. The relevant terms of the LPA are summarized at paragraph 14 of Mr. Li's affidavit.

37. But to the extent that Mr. Li is suggesting that I (or anyone) told him that no member of the "Cresford Group" would receive any funds before the LPs were paid in full, he is not correct.

(i) The waterfall in the Investor Presentation and LP Agreement

38. Another of the slides in the Investor Presentation described the distribution of profits at the conclusion of the YSL Project (the **"Waterfall"**) as follows:

> Revenue proceeds (after payment of project expenses) will be distributed at the end of the project in the following priority:
>
> ➢ First, repayment of all external lenders;
> ➢ Second, return of invested capital to the investor;
> ➢ Third, distribution of the agreed upon return on investment to the

with Cresford was its integrated approach to development, including its "ability to control its own construction management" and its "winning sales formula."

44. Members of the "Cresford Group" received fees from the YSL Project throughout the course of the Project. In fact, the LP Agreement at section 3.4 specifically contemplates payments to entities within the "Cresford Group", as that term is defined in Mr. Li's affidavit, as each of them was owned and controlled by Mr. Casey.

45. During the course of the project, YSL made very significant payments to members of the Cresford Group. The LPs are fully aware of these payments, based on the material produced by YSL in the course of its bankruptcy proceeding. These fees include:

(a) Marketing fees totaling $11.6 million;

(b) Construction management fees totaling $2.89 million;

(c) Payments to various Cresford employees.

These fees are reflected on the general ledgers maintained by Cresford, which are being submitted within the Brief of Evidence supporting my submissions.

46. In addition to these payments, which appear to relate to services rendered by Cresford, YSL made a number of intercompany advances to other Cresford entities. The purpose and legitimacy of these payments are uncertain. These payments are also shown on Cresford's general ledger and bank statements.

47. The LPs do not appear to take issue with any of these payments and have not taken any steps to address any of them. The LPs only seem to object to payments to me.

H. No misrepresentation to the LPs

48. In their submissions, the LPs accuse me of making misrepresentations to them about the Agreement. As I understand it, the LPs' complaint is that I should have told them about the Agreement. I did not tell the LPs the terms of my Agreement, because I did not at that time have any idea that it might one day be relevant to them.

49. I have no legal training. In fact, I do not hold any post-secondary degree. I gained some familiarity with legal and accounting issues during my time at Cresford, but this was never a key part of my job. I could never have known that events would unfold as they ultimately did, and that I would wind up in conflict with the LPs for a limited pool of money after YSL's insolvency.

50. First, I never expected that Mr. Casey would terminate me. I intended to stay with Cresford until long after the YSL Project was completed. I thought that Mr. Casey shared this intention, because he often told me that he wanted me to take over the Cresford Group;

51. Second, I always believed that YSL would act in the best interest of its stakeholders to maximize the value of the YSL Project. I believed that I would remain at YSL, and have the ability to ensure that it worked to maximize the value of the YSL Project. As importantly, I trusted Mr. Casey to act in the interest of the YSL Project.

52. When I was terminated, the YSL Project was worth far more than Cresford had invested in it. It could have been sold at a price that would have allowed the LPs to earn their full return and for me to earn a substantial amount on account of the Profit Share Agreement.

I. My termination from Cresford

53. For a period of time after the LPs' investment, things proceeded extremely well with the YSL Project. It was well capitalized and budgeted and did not suffer from cost issues. It had a

IN THE MATTER OF THE *BANKRUPTCY AND INSOLVENCY ACT*, R.S.C. 1985, c. B-3, AS AMENDED

AND IN THE MATTER OF THE NOTICES OF INTENTION TO MAKE A PROPOSAL OF YG LIMITED PARTNERSHIP AND YSL RESIDENCES INC.

Consolidated Court File No. 31-2734090

ABC - 141

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

Proceeding commenced at Toronto

AFFIDAVIT OF MARIA ATHANASOULIS
Sworn May 5, 2023

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Consolidated Court File No.: BK-21-02734090-0031

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)
IN BANKRUPTCY AND INSOLVENCY

IN THE MATTER OF THE NOTICES OF INTENTION TO MAKE A PROPOSAL OF
YG LIMITED PARTNERSHIP AND YSL RESIDENCES INC.
OF THE CITY OF TORONTO, IN THE PROVINCE OF ONTARIO

AFFIDAVIT OF LUE (ERIC) LI
(sworn December 20, 2022)

I, Lue (Eric) Li, of the community of Woodbridge, in the City of Vaughan, in the Province of Ontario, make oath and say as follows:

1. I am a director of 2583019 Ontario Incorporated, the general partner of YongeSL Investment Limited Partnership ("**YongeSL**"), a Class A Preferred Unit holder, and limited partner, of the Debtor YG Limited Partnership ("**YG**"), and as such have knowledge of the matters contained in this affidavit. The facts stated in this affidavit are within my personal knowledge or determined from the face of the documents attached hereto as exhibits and I believe such information to be true. Where I do not have direct knowledge of the matters set out below, I have stated the source of my knowledge and believe it to be true.

2. I am in the wealth management business. I first met Maria Athanasoulis in 2015. We were both speakers at an investment seminar held at the Four Seasons Hotel in Beijing, China. I spoke about tax issues relating to investment in Canada. Ms. Athanasoulis spoke about real estate investment opportunities in Canada. I understood that she was a senior

officer of the Cresford Group of companies, a group of condominium development companies.

3. I met Ms. Athanasoulis again at social events in 2016 and early 2017. At the latter event, Ms. Athanasoulis told me about a new Cresford Group condominium development called the YSL Project. She told me that the Cresford Group was seeking investors in the YSL Project and wondered if any of my friends or clients would be interested in investing. Our discussion regarding the YSL Project was brief and we scheduled a meeting in March 2017.

4. The meeting was held at a Second Cup coffee shop. Ms. Athanasoulis and I discussed that an investment in the YSL Project would be for a 6-year term, that the investment would be doubled, and that the investor would receive a preferred return on the proceeds of the project.

5. After the meeting, I considered this potential opportunity and spoke with some of my friends and clients. I then wrote to Ms. Athanasoulis and asked for more information regarding the YSL Project. A copy of my email to Ms. Athanasoulis, copying Henry (Yulei) Zhang, a broker working for Cresford (his email is 9955553@gmail.com), and one of my colleagues Ying Sun, is attached as **Exhibit "A"**.

6. We organized another meeting was held at the Cresford Group's office at 170 Merton Street, Toronto. I attended the meeting with three of my friends and a colleague, Ying Sun. Ms. Athanasoulis was present, as was Mr. Zhang.

7. During the meeting, Ms. Athanasoulis emphasized that the YSL Project represented a rare investment opportunity that would involve a preferred return on investment over a 6 year term. Ms. Athanasoulis showed us the architectural features of the YSL Project. Ms. Athanasoulis also gave me a 1-page handout that showed how the proceeds of the YSL Project would be paid. I no longer have a copy of that handout, but it had the same information on it as page 11 of the Investor Presentation (defined below).

8. My friends and I specifically asked whether the Cresford Group would receive any return from the YSL Project before investors. Ms. Athanasoulis confirmed that investors would be paid first and referred to the 1-page handout. Ms. Athanasoulis repeated this multiple times during the meeting because we asked multiple times. It was important to us that the Cresford Group not receive any return before investors were repaid their principal and received their full return on investment.

9. On or about the date of the meeting, I received a document (the "**Investor Presentation**") that contained information relating to the potential investment, a copy of which is attached as **Exhibit "B"**.

10. The Investor Presentation provided, on page 11, that

> Revenue proceeds (after payment of project expenses) will be distributed at the end of the project in the following priority:
>
> - First, repayment of all external lenders;
> - Second, return of invested capital to the investor;
> - Third, distribute the agreed upon return on investment to the investor; and
> - Fourth, distribution to Cresford.

11. After the meeting, I also received an email from one of Ms. Athanasoulis' colleagues (Howard Ng), with a copy of the draft agreements that would govern the limited partners' investment in the YSL Project. A copy of Mr. Ng's June 13, 2017, email to me, which copied Ms. Athanasoulis, together with its attachments, is attached as **Exhibit "C"**.

12. I exchanged emails with Mr. Ng, copying Ms. Athanasoulis, regarding the language of these agreements on June 13 and 14, 2017. Mr. Ng sent me updated drafts of these agreements. A copy of that email chain, without enclosures, is attached as **Exhibit "D"**.

13. On June 23, 2017, Mr. Ng followed up and asked whether I had any comments on the draft agreements. I spoke with Ms. Athanasoulis regarding the drafts and wanted to ensure that investors would be repaid their principal and receive their full return on investment, within 5 years (not 6) and before the Cresford Group received anything. She agreed. The next day, I wrote to Mr. Ng and asked that he update the draft agreements to reflect this.

14. On June 27, 2017, Mr. Ng wrote to me with updated draft agreements. Consistent with my discussions with Ms. Athanasoulis, the updated draft Amended and Restated Limited Partnership Agreement provided that,

(a) holders of Class A Preferred Units would be entitled to a "preferred return" equal to their principal and return on investment from the proceeds of the YSL Project **before** any amount was paid to the Cresford Group, the holder of Class B Units (see updated clause 4.2); and

(b) the agreement could not be amended to create a class of limited partner ranking superior to any other without the unanimous approval of all limited partners (see updated clause 10.14(d)).

15. The latter amendment was particularly important to me because it reflected the requirement that the limited partners be repaid first before the Cresford Group would receive anything from the proceeds of the YSL Project. I was not prepared to invest if there was any chance that after advancing millions of dollars another person could claim a prior entitlement to the proceeds of the YSL Project without the consent of **all** limited partners.

16. A copy of the email chain between Mr. Ng and I during the period June 23-27, 2017, with enclosures, is attached as **Exhibit "E"**.

17. Between June 30 - October 20, 2017, YongeSL entered into four Subscription Agreements with YG pursuant to which it became the owner of 7,100 Class A Preferred units in YG. Copies of these Subscription Agreement are attached collectively as **Exhibit "F"**. In total, YongeSL advanced $7.1 million to YG.

18. A copy of the Amended and Restated Limited Partnership Agreement dated August 4, 2017 (the "**LP Agreement**"), is attached as **Exhibit "G"**.

19. In entering into this agreement and subscribing for units in YG, YongeSL relied on my discussions with Ms. Athanasoulis and the Investor Presentation, particularly page 11 of that document which described how the proceeds of the YSL Project would be distributed.

20. At no time did Ms. Athanasoulis tell me that she had any agreement to share in YG's profits, let alone in priority to YG's limited partners like YongeSL.

21. YongeSL would not have agreed to invest in the YSL Project if it knew that Ms. Athanasoulis, one of the Cresford Group's most senior officers, had any right to be paid from the proceeds of the YSL Project before the Class A Preferred Unit holders were repaid their principal and received their return on investment. That was the whole point of clause 10.14(d) of the LP Agreement, which I insisted be included.

SWORN remotely via videoconference, by Lue (Eric) Li stated as being located in the City of Vaughan, in the Province of Ontario, before me at the City of Toronto, in the Province of Ontario, this 20th day of December, 2022, in accordance with O. Reg 431/20, *Administering Oath or Declaration Remotely*

Commissioner for Taking Affidavits, etc.
(or as may be)

Alexander Soutter
Barrister & Solicitor

LUE (ERIC) LI

YSL

YONGE STREET LIVING RESIDENCES

Cresford

ABC - 148

Overview of Cresford

Cresford Developments (Cresford) is a group of private companies and partnerships wholly owned by Daniel C. Casey and his family trust.

In business for over 40 years, under the leadership of Mr. Casey and his talented Executive Management Team, Cresford has completed over 60 residential developments and over 20,000 residences.

With a proven track record, Cresford relies on its profound understanding of the Toronto real estate market and in-depth knowledge to transform each location through thoughtful and correct decisions on architecture, product and quality. The ability to execute a winning sales formula and the capability to control its own construction management have solidified the company's success. Cresford's proven commitment to deliver on its promise to the consumer has helped define Cresford as a mid market luxury brand in the Downtown Toronto condominium market.

Cresford has a long-standing and solid relationship with all levels of government in Canada including municipal, provincial and federal. It is proud to have met the exacting governance standards and rigorous due diligence requirements of various public institutions and to have been selected by them to partner on real estate transactions that strengthen Toronto communities. Most recent partners include The Children's Aid Society, YMCA, Canada Post Corporation, British Columbia Investment Management Corporation and Ryerson University.

Mr. Casey's vast business experience extends beyond his primary focus on residential development. He is also a founding shareholder and board member of Onex Corporation, one of the largest publicly traded private equity investment firms in Canada.

Cresford's successful history has led to alliances with top professionals, consultants and business owners to create the very best residential communities.

For the past 40 years, our mission is to be Canada's number one choice for modern, luxury condominium living. We strive to bring the latest, most innovative condominium lifestyles that appeal to today's smart, savvy, sophisticated purchasers. We associate with world-leading fashion and luxury brands as well as renowned architects and design firms to create the ultimate signature expression of elegant condominium living. We are driven by our commitment to create products that are truly special that meet our consumers demands. Cresford has a reputation of building timeless, high quality, design focused landmark developments.

The Cresford Difference

- ✓ Timeless architecture
- ✓ Exceptional locations
- ✓ Marketing experience that connects the purchaser with the location and product
- ✓ Strong branding
- ✓ Well-established company with a proven track record

Timeline 2009 – Current

Cresford commands a high price per square foot in comparison to its competitors and the premium is reflected in its product.

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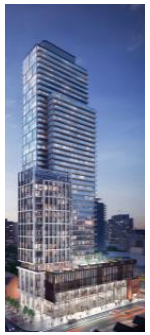
2018



The Clover
Under Construction

2019

Halo
Construction 2017

2020

YSL
Under Development

2022

YSL Investment Opportunity

With Cresford's strength in the market place for over 40 years and a well-established business model, we want to provide investors with the opportunity to experience the Cresford difference and create a long term relationship with an exclusive few to share in our continued successes.

Exceptional Location

- ✓ High profile position at the corner of Yonge and Gerrard
- ✓ One block from the Toronto Eaton Centre, which attracts the most visitors of any of Toronto's tourist attractions. It is North America's busiest mall
- ✓ Steps from Yonge & Dundas, ranked as Toronto's Busiest Intersection with 129,704 in weekly traffic volume (Source: City of Toronto Transportation Services, 2015)
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Overview of Investment

- Investors invest in the partnership units as limited partners of YSL LP.
- YSL LP provides a mortgage to YG LP (the mortgage will be ranked junior to construction lenders, mezzanine lenders and deposit insurers).
- Upon the completion of the project, the investor will receive its invested capital along with an investment return of 100% of the invested capital.

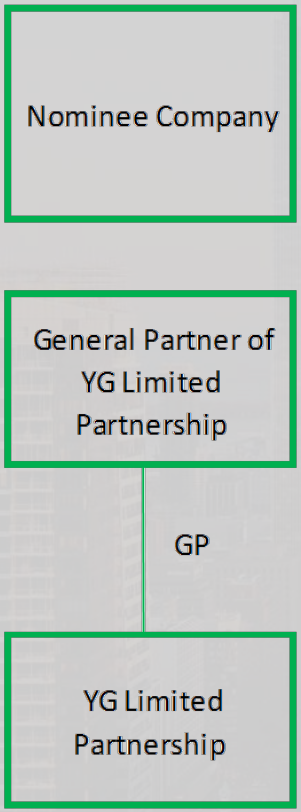
Overview of Security

The limited partners of YSL LP have the following securities for their investments in the limited partnership units of YSL LP:

- A standard charge is registered on title of the land indicating that YSL LP is a mortgagee of the land.

- The nominee company, the registered owner of the land provides a corporate guarantee to YSL LP.

Overview of Investment Structure



Nominee company holds registered title to the land as limited partnership cannot hold registered title.

Investors invest in YSL Limited Partnership as limited partners

YSL Limited Partnership provides mortgage loan to YG Limited Partnership and receives a mortgage/charge on the registered title to the land as a mortgagee to secure such loan (behind VTB, construction, deposit insurance and mezzanine financing)

Distribution of Invested Capital and Return

Revenue proceeds (after payment of project expenses) will be distributed at the end of the project in the following priority:

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Total project costs	**683,290,855**	
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Net project income	**132,628,106**	

Contact

Daniel C. Casey
416.971.7757
dan@cresford.com

Forward-looking Statements

This presentation may contain forward-looking statements and information relating to expected future events and financial and operating results and projections, including statements regarding growth and investment opportunities and targeted returns, that involve risks and uncertainties. Such forward-looking information is typically indicated by the use of words such as “will”, “may”, “expects” or “intends”. The forward-looking statements and information contained in this presentation include statements regarding expected or targeted investment returns and performance. These statements are based on management’s current expectations, intentions and assumptions which management believes to be reasonable having regard to its understanding of prevailing market conditions and the current terms on which investment opportunities may be available.

Projected returns are based in part on projected cash flows for incomplete projects. Numerous factors, many of which are not in Cresford’s control, and including known and unknown risks, general and local market conditions and general economic conditions (such as prevailing interest rates and rates of inflation) may cause actual investment performance to differ from current projections. Accordingly, although we believe that our anticipated future results, performance or achievements expressed or implied by the forward-looking statements and information are based upon reasonable assumptions and expectations, the reader should not place undue reliance on forward-looking statements and information. If known or unknown risks materialize, or if any of the assumptions underlying the forward-looking statements prove incorrect, actual results may differ materially from management expectations as projected in such forward-looking statements.

Cresford and its affiliates disclaim any intention or obligation to update or revise any forward-looking statements, whether as a result of new information, future events or otherwise, unless required by applicable law.

Consolidated Court File No.: BK-21-02734090-0031

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)
IN BANKRUPTCY AND INSOLVENCY

IN THE MATTER OF THE NOTICES OF INTENTION TO MAKE A PROPOSAL OF
YG LIMITED PARTNERSHIP AND YSL RESIDENCES INC.
OF THE CITY OF TORONTO, IN THE PROVINCE OF ONTARIO

AFFIDAVIT OF YUAN (MICHAEL) CHEN
(sworn December 14, 2022)

I, Yuan (Michael) Chen, of the City of Markham, in the Province of Ontario, make oath and say as follows:

1. I am a director of E&B Investment Corporation ("**E&B**"), a Class A Preferred Unit holder, and limited partner, of the Debtor YG Limited Partnership ("**YG**"), and as such have knowledge of the matters contained in this affidavit. The facts stated in this affidavit are within my personal knowledge or determined from the face of the documents attached hereto as exhibits and I believe such information to be true. Where I do not have direct knowledge of the matters set out below, I have stated the source of my knowledge and believe it to be true.

2. I am a realtor. I met Maria Athanasoulis for the first time in 2015 at a realtor appreciation event. I learned that Ms. Athanasoulis was a senior officer of the Cresford Group of companies, a group of condominium development companies.

3. Ms. Athanasoulis and I met every now and then over the next two years, sometimes for social events and sometimes for business.

4. In or around May 2017, Ms. Athanasoulis told me about a new Cresford Group condominium development called the YSL Project. She told me that the Cresford Group was seeking investors in the YSL Project and wondered if any of my clients would be interested in investing.

5. On May 31, 2017, I met with Ms. Athanasoulis at the Cresford Group's office at 170 Merton Street, Toronto, to discuss this potential investment opportunity. She told me that the investment would provide a 100% return over a 5-6 year period and that a minimum of $1 million was required to invest. I was told to keep the potential opportunity confidential but to consider whether any of my clients would be interested.

6. On June 1, 2017, I asked to meet Ms. Athanasoulis at her office again to discuss the YSL Project. We met around noon that day. During our meeting, she emphasized the return on investment. She told me that she would send me a document following the meeting that would have further details.

7. After the meeting, Ms. Athanasoulis sent me a pdf (the "**Investor Presentation**") by email that contained information relating to the potential investment. The information in the Investor Presentation is consistent with our discussions earlier that day and the day before. A copy of the email, with attached Investor Presentation, is attached as **Exhibit "A"**.

8. The Investor Presentation provided, on page 11, that

> Revenue proceeds (after payment of project expenses) will be distributed at the end of the project in the following priority:
>
> - First, repayment of all external lenders;
> - Second, return of invested capital to the investor;
> - Third, distribute the agreed upon return on investment to the investor; and
> - Fourth, distribution to Cresford.

9. After meeting with Ms. Athanasoulis and reading the Investor Presentation, I was convinced that the YSL Project was a good investment opportunity.

10. I was not able to put together $1 million minimum investment amount that Ms. Athanasoulis told me I would need to invest. I told Ms. Athanasoulis this and did not invest at that time.

11. Approximately a month later, however, Ms. Athanasoulis told me that the minimum investment was reduced to $500,000.

12. I identified clients who were interested in making this $500,000 investment and we incorporated E&B on or about July 7, 2017.

13. On July 17, 2017, at my request, one of Ms. Athanasoulis' colleagues (Howard Ng) sent me a copy of the documents that would govern an investment in YG as well as another copy of the Investor Presentation. A copy of Mr. Ng's email, with attachments, is attached as **Exhibit "B"**.

14. On August 31, 2017, E&B entered into a Subscription Agreement with YG pursuant to which it became the owner of 500 Class A Preferred units in YG and agreed to the terms of the Amended and Restated Limited Partnership Agreement dated August 4, 2017. A copy of the Subscription Agreement is attached as **Exhibit "C"**.

15. In entering into this agreement and subscribing for units in YG, E&B relied on my discussions with Ms. Athanasoulis and the Investor Presentation that she sent me, particularly page 11 of that document which described how the proceeds of the YSL Project would be distributed.

16. At no time did Ms. Athanasoulis tell me that she had any agreement to share in YG's profits, let alone in priority to YG's limited partners like E&B.

17. E&B would not have agreed to invest in the YSL Project if it knew that Ms. Athanasoulis, one of the Cresford Group's most senior officers, had any right to be paid from the proceeds of the YSL Project before the Class A Preferred Unit holders were repaid their principal and received their return on investment.

SWORN remotely via videoconference, by Yuan (Michael) Chen stated as being located in the City of Markham, in the Province of Ontario, before me at the City of Toronto, in the Province of Ontario, this 14th day of December, 2022, in accordance with O. Reg 431/20, *Administering Oath or Declaration Remotely*

Commissioner for Taking Affidavits, etc.
(or as may be)

Alexander Soutter
Barrister & Solicitor

YUAN (MICHAEL) CHEN

This is Exhibit "A" referred to in the
Affidavit of Yuan (Michael) Chen sworn by Yuan (Michael) Chen at the City of Toronto, in the Province of Ontario, before me this 14th day of December, 2022 in accordance with *O. Reg. 432/20, Administering Oath or Declaration Remotely*.

_____

A Commissioner for taking affidavits

ALEXANDER SOUTTER

发件人: Maria Athanasoulis <mathanasoulis@cresford.com>
发送时间: 2017 年 6 月 1 日 22:47
收件人: michaelychen@hotmail.com <michaelychen@hotmail.com>
主题:

YSL

YONGE STREET LIVING RESIDENCES

Cresford

ABC - 168

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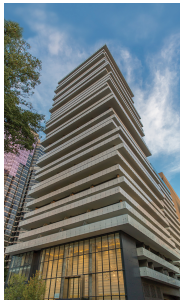

1Thousand Bay
Completed
2016

CASA III
Under Construction
2017

VOX
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2018

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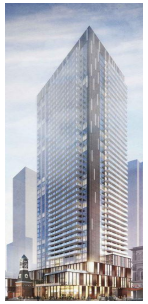
Under Construction
2019



Halo
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YSL
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BSN
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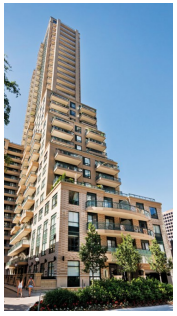
2009



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YONGE STREET LIVING RESIDENCES

Cresford

Overview of Investment Structure

Distribution of Invested Capital and Return

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Forward-looking Statements

This presentation may contain forward-looking statements and information relating to expected future events and financial and operating results and projections, including statements regarding growth and investment opportunities and targeted returns, that involve risks and uncertainties. Such forward-looking information is typically indicated by the use of words such as “will”, “may”, “expects” or “intends”. The forward-looking statements and information contained in this presentation include statements regarding expected or targeted investment returns and performance. These statements are based on management’s current expectations, intentions and assumptions which management believes to be reasonable having regard to its understanding of prevailing market conditions and the current terms on which investment opportunities may be available.

Projected returns are based in part on projected cash flows for incomplete projects. Numerous factors, many of which are not in Cresford’s control, and including known and unknown risks, general and local market conditions and general economic conditions (such as prevailing interest rates and rates of inflation) may cause actual investment performance to differ from current projections. Accordingly, although we believe that our anticipated future results, performance or achievements expressed or implied by the forward-looking statements and information are based upon reasonable assumptions and expectations, the reader should not place undue reliance on forward-looking statements and information. If known or unknown risks materialize, or if any of the assumptions underlying the forward-looking statements prove incorrect, actual results may differ materially from management expectations as projected in such forward-looking statements.

Cresford and its affiliates disclaim any intention or obligation to update or revise any forward-looking statements, whether as a result of new information, future events or otherwise, unless required by applicable law.

Consolidated Court File No. 31-2734090

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

IN THE MATTER OF THE *BANKRUPTCY AND INSOLVENCY ACT*,
R.S.C. 1985, c. B-3, as amended

IN THE MATTER OF THE NOTICES OF INTENTION
TO MAKE A PROPOSAL OF
YG LIMITED PARTNERSHIP AND YSL RESIDENCES INC.

Claim of Maria Athanasoulis against
YG Limited Partnership and YSL Residences Inc.

AFFIDAVIT OF PAUL LAM

I, Paul Lam, of the City of Toronto, in the Province of Ontario, MAKE OATH AND SAY:

1. I have been a realtor with Homelife New World Realty Inc. for over 33 years, during which I have worked with Cresford Developments for over 15 years on their condominium development projects, including the YSL Project (defined below). During that period, I dealt with Maria Athanasoulis ("**Maria**") with respect to the YSL Project and other Cresford projects. As such, I have knowledge of the matters contained in this Affidavit. Where I rely on information of others, I state the source of that information and believe that information to be true.

2. In mid-2017, Maria told me about a "highly profitable" investment opportunity available only to a small group of investors. She asked if I had any clients who might be interested.

- Second, return of invested capital to the investor;
- Third, distribution of the agreed upon return on investment to the investor; and
- Fourth, distribution to Cresford.

8. During the meeting on June 14, 2017, Dan spoke about his successes in real estate development projects and told Tony and Lorraine that he would provide a personal guarantee to investors for their investments in the YSL Project. Dan and Maria discussed the YSL Project and the YSL Pro Forma Package with Tony and Lorraine in detail and confirmed that investors' investment capital would be repaid plus 100% return on investment, and that distributions would be made in accordance to the Waterfall as set out in the YSL Pro Forma Package — investors would be paid their investment capital and return on investment before Cresford received any distribution from the YSL Project.

9. Later that night, I emailed Howard, copying Maria, to inform them that Tony and Lorraine had decided to invest $2 million in the Project through their company, 2504670 Ontario Inc. I asked Howard to send me the relevant documents to facilitate the investment. A copy of my email is attached as **Exhibit "B"**.

10. Within an hour, Howard emailed me, copying Maria, a Subscription Agreement and an Amended and Restated LP Agreement for Tony and Lorraine to invest in the YSL Project. Howard also attached a Guarantee from Dan and his company, 2502295 Ontario., to 2504670 Ontario Inc. regarding the return of investment capital and profit, as well as a slightly updated version of the YSL Pro Forma Package to "reflect the nature of the investment along with Dan's guarantee". A copy of the email and enclosures is attached as **Exhibit "C"**.

attachments to Alan on the same day. A copy of the email and its enclosures are attached as **Exhibit "J"**.

SWORN by Paul Lam at the City of Toronto, in the Province of Ontario, before me on November 28, 2022 in accordance with O. Reg. 431/20, Administering Oath or Declaration Remotely.

Commissioner for Taking Affidavits
(or as may be)

XIN LU (CRYSTAL) LI

PAUL LAM

YSL Pro Forma Package

From: Howard Ng (hng@cresford.com)

To: paullamtcms@rogers.com

Cc: mathanasoulis@cresford.com

Date: Tuesday, June 13, 2017, 04:17 PM EDT

Hi Paul,

As per your request, please find attached a copy of the YSL Pro Forma Package.

Please feel free to let me know if you have any questions.

Howard Ng, CPA, CA

Director, Accounting and Finance

Cresford Developments
T: 416.971.7557 ext. 232 | **F**: 416.971.9504 | **C**: 647.970.4031

E: hng@cresford.com
170 Merton Street | Toronto Ontario | M4S 1A1
www.cresford.com

YSL Pro Forma Pack 6.13.2017 FINAL Presentation.pdf
778.4kB

YSL

YONGE STREET LIVING RESIDENCES

Cresford

ABC - 186

Overview of Cresford

Cresford Developments (Cresford) is a group of private companies and partnerships wholly owned by Daniel C. Casey and his family trust.

In business for over 40 years, under the leadership of Mr. Casey and his talented Executive Management Team, Cresford has completed over 60 residential developments and over 20,000 residences.

With a proven track record, Cresford relies on its understanding of the Toronto real estate market and in-depth knowledge to transform each location through thoughtful decisions on architecture, product and quality. The ability to execute a winning sales formula and the capability to control its own construction management have solidified the company's success. Cresford's commitment to deliver on its promise to the consumer has helped define Cresford as a mid market luxury brand in the Downtown Toronto condominium market.

Cresford has a long-standing and solid relationship with all levels of government in Canada including municipal, provincial and federal. It is proud to have met the exacting governance standards and rigorous due diligence requirements of various public institutions and to have been selected by them to partner on real estate transactions that strengthen Toronto communities. Most recent partners include The Children's Aid Society, YMCA, Canada Post Corporation, British Columbia Investment Management Corporation and Ryerson University.

Mr. Casey's business experience extends beyond his primary focus on residential development. He is also a founding shareholder and board member of Onex Corporation, one of the largest publicly traded private equity investment firms in Canada.

Cresford's successful history has led to alliances with top professionals, consultants and business owners to create the very best residential communities.

For the past 40 years, our mission is to be Canada's number one choice for modern, luxury condominium living. We strive to bring the latest, most innovative condominium lifestyles that appeal to today's smart, savvy, sophisticated purchasers. We associate with world-leading fashion and luxury brands as well as renowned architects and design firms to create the ultimate signature expression of elegant condominium living. We are driven by our commitment to create products that are truly special that meet our consumers demands. Cresford has a reputation of building timeless, high quality, design focused landmark developments.

The Cresford Difference

- ✓ Timeless architecture
- ✓ Exceptional locations
- ✓ Marketing experience that connects the purchaser with the location and product
- ✓ Strong branding
- ✓ Well-established company with a proven track record

Timeline 2009 – Current

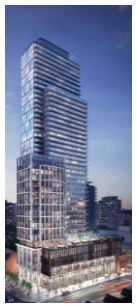
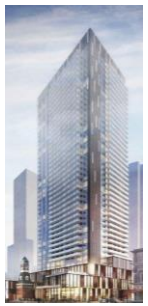
Cresford commands a high price per square foot in comparison to its competitors and the premium is reflected in its product.

In the last 8 years, Cresford has cultivated a combined portfolio of over 6,000 residential units, 187,000 sf of retail space, 220,000 sf of office, totaling over $3 billion dollars of value.








CASA Completed — 2009

NXT Completed — 2010

NXT 2 Completed — 2013

MYC Completed — 2014

1Thousand Bay Completed — 2016

CASA III Under Construction — 2017

VOX Under Construction — 2018

The Clover Under Construction — 2019

Halo Construction 2017 — 2020

YSL Under Development — 2022

BSN Completed — 2009

Lofts399 Completed — 2013

CASA II Completed — 2016

59 Hayden Under Construction — 2017




YSL Investment Opportunity

With Cresford's strength in the market place for over 40 years and a well-established business model, we want to provide investors with the opportunity to experience the Cresford difference and create a long term relationship with an exclusive few to share in our continued successes.

Exceptional Location

- ✓ High profile position at the corner of Yonge and Gerrard
- ✓ One block from the Toronto Eaton Centre, which attracts the most visitors of any of Toronto's tourist attractions. It is North America's busiest mall
- ✓ Steps from Yonge & Dundas, ranked as Toronto's Busiest Intersection with 129,704 in weekly traffic volume (Source: City of Toronto Transportation Services, 2015)
- ✓ The Property is also in close proximity to the University of Toronto, Ryerson University, Mount Sinai Hospital, Toronto General Hospital, SickKids Hospital, Dundas Square and Toronto Eaton Centre

Highly Accessible

- ✓ The College and Dundas subway stations are just steps from the Property, providing direct access to the Yonge-University subway line and connections to the Bloor-Danforth subway line.

- ✓ Union Station, Toronto's main transit hub is only three stops south of Dundas subway station and offers commuter services throughout the GTA and the surrounding areas via Toronto Transit Comission (TTC), GO Transit bus and train routes, Greyhound buses, and the VIA Rail system.

Overview of Investment

- Investors invest in the partnership units as limited partners of YSL LP.
- YSL LP provides a mortgage to YG LP (the mortgage will be ranked junior to construction lenders, mezzanine lenders and deposit insurers).
- Upon the completion of the project, we are projecting that the investor will receive its invested capital along with an investment return of 100% of the invested capital.

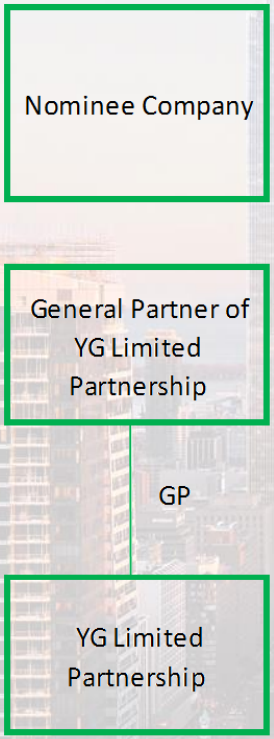
Overview of Security

The limited partners of YSL LP have the following security for their investments in the limited partnership units of YSL LP:

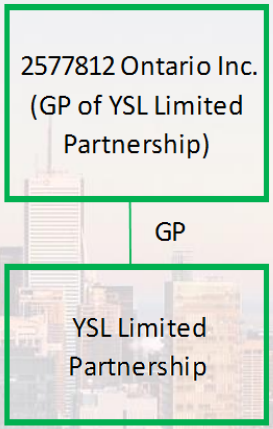
- A standard charge is registered on title of the land indicating that YSL LP is a mortgagee of the land.

- The nominee company, the registered owner of the land provides a corporate guarantee to YSL LP.

Overview of Investment Structure



Nominee company holds registered title to the land as limited partnership cannot hold registered title.



Investors invest in YSL Limited Partnership as limited partners

YSL Limited Partnership provides mortgage loan to YG Limited Partnership and receives a mortgage/charge on the registered title to the land as a mortgagee to secure such loan (behind VTB, construction, deposit insurance and mezzanine financing)

Distribution of Invested Capital and Return

Revenue proceeds (after payment of project expenses) will be distributed at the end of the project in the following priority:

- First, repayment of all external lenders;
- Second, return of invested capital to the investor;
- Third, distribute the agreed upon return on investment to the investor; and
- Fourth, distribution to Cresford.

YSL Pro Forma Income Statement

YSL pro forma income statement		
Total building area	1,046,241	s.f
Total saleable area - Residential	756,453	s.f
Total saleable area - Office	105,817	s.f
Total saleable area - Retail	92,493	s.f
Project revenue	**$**	
Residential	820,756,750	
Office	38,080,834	
Retail	123,010,746	
Parking and lockers and other	35,550,000	
Recoveries (Tarion/development charges)	23,572,845	
Total project revenue	**1,040,971,173**	
Project costs		
Land purchase	168,000,000	
Land transfer tax	5,082,400	
Development levies and permits	72,396,998	
Construction costs	309,871,381	
Design, marketing and administration	126,368,532	
Tarion fees	1,571,545	
Total project costs	**683,290,855**	
Net project income before financing	**357,680,318**	
Financing costs	225,052,212	
Net project income	**132,628,106**	

YSL
YONGE STREET LIVING RESIDENCES

Cresford

Contact

Daniel C. Casey
416.971.7757
dan@cresford.com

Forward-looking Statements

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Cresford and its affiliates disclaim any intention or obligation to update or revise any forward-looking statements, whether as a result of new information, future events or otherwise, unless required by applicable law.

In the Matter of an Arbitration pursuant to the Arbitration Act, S.O. 1991

of a Claim between:

Maria Athanasoulis

("Claimant")

and

KSV Restructuring Inc.
in its capacity as Proposal Trustee
of YG Limited Partnership and YSL Residences Inc.

("Respondent")

In relation to Consolidated Court File No. 31-2734090 in the *ONTARIO* SUPERIOR COURT OF JUSTICE (COMMERCIAL LIST) IN THE MATTER OF THE *BANKRUPTCY AND INSOLVENCY ACT,* R.S.C. 1985, c. B-3, as amended IN THE MATTER OF THE NOTICES OF INTENTION TO MAKE A PROPOSAL OF YG LIMITED PARTNERSHIP AND YSL RESIDENCES INC.

Counsel for Claimant:	Mark Dunn Sarah Stothart
Counsel for Respondent:	Matthew Milne-Smith Chenyang Li Robin Schwill
Hearing Dates:	February 22, 23, 24 and 25, 2022
Arbitrator:	William G. Horton, FCIArb, C.Arb.

PARTIAL AWARD
(March 28, 2022)

I. Introduction

1. This arbitration arises in the context of a court proceeding relating to the insolvency of YG Limited Partnership and YSL Residences Inc. (together, "**YSL**").

2. Until its insolvency, YSL was part of a group of companies (collectively, "**Cresford**" or the "**Cresford Group**") which was engaged in the development, construction, marketing and sale of condominiums in Toronto, Ontario. Cresford incorporated a separate company for each condominium project upon which it embarked. YSL was incorporated to pursue a high-rise condominium project at the corner of Yonge Street and Gerrard Street in Toronto (the "**YSL Project**").

3. Mr. Dan Casey ("**Casey**") is the founder and President of Cresford, and the sole director of all the companies in the Cresford Group.

4. KSV Restructuring Inc. ("**KSV**") was appointed as the Proposal Trustee for YSL pursuant to the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("**BIA**") on April 30, 2021. It should be noted at the outset that, while counsel for KSV advances the position of Cresford in this arbitration, they are not in fact counsel for Cresford and are not in a solicitor client relationship with Cresford or Casey.

5. Ms. Maria Athanasoulis ("**Athanasoulis**"), who was employed by Cresford in various roles between 2004 and 2020, advances this claim against the insolvent estate of YSL.

6. Athanasoulis alleges that she was entitled to a share of the profits earned by Cresford, on the YSL Project among others, pursuant to an oral agreement ("**PSA**") or agreements with Casey. She claims that the most recent PSA entitled her to 20% of the profits (the "**20% PSA**"). She asserts that the existence of this agreement is corroborated by the evidence of Mr. John Papadakis ("**Papadakis**") who attended a meeting at which the alleged agreement was discussed. Papadakis was a lawyer acting for Cresford at the time and is also a friend of Athanasoulis through a family connection with her husband.

7. Athanasoulis further alleges that Cresford repudiated her employment contract and constructively terminated her employment in or around early or mid-December 2019.

8. Prior to the proceedings under the BIA which led to this arbitration, Athanasoulis' claims were advanced in an action in the Superior Court of Ontario (the "**Action**") against various corporate entities within the Cresford Group and against Casey (collectively the "**Defendants**"). In the Action, Athanasoulis delivered a Statement of Claim and the Defendants delivered a Statement of Defence and Counterclaim.

9. In their Statement of Defence and Counterclaim, the Defendants alleged that Athanasoulis would only have been entitled to 10% of the net profits realized on the successful completion of certain projects, including the YSL Project, if she remained an employee of Cresford at the date of the project's completion. Subsequently, in this arbitration, Casey denied ever entering into any PSA with Maria Athanasoulis.

10. KSV takes the position that none of the discussions Athanasoulis relies upon gave rise to any PSA that was binding and enforceable. KSV maintains that Athanasoulis was fairly compensated by Cresford for her services at all material times.

11. KSV further alleges that Athanasoulis was not constructively dismissed; rather, she resigned from her employment at Cresford effective January 2, 2020. KSV does not allege any cause for Athanasoulis' dismissal, in the event she is found to have been dismissed.

II. Agreement to Arbitrate

12. The parties appointed me as sole arbitrator to determine this dispute by way of Terms of Appointment dated December 9, 2021.

13. Paragraph 2 of the Terms of Appointment sets out the parties' agreement to bifurcate Athanasoulis' claim such that the arbitration scheduled to proceed from February 22 to 25, 2022 was to resolve only the liability of YSL.

14. In the event that I were to find that YSL is liable to Athanasoulis, the parties have agreed to schedule an additional hearing before me to determine the quantum of YSL's liability.

III. Issues to be Determined

15. The issues to be decided in this phase of the arbitration are as follows:

a. Did Athanasoulis have a PSA that entitled her to 20% of the profits earned by the YSL Project?

b. If so, what were the terms of the PSA?

c. Was Athanasoulis employed by YSL?

d. Was Athanasoulis constructively dismissed, i.e. did she resign or was she constructively dismissed?

IV. Agreed Facts

16. The parties provided various documents to assist me:

    a. an Agreed Statement of Facts delivered on February 18, 2022;

    b. a Chronology; and

    c. a cast of Characters.

17. In order to avoid duplication, I have incorporated the contents of these documents into my factual findings rather than separately identifying the agreed facts for the purposes of this Award.

V. Evidence of Fact Witnesses

18. The witness evidence in the arbitration was provided by oral testimony given under solemn affirmation as to truth. Three witnesses testified: Athanasoulis, Casey and Papadakis.

19. By agreement, each of the witnesses had previously been examined for discovery in the arbitration.

VI. Findings of Fact

20. Based on the facts agreed upon between the parties, and upon the evidence adduced in the arbitration with respect to facts not covered by their agreement, the following are my findings of fact.

A. The Parties

21. YSL was part of the Cresford Group, which was engaged in the development, construction, marketing and sale of significant condominium projects in the central core of the City of Toronto, Ontario.

22. Daniel Casey was the founder and President of Cresford and the sole director of all Cresford entities at all material times.

23. Each of Cresford's development and construction projects was owned by a separate legal entity (each an "**Owner**"). That entity purchased the land where the relevant project was to be built, obtained the required permissions, marketed the project to proposed purchasers, hired contractors to build the project and took all of the other steps to convert real estate into a major condominium development. Each project pursued by a Cresford entity had its own financing and involved family trusts which Casey controlled, or Limited Partnerships involving third party investors.

24. YSL was the Owner of the YSL Project.

25. Athanasoulis joined Cresford in 2004 as Manager, Special Projects. Her prior education and experience were limited. She had graduated from high school and took a business administration course at Seneca College which she did not finish. While at Seneca College she had a part time job at Canada Trust (as it then was), which she decided to focus on instead of college. She worked with two individuals at TD Canada Trust, Ted Dowbiggin ("**Dowbiggin**") and Ian Scott ("**Scott**"). Following the merger of Canada Trust with TD Bank, Dowbiggin and Scott left to join Cresford and offered Athanasoulis a job in the finance department of Cresford. She was also given a role as manager of special projects.

B. Career of Athanasoulis at Cresford before February 16, 2019

26. In her capacity as manager of special projects, Athanasoulis quickly demonstrated a particular talent for marketing condominiums.

27. Athanasoulis was promoted to Vice-President, Sales and Marketing in 2005. In that position she worked with Casey and outside marketing consultants hired by Cresford in the marketing aspects

of Cresford's business. At that time, Cresford paid its outside marketing consultants on average about 1.5% of total sales as a marketing fee. This was a substantial expense as total sales from a single Cresford condominium project normally ran into the hundreds of millions of dollars. In addition, these fees were payable at the time condominiums were sold, whereas a developer usually only earns the revenues from condominium sales when the condominium corporation is registered upon completion of the project.

28. In about 2007, based on Athanasoulis' success in the marketing field, Cresford began to be less dependent on outside consultants and relied more on her leadership, thus saving on external sales marketing fees. She was promoted to President, Sales and Marketing in 2012.

29. By the end of 2013, Athanasoulis and Dowbiggin were the only two senior officers of Cresford reporting directly to Casey and, together with Casey they formed the Executive Committee of Cresford. Dowbiggin was President, Land and Finance and Athanasoulis was President, Marketing and Sales. During this period, Athanasoulis was responsible for operational matters: sales, marketing, customer service, construction and property management. The only aspects of Cresford's business Athanasoulis did not manage were financing and land acquisition.

30. Around August 2018, Dowbiggin left Cresford. Athanasoulis assumed Dowbiggin's responsibilities and became the President and Chief Operating Officer. After Dowbiggin's departure, all of Cresford's employees reported, directly or indirectly, to Athanasoulis and she reported to Casey. However, Casey retained the responsibility for raising the capital necessary for Cresford's business and remained the primary contact with Cresford's lenders.

31. As part of her responsibilities, Athanasoulis oversaw a property management company within Cresford, which was a fee generating business for which many developers hire a third party. She also oversaw a high-rise construction team, which allowed Cresford to manage its product and earn additional fees.

32. Athanasoulis also served as an officer of individual companies within Cresford. In the case of YSL, she was Vice-President and Secretary.

33. At all times, Casey had the ultimate authority to make decisions on behalf of Cresford and each of its constituent entities, including YSL, and to enter into contracts on behalf of Cresford.

C. The YSL Project

34. The YSL Project was planned as an 85-story condominium tower, potentially to be built in two stages with each stage being a separately registered condominium corporation.

35. Cresford initially bought the YSL Project as part of a joint venture but bought out its joint venture partner's interest. Cresford considered selling the YSL Project after it achieved zoning for high rise condominium development but did not ultimately proceed with a sale.

36. The marketing of the YSL Project was launched in October 2018. Under the leadership of Athanasoulis, the launch was very successful. The YSL Project achieved the highest price per square foot that had ever been achieved in the neighbourhood and was "a first" in terms of pre-sale numbers in a short period of time.

37. YSL sold condominium units worth approximately $650 million in the period up to January 2, 2020, with the bulk of the sales coming in the early stages of the campaign. At the time Athanasoulis was terminated, Cresford expected to earn a net profit of $196,641,600 on the YSL Project, and to generate fees of $59,462,617 for Cresford.

D. Cresford's Other Projects During the Period at Issue

38. In addition to the YSL Project, Cresford had three other active projects as of January 2020:

a. The Clover on Yonge (the "**Clover**"), a 44-story condominium located near Yonge and Bloor in Toronto. Clover was owned by Clover on Yonge Inc. in its capacity as General Partner of Clover on Yonge Limited Partnership. Pursuant to a plan of compromise and arrangement that was approved in proceedings under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("**CCAA**") commenced by Clover on Yonge Inc. and Clover on Yonge Limited Partnership on June 22, 2020, all of Clover's equity was acquired by entities related to Concord Pacific Developments Inc. ("**Concord**").

b. Halo Residences on Yonge ("**Halo**"), a 38-story condominium tower located on Yonge Street between Wellesley and Carlton in Toronto. Halo was owned by 480 Yonge Street Inc., the general partner of 480 Yonge Street Limited Partnership. 480 Yonge Street Inc. and 480 Yonge Street Limited Partnership were the subject of a Receivership Order issued on March 27, 2020. An Approval and Vesting Order issued September 15, 2021 vested Halo in 494 Yonge Street Inc.

c. The Residences of 33 Yorkville ("**33 Yorkville**"), a condominium with one 64-story tower and one 41-story tower. 33 Yorkville was owned by 33 Yorkville Residences Inc., in its capacity as general partner of 33 Yorkville Residences Limited Partnership. 33 Yorkville Residences Inc. and 33 Yorkville Residences Limited Partnership were the subject of a Receivership Order issued on March 27, 2020. Pursuant to an Approval and Vesting Order issued March 11, 2021, 33 Yorkville was vested in PEM (Yorkville) Holdings Inc.

39. Casey explained that the difficulties faced by these three projects were largely the result of rising construction costs in the period before construction of those projects began. The YSL Project was launched later and did not suffer from the same difficulties.

40. As of the beginning of 2020, the costs recorded in YSL's *pro forma* projections were regarded by both Casey and Athanasoulis as being current and reliable projections.

E. Athanasoulis Compensation History

41. The management of Cresford was conducted on a very informal basis. Corporate formalities were not observed. Many aspects of the business especially in relation to employment and compensation issues were conducted on the basis of oral discussions and understandings. Employment agreements, on the rare occasions in which they were put in writing (usually at the request of an employee) were made out between the employee and "Cresford Developments", a name which does not correspond to any distinct legal entity.

42. If Athanasoulis ever signed an employment contract with Cresford, it was early in her career with Cresford and no copy of it has been located.

43. The property management and other fee generating entities within the Cresford Group, generated the cash necessary to pay expenses of the organization, including the salaries, on a current basis.

44. Fees earned within Cresford were ultimately collected within East Downtown Redevelopment Partnership ("**EDRP**") which paid employee salaries within Cresford. EDRP did not own any projects and conducted no business in its own name. There is nothing to suggest that EDRP exercised any management or control over Athanasoulis, or indeed communicated with her in any way relative to her employment. On the evidence in this arbitration, EDRP essentially served the role of paymaster and financial clearing house with the Cresford Group of companies.

45. Throughout most of her employment, Athanasoulis reported directly to Casey. Latterly, the ambit of her employment encompassed all of Cresford's development activities, with some of her energies being directed to the service of the entire group and some of her energies being directed to the fulfillment of responsibilities with respect to individual projects, to the benefit of Cresford, the Owners and other stakeholders in those projects.

46. Athanasoulis' compensation included a base salary and, from time-to-time, bonuses. Her base salary was paid by EDRP. It is not clear from the evidence on record, whether all performance bonuses were paid by the individual Owners to which the performance that earned the bonus related. It is admitted by KVC that one cash bonus was paid by YSL to a company owned by Athanasoulis husband. Bonuses were paid either in cash or through credits on condominium units within the relevant Owner's project. Clearly, bonuses paid by way of credits on condominium purchases had to come from the relevant Owners. There is no evidence as to cash flows between EDRP and the Owners.

47. Athanasoulis' compensation in and before 2014 was summarized in a consultant's report as comprising a base salary of $200,000 with eligibility for a bonus up to $100,000 on certain parameters (sales of units on three projects and input to the Strategic Advisory Committee) and a further bonus of 0.125% to 0.175 % on total sales of the newly launched Casa III project.

48. Casey's evidence that Athanasoulis was never paid commissions on sales, is not credible. His memory of such matters is poor and is contradicted by the positions taken on behalf of him and the other Cresford Defendants in their Statement of Defence and Counterclaim. However, there is room for debate in relation to exactly how Athanasoulis' compensation at any point in time related to previously agreed terms. Her compensation appears to have been finalized in periodic

discussions between her and Casey. There is no evidence of any issue ever arising as to whether she was properly compensated in relation to prior agreements.

49. In 2014, in light of the successful launch of a Cresford condominium project known as Vox ("**Vox Project**"), Casey agreed to pay Athanasoulis 10% of the profits earned on the Vox Project (the "**10% PSA**"). At about the same time they agreed that Athanasoulis' base salary would be increased to $500,000.

50. Again, Casey's denial of having agreed to this (as part of his blanket denial of having agreed to pay any commissions, including the 10% PSA in relation to future projects) is contradicted by factual assertions in paragraph 51 of the Statement of Defence where it was stated: "After the Vox Project, Casey agreed to pay Athanasoulis 10% of the net profits realized on the successful completion of future projects." In addition, the Defence in this arbitration contains the admission that "…Cresford agreed to pay Athanasoulis 10% of the net profits realized on the completion of certain projects, including YSL." Both pleadings assert that "…Athanasoulis would only be entitled to this benefit if she contributed to the successful completion of the project and remained an employee of Cresford at the date of project completion."

51. Casey admits that the information in these pleading must have come from him and that he would very likely have had an opportunity to review and correct the pleading, but he has no explanation as to how his counsel or KSV's counsel came to acknowledge the existence of an agreement to pay a bonus in the amount of 10% of net profits – albeit on an alleged condition of continued employment which is itself subject to dispute – an agreement to which only he could have committed on behalf of Cresford.

52. With respect to the condition of continued employment, I note that neither pleading asserts that the condition was specifically discussed and agreed upon between Casey and Athanasoulis. Athanasoulis denies that any such condition was discussed, and Casey is in no position to assert that it was, having now testified that no such discussion took place.

53. Athanasoulis did attempt to put the 10% PSA into written form, using as a template the written agreement of another employee. She gave her draft, dated November 14, 2014 ("**November 14 Draft**") to Casey. However, it does not appear that either of them followed up, and there is no

evidence that it was ever discussed. This is not surprising in the corporate culture that prevailed at Cresford. As with all prior agreements relating to Athanasoulis' employment, the 10% PSA was not documented. The details surrounding the arrangement were never clarified. Athanasoulis trusted Casey to fulfill the promise and continued to replicate and surpass her prior success.

54. In this arbitration, both sides sought to use the November 14 Draft to argue what Athanasoulis' understanding of the 10% PSA must have been, especially with respect to any condition of continued employment. The submissions of the parties focussed on the following provisions:

    a. Under the heading "The Employee's employment may be terminated as follows" Paragraph 4 states: "Bonus payments will be paid in full at the completion of any project in the construction phase."

    b. Schedule A 4): "A bonus of 10% of final profits will be paid on final closing on any future site Cresford acquires."

55. Despite the failure to follow up on the November 14 Draft, Athanasoulis was generously compensated in the years after the 10% PSA, although no occasion arose to apply the 10% PSA. It is difficult on the evidence in this arbitration to reconcile the compensation she received to the agreements or understandings that were in place. However, there is no suggestion that she was undercompensated by reference to what is set out in the November 14 Draft. As no projects were completed or sold at a profit during this period of time, the 10% PSA was not triggered.

56. Athanasoulis' taxable income from employment as declared on her T4 slips was as follows for the years indicated:

2014 - $301,900
2015 - $314,400
2016 - $617,195
2017 - $621,871
2018 - $889,400
2019 - $889,400

57. Between 2014 and 2019, Athanasoulis received, as part of her compensation, discounts on the purchase of condominium units on Cresford projects totalling a minimum of $3,717,378. These

discounted transactions were done with companies held by Athanasoulis and/or her husband. These agreements required no investment or deposit until closing, at which time any additional value of the unit over the launch price would also accrue to the benefit of Athanasoulis and her husband. Given the rising prices of condominiums in Toronto, the discounts were therefore considered to be the minimum value of the benefit. There is some overlapping between compensation recorded on Athanasoulis' T4 slips and compensation paid by way of discounted transactions with Athanasoulis and her husband. Compensation paid in cash was paid through EDRP. Compensation paid by way of discounted transactions was "paid" by the relevant Owner, sometimes by way of discounts in favour of companies owned by Athanasoulis' husband.

58. Although there is a lack of arithmetical specificity in the evidence, it is not disputed that Athanasoulis was paid substantial bonuses from the project Owners, including a cash bonus from YSL. Unlike profit share, which in the normal course could only be calculated at the end of a project, bonuses were paid primarily based on sales of condominiums in each project in any given year.

59. Athanasoulis was never paid a profit share while she was at Cresford. None of the projects, other than the Vox Project, reached the point of registration or were otherwise disposed of at a profit. The Vox Project was not profitable. Athanasoulis testified that the project was primarily acquired to earn fees and was expected to be a "tight deal".

60. Following the 10% PSA, Athanasoulis became an increasingly valuable contributor to the success of Cresford. Casey and Athanasoulis discussed raising her profit share from 10% to 15%. However, these discussions were not concluded before they were overtaken by other events.

61. After the successful launch of the 33 Yorkville Project in 2017, Casey and Athanasoulis discussed increasing Athanasoulis' profit share to 20% of current and future projects. The evidence of Athanasoulis is somewhat inconsistent as to whether she thought that they came to an agreement with respect to increasing the profit share to 20% at that time, or later after the successful launch of YSL in 2018. As with all matters surrounding Athanasoulis' compensation, there is a lack of clarity and no documentary confirmation. Nevertheless, it rings true that such discussions began in 2017 and rose to the level of a mutual understanding after the launch of the YSL Project, by which time Dowbiggin had left Cresford.

62. The YSL Project was off to an exceptional start, with initial sales of approximately $550 million, and was at all times projected to be profitable. Athanasoulis was the only employee of Cresford who spoke at the launch event. In her capacity as an officer of YSL she signed contracts on behalf of YSL.

63. Athanasoulis' role continued to expand. Following Dowbiggin's departure at the beginning of 2018, and even more so after a health issue experienced by Casey in December 2018, she was responsible for essentially all of Cresford's operations. This included:

    a. all aspects of design, marketing, and sales;

    b. Cresford's relationship with its contractors, including negotiating contracts and addressing any ongoing issues;

    c. Cresford's relationship with its lenders. Mr. Casey had little contact with lenders, in this period, apart from what he described as "social" interactions; and

    d. overseeing all of Cresford's employees.

F. Meeting with John Papadakis

64. At some point in late 2018, Casey had a serious health issue. In light of that, and to secure Athanasoulis' conditions of employment and continued role in the company, Casey and Athanasoulis decided that a meeting would take place to discuss putting a written agreement in place with respect to Athanasoulis' compensation, in case Casey was "hit by a bus". It is not clear from the evidence, who initiated the meeting. However, Athanasoulis was the one who contacted Papadakis to set up the meeting. She told Papadakis that the purpose of the meeting was to discuss putting her agreement with Casey into writing.

65. Papadakis was a partner in the Blaney McMurtry law firm which acted for Cresford. He practices commercial law and commercial real estate lending and acquisition. His primary dealings with Cresford were through Athanasoulis, although he did meet with Casey on occasion.

66. Papadakis was also a close family friend of Athanasoulis. Athanasoulis' husband's parents were Papadakis' godparents. Papadakis was best man at Athanasoulis' wedding and her husband is a

godparent to Papadakis' child. He was called upon to give evidence in the arbitration by Athanasoulis.

67. Athanasoulis and Mr. Casey met with John Papadakis on Saturday, February 16, 2019 at Cresford's office. The meeting, which was described as "informal", included a discussion of Casey's health as well as a review of Athanasoulis' employment arrangements. While there is an issue in this arbitration as to whether or not an enforceable agreement was reached at, or before, the meeting, it is important to note that there is no evidence as to any disagreement or point of contention as to any matter that was discussed at the meeting.

68. The meeting lasted about two hours. In broad terms, it is clear that the purpose of the meeting was not to negotiate any new terms but to review the terms of the existing arrangements with a view to putting them into a formal document. The purpose of putting the arrangements into a written document was described to Papadakis at the meeting by Casey as being "in case I get hit by a bus". Casey agrees that he made this statement.

69. The 20% profit share was discussed at the meeting as part of the arrangements that were already in place.

70. Casey presented evidence regarding the meeting which differed in some respects from the evidence given by Athanasoulis and Papadakis. To a large extent these differences are matters of characterization rather than matters of fact. To the extent that Casey's evidence differs I accept the evidence of Athanasoulis and Papadakis. Casey's memory is imprecise and is at odds with highly germane allegations, clearly pleaded on his behalf in two different legal proceedings, that could only have originated from, or been confirmed by, him. His characterizations of the facts do not ring true in the overall context.

71. I was urged by KSV to make findings of credibility against Athanasoulis on the basis of her conduct following her departure from Cresford in January 2020. As Athanasoulis has acknowledged, her conduct (as described below in relation to the Mann Letters) was inexcusable – although she did provide an explanation. However, KSV has not sought to at this stage to justify certain conduct of Casey which is referenced in the Mann letters, which also does not reflect well on him. I have not based my findings of credibility on general observations or judgments

regarding the conduct of Athanasoulis or Casey, or a consideration as to which of them behaved less badly. Rather, I have based my findings on an evaluation of the evidence in relation to the events to which the evidence relates and its congruency with the overall context.

72. Athanasoulis had become critically important to the success of Cresford. There was nothing unusual, unfair or contentious about the arrangements that were in place with Athanasoulis, including the 20% profit share which would, by its nature, depend entirely on the size of the overall profit. Casey had every reason to want to make her feel secure in her position. In light of his recent health concerns, he wanted to ensure that she would carry on and complete the projects even if something happened to him, as he explained to Papadakis at the meeting. Although she remained an employee in legal terms, Casey often referred to her in public as his "partner". For many important entities doing business with Cresford, she had become the "face" of Cresford especially after Dowbiggin's departure and Casey's illness. Casey was in no position to create any doubt in Athanasoulis' mind that he would not fulfill that which he had promised in relation to her compensation, or resist it being put into writing. It is clear, even on his own evidence, that he did not do so at the meeting.

73. Despite his personal ties to Athanasoulis and her family, I found the evidence of Papadakis to be balanced and objective. On a number of important points where it would have been easy for him to fabricate answers useful to Athanasoulis, he did not do so. He was careful to distinguish between what was actually said at the meeting and things he assumed based on his understanding of the situation. Apart from legal characterizations of what took place at the meeting, the evidence of Papadakis is not substantially at odds with Casey's evidence.

74. I accept the evidence of Papadakis that, at the meeting, it was confirmed that Athanasoulis was to receive 20% of the profits from existing and future projects. There was no discussion of which entities within the Cresford Group would pay the profits. Papadakis assumed that each entity that earned the profit would be obligated to pay, but he did not recall any specific discussion of that point. He did recall that he asked for a list of the companies involved to assist him in drafting the agreement. There was no discussion about how profits would be calculated, other than that they would be *bona fide* profits, i.e. there would not be any sort of non-bona fide transactions that would

decrease profits. There was no discussion about when profits would be paid. No restrictions or conditions were discussed in relation to the profit sharing.

75. At the conclusion of the meeting, Papadakis asked to be given a corporate chart so that he could begin drafting the agreement. He received the corporate chart from a senior employee of Cresford about 2 weeks later. However, he never did create a written agreement. YSL objected, on grounds of legal privilege, to Papadakis providing evidence as to why he did not do so. In this context, I would note that legal privilege attaches to communications between lawyers and their clients. In this case, Papadakis and his firm were the lawyers. Cresford was the client.

76. Thereafter, Athanasoulis would occasionally remind Papadakis not to forget that "we've got to get to that agreement". There is no evidence that she was ever told that Papadakis did not prepare the written agreement as a result of the privileged communications with Cresford.

77. After the events (described below) which led to the end of Athanasoulis' employment with Cresford, Athanasoulis brought the previously mentioned action against Cresford in the Superior Court of Ontario. In that context, Papadakis was interviewed over the phone by Mr. Al O'Brien ("**O'Brien**") litigation counsel for Cresford, with respect to the meeting of February 16, 2019. O'Brien prepared a memorandum relating to that telephone conversation dated February 4, 2020 ("**O'Brien Memo**").

78. Counsel for Athanasoulis objected to the introduction of the O'Brien Memo into evidence. The memo was offered as a document that had been given to counsel for KSV in this arbitration by Aird & Berlis, Cresford's current litigation counsel. No one was called to give evidence as to the document itself. O'Brien has since passed away. Significant portions of the document have been redacted on the basis of privilege.

79. After receiving submissions as to the admission of the O'Brien Memo into evidence, for reasons stated on the record, I admitted the document into evidence subject to weight and to give Papadakis an opportunity to confirm, deny or explain the assertions in the O'Brien Memo.

80. The O'Brien Memo recounts that O'Brien had sent Papadakis extracts from Athanasoulis' Statement of Claim prior to the telephone conversation. Prior to the call Papadakis had informed O'Brien that he had not been able to locate any notes of the February 16, 2019 meeting.

81. The O'Brien memo stated that Papadakis had made the following comments:

    a. The February 16, 2019 meeting was a "informal" and "very preliminary meeting" and Papadakis "was not to be drafting anything". "He was never instructed to draft anything and in fact never did draft anything".

    b. Papadakis "will state that Maria and Dan never got to a point of "meeting of the minds" as to how to move forward".

    c. Papadakis stated that he was "never in a position to draft anything" and "Dan never told him not to proceed with drafting anything". "They were never at a stage to start drafting an agreement."

82. With a few unimportant exceptions, Papadakis flatly contradicted these statements in the O'Brien Memo. He agreed that the meeting was informal in that it was conducted in an informal manner, i.e., not in a boardroom wearing suits. However, he disagreed that he told O'Brien that he was "not to be drafting anything". He testified that he advised O'Brien that there was a verbal agreement in place that he was asked to put in writing. Papadakis testified that the term "meeting of the minds" never came up in his conversation with O'Brien and that it was not correct to say that there was no meeting of the minds. He testified that it was outside the realm of possibility that he would have said that to O'Brien because it was a legal conclusion and is incorrect. He would not have used that term in his conversation with O'Brien.

83. Papadakis gave evidence that the discussion on February 16, 2019 was not a negotiation, it was a verbal arrangement that he was asked to put into writing. He agreed that he told O'Brien that there was no written contract. He agreed that he was not in a position to draft the agreement right after the meeting because he needed the information he had requested about the corporate structure.

84. I accept the evidence of Papadakis in preference to the information in the O'Brien Memo.

85. Papadakis' evidence was clear, consistent and convincing as summarized in the following exchange during his cross examination:

> Q. Let me rephrase. I'm going to put it to you, Mr. Papadakis, that on January 31st, 2020, you told Mr. O'Brien that there was no enforceable contract between Mr. Casey and Athanasoulis. Will you accept that?
>
> A. No. No. I said exactly what I've been saying this whole time. There was a verbal agreement in place. You're talking about me using the words "enforceable contract"; those terms did not come up in my conversation. What he asked me is what was asked of me earlier, what was said, what happened at that meeting. He did not go into any, was there an enforceable contract, was there a meeting of the minds. It was what was said, you know -- going back to what you had shown me earlier, those paragraphs, that just talks about what happened at the meeting. That's what we talked about.

86. At the time of their conversation, both Papadakis and O'Brien had potential reasons not to be objective: Papadakis for the reasons previously mentioned in paragraph 66 above and O'Brien because he was not just Cresford's counsel but also a personal friend of Casey and a Trustee of Casey's Estate. However, the objective evidence and surrounding circumstances favour Papadakis' evidence.

87. It is not credible that Papadakis told O'Brien that he was "not to be drafting anything" after the meeting when it is known that the purpose of asking Papadakis to attend the meeting was to create a written agreement in case Casey was "hit by a bus". Any such statement by Papadakis would also be inconsistent with the fact that he did not draft anything after the meeting because of a communication which took place after the meeting, for which Cresford claims privilege.

88. Given that there were in fact no matters of disagreement at the meeting (a matter on which all three attendees at the meeting agree) to say that there was "no meeting of the minds" is a strikingly inapt comment – one that is not supported by the facts, and is at best an arguable legal conclusion. Ironically, the biases alleged against Papadakis make it all the more unlikely that he would have made that comment.

89. Certainly, as Papadakis agreed under cross examination, the matters on which Casey and Athanasoulis confirmed their agreement at the meeting were at a high level of generality. Casey testified that he and Athanasoulis had a "conceptual agreement". Thus, the issue arises as to whether or not their conceptual agreement lacked any contractual intent or essential terms needed to create an agreement enforceable at law. That is a matter for legal argument and analysis, as

discussed below. But there was no reason based on what occurred at the meeting to conclude that there was not, or would not continue to be, a "meeting of the minds".

90. In the circumstances, I am unable to give the O'Brien Memo any weight as against the testimony given by Papadakis in this arbitration.

G. Terms of the PSA

91. The following facts are relevant to the issue of reasonable certainty regarding the calculation of profits in the context of Cresford's business. They are not intended to be definitive findings in terms of how profits should be calculated in the circumstances of any particular project.

92. Cresford prepared budgets, called *pro formas*, that were submitted to lenders and used for internal decision-making. The *pro formas* were prepared on a project by project basis and included a profit calculation.

93. Project profits were calculated by taking project revenues and deducting project expenses.

94. It was Athanasoulis' evidence that the *pro formas* served as a basis to calculate the profits to which she was entitled and that this was something she discussed with Casey. Casey agreed that he and Athanasoulis had a shared understanding as to what was meant when they discussed project profits.

95. The *pro formas* for each project began as pure projections of revenue and categories of expenses at the beginning of each project. They show how all the anticipated financial elements would be treated in the overall calculation of profits. For example, fees charged to a project by other Cresford companies were treated as expenses to the project. As the project progressed, the components of revenues and expenses would be updated with new estimates based on changing circumstances, and with known costs as they were incurred. *Pro formas* became more reliable as construction of the project progressed.

96. Projections can prove to be wrong and events could occur that would significantly affect projections. The COVID pandemic which began in early 2020 is a dramatic example. However, revenues from condominium projects are not earned until construction is completed and the

condominium corporation is registered. By the time the project is registered and revenues are released, costs and revenues are known and, using the *pro formas*, profits can be calculated.

97. Profits can also be earned on projects prior to registration, although not from sales of the condominium units themselves. For example, land may be sold after successful rezoning of the property or at a point where a partial development has occurred.

98. There was never any discussion between Casey and Athanasoulis as to any condition attaching to Athanasoulis' entitlement to a share of the profits. Specifically, it was never discussed that Athanasoulis would cease to be entitled to a share of the profits if her employment was terminated. Casey agreed that Cresford could not extinguish any entitlement by simply terminating Athanasoulis' employment.

H. Events of 2019

99. In the course of 2019, a number of challenges unfolded with respect to the Cresford projects.

100. The three ongoing projects, other than the YSL Project, began to experience serious cost over-runs due to conditions in the construction industry at that time.

101. The YSL Project, which had proceeded to the demolition and excavation stage, was experiencing some difficulties satisfying a condition relating to drawing down its construction loan for the erection of the tower. The condition was that the retail segment of the project had to be pre-sold. Athanasoulis had attempted to put together a consortium to purchase the retail space, but that had been unsuccessful. Casey then engaged in discussions to sell the retail space to Hawalius Inc. ("**Hawalius**").

102. In the course of dealing with these issues, Casey and Athanasoulis discussed the possibility of selling the entire Cresford business. Patrick Dovigi ("**Dovigi**"), the owner of GFL Environmental, which had worked on the foundation for the YSL Project, had expressed an interest in owning rental projects. Casey and Athanasoulis agreed that Dovigi would be approached to see if he had any interest in acquiring Cresford. Dovigi expressed interest, but on the condition that Athanasoulis join him and take a 50% interest. Casey was aware of this and promoted Athanasoulis in his discussions with Dovigi. Casey was extravagant in his praise to Athanasoulis

herself for being in a position to facilitate such a transaction. However, the potential sale to Dovigi created significant issues which ultimately led to Athanasoulis leaving the company without any transaction with Dovigi taking place.

103. Casey testified that he asked Athanasoulis to focus on the transaction with Dovigi. However, he himself took the lead in negotiations with Dovigi and asked Athanasoulis to "remain totally quiet regarding [Dovigi] so he cannot triangulate". In his text message to Athanasoulis of November 22, 2019 Casey went on to say:

> I have a good feeling we can do the deal. If any new information comes up, I will keep you informed.
>
> [Underlining added.]

104. Nevertheless, it appears that Athanasoulis did continue to have discussions with Dovigi. She appears to have played a role in providing information regarding Cresford to Dovigi to inform the negotiations.

105. At the same time, Casey continued to negotiate with Hawalius, without involving Athanasoulis.

106. Casey sought and obtained the assistance of Dowbiggin and Joe Bolla, as external advisors to assist him with the negotiations with Dovigi and Hawalius, and with the other financial issues facing Cresford.

107. While these events were unfolding, Casey instructed employees of Cresford who previously reported to Athanasoulis to report to him instead, and to take other measures regarding record keeping, that caused the employees serious distress. On December 11, 2019, Sean Fleming, Cresford's VP of Finance and Planning ("**Fleming**") stated in an email to Dan Casey, among other things:

> We were asked to join you for a confidential meeting on Wednesday December 11, 2019 that left us feeling uncomfortable. The direction to no longer put anything in writing and to only communicate by way of telephone was alarming. We are also concerned with the sudden change in leadership and decision making without any explanation as to why and for how long.

[Underlining added.]

108. In the arbitration, Casey sought to explain his instructions to Cresford employees not to report to Athanasoulis as a temporary measure which was to remain only in place while she was focussed on negotiations with Dovigi. However, this was never explained to Athanasoulis or other Cresford employees.

109. Casey achieved an agreement in principle (expressed in an unsigned letter of intent ("**LOI**")) with Hawalius and represented to the construction lender that the condition regarding the sale of the retail space had been satisfied. Athanasoulis was aware that Dovigi wanted to acquire the retail space as part of any transaction to acquire Cresford. Athanasoulis felt that the Hawalius transaction negatively impacted the negotiations with Dovigi and that she had been blindsided.

110. On December 13, 2019, Fleming forwarded to Casey an email from the construction lender which sought additional information regarding the LOI. Fleming also raised a number of issues regarding the accuracy and business intent of a number of aspects of the LOI.

111. In a telephone conversation with Bolla, Athanasoulis also disputed whether the agreement in principle with Hawalius satisfied the condition for the construction loan advance. Athanasoulis felt that the lender was being misled regarding the satisfaction of the condition and she raised various issues with Bolla regarding the LOI. Athanasoulis also sent an email to Casey suggesting that he was "presenting a suspicious LOI to the bank".

112. Later the same day, O'Brien on behalf of Cresford sent an email to Athanasoulis in which he referred to the conversation and stated that Athanasoulis had "threatened to take steps to interfere with the closing of the YSL financing". In the email (which was sent by O'Brien's assistant on his behalf) O'Brien reminded Athanasoulis of her fiduciary duties to Cresford and warned her not to interfere in the Hawalius transaction, or with the drawdown of the construction loan.

113. During her involvement with the Dovigi transaction, Athanasoulis also discovered what she believed to be a major violation of Cresford's obligations to its lenders in that it had represented

that it had invested significant equity in the order of $20 million in the YSL Project (as required by the terms of the loan agreement), whereas Casey had borrowed the money and was charging the interest as an expense to the project. The financial difficulties experienced by Cresford and the issues regarding the YSL construction financing caused Athanasoulis to question Casey's past assurances that he had substantial means and assets at his disposal to support Cresford's business.

114. Over the course of the fall of 2019, Casey excluded Athanasoulis from all aspects of Cresford's business except the transaction with Dovigi. In addition to the particular matters noted above, he instructed her to have no further dealings with lenders and conducted certain discussions regarding the potential acquisition of a major new site, the Chelsea Hotel, without her involvement. When Athanasoulis complained, at a meeting on December 5, 2019, Casey berated her and called her "crazy".

115. In his evidence, Casey sought to characterize the situation as Athanasoulis having been instructed to focus on negotiating with Dovigi and being "on assignment" during that period. There was some variation in the evidence as to whether Casey told Athanasoulis to work "exclusively" on the Dovigi transaction, or to give that transaction her primary attention. Casey has complained in his Statement of Defence and Counterclaim regarding her failure to follow up on another matter that was brought to her attention during this period. On the other hand, he agreed in cross-examination with counsel's suggestion that Athanasoulis' attention to the Dovigi transaction was to be exclusive.

116. Casey's evidence was that Athanasoulis' primary or exclusive concern with the Dovigi transaction to the exclusion of other matters was to be temporary, and that the direction to her employees not to report to her was temporary and part of an ethical screen, given Athanasoulis' potential involvement with Dovigi in any purchase of Cresford. Whether or not this was so, these intentions were not communicated to Athanasoulis or to any of the staff, or third parties with whom Athanasoulis had been dealing on behalf of Cresford. There is no evidence of any communication to Athanasoulis or Cresford employees regarding an ethical screen.

I. Athanasoulis' Departure from Cresford

117. On January 2, 2020, Mark Dunn, as counsel for Athanasoulis, wrote to O'Brien indicating that Athanasoulis considered her employment with Cresford to have been constructively terminated, and that she would cease to work for Cresford effective that day. The letter set out the grounds for that contention, most of which have been referred to above. The letter set out various steps to be taken to formalize and communicate the fact that Athanasoulis was no longer employed by Cresford. The letter advised that a claim would be filed on January 10, 2020 if an amicable settlement could not be reached by that date.

118. O'Brien responded to Dunn's letter disputing the allegation of constructive dismissal, but agreeing to discuss the steps to be taken in light of her departure.

119. Athanasoulis' last day of work was January 2, 2020.

J. Subsequent Events

120. Athanasoulis filed a lawsuit against Cresford in the Ontario Superior Court of Justice on January 21, 2020.

121. The Statement of Claim, in addition to advancing the claims that are the subject of this arbitration, contained allegations as to Cresford's financial difficulties and Athanasoulis' concerns regarding dealings with Cresford's lenders which are referenced above.

122. Before delivering the Statement of Claim, Athanasoulis sent a letter to each of two lenders to Cresford: QuadReal Finance and Otera Capital ("**Mann Letters"**). Each letter contained serious allegations of financial wrongdoing against Casey and Cresford, and expressly alleged fraud. Athanasoulis falsely signed the letter in the name of David Mann, the Chief Financial Officer of Cresford ("**Mann**"), a fact that she has since acknowledged.

123. Apart from the allegation of "fraud", KSV does not contest the accuracy of the information in the Mann Letters, and in fact relies on those facts in support of its position that Cresford would never have achieved the profit in which Athanasoulis is claiming a share.

124. As stated above, KSV relies on the Mann Letters as going to Athanasoulis' credibility.

125. On February 21, 2020, the Statement of Defence and Counterclaim was filed. By way of defence, the Defendants denied any liability, including for damages in lieu of notice or for a share of profits. By way of counterclaim, the Defendants sued for damages for, among other things, breach of fiduciary duty, breach of contract and intentional interference with contractual relationships and for defamation. None of the claims raised in the Counterclaim are being dealt with in this arbitration.

126. YSL became subject to a Notice of Intent for Proposal pursuant to the BIA on April 30, 2021.

K. Issues and Analysis

127. By way of preliminary comments, it is useful to address four points which KSV identifies as unusual aspects of this case that should guide the decisions in this case.

128. First, KSV asserts that it is important to note that this case concerns an equity claim, i.e. a claim to a share of the profits, by an employee who has invested no equity. However, I would note that the ranking of the PSA claim in the insolvency proceedings is not an issue that I have been tasked with addressing. I am not aware of any principle of law that the only legally adequate consideration for a promise to share profits, is a contribution to the capital structure of the promisor by way of an investment of equity.

129. KSV's second over-arching point is that this is a claim for a share of profits in an insolvent company, in relation to a project that has not been built and will never be built by this group of companies. However, the existence or non-existence of an agreement, and the determination of the terms of the agreement, does not depend upon whether or not the subject matter of the contract had a favourable outcome. The existence or non-existence of a profit, payable by YSL as a profit share or as damages in lieu, in the circumstances of this case would appear to be a potentially complex determination which – apparently for that reason – has been reserved by agreement of the parties to the second stage of this arbitration.

130. Third, KSV points out that this claim concerns a "life changing amount of money" based on the "flimsiest of alleged oral agreements". However, the existence or non-existence of any agreement is to be determined based on legal tests that are to be applied to the facts of the case at

the time the agreement was allegedly formed. Any opinion the arbitrator may hold as to the providence or fairness of the bargain is not relevant. In addition, as KSV itself points out in other submissions, an agreement to share profits is highly contingent and as of February 16, 2019 Cresford had not yet achieved a profit.

131. Fourth, KSV argues that the claim for wrongful dismissal is unusual in that it is made by a senior employee who was merely asked to step aside from certain duties where there was a potential conflict of interest, until that conflict of interest was resolved. Certain aspects of this assertion are factually contentious.

i. Did Athanasoulis have a PSA that entitled her to 20% of the profits earned by the YSL Project?

132. The fundamental issue in relation to the first question is whether or not Athanasoulis and Casey (representing Cresford) entered into a complete and binding agreement with respect to 20% of the profits earned by the YSL Project. The primary argument against this conclusion by KSV is that there were many other terms that were essential to any such agreement that were not in fact discussed or agreed upon. KSV takes the position that, as stated by Casey, what the parties had was at best a "conceptual agreement" that was subject to details being fleshed out in a written agreement that was yet to be drafted. For example, it is suggested that details would need to be set out as to which entity within the Cresford Group would be responsible to pay the profit share, how profit share was to be calculated, when it would be paid, and so on.

133. In my view, it is clear that Athanasoulis and Casey believed by February 16, 2019 that they had agreed that, as a term of her employment, Athanasoulis would receive 20% of the profits of current and future projects completed by companies in the Cresford Group. They understood the agreement to be binding. They expected Athanasoulis to act upon it as representing fair compensation for her existing, and expected future, contributions to the profitability in which she was to share. Their instructions to Papadakis to reduce the agreement to writing were given for the purpose of memorializing the agreement so that Athanasoulis could rely on it in case Casey "was hit by a bus". What was objectively conveyed by this explanation was that a written agreement was only necessary if Casey was not available to honour the agreement since the parties otherwise trusted each other to give effect to their oral agreements as they had in the past. When

giving those instructions, they did not identify any issues upon which they disagreed or sought advice.

134. At the meeting Papadakis sought further information so that the agreement could be reduced to writing. In particular, he required a corporate chart so as to identify which companies within the Cresford Group would need to be parties. However, Casey at all times had the power to bind all of the relevant entities on behalf of which the 20% PSA was entered into.

135. It is possible that many additional issues could have been identified and provided for in any draft of a written agreement prepared by Papadakis, had his work not been discontinued as a result of privileged communications with Cresford. While Cresford is within its rights to claim privilege over communications related to why the agreement was not drafted, it is not open to KSV (standing in the shoes of Cresford) to offer an affirmative explanation as to why Papadakis was unable to draft an agreement, for example based on a lack of instructions as to "essential terms". In any event, there is no reason to believe that any such terms would have been contentious.

136. Given, as I have found, the subjective intention of the parties that their agreement with respect to the PSA was binding as of February 16, 2019, the issue is whether the agreement nevertheless fails to be enforceable because of a lack of essential terms.

137. The need for an agreement to include all essential terms in order to be enforceable has been dealt with in a number of cases. In general, the legal principles may be summarized as follows:

a. *Bawitko Investments Ltd. v. Kernels Popcorn Ltd*., [1991] O.J. No. 495:

> "20. As a matter of normal business practice, parties planning to make a formal written document the expression of their agreement, necessarily discuss and negotiate the proposed terms of the agreement before they enter into it. They frequently agree upon all of the terms to be incorporated into the intended written document before it is prepared. Their agreement may be expressed orally or by way of memorandum, by exchange of correspondence, or other informal writings. The parties may "contract to make a contract", that is to say, they may bind themselves to execute at a future date a formal written agreement *containing* specific terms and conditions. When they agree on all of the essential provisions to be incorporated in a formal document with the intention that their agreement shall thereupon

become binding, they will have fulfilled all the requisites for the formation of a contract. The fact that a formal written document to the same effect is to be thereafter prepared and signed does not alter the binding validity of the original contract.

21. However, when the original contract is incomplete because essential provisions intended to govern the contractual relationship have not been settled or agreed upon; or the contract is too general or uncertain to be valid in itself and is dependent on the making of a formal contract; or the understanding or intention of the parties, even if there is no uncertainty as to the terms of their agreement, is that their legal obligations are to be deferred until a formal contract has been approved and executed, the original or preliminary agreement cannot constitute an enforceable contract. In other words, in such circumstances the "contract to make a contract" is not a contract at all. The execution of the contemplated formal document is not intended only as a solemn record or memorial of an already complete and binding contract but is essential to the formation of the contract itself. See, generally, Von Hatzfeld Wildenburq v. Alexander, [1912] 1 Ch. 284; Canada Square Corp. Ltd. et al. v. Versafood Services Ltd. et al. (1980), 1979 CanLII 2042 (ON SC), 25 O.R. (2d) 591 (H.Ct.), aff'd., (1981), 1981 CanLII 1893 (ON CA), 34 O.R. (2d) 250 (C.A.); Bahamaconsult Ltd. v. Kellogg Salad Canada Ltd. (1976), 1975 CanLII 379 (ON SC), 9 O.R. (2d) 630 (H.Ct.), rev'd, (1977), 1976 CanLII 554 (ON CA), 15 O.R. (2d) 276 (C.A.); Chitty on Contracts, 26th ed. (1990), at pp.79-91; Corbin on Contracts, (1963), Vol. 1, § 29-30; and Treitel, Law of Contract, 7th ed. (1987), at pp.42-47."

b. *Canada Square Corp. v. Versafood Services Ltd.*, [1981] O.J. No. 3125 (Ont. C.A.) at para. 37:

"… accepting that the parties intended to create a binding relationship and were represented by experienced businessmen who had full authority to represent their respective companies, a court should not be too astute to hold that there is not that degree of certainty in any of its essential terms which is the requirement of a binding contract."

c. *McPherson v. Scully*, [2004] O.J. No. 5235 at para. 56:

"It is the tendency of modern courts to favour enforcement of contracts, particularly where there has been reliance."

138. As with the application of all legal principles relating to contract formation and interpretation, the exercise is highly fact dependent. For example, the *Bawitko* case involved a complex legal arrangement involving a possible franchise agreement. A draft of over 50 pages had already been produced by the franchisor, but had not been subject to any detailed discussions. The parties did not have any prior business dealings to inform their contractual expectations. The court held that the parties had not achieved a meeting of the minds on all essential terms. In the *Canada Square* case, although the final lease had not been signed, the landlord had sent a letter to the tenant outlining basic terms which were described by the court as "crudely expressed", containing "some very loose language" and "not crystal clear". Nevertheless, in that case, the agreement to lease an entire floor of an as yet unconstructed project was enforced. In the *McPherson* case, the court placed considerable reliance on the dealings between the parties over an extended period of time to find that an enforceable agreement had been reached.

139. The important context for the issue in this case is that the 20% PSA was not a standalone agreement nor the first profit sharing agreement between the parties. It was an integral part of an existing contract of employment. That contract was oral and had been acted on by both sides for about 15 years. Despite being referred to in a few documents and despite an inconclusive attempt in 2014 by Athanasoulis to document the employment relationship, no definitive written agreement containing the PSA ever came into existence.

140. None of the written documents, including the November 14 Draft, could be confidently stated to set out the complete and precise terms of her employment. For example, the November 14 Draft was based on an employment agreement of another employee that Athanasoulis modified. It is not certain that she understood the implications of all the terminology, and there is no evidence that the specific wording was ever agreed to (or, for that matter, disagreed to) by Casey. Nevertheless, there is no doubt that Athanasoulis was employed by Cresford and held office in various Cresford entities based on an oral agreement that was defined by an ongoing pattern of conduct between the parties which appear to have given rise to few, if any, disagreements regarding compensation prior to February 16, 2019. On the contrary, there is a history of Athanasoulis being paid compensation that was broadly consistent with what she has alleged to be the terms of her employment.

141. Clearly, the avoidance of uncertainty regarding a contractual relationship is one of the virtues of a written agreement. However, it should be borne in mind that most commercial *disputes* are based on the interpretation of agreements which *have* been reduced to writing. For example, written agreements that require a sharing of profits regularly give rise to disputes regarding the calculation of profits, even when the agreement contains specific terms as to how profit is to be calculated (for example "in accordance with GAAP" or IFRS). Indeed, profit sharing agreements are notoriously more litigious than, for example, agreements that involve sharing of top line revenues (such as sales).

142. To assert that any particular issue that might arise with respect to the calculation of profit must be addressed as an "essential term" sets a very high standard for the degree of certainty required by commercial agreements, oral or written. For example, if an express statement as to whether profit is to be calculated before or after tax is an "essential term", that would mean that <u>any</u> agreement that failed to contain a particular term in that regard would lack an essential term and be unenforceable. In my view, the relevant legal principles are not to be applied in that manner, and do not lead to that conclusion.

143. Here, there was continuous performance/reliance by Athanasoulis (before and after February 16, 2019) on the terms of her employment, including incentive-based elements, as defined by her discussions with Casey. The recording of their agreement into a written document would have been a departure from their previous practices and was embarked upon for a specific reason, the emergence of health issues with Casey.

144. In this case, the relationship is one of long-term employment. This is not a case where a claimant with a scant prior relationship to the defendant claims a massive finder's fee based on an off-hand comment at a cocktail party. Over a period of 15 years, Athanasoulis had risen to the level of being the most senior officer reporting to the CEO in an organization with projects in the hundreds of millions of dollars (and in the case of the YSL Project exceeding $1 billion). Her contributions to the operational success of the Cresford Group appear to have eclipsed that of Casey, although his involvement remained crucial in terms of sourcing capital. Her work had justified significant bonuses and incentives being added to her compensation. Cresford had already agreed to a PSA of 10%, and was discussing increasing that to 15%. With Dowbiggin's

departure and Casey's illness, it is perfectly logical that Casey would see a need to confirm an increase in the PSA to 20% and seek to memorialize that agreement in a formal document. Despite KSV's attempt to minimize the contributions of Athanasoulis as simply those of an employee with a talent for condo sales, there is nothing disproportionate, in the realm of executive compensation, about the agreement to increase her profit share to 20%.

145. The situation here is not analogous to that in the case of *Ayers v. Carewell Holdings Inc*., 2002 CarswellOnt 1761 (Sup. Ct.). The individual who claimed the bonus in that case was found not to be credible because of an inconsistency in how he documented a lesser bonus for his wife as compared to the larger bonus he claimed for himself. Also, the bonus was found to be "too one sided and the amount to be too rich to be credible" based precisely on the fact that it was allegedly payable even if there was no increase in profitability. In the present case, the failure to record the agreement, despite the parties' intention to do so, was consistent with past practice (including prior fruitless attempts to document their agreements). Athanasoulis had been paid significant bonuses based on sales long before profitability from a particular project could be determined, and the 20% PSA did not require any payment to Athanasoulis unless a profit was obtained. Were that to be the case, her anticipated contribution to the result was not in doubt.

146. When they agreed to the 20% PSA, Athanasoulis and Casey had a common understanding of what "profits" meant. Broadly speaking they understood that profits are revenues less expenses. It is reasonable to infer that they understood profits to be as calculated within the *pro forma* process that they used generally for all projects within their business. As given in evidence by Papadakis, they agreed that profits would not be artificially reduced by "bad faith" transactions.

147. In my view, given that the calculation of ultimate profits was an ongoing exercise with respect to each of the projects through the *pro forma* process, and would ultimately have to be accounted for with third party investors, there is a strong factual matrix and history of dealings between the parties within which any dispute regarding the meaning or calculation of profits could be determined. It is not essential to the enforceability of the agreement that every option regarding the calculation of profits be affirmed or negated.

148. I therefore find that Athanasoulis and Casey did agree, on or before February 16, 2019, to amend her employment agreement to provide for a 20% share of the profits calculated in good faith on the basis of the *pro forma* statements used in Cresford's business.

149. As to the question of who were parties to the agreement, I find that the intention of the 20% PSA was to bind all relevant entities that Casey had the power to bind – hence Papadakis' need for a corporate chart when memorializing the agreement. The profits that Casey and Athanasoulis had in mind were profits from the projects carried on by the Owners, such as YSL. Sharing of profits earned by any entity other than YSL is not the subject of the present claim. In the case of the YSL Project, any profit to be shared would necessarily have to be shared by YSL, and it is an inescapable inference that was the common intention of the Athanasoulis and Casey.

150. I therefore find that Athanasoulis did have a PSA that entitled her to 20% of the profits earned by the YSL Project.

ii. If so, what were the terms of the PSA?

151. In the course of answering the first question, I have found that the 20% PSA did not lack essential terms. The essential terms of that agreement, emerging from the foregoing analysis, were:

a. Athanasoulis was to be entitled to 20% of the profits earned on any of Cresford's current and future projects.

b. Profits were to be calculated, on a good faith basis, based on the pro forma budgets prepared by Cresford with respect to each project.

c. Athanasoulis' share of the profits was to be paid by the relevant Owner that earned the profit.

d. Profits were to be shared when earned, usually at the completion of a project.

152. Beyond these terms, certain other issues regarding the terms of the agreement arise in the context of the present situation. In particular:

a. the termination of Athanasoulis' employment before the completion of the YSL Project raises an issue as to whether her right to a share of the profits survived termination of her employment;

b. the fact that an insolvency proposal has been approved by the court at a time when the YSL Project has not proceeded to above-ground construction places in doubt whether, on any interpretation of the agreement, YSL has earned or will earn a profit; and

c. the circumstances giving rise to the termination of Athanasoulis' employment, her subsequent lawsuit against Cresford and Casey, her revelation of damaging information regarding Cresford finances, and the insolvency of YSL raise issues regarding causation in terms of the YSL Project not being completed and whether YSL would have earned a profit.

153. There is no evidence that any of these circumstances were in the minds of the parties when they entered into the 20% PSA. Indeed, each of these circumstances would appear to be contrary to the assumptions on the basis of which the 20% PSA was entered into. In particular:

a. the notion that Athanasoulis employment might be terminated without cause was the furthest thing from the minds of the parties. The entire premise of the 20% PSA was that she was a key employee whose contributions were needed in order to achieve a profit;

b. the object of the agreement was retention of Athanasoulis as a key employee until a profit was earned; and

c. the objective of earning and sharing a profit was the antithesis of Cresford or the Owners becoming insolvent.

154. Unquestionably, parties can and should provide in their agreements for events that commonly occur, even if they consider that they are unlikely to arise in their case. As observed in argument, that is the essence of what commercial lawyers do when they draft an agreement.

However, many if not most commercial disputes involve events that the parties did not anticipate or did not provide for, clearly or at all, in their agreement, despite the use of lawyers.

155. With respect to the issue of continued employment, Athanasoulis argues that the November 14 Draft provides the basis of a determination that the parties had an understanding that the PSA would be payable "on final closing" without any reference to Athanasoulis remaining employed by Cresford at that time. I am not prepared to draw that conclusion from the November 14 Draft as there is no evidence that that specific language was ever discussed or agreed to. Even if one were to accept the November 14 Draft as defining the terms of the PSA with respect to continued employment, it would leave open the questions as to whether the profit share could be defeated by a termination of Athanasoulis' employment for cause, or by voluntary resignation, before a profit was earned.

156. Nor is there any evidence of discussions on February 16, 2019 to the effect that Athanasoulis had to be employed at the end of a project in order to earn a share of the profit, as alleged (in the alternative) by Cresford and KSV.

157. There was no *express* term of the oral agreement regarding continued employment. However, there is a term which can readily be implied, and which Casey himself has accepted as obvious, namely that Cresford cannot avoid the obligation to pay a share of the profits by simply terminating Athanasoulis' employment. I understood his admission in this regard to relate to a situation where termination was without cause.

158. KSV accepts that the avoidance of such an obligation by terminating an employee just before the obligation falls due would not avail an employer. However, it argues that such a right could be defeated if it did not fall due within a contractual or common law notice period for termination without cause.

159. Athanasoulis argues that in the absence of any express agreement that the 20% PSA would be defeated by termination of Athanasoulis' employment, the result is that it cannot be so defeated.

160. The purpose of the profit share was to incentivize Athanasoulis to work towards the objective of creating and maximizing the profit to be earned by the Owners. It is not in dispute that, in the ordinary course, it would take several years (possibly 5 to 7 years) to complete the

types of projects Cresford was undertaking. That was the case with respect to the YSL Project. The 20% PSA necessarily implied a mutual commitment on both sides to work to the objective of making a profit over that period of time. It would defeat the fundamental purpose of the agreement if Cresford could increase its profit share by 20% and decrease Athanasoulis' share to zero, possibly after several years of crucial contributions by her in the form of advance sales etc, simply by terminating her employment on notice. It is not necessary to consider whether Cresford may have been able to do so in the event it terminated Athanasoulis' employment for cause, as that is not in issue in this case.

161. I therefore accept Athanasoulis' submission that, in the absence of an express agreement to the effect that the 20% PSA only applies if Athanasoulis is employed by Cresford when the profit is earned, there is no such limitation on that right.

162. Although I have found the November 14 Draft not to be determinative of the terms of the 10% PSA, my conclusion that employment at the time a profit is realized is not required pursuant to the 20% PSA is consistent with the provisions of the November 14 Draft.

163. In my view, there were no express or implied terms with respect to the issues relating to insolvency. These issues will have to be determined in the next phase of the arbitration by the application of the relevant legal principles to the factual circumstances giving rise to the insolvency.

164. I fully appreciate KSV's submissions that it appears incongruous to be discussing profit share in the context of companies that have subsequently gone through insolvency proceedings. However, the parties have agreed to bifurcate liability issues from damage issues, and to have me address specific questions relating to liability at this stage. Without hearing more evidence and submissions regarding what led to the insolvency proceedings and what their financial outcome was in terms of YSL, I am not in a position to accede to KSV's submission that I should find no breach on the basis that there has not been, and will never be, any profit to share. Equally, I do not rule out the possibility that the profit may be shown to be nil and the damages for any breach to be nominal.

165. Similarly, as a matter of causation, I am not able to determine at this stage whether or not the actions of Athanasoulis were the cause of Cresford's demise. All of those issues are necessarily reserved to the second stage of the arbitration.

166. Based on the foregoing analysis with respect to the first and second issue, I find the following with respect to the terms of the 20% PSA:

a. Athanasoulis was to be entitled to 20% of the profits earned on any of Cresford's current and future projects.

b. Profits were to be calculated, on a good faith basis, based on the pro forma budgets prepared by Cresford with respect to each project.

c. Athanasoulis' share of the profits was to be paid by the relevant Owner that earned the profit.

d. Profits were to be shared when earned, usually at the completion of a project.

e. There was no requirement that Athanasoulis remain employed at the time that a profit was earned.

iii. Was Athanasoulis employed by YSL?

167. KSV submits that Athanasoulis was not employed by YSL. Therefore, even if a PSA was found to exist, the obligations under it could not be owed by YSL. In KSV's oral submissions, various other possible candidates for the employer were suggested including: the Cresford organization, EDRP and "various other management organizations within the Cresford Group".

168. KSV relies primarily on the decision of the Ontario Court of Appeal in *O'Reilly v. ClearMRI Solutions Ltd.,* 2021 ONCA 385 to support its submissions. KSV submits that YSL was among the lowest companies on the organization chart and did not exercise the degree of effective control over Athanasoulis which is required to give it the status of employer, and to impose upon it any attendant obligations.

169. In my view, the description of the common employer doctrine in the *O'Reilly* case, supports a finding that YSL was a common employer of Athanasoulis, along with other Owners and companies in the Cresford Group of companies. I base that finding on paragraphs 49 to 65 of the *O'Reilly* decision and the following facts in this case:

a. Athanasoulis was an officer of YSL. Her employment status is therefore not based merely upon the relationship between YSL and another company or companies by which she was employed. There is no issue of "piercing the corporate veil" in this case.

b. As with the *Downtown Eatery (1993) Ltd. v Ontario* 2001 CarswellOnt 1680, cited with approval in the *O'Reilly* case, Athanasoulis" employment "rested more on her relationship to the group of companies rather than the relationships among the companies in the group".

c. YSL was a distinct corporate entity (with distinct stakeholders) which was separately and directly benefitted by the work performed by Athanasoulis.

d. Casey had the authority to bind YSL. Where Casey made promises to Athanasoulis that only YSL was in a position to fulfill (e.g., an agreement to share YSL's profits) it is objectively reasonable to infer that those promises were made on behalf of YSL.

e. Although in the context of Cresford it may have been a formality, there is no reason to believe that YSL could not have exercised its control by making a different decision with respect to Athanasoulis' employment than other members of the group. The fact that YSL was structured to exercise that control through Casey (as were all other companies within the group) does not negate YSL's control over Athanasoulis with respect to its own business, as a legal matter.

f. There was no written agreement of employment, but such documents that refer to the relationship between Cresford and its employees do not refer to any particular legal entity within the Cresford Group. Where no individual employer is specified,

it is reasonable to conclude that each member of the group is an employer in relation to aspects of the employment relationship particular to it.

g. There is no evidence of EDRP as an entity being involved substantively in any of Athanasoulis' activities on behalf of the Cresford Group or exercising any control. EDRP was not identified on a corporate chart used by KSV counsel to make the argument that YSL was at the bottom of the corporate ladder. At best, it appears to have been a financial clearing house within the group.

h. In any event, the companies on the "bottom rung" of the corporate chart are the Owners. They are the operating companies. As such, they are precisely the companies for which Athanasoulis worked. Her activities related to their operations, not merely to aggregated "head office" types of functions. She was involved in dealing with contractors and lenders and with managing sales programs for specific projects, such as the YSL Project.

i. The agreement with Athanasoulis included elements of compensation (e.g., bonuses) which were directly attributable to her contributions to individual companies within the group (e.g., YSL) and which were in many instances advanced by those companies to her (e.g., in the form of discounts on condominium sales).

170. Based on the foregoing, I find that Athanasoulis was an employee of YSL.

iv. Was Athanasoulis constructively dismissed i.e., did she resign or was she constructively dismissed?

171. The basic legal framework for the law relating to constructive dismissal was set out by the Supreme Court of Canada in *Farber v. Royal Trust Co*., 1997 CanLII 387 (SCC), [1997] 1 SCR 846, in which it was stated:

> 24. Where an employer decides unilaterally to make substantial changes to the essential terms of an employee's contract of employment and the employee does not agree to the changes and leaves his or her job, the employee has not resigned, but has been dismissed. Since the employer has not formally dismissed the employee, this is referred to as "constructive dismissal". By unilaterally seeking

> to make substantial changes to the essential terms of the employment contract, the employer is ceasing to meet its obligations and is therefore terminating the contract. The employee can then treat the contract as resiliated for breach and can leave. In such circumstances, the employee is entitled to compensation in lieu of notice and, where appropriate, damages.
>
> 25. On the other hand, an employer can make any changes to an employee's position that are allowed by the contract, *inter alia* as part of the employer's managerial authority. Such changes to the employee's position will not be changes to the employment contract, but rather applications thereof. The extent of the employer's discretion to make changes will depend on what the parties agreed when they entered into the contract.

172. As set out in *Potter v. New Brunswick Legal Aid Services Commission*, 2015 SCC 10, paragraph 63, the question in any constructive dismissal case is whether a reasonable person *in the employee's position* would conclude the essential terms of the contract had been substantially changed.

> "There is no requirement that the employer actually intend no longer to be bound by the contract. The question is whether, given the totality of the circumstances, a reasonable person in the employee's situation would have concluded that the employer's conduct evinced an intention no longer to be bound by it."

173. The issue is whether a breach of an express or implied term of the contract has occurred and whether that breach has caused a substantial change to an essential term of the employment contract.

174. The responsibilities that an employee must perform are, of course, part of the employment contract. Taking those responsibilities away will often result in constructive termination. The Supreme Court of Canada recognized in *Potter* (para. 83) that work is a "fundamental aspect" in a person's life and an "essential component of his or her sense of identity, self-worth and emotional well-being". That is particularly applicable in this case in which Athanasoulis success was completely defined by her role at Cresford, with few other qualifications or accomplishments, and her remarkable rise to be the "face" of Cresford to the public.

175. I accept Athanasoulis' submissions (and there does not appear to be any serious dispute) that the *Potter* case, and other authorities cited by her establish the following general principles:

- Employment is not only a way to earn money – the responsibilities associated with a position, and the reputation and status that flows from those responsibilities, are critically important.

  Potter, paras. 83-84;

  Blight v. Nokia Products Ltd., 2012 ONSC 2093, paras 23-24 and 31

- A reduction to an employee's responsibilities is a substantial breach of an essential term of the employment contract, and thereby constitutes constructive dismissal. This is especially the case if there is an associated loss of reputation or status.

  Farber, paras. 38 and 46;

  See also Schumacher *v. Toronto Dominion Bank*, [1999] O.J. No. 1772 (Ont. C.A.), paras. 27-28

- Changing reporting structures can also be a constructive termination.

  Robinson v. H. J. Heinz Company of Canada LP, 2018 ONSC 3424, para. 29

- Without proper justification, suspending or denying an employee the opportunity to work almost "inevitably" leads to a finding of constructive dismissal.

  Potter, para. 84 and para. 106;

  Shah v. Xerox Canada Ltd., [2000] O.J. No. 849, para. 9

- It is not generally enough for the employer to *have* cause for the suspension, it must almost always *articulate* that cause to the employee at the time of the suspension.

  Potter, paras. 98-99

- It is a fundamental implied term of any employment contract that the employer will treat the employee with dignity and respect. An employer who verbally abuses an employee has often effected a constructive termination of that employee.

  Drew v. Canadian National Railway, 2009 CarswellNat 2256, para 222;

  Nasser v. ABC Group Inc., 2007 CarswellOnt 8884, paras. 32-33, aff'd 2008 CanLII 4264 quoting *Lloyd Imperial Parking*, [1996] A.J. No. 1087, para. 41

176. KSV does not contest any of the above principles. It defends the constructive dismissal claim against Cresford by denying that Athanasoulis was treated in an unfair or disrespectful manner. On the contrary, KSV maintains, the changes in her role and responsibilities were fair and reasonable having regard to her potential involvement with Dovigi after his possible purchase

of Cresford. KSV argues that it was a reasonable measure in the legitimate interests of Cresford that Athanasoulis and Dovigi not be given any information about Cresford outside of the negotiations and that an "ethical screen" be established between Athanasoulis and other employees at Cresford. KSV maintains that these necessary arrangements were temporary and should have been understood by Athanasoulis to be temporary, and dependent on whether a transaction with Dovigi was achieved.

177. It is not unusual in M&A transactions for senior management employees to find themselves in near conflict positions, particularly when incentives are offered by the purchaser for them to remain in place after the transaction is complete. In this case, the incentive offered to Athanasoulis was unusually substantial in that she was offered a profit participation of 50%. However, it is important to keep this fact in the context of the actual dealings between Casey and Athanasoulis. The sale of the company was mutually identified by Casey and Athanasoulis as a solution to Cresford's financial difficulties and a possible sale to Dovigi was welcomed by Casey as much as by Athanasoulis. Casey was aware of the importance Dovigi placed on Athanasoulis continued involvement, he actively promoted her to Dovigi and was aware of the condition that she remain involved after the sale with an even greater share of the profits.

178. In the words of KSV's counsel:

> So Mr. Casey understood that Athanasoulis was to have a financial interest in the company, along with Mr.Dovigi, following the potential sale. And she gave evidence to that. She said I was going to, I was going to have a stake in it; we were going to be partners; we were going to split it 50/50.
>
> Mr. Casey instructed Athanasoulis to seek a deal that worked for Cresford and for Mr. Dovigi and for herself. Remember, he said it was those three parties.
> …
>
> … it probably wasn't the best idea in the world to have Athanasoulis trying to satisfy the interest of all three parties at once. But that's the situation they were in. They dealt with things informally. They trusted each other.
>
> As a result of her special interest in the sale to Mr. Dovigi, Mr. Casey assigned Athanasoulis to devote most of her work during that time period to the sale.

179. The foregoing is a fair summary of the situation with the possible qualification of the last paragraph. The exact role Athanasoulis was to play in negotiations with Dovigi is unclear. The evidence is somewhat inconsistent on this aspect. Clearly, Casey himself continued to conduct negotiations with Dovigi and at one point advised Athanasoulis to "…remain totally quiet regarding [Dovigi] so he cannot triangulate. I have a good feeling we can do the deal. If any new information comes up I'll keep you informed." [Underlining added.] Indeed, it seems an odd choice that Athanasoulis would be directed to devote most of her attention to the very transaction which gave rise to her conflict of interest. Nevertheless, Casey's evidence is that Athanasoulis was to devote most of her time to the sale and to negotiating with Dovigi.

180. In any event, Athanasoulis did continue to negotiate with Dovigi and, in that process, learned negative information regarding Cresford's financial dealings of which she was previously unaware. That information was eventually set out in the Mann Letters, after Athanasoulis' departure from Cresford.

181. Given that Casey continued to negotiate a sale to Hawalius of the retail space in YSL, which Dovigi considered to be inconsistent with his purchase of Cresford, a conflict was inevitable between the two transactions and between Casey and Athanasoulis.

182. In these challenging circumstances, some adjustments to the scope of Athanasoulis' role and responsibilities were justifiable. However, in my view, the extreme measures that were taken by Casey and, as importantly, the manner in which they were implemented were not justified and rendered Athanasoulis' continued employment untenable. Perhaps the most serious of these were:

a. Casey told Athanasoulis that she was not to deal with Cresford's lenders, despite the fact that Athanasoulis had played an important role in interfacing with lenders on behalf of Cresford. This was occurring at a time when irregularities in Cresford's lending arrangements were coming to light, and at a time when Casey had brought Dowbiggin back in as a consultant to deal with financial matters.

b. Casey excluded Athanasoulis completely from negotiations relating to the sale of YSL's retail component. In that regard, while directing Athanasoulis to focus on the Dovigi transaction, he negotiated an agreement with Hawalius that undermined the Dovigi transaction. At the same time Casey's representations to YSL's construction lender regarding the Hawalius transaction raised doubts in the minds of Athanasoulis and another senior Cresford employee as to whether the representations were accurate.

c. In response to the issues raised by Athanasoulis with respect to the Hawalius transaction, Casey had Cresford's litigation counsel write Athanasoulis to accuse her of breaching her fiduciary duty and re-iterating that she was not to contact any lenders. The involvement of an employer's litigation counsel to communicate with an employee, especially accompanied by accusations of breach of fiduciary duty and interference with contractual relations, is not usually a hallmark of secure employment.

d. Without notice to Athanasoulis or explanation to senior Cresford staff he instructed the latter to report directly to him, and not to Athanasoulis. At the same time, he instructed them not to put communications in writing.

e. Athanasoulis testified that Mr. Casey "berate[d]" her, "bl[ew] up" and called her "crazy" at a meeting on December 5, 2019.

183. The foregoing actions by Casey, separately and in combination, precluded Athanasoulis from performing most of the functions critical to her role at Cresford and had serious potential reputational consequences for Athanasoulis. In particular, the instructions to senior Cresford employees not to report to her – which they perceived as a change of leadership – combined with an instruction not to communicate in writing, created an aura of crisis and wrongdoing that understandably caused confusion and concern among those who had previously reported to Athanasoulis.

184. The case of *MacKinnon v Acadia University* 2009 NSSC 269, was cited by KSV as a case with many facts comparable to the present case in which no constructive dismissal was found to have occurred. In that case, the court found that, absent expressed restriction, the employer was entitled to change the scope of an employee's duties to meet changing circumstances and priorities, including by creating, deleting, or reallocating spheres of responsibility (para 83). KSV argues that the fact that, on a temporary basis, certain projects may have been removed from Athanasoulis' oversight does not amount to constructive dismissal when there is no change in title or salary. KSV argues that "implicitly" on the objective facts the changes to Athanasoulis' employment were temporary.

185. In reviewing the *MacKinnon* case, I note that the court observes that "Case law provides helpful but limited guidance and should be read with caution…" (Para 62). It notes that the cases have swung "like a pendulum" in concert with economic conditions but has probably reached the current position that "Legitimate business interests can justify a degree of change in the employees

duties, provided the degree of change is not fundamental to the employment contract." (para 63). The court concludes that the current test remains that described by Gonthier J. in *Farber* in that "save in exceptional cases, an employer's change must be fundamental (severe, serious, unilateral and substantial and without reasonable notice) to amount to a repudiation of the employment contract." (Para 69.)

186. In my view that test for constructive dismissal is met in this case. The degree of change in status and role which was abruptly imposed on Athanasoulis was fundamental to the employment contract. The change was "severe, serious, unilateral, substantial and without any notice".

187. While the actions of Cresford may have been justified in the abstract on a limited and temporary basis in terms of the Dovigi transaction, the indiscriminate and non-transparent manner in which they were implemented placed Athanasoulis in an untenable position in terms of critical relationships with other senior employees who reported to her and with third parties who looked to her as their principal contact.

188. It is not disputed that the changes were made without any notice to Athanasoulis and were not described to Athanasoulis nor to anyone else as being temporary. The suggestion that the temporary nature of these changes was implicit is not viable in the context of the financial irregularities which were then in play, the legal warnings given to Athanasoulis and Casey's deteriorating personal communications with her. The relationship of trust which had been the foundation of a very successful employment relationship, based entirely on oral agreements, was destroyed. In reality, the changes and the way in which they were implemented carried a very high risk that Athanasoulis' reputation and standing with others, upon whom her effectiveness as an employee and her future career in business depended, would be permanently compromised.

189. In the circumstances, I find that the changes in Athanasoulis' employment and in her relationship with Casey:

a. fundamentally changed the nature of Athanasoulis' employment and her ability to continue as an employee;

b. were not justified by any conduct on her part; and

c. were made unilaterally without reasonable notice or explanation.

190. I find that she was constructively dismissed by these actions.

L. Summary of findings

191. For the foregoing reasons, I make the following findings at this stage of the arbitration:

a. Athanasoulis did have a PSA that entitled her to 20% of the profits earned by the YSL Project.

b. I find that the terms of the 20% PSA were:

i. Athanasoulis was to be entitled to 20% of the profits earned on any of Cresford's current and future projects.

ii. Profits were to be calculated, on a good faith basis, based on the *pro forma* budgets prepared by Cresford with respect to each project.

iii. Athanasoulis' share of the profits was to be paid by the relevant Owner that earned the profit.

iv. Profits were to be shared when earned, usually at the completion of a project.

v. There was no requirement that Athanasoulis remain employed at the time that a profit was earned.

c. Athanasoulis was an employee of YSL.

d. Athanasoulis was constructively dismissed in December 2019.

M. Next Steps in the Arbitration

192. If either party wishes to make submissions as to costs at this stage of the arbitration, such submissions shall be made within 21 days of release of this Partial Award. Written responses to any requests for costs shall be delivered within the next 21 days. I will provide directions as to how any further submissions are to be made.

193. Counsel shall confer as to the procedures they wish to adopt for the next phase of the arbitration. Either or both sides may seek directions at any time. If no agreement is reached within 30 days of release of this Partial Award, I will convene a case management conference.

Date: March 28, 2022

William G. Horton, FCIArb, C.Arb.
Sole Arbitrator
Toronto

YG LIMITED PARTNERSHIP

AMENDED AND RESTATED LIMITED PARTNERSHIP AGREEMENT

Effective August 4, 2017

TABLE OF CONTENTS

AMENDED AND RESTATED LIMITED PARTNERSHIP AGREEMENT

THIS AGREEMENT is made and entered into effective as of the 4th day of August, 2017 (the "**Effective Date**")

B E T W E E N:

9615334 CANADA INC., a corporation incorporated under the laws of Canada, and extra-provincially registered in Ontario

(the "**General Partner**")

- and -

CRESFORD (YONGE) LIMITED PARTNERSHIP, a limited partnership formed under the laws of the Province of Ontario

("**Cresford**")

- and -

8451761 CANADA INC., a corporation incorporated under the laws of Canada

("**8451761**")

- and -

2504670 CANADA INC., a corporation incorporated under the laws of Canada

("**2504670**")

- and -

Each party who from time to time is listed on the attached Schedule "A" or executes this Agreement, a counterpart hereof or a subscription form which is accepted by the General Partner and accordingly becomes a Limited Partner in accordance with the terms hereof

(hereinafter collectively called the "**New Limited Partners**" and individually a "**New Limited Partner**")

WHEREAS a declaration was registered on February 3, 2016 as required under *The Business Names Registration Act* (Manitoba) in order to create the Partnership and to afford the Limited Partners the limited liability provided under the MPA, and a limited partnership agreement respecting the Partnership so created was entered into made as of the 16th day of February, 2016, between the General Partner, Cresford and another Person (the "**Original Limited Partnership Agreement**");

AND WHEREAS the General Partner and the other parties hereto (such other parties being herein referred to individually as a "**Limited Partner**" and collectively as the "**Limited Partners**") wish to amend and restate the Original Limited Partnership Agreement in the manner set out herein;

NOW THEREFORE, in consideration of the mutual covenants and agreements contained herein and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the parties hereby agree as follows:

ARTICLE 1 - DEFINITIONS

1.1 Definitions

As used in this Agreement, the following terms shall have the following meanings:

"**Accountants**" means a firm of chartered professional accountants that is nationally recognized appointed from time to time as the accountants of the Partnership.

"**Affiliate**" means with respect to any Person, any other Person directly or indirectly Controlling, Controlled by, or under common Control with such Person.

"**Agreement**" means this Limited Partnership Agreement, as amended, modified, supplemented or restated from time to time.

"**Appraiser**" means an appraiser that is at arm's length (as defined in the *Tax Act*) to the Limited Partners and the General Partner and is qualified by education, experience, accreditation and training to value properties such as the Property and has been ordinarily engaged in the valuation of real property in the Province of Ontario for the immediately preceding five (5) years.

"**ASPE**" means accounting standards for private enterprises which are in effect from time to time in Canada applied on a consistent basis.

"**Business Day**" means any day other than a Saturday, Sunday or holiday (as that term is defined in the *Interpretation Act* (Canada)) in the Province of Ontario.

"**Capital Account**" means an account established in accordance with Section 5.3.

"**Capital Account Balance**" means the balance outstanding in a Capital Account from time to time.

"**Capital Contribution**" means with respect to any Partner at any time, the amount of capital actually contributed by such Partner to the Partnership.

"**Certificate**" means the form of certificate issued by the General Partner evidencing the number of Units owned by a Limited Partner.

"**Change in Control**" means, in respect of a corporation or entity that has Control over a Limited Partner, the occurrence of an event whereby such corporation or entity loses Control

over, or after which it no longer Controls, the Limited Partner, provided that, for greater certainty, transfer of ownership to Affiliates of such corporation or entity that has Control over a Limited Partner shall not be deemed a Change in Control for purposes of this Agreement, for so long as such transferee remains an Affiliate of such corporation or entity.

"Class A Preferred Units" means Units designated as Class A Preferred Units, the attributes of which are set forth in Subsection 4.2(a).

"Class B Units" means Units designated as Class B Units, the attributes of which are set forth in Subsection 4.2(b).

"Construction Management Agreement" means the agreement to be entered into pursuant to which the Construction Manager will be retained by the Partnership to manage construction of the Project.

"Construction Manager" means 2517516 Ontario Limited retained by the Partnership to undertake the construction of the Project pursuant to the provisions of the Construction Management Agreement.

"**Control**" or "**Controls**" means, in the context of the ownership or control of a corporation or entity:

(i) the right to exercise, directly or indirectly, more than 50% of the voting rights attaching to all the Ownership Interests of the corporation or entity;

(ii) possession, directly or indirectly, of the power to direct or cause the direction of the management and policies of the corporation or entity; or

(iii) the right to elect or appoint more than 50% of the directors or members of the governing body of the corporation or other entity;

and the words "**Controlling**", "**Controlled**" and "**Controlled by**" shall have corresponding meanings.

"**Debtor Relief Law**" has the meaning set forth in Section 7.1(c).

"Declaration" means the declaration made and registered with the Director on February 3, 2016 as required under *The Business Names Registration Act* (Manitoba) in order to create the Partnership and to afford the Limited Partners the limited liability provided under the MPA.

"**Defaulting Partner**" means a Limited Partner or General Partner in respect of which an Event of Default has occurred and is continuing.

"Development Management Agreement" means the agreement dated as of February 16, 2016 whereby the Development Manager was retained by the Partnership to manage development of the Project.

"Development Manager" means 2503425 Ontario Limited retained by the Partnership to manage development of the Project.

"Distributable Cash" means:

(a) all cash held by the Partnership relating to the Project available for distribution from time to time to the holders of the Class A Preferred Units and Class B Units; and

(b) the Net Income of the Partnership relating to the Project available for distribution from time to time to the holders of the Class A Preferred Units and Class B Units,

in each case as determined by the General Partner acting in accordance with ASPE and as evidenced by the financial statements of the Partnership.

"**Event of Default**" has the meaning set forth in Section 7.1.

"**Fiscal Year**" has the meaning set forth in Section 2.5.

"**General Partner**" means 9615334 Canada Inc. and any Person who succeeds it as the general partner of the Partnership pursuant to the terms of this Agreement.

"**Initial Capital Contribution**" means the initial Capital Contribution made by a Limited Partner as described in Schedule "A" or in the Subscription Agreement executed by it.

"**Initiating Notice**" has the meaning set forth in Section 7.2(c).

"**Initiating Notice Period**" has the meaning set forth in Section 7.2(c).

"**Limited Partners**" means the limited partners of the Partnership, being Cresford, 8451761, 2504670 and any New Limited Partners, and their respective permitted successors and assigns, but excluding any Person that ceases to be a Limited Partner in accordance with the terms hereof; and "**Limited Partner**" means any one of them.

"MPA" means *The Partnership Act* (Manitoba).

"**Net Income**" or "**Loss**" means for any fiscal period, the net income or loss of the Partnership during the period determined in accordance with ASPE.

"**Non-Defaulting Partner**" means a Limited Partner or General Partner in respect of which an Event of Default has not occurred and is continuing.

"**Ownership Interests**" means, as to any Person, the outstanding voting shares, membership interests, partnership interests or other legal or equitable ownership interests of any kind, however characterized, in such Person.

"**Partner**" means any Limited Partner or General Partner. In the event any Partner shall have withdrawn in whole from the Partnership as provided in this Agreement, such Person shall no longer be a Partner as defined herein after such withdrawal.

"**Partnership**" means YG Limited Partnership.

"**Person**" means an individual, a partnership, an association, a joint venture, a corporation, a business, a trust, an unincorporated organization, any other entity or a government or any department, agency, authority, instrumentality or political subdivision thereof.

"**Prime Rate**" means the annual rate of interest established and quoted by the Partnership's bank from time to time at its head office in Toronto, Ontario as its prime rate for purposes of calculating interest on commercial loans in Canadian dollars.

"**Project**" means the development of and construction on the Property of a mixed-use retail, office and residential condominium building containing approximately 958 residential units, 340 parking units, and approximately 220,832 square feet of retail or commercial space.

"**Property**" means the lands and premises described in Schedule "B".

"**Purchaser**" has the meaning set forth in Section 7.2(c).

"**Related Party**" means any of the Affiliates of the General Partner or any of their respective directors, officers, employees and shareholders.

"**Reserves**" means amounts from time to time transferred or credited, in the discretion of the General Partner, to a reserve or contingent account on the books and records of the Partnership for operating expenses, working capital, capital expenditures or contingencies.

"Sales Manager" means 2503425 Ontario Limited retained by the Partnership to manage the sale of condominium units and other portions of the Project.

"Sales Management Agreement" means the agreement dated as of February 16, 2016 whereby the Sales Manager was retained by the Partnership to manage the marketing and sales of the Project.

"**Special Resolution**" means a resolution approved by all of the Limited Partners at a duly convened meeting of Limited Partners, or at any adjournment thereof, called in accordance with this Agreement or a written resolution in one or more counterparts, signed by all Limited Partners.

"**Subscription Agreement**" means the agreement whereby a Person has agreed to become a Partner and to subscribe for Units.

"**Subscription Amount**" means with respect to any Partner the amount payable by such Partner for Units in the Partnership pursuant to a Subscription Agreement entered into by such Partner.

*"**Tax Act**"* means the *Income Tax Act* (Canada).

"**Taxable Income**" or "**Tax Loss**", in respect of any Fiscal Year means, respectively, the amount of income or loss of the Partnership for such period as determined by the General Partner in accordance with the provisions of the *Tax Act* (including the amount of the taxable gain or allowable loss from the disposition of each capital property of the Partnership as determined by the General Partner in accordance with the provisions of the *Tax Act*).

"**Term**" has the meaning set forth in Section 2.4.

"Unit" means a Class A Preferred Unit or a Class B Unit, and **"Units"** means the Class A Preferred Units and the Class B Units, collectively.

"**Vendor**" has the meaning set forth in Section 7.2(c).

1.2 Statutory References

Any references herein to any law, by-law, rule, regulation, order or act of any government, governmental body or other regulatory body shall be construed as a reference thereto as amended or re-enacted from time to time or as a reference to any successor thereto.

ARTICLE 2 - ORGANIZATION

2.1 Formation

(a) The parties hereto hereby agree to form a limited partnership under the provisions of the MPA pursuant to the registration of the Declaration. The rights and liabilities of the Partners shall be as provided in the MPA except as herein otherwise expressly provided.

(b) The General Partner shall be the general partner of the Partnership.

(c) The Partnership shall not have more than fifty (50) Persons as holders of Units or other interests in the Partnership.

2.2 Name

The name of the Partnership is "YG Limited Partnership". The General Partner is authorized to make any variations in the Partnership's name from time to time by notice to the Limited Partners, provided that such name shall contain the words "Limited Partnership", the abbreviation "L.P." or the designation "LP".

2.3 Principal Place of Business

The Partnership shall have its principal place of business at 170 Merton Street, Toronto, Ontario M4S 1A1, or at such other place as the General Partner may from time to time designate by notice to the Limited Partners.

2.4 **Term**

The term (the "**Term**") of the Partnership commenced on the Effective Date, and shall continue until the termination and dissolution in accordance with Article 12 .

2.5 **Fiscal Year**

The fiscal year (the "**Fiscal Year**") of the Partnership for accounting and income tax purposes shall be a year ending on December 31 of each year or, in the case of the first Fiscal Year, the portion of the calendar year commencing on the Effective Date and ending on December 31, 2017, and in the case of the Fiscal Year in which the Partnership is terminated and wound up, the portion of the calendar year ending on the date on which the Partnership is terminated.

ARTICLE 3 - THE PARTNERSHIP

3.1 **Purpose and Scope of Business**

(a) Subject to the restrictions contained herein, the objects, purposes and business of the Partnership shall be:

(i) to own, develop and sell the Project; and

(ii) to engage in any other lawful activities determined by the General Partner to be necessary, advisable, convenient or incidental to the foregoing.

(b) Subject to the restrictions set forth in this Agreement, the Partnership shall have the power to do any and all acts necessary, appropriate, proper, advisable, incidental or convenient to or for the furtherance of the objects and purposes described herein, and shall have, without limitation, any and all of the powers that may be exercised on behalf of the Partnership by the General Partner pursuant to Section 3.2.

3.2 **Powers of the General Partner**

(a) Subject to the other provisions of this Agreement, the General Partner shall have the exclusive authority and power to manage, control, administer and operate the business, policies and affairs of the Partnership and to make all decisions regarding the business, policies and affairs of the Partnership, and the General Partner is hereby authorized and empowered on behalf of and in the name of the Partnership to carry out any and all of the business, objects and purposes of the Partnership and to perform all acts and enter into and perform all contracts and other undertakings that it may in its discretion deem necessary or advisable in connection therewith or incidental thereto. Without limiting the generality of the foregoing, any action taken by the General Partner shall constitute the act of and serve to bind the Partnership. In dealing with the General Partner acting on behalf of the Partnership, no Person shall be required to inquire into the authority of the General Partner to bind the Partnership. Persons dealing with the Partnership are

entitled to rely conclusively on the power and authority of the General Partner as set out in this Agreement.

(b) Without limiting the generality of Section 3.2(a), it is acknowledged and agreed that the General Partner is authorized and has the right, on behalf of and without further authority from the Limited Partners:

(i) to acquire the Property and any other real or personal property from time to time related to the Project;

(ii) to acquire the interest of the limited partner of the Partnership (other than Cresford) under the Original Limited Partnership Agreement;

(iii) to sell condominium units and other portions of the Property or Project;

(iv) to engage such professional advisers as the General Partner considers advisable in order to perform or assist it in the performance of its duties hereunder;

(v) to open and operate in the name of the Partnership a separate bank account in order to deposit and distribute funds with respect to the Partnership;

(vi) to execute, deliver and carry out all other agreements which require execution by or on behalf of the Partnership;

(vii) to pay all taxes, fees and other expenses relating to the orderly maintenance and management of the assets owned by the Partnership;

(viii) to commence or defend on behalf of the Partnership any and all actions and other proceedings pertaining to the Partnership or the assets owned by the Partnership;

(ix) to determine the amount and type of insurance coverage to be maintained in order to protect the Partnership and the assets owned by the Partnership from all usual perils of the type covered in respect of comparable assets and in order to comply with the requirements of the lenders of funds to the Partnership;

(x) to determine the amount, if any, to be claimed by the Partnership in any year in respect of capital cost allowance and expenses incurred by the Partnership;

(xi) to hold the assets owned by the Partnership in the name of the General Partner or such other nominee as may be appointed by the General Partner;

(xii) to invest funds not immediately required for the business of the Partnership in such investments or securities as the General Partner determines;

(xiii) to make distributions of available funds in accordance with the provisions of this Agreement;

(xiv) to provide or arrange for the provision of such financial and other reporting functions as may be required by the provisions hereof;

(xv) to retain managers to manage the assets owned by the Partnership and the Project, including without limitation the Development Management Agreement, the Sales Management Agreement and the Construction Management Agreement;

(xvi) to borrow money, execute guarantees and give security in the name of the Partnership or the General Partner for any purposes, all on such terms as the General Partner shall deem fit in its sole, subjective and final discretion;

(xvii) to draw, make, execute and issue promissory notes and other negotiable or non-negotiable instruments and evidence of indebtedness;

(xviii) to create, by grant or otherwise, easements and rights of way, licences, restrictions and covenants;

(xix) at the expense of the Partnership, to employ, retain or appoint, at a cost equal to or less than the then prevailing competitive terms for such services, and dismiss or terminate any and all employees, agents, independent contractors, real estate managers, corporate or asset managers, brokers, solicitors and accountants;

(xx) to retain and/or deal with all engineers, architects, appraisers, contractors, utility companies, surveyors, municipal and governmental agencies and any and all other Persons in connection with and in pursuance of the Project, and in connection therewith to enter into contracts with such Persons;

(xxi) to grant such liens, charges, security interests and encumbrances and to execute such documents and instruments and to do all acts relating thereto as may be necessary in connection with the financing of the assets and business of the Partnership;

(xxii) to delegate any or all of its rights and duties herein, provided that the General Partner shall remain responsible for the supervision and performance of any Person to whom such rights and duties have been delegated; and

(xxiii) to execute any and all other deeds, documents and instruments and to do all acts as may be necessary or desirable to carry out the intent and purpose of this Agreement.

3.3 **Reimbursement of the General Partner**

The General Partner is entitled to reimbursement by the Partnership for all reasonable third party costs and expenses that are incurred by the General Partner on behalf of the Partnership in the ordinary course of business or other costs and expenses incidental to acting as general partner to the Partnership. All such expenses shall be otherwise paid by the Partnership.

3.4 **Management Fees**

The Partnership shall retain the Development Manager pursuant to the provisions of the Development Management Agreement to provide development management services to the Project, the Construction Manager pursuant to the provisions of the Construction Management Agreement to provide construction management services to the Project and the Sales Manager pursuant to the provisions of the Sales Management Agreement to provide marketing and sales services in respect of the sale of condominium units and other portions of the Project. The parties acknowledge that, under such agreements, the Partnership shall pay management fees and commissions to the Development Manager, the Construction Manager and the Sales Manager in connection with the management services performed by them in respect of the Project, plus any goods and services tax and/or harmonized sales tax payable thereon.

3.5 **Duty of the General Partner**

The General Partner covenants that:

(a) it shall exercise its powers and discharge its duties under this Agreement honestly, in good faith and in the best interests of the Limited Partners and that it shall exercise the care, diligence and skill that a reasonably prudent operator of a business similar to that of the Partnership would exercise in comparable circumstances; and

(b) it shall maintain the confidentiality of financial and other information and data which it may obtain through or on behalf of the Partnership, the disclosure of which may adversely affect the interests of the Partnership or a Limited Partner, except to the extent that disclosure is required by law or is in the best interests of the Partnership, and it shall utilize the information and data only for the business of the Partnership; and

(c) it shall not engage in any business, other than acting as a general partner of the Partnership.

3.6 **Restrictions upon the General Partner**

The General Partner covenants that it shall not:

(a) use the Capital Contributions of the Partners for any reason other than in connection with the Project and other purposes related thereto, including those listed in Subsection 3.2(b);

(b) purchase any property of, sell any property to, or enter into any contract with any Related Party, other than on market terms; or

(c) commingle funds of the Partnership with the funds of any other Person.

3.7 **Limitation on Authority of Limited Partner**

No Limited Partner shall:

(a) take part in the control or management of the business of the Partnership provided that each Limited Partner shall have the right from time to time to examine the state and progress of the business and affairs of the Partnership;

(b) execute any document which binds or purports to bind the Partnership or any Partner as such;

(c) hold itself out as having the power or authority to bind or sign on behalf of the Partnership or any Partner;

(d) have any authority to undertake any obligation or responsibility on behalf of the Partnership; or

(e) bring any action for partition or sale in connection with any property or asset of the Partnership.

3.8 **Liability of the Limited Partners**

Subject to the MPA and any specific assumption of liability, the liability of each Limited Partner for the debts, liabilities, losses and obligations of the Partnership is limited to the amount of the capital contributed or agreed to be contributed to the Partnership by it and its proportionate share of any undistributed income of the Partnership as is hereinafter provided.

3.9 **Indemnification by General Partner**

The General Partner shall indemnify and hold harmless each Limited Partner from any costs, damages, liabilities or expenses suffered or incurred by such Limited Partner in any case where the liability of such Limited Partner is not limited in the manner provided in Section 3.8, unless the liability of such Limited Partner is not so limited as a result of, or arising out of, any act or omission of such Limited Partner.

3.10 **Status of the General Partner**

The General Partner represents, warrants and covenants, as the case may be, to each Limited Partner that:

(a) it is and shall continue to be a corporation incorporated and validly subsisting under the laws of Canada;

(b) it has and shall continue to have the requisite capacity and corporate authority to act as the general partner of the Partnership and to perform its obligations under this Agreement, and such obligations do not and shall not conflict with or breach its articles of incorporation, by-laws or any agreement by which it is bound;

(c) it shall not nor shall any Affiliate of the General Partner borrow from the Partnership;

(d) it has contributed the sum of $1.00 as a capital contribution to the Partnership;

(e) it shall not carry on any business other than for the purposes set forth herein;

(f) this Agreement and all other agreements contemplated hereby have been duly authorized, executed and delivered by it and constitutes a valid and binding obligation enforceable against it in accordance with their terms, except as enforcement may be limited by bankruptcy, insolvency and other laws affecting the rights of creditors generally, and except that equitable remedies may be granted only in the discretion of a court of competent jurisdiction; and

(g) any and all property and assets of the Partnership which are held in the name of the General Partner shall be held by it in trust as nominee for and on behalf of the Partnership.

3.11 **Status of each Limited Partner**

Each Limited Partner represents, warrants and covenants, as the case may be, to each other Limited Partner and to the General Partner that:

(a) it is not a “non-resident” of Canada within the meaning of the Tax Act;

(b) it is legally competent to execute this Agreement and all other agreements contemplated hereby and to take all actions required pursuant hereto, and it further certifies that all necessary approvals of its directors, shareholders, partners, members or otherwise have been given;

(c) it shall promptly provide such evidence of the foregoing representations and warranties as the General Partner may reasonably request;

(d) this Agreement and all other agreements contemplated hereby have been duly authorized, executed and delivered by it and constitutes a valid and binding obligation enforceable against it in accordance with their terms, except as enforcement may be limited by bankruptcy, insolvency and other laws affecting the rights of creditors generally, and except that equitable remedies may be granted only in the discretion of a court of competent jurisdiction; and

(e) it will not transfer or purport to transfer its Units to any person who would be unable to make the representations and warranties above.

3.12 **Non-Residents**

If the Limited Partners propose to dissolve the Partnership, the General Partner may require those Limited Partners who are then non-residents of Canada for the purposes of the *Tax Act* to transfer their Units to residents of Canada. If a non-resident Limited Partner fails to transfer his Units to a resident of Canada who qualifies to hold Units under the terms of this Agreement within 30 days of the giving of a notice to such non-resident Limited Partner to so transfer his Units, the General Partner shall be entitled to sell such Units on behalf of such non-resident Limited Partner on such terms and conditions as it deems reasonable and may itself become the purchaser of such Units. On any such sale by the General Partner the price shall be the fair market value for such Units as determined by an independent Appraiser appointed by the General Partner, whose appraisal shall be final and binding on the Partnership, the General Partner, and the Limited Partners so affected. The cost of such appraisal shall be borne by the Limited Partner(s) whose Units are sold by the General Partner and may be deducted from the proceeds of such sale together with any other expenses incurred in connection therewith.

3.13 **Execution of Instruments**

All deeds, transfers, assignments, mortgages, leases or other documents or instruments which the Partnership is to execute or to which the Partnership is otherwise to become a party shall be executed by the proper signing officer or officers of the General Partner or by such other person or persons as the General Partner shall designate in writing from time to time.

ARTICLE 4 - THE UNITS

4.1 **Units**

The interests of the Partners in the Partnership are divided into the Class A Preferred Units and the Class B Units. The Class A Preferred Units and Class B Units under the Original Limited Partnership Agreement (of which there are none outstanding on the date hereof) are cancelled and terminated.

4.2 **Attributes of Units**

(a) Class A Preferred Units shall have equal voting, distribution, liquidation and other rights and shall have no conversion, exchange, pre-emptive or redemption rights, save and except that Class A Preferred Units in the aggregate shall entitle the Partner holding them solely to a preferred return of the profits and Distributable Cash of the Partnership to the extent needed to reimburse such Partner of all Capital Contributions made by it and to pay such Partner a preferred return equal to the greater of:

(i) an amount equal to the total Capital Contributions made by it, and

(ii) a compounded and cumulative preferred annual return of twelve and twenty-five one-hundredths percent (12.25%) calculated from the date of each Capital Contribution on account of such Class A Preferred Units from time to time,

and holders of Class A Preferred Units shall have no further entitlement to any remaining profits and Distributable Cash of the Partnership. Holders of Class A Preferred Units shall be entitled to such payments in priority to holders of Class B Units, as further detailed in this agreement. The rate of return of 12.25% per annum referred to in Paragraph 4.2(a)(ii) will be achieved when the total of the Capital Contributions made by the holder of Class A Preferred Units from time to time are returned to it with an annual return of 12.25% calculated on a cumulative basis and commencing on the date such Capital Contributions are made, and compounded annually at the rate of 12.25% taking into account the timing and amounts of all previous Capital Contributions of and all previous distributions to such holder. The total number of Class A Preferred Units owned by a Limited Partner from time to time shall be determined by dividing the total Capital Contributions by such Limited Partner in respect of such class (but excluding any returns, reimbursements or repayments of capital to the Limited Partner) by One Thousand Dollars ($1,000.00). The Partners acknowledge that a Limited Partner may hold a fraction of a Class A Preferred Unit in the event that such Limited Partner contributes an amount of capital on account of such class which is not an exact multiple of One Thousand Dollars ($1,000.00).

(b) Class B Units shall have equal voting, distribution, liquidation and other rights and shall have no conversion, exchange, pre-emptive or redemption rights, save and except that Class B Units in the aggregate shall entitle the Partners holding them to one hundred percent (100%) of the remaining profits and losses and Distributable Cash of the Partnership after the satisfaction of the preferred entitlements thereto of holders of Class A Preferred Units. The total number of Class B Units owned by a Limited Partner from time to time shall be determined by dividing the total Capital Contributions by such Limited Partner in respect of such class by One Thousand Dollars ($1,000.00). The Partners acknowledge that a Limited Partner may hold a fraction of a Class B Unit in the event that such Limited Partner contributes an amount of capital on account of such class which is not an exact multiple of One Thousand Dollars ($1,000.00). The Class C Units under the Original Limited Partnership Agreement that are outstanding on the date hereof are hereby reclassified and designated as Class B Units under this Agreement.

(c) Except as otherwise provided in this Agreement, no Unit shall have any preference or right in any circumstance over any other Unit. The holder of each Unit shall, subject to the other provisions hereof, have the right to exercise one vote for each Unit held in respect of all matters to be decided by the Partners, provided that there shall not be a vote for any fractional portion of a Unit.

4.3 Certificates

As Units are paid for, each Partner shall be entitled to receive a Certificate specifying the number of Units held by it. The Certificate shall be in such form as the General Partner may from time to time approve. The General Partner shall have the right to choose to dispense entirely with any requirement to issue certificates.

4.4 Receipt by Partner

The receipt of any money, security or other property from the Partnership by a Person in whose name any Unit is recorded, or if such Unit is recorded in the names of more than one Person, the receipt thereof by any one or more of such Persons, or by the duly authorized agent of any such Person in that regard, shall be a sufficient and proper discharge for that amount of money, security or other property payable, issuable or deliverable in respect of such Unit.

4.5 Registrar and Transfer Agent

The General Partner shall act as registrar and transfer agent for the Partnership and shall maintain such books as are necessary and appropriate to record the names and addresses of the Limited Partners, the number of Units held by each Limited Partner, the particulars of assignments of Units and such other information regarding each Limited Partner as is prescribed by the MPA and the regulations thereto. The General Partner shall perform all duties usually performed by transfer agents and registrars of certificates of shares in a corporation, except as the same may be modified by reason of the interests held being units rather than shares.

4.6 Inspection of Records

The General Partner shall permit any Limited Partner and/or its agent duly appointed in writing at the expense of the Limited Partner to inspect the register of Limited Partners at any reasonable time during normal business hours.

4.7 Admission as Additional or Substituted Partner

Where a transferee or a successor of a Partner is entitled to become a Partner pursuant to the provisions hereof:

(a) all Partners will be deemed to consent to the admission of the transferee or the successor as an additional or substituted Partner, as the case may be, without further act of the Partners;

(b) the General Partner shall, or shall cause, the transferee or substituted Partner to be entered on the register of the Partnership as the holder of record of the applicable number of Units and Capital Contributions; and

(c) the General Partner shall execute this Agreement on behalf of such transferee or successor.

Upon the completion of the foregoing matters, the transferee or successor, as the case may be, shall become a Partner.

4.8 **Prohibition on Dealings with Units**

(a) Subject to Subsection 4.8(b), no Partner may, directly or indirectly, transfer, sell, assign, mortgage, charge, pledge or grant a security interest in any Units or otherwise deal with its Units (individually and collectively, a "**Transfer**"), unless the General Partner, in its sole and absolute discretion (which may be exercised unreasonably), shall first have consented in writing thereto.

(b) A transfer of Units by a Limited Partner to an Affiliate of the Limited Partner shall be permitted without the approval of the General Partner, provided that:

(i) prior written notice of such transfer is given by the Limited Partner to the other Partners;

(ii) the provisions of Subsection 4.8(c) are complied with;

(iii) the transferor will acknowledge, covenant and agree in favour of the other Partners that the transferor will not be released from its obligations hereunder and will remain jointly and severally liable for the performance by the transferee of all of its obligations under this Agreement and the agreements mentioned under Subsection 4.8(c)(i);

(iv) the transferee and the transferor will agree in favour of the remaining Partners that the transferee will remain an Affiliate of the transferor; and

(v) the transferee agrees with the other Partners, in an agreement in form and substance acceptable to the parties thereto, acting reasonably, that:

(A) in all matters in which a Partner, by the terms of this Agreement, has a right or privilege, such right or privilege will be exercised by the transferor on behalf of itself and the transferee, and the other Partners will be entitled to rely on the actions of the transferor in that regard as binding upon the transferee, and the transferor will obtain a power of attorney from the transferee to such effect;

(B) in all matters in which a Partner, by the terms of this Agreement, is subject to an obligation, prohibition or restriction, such obligation, prohibition or restriction will be binding upon the transferee to the same extent as the transferor; and, as well, the transferor and the transferee shall be jointly and severally obligated to the other Partners for the fulfillment of any obligation hereunder by the transferee and provided that, in such case, recourse may be had to the transferor and the transferee for such obligations; and

(C) any notices required to be given hereunder to the transferee need only be given to the transferor and shall be effective and binding as though given to both the transferee and the transferor.

(c) No transfer, sale or assignment of a Unit consented to in writing by the General Partner pursuant to Subsection 4.8(a) shall be effective unless:

(i) a duly executed transfer and assumption of this Agreement, in such form as is approved by the General Partner, shall have been filed with the Partnership;

(ii) the Limited Partner and the transferee shall have executed and acknowledged such other instruments and taken such other action as the General Partner reasonably shall deem necessary or desirable to effect such transfer, sale or assignment;

(iii) the conditions set forth in Section 4.8(d) shall have been satisfied, and, if requested by the General Partner, the Limited Partner or the transferee shall have obtained an opinion of counsel satisfactory to the General Partner as to the legal matters set forth therein; and

(iv) the Limited Partner or the transferee shall have paid to the Partnership an amount sufficient to cover all expenses incurred by or on behalf of the Partnership in connection with such transfer, sale or assignment.

(d) Notwithstanding any other provision of this Agreement, no Transfer shall be made by any Limited Partner of all or any part of its Units if:

(i) in the opinion of counsel to the Partnership, such Transfer would result in a violation of any applicable securities laws; or

(ii) such Transfer would, in the judgment of the General Partner, cause a dissolution of the Partnership or would breach, or would cause the Partnership to breach, any applicable law or regulation or impose any additional materially burdensome registration or filing requirements on the Partnership or any Partner or otherwise subject the Partnership or any Partner to any additional materially burdensome regulation, including in each case under applicable securities laws.

(e) No attempted or purported Transfer of Units shall be effective or recognized by the Partnership unless effected in accordance with and permitted by this Agreement. A transferee who is not admitted as a Partner in accordance with the terms hereof shall have no right to any information or accounting of the affairs of the Partnership, shall not be entitled to inspect the books or records of the Partnership and shall not have any of the rights of a General Partner or a Limited Partner under the MPA or this Agreement.

4.9 No Change of Control

No transfer of any Ownership Interests of any Partner may be made, either directly or indirectly, that would result in any Change in Control of the Partner, unless the General Partner, in its sole and absolute discretion (which may be exercised unreasonably), shall first have consented in writing thereto.

4.10 Allocations on Transfers

If at any time during any fiscal period of the Partnership a Partner transfers its Units in accordance with this Agreement, no share of the Net Income or Losses of such fiscal period to the date of transfer with respect to such Unit shall be allocated to such Partner as at the date of transfer, but shall be allocated to the Partner being the registered owner of such Units as at the end of such fiscal period of the Partnership.

4.11 Recording of Transfer

The General Partner will record all transfers of Units which have been approved in accordance with the terms of the Agreement and amend or cause to be amended the register of Partners and will do all things and make such filings and recordings as are required by law to effect and record such transfers. The transferee of any Units shall be subject to and entitled to the obligations and benefits of all Capital Contributions of the transferor.

4.12 Parties Not Bound to See to Trust or Equity

Except where specific provision has been made therefor in this Agreement, no Partner shall be bound to see to the execution of any trust, express, implied or constructive, or to honour any charge, pledge or equity to which any Unit or any interest therein is subject, or to ascertain or inquire whether any sale or transfer of any Unit or interest therein by any Partner is authorized by such trust, charge, pledge or equity, or to recognize any Person having any interest therein except for the Person or Persons recorded as a Partner.

4.13 Liability on Transfer

Subject to the other terms hereof, when an assignment and transfer of any Units is completed and the transferee is registered as a Partner, the transferor of those Units will be thereupon relieved of all obligations and liabilities relating to its Units, including the obligations and liabilities under this Agreement to the extent permitted by law and the transferee will assume all such obligations and liabilities. The transferee of any Units shall be subject to and entitled to the obligations and benefits of all Capital Contributions of the transferor.

4.14 Successors in Interest

The Partnership shall continue notwithstanding the admission of any new general partner or limited partner or the withdrawal, death, insolvency, bankruptcy or other disability or incapacity of any Partner. The Partnership shall be dissolved only in the manner provided for in this Agreement.

4.15 **Incapacity, Death, Insolvency or Bankruptcy**

If a Person becomes entitled to a Unit on the incapacity, death, insolvency or bankruptcy of a Partner, or otherwise by operation of law, in addition to the requirements hereof, that Person will not be recorded as or become a Partner until such Person:

(a) produces evidence satisfactory to the General Partner of such entitlement;

(b) has agreed in writing to be bound by the terms of this Agreement and to assume the obligations of a Partner under this Agreement; and

(c) has delivered such other evidence, approvals and consents in respect of such entitlement as the General Partner may require and as may be required by law or by this Agreement.

4.16 **Lost Certificates**

Where a Limited Partner claims that the Certificate for its Units has been defaced, lost, apparently destroyed or wrongly taken, the General Partner shall cause a new Certificate to be issued, provided that the Limited Partner files with the General Partner an indemnity in a form and amount satisfactory to the General Partner to protect the Partnership from any loss, cost, damage or liability that it may incur or suffer by complying with the request to issue a new Certificate and provided further, that the Limited Partner satisfies all other reasonable requirements imposed by the General Partner, including delivery of a form of proof of loss in a form satisfactory to the General Partner. The Limited Partner shall reimburse the Partnership for all costs incurred by it in the issuance of a new Certificate.

ARTICLE 5 - CAPITAL CONTRIBUTIONS AND CAPITAL ACCOUNTS

5.1 **Initial Capital Contributions**

The Initial Capital Contributions of the Limited Partners are set out in Schedule "A". The Initial Capital Contribution of the General Partner is $1.00.

5.2 **Unit Issuance**

The Units will be issued to the Partners by the Partnership from time to time upon receipt of Capital Contributions from them.

5.3 **Capital Accounts**

(a) Each Partner shall have a capital account (a "**Capital Account**") to which shall be credited the amount of any Capital Contributions made by each such Partner pursuant to the terms of this Agreement, including the Initial Capital Contribution.

(b) The Capital Account of a Partner shall be increased from time to time by the amount of:

(i) any additional Capital Contributions to the Partnership made by such Partner or received by the Partnership on behalf of such Partner pursuant to Section 5.6, and

(ii) any Net Income allocated to such Partner.

(c) The Capital Account of a Partner shall be decreased by the amount of:

(i) any Loss allocated to such Partner, and

(ii) any distributions made to such Partner.

5.4 No Interest Payable

No Partner shall be entitled to receive interest from the Partnership on the amount of any Capital Contribution or on its Capital Account Balance.

5.5 Return of Capital

No Partner has the right to withdraw any capital or other amount or receive any distribution from the Partnership except as provided in this Agreement and as permitted by law.

5.6 Additional Capital Contributions

Notwithstanding any other provision of this Agreement, no Limited Partner shall be obligated to make or advance any capital contributions to the Partnership in addition to its Initial Capital Contribution, unless it, in its sole discretion, elects to do so.

5.7 Compliance with Laws

The Limited Partners shall comply with the provisions of the MPA and any other applicable legislation in force from time to time and shall not take any action which will jeopardize or eliminate the status of the Partnership as a limited partnership. Without limiting the generality of the foregoing, each Limited Partner shall, on request by the General Partner, immediately execute all certificates, Declarations, instruments and documents necessary to comply with any law or regulation of any jurisdiction in Canada in regard to the formation, continuance, operation or dissolution of the Partnership.

ARTICLE 6 - DISTRIBUTIONS AND ALLOCATIONS

6.1 Calculation of Net Income and Losses

The Net Income or Loss of the Partnership shall be determined in accordance with ASPE and such determination shall be binding on the Partners.

6.2 Allocation of Net Income, Loss, Taxable Income and Tax Loss

The Net Income, Loss, Taxable Income and Tax Loss shall be allocated to the Partners in each Fiscal Year as follows:

(a) as to Net Income and Taxable Income:

(i) 0.00001% of such Net Income or Taxable Income to the General Partner; and

(i) the balance of such Net Income or Taxable Income to the Limited Partners in the same proportion as proportions of Distributable Cash are paid to Limited Partners under Section 6.3; and

(b) as to Losses and Tax Losses:

(i) firstly, an amount of such Loss or Tax Loss shall be allocated to the General Partner to the extent of its Capital Account until such Capital Account has a zero balance; and

(ii) secondly, the remainder of such Loss or Tax Loss shall be allocated to Cresford, except that a portion thereof shall be allocated to 8451761, 2504670 and any New Limited Partners to the extent that they do not receive back any of the Capital Contributions made by them to the Partnership.

6.3 **Distributions of Cash**

(a) The General Partner shall, from time to time, distribute all Distributable Cash that is not reasonably necessary for the conduct of the Partnership's business. The General Partner may retain or establish one or more Reserves in such amounts that it considers prudent with respect to contingent or unforeseen liabilities and obligations.

(b) The General Partner shall cause the Partnership to distribute Distributable Cash, if any, to the Partners throughout the course of the Project as soon as they are available, as follows:

(i) first, to the holders of Class A Preferred Units, pro rata, to the extent of Capital Contributions by them on account of Class A Preferred Units;

(ii) second, to the holders of Class A Preferred Units, pro rata, to the extent of the preferred return to which each of them is entitled pursuant to Section 4.2(a);

(iii) third, to holders of Class B Units on a pro rata basis by reference to the number of Class B Units they hold, to the extent of Capital Contributions by them on account of Class B Units; and

(iv) thereafter, to holders of Class B Units in each case in accordance with the ratio that the number of Class B Units held by such holder of Class B Units bears to the total number of Class B Units then issued and outstanding.

6.4 **Distributions Upon Dissolution**

Upon the dissolution of the Partnership, the assets of the Partnership shall be liquidated as promptly as is consistent with obtaining a reasonable value therefor, and the proceeds therefrom shall be applied and distributed in the following order of priority:

(a) to pay all costs involved in the sale of the assets of the Partnership and the dissolution of the Partnership and to pay all liabilities of the Partnership, all in the manner required by law;

(b) to establish such Reserves which General Partner may deem reasonably necessary for any contingent or unforeseen liabilities or obligations or debts or liabilities not yet payable by the Partnership or by the General Partner on behalf of the Partnership which have arisen out of or in connection with the Partnership. Such Reserves may be held for disbursement by the General Partner or delivered to an independent escrow agent, designated by the General Partner, to be held by such escrow agent for the purpose of disbursing such Reserves in payment of any of the aforementioned contingencies, debts or liabilities, and, at the expiration of such period and as the General Partner shall deem advisable, to distribute the balance thereafter remaining in the manner hereinafter provided for; and

(c) to the Partners in accordance with the provisions of Section 6.3, no later than the later of 90 days after the date of dissolution of the Partnership and the end of the Fiscal Year in which the dissolution of the Partnership occurs.

6.5 **Return of Distributions**

Except as otherwise provided in the MPA and Section 6.7, a Limited Partner shall not be obligated to return any distribution from the Partnership.

6.6 **Nature and Limitation on Distributions**

No Limited Partner shall be entitled to receive distributions from the Partnership other than as specifically provided by this Agreement.

6.7 **Repayments**

If, as determined by the Accountants, any Limited Partner has received an amount which is in excess of its entitlement, such Limited Partner shall forthwith reimburse the Partnership to the extent of such excess upon notice (accompanied by sufficient evidence) by the General Partner. The General Partner may set-off and apply any sums otherwise payable to a Limited Partner against such amount due from such Limited Partner. If the Limited Partner who is obligated to repay such excess does not do so within five (5) Business Days of notice from the General Partner, then such excess shall bear interest at the Prime Rate plus 5% per annum, calculated, compounded and payable monthly to the Partnership (for the benefit, pro rata, of the Limited Partners other than the Limited Partner who is obligated to pay such excess).

ARTICLE 7 - DEFAULT

7.1 Events of Default

Any of the following events or circumstances is a default under this Agreement (herein called an "**Event of Default**") with respect to a Partner:

(a) if a Limited Partner or the General Partner defaults in any material respect under any of the provisions of this Agreement, other than a default referred to in Subsection 7.1(g), and such default continues for a period of 30 days after notice thereof has been given by any other Partner, or such longer period not to exceed 60 days as may be required to cure such default provided that reasonable steps to cure such default are taken and diligently pursued; or

(b) if a Limited Partner or the General Partner commits an act of fraud, theft, gross negligence or wilful misconduct or intentionally breaches in any material respect any applicable laws; or

(c) if a Limited Partner or the General Partner becomes insolvent, fails to pay its debts generally as they become due, voluntarily seeks, consents to or acquiesces in the benefit of any of the *Bankruptcy and Insolvency Act* (Canada), the *Companies' Creditors Arrangement Act* (Canada) or any other applicable liquidation, bankruptcy, moratorium, rearrangement, receivership, administration, insolvency, reorganization, fraudulent transfer or conveyance, suspension of payments or similar laws from time to time in effect affecting the rights of creditors generally in any relevant jurisdiction (collectively, "**Debtor Relief Law**") other than as a creditor or claimant, or it becomes a party to or is made the subject of any proceeding provided for under any Debtor Relief Law, other than as a creditor or claimant, unless in the event such proceeding is involuntary, such proceeding or the petition instituting same is dismissed within 30 days after its filing; or

(d) if a liquidator, receiver, receiver and manager, or trustee in bankruptcy is appointed to a Limited Partner or of its Units or any part thereof with the consent or acquiescence of the Limited Partner; or

(e) if a liquidator, receiver, receiver and manager, or trustee in bankruptcy is appointed to the General Partner with the consent or acquiescence of the General Partner; or

(f) if an encumbrancer or secured creditor of the General Partner or Limited Partner takes possession of any assets of such Partner or any part thereof, or if a distress or execution or any similar process is levied or enforced upon or against such Partner's assets or any part thereof and the same remains unsatisfied for the shorter of a period of 30 days or such period as would permit the same to be sold; provided that such process is not in good faith disputed by such Partner and, in that event, provided that, if such Partner desires to contest the same, it also gives to the Non-Defaulting Partners security which, in the discretion of the Non-

Defaulting Partners, is sufficient to pay in full the amount claimed in the event it is held to be a valid claim; or

(g) if a Limited Partner Transfers or attempts to Transfer its Units (or any part thereof) contrary to the provisions of this Agreement; or

(h) a Limited Partner or the General Partner defaults under any financing facility and such default is not remedied within the period permitted under such financing facility.

7.2 **Rights Available to Non-Defaulting Partners**

If an Event of Default in respect of a Defaulting Partner has occurred and is continuing, each Non-Defaulting Partner will have remedies set out below in respect thereof:

(a) bring any proceedings in the nature of specific performance, injunction or other equitable remedy, it being acknowledged by each of the Limited Partners that damages at law may be an inadequate remedy for a default or breach of this Agreement; and/or

(b) bring any action at law as may be necessary or desirable in order to recover damages; and/or

(c) the right (but not the obligation) to elect, by notice (in this Subsection 7.2(c), the "**Initiating Notice**") to the other Partners given within 30 days after the occurrence of such Event of Default (the "**Initiating Notice Period**"), to purchase the Defaulting Partner's Units, in which case the Defaulting Partner (the "**Vendor**") will sell and the Non-Defaulting Partner giving the Initiating Notice (or, if two or more Non-Defaulting Partners give an Initiating Notice within the Initiating Notice Period, the Non-Defaulting Partners giving Initiating Notices, in such respective proportions as are equal to the number of each such Non-Defaulting Partner's Units divided by the aggregate number of Units owned by all such Non-Defaulting Partners who gave an Initiating Notice within the Initiating Notice Period) (the "**Purchaser**") will purchase such Units on the following terms:

(i) the closing of the transaction contemplated in this Section 7.2(c) will take place on a date selected by the Non-Defaulting Partner or Non-Defaulting Partners who gave an Initiating Notice (as applicable), which date will be no later than 60 days after the giving of the Initiating Notice. Pursuant to this Section, the purchase price for the Defaulting Partner's Units will be equal to 50% of the amount of capital contributed to the Partnership by the Defaulting Partner;

(ii) at the closing, at the Purchaser's request, the Vendor will deliver to the Purchaser a transfer of its Units and all rights of the Vendor hereunder and under any instruments, agreements, orders and other documents relating to the Units being acquired (in each case, the **"Transferred Property"**)

(such transfer and all other agreements and other documents required by this Subsection 7.2(c) to be satisfactory to counsel for the Purchaser, acting reasonably, and hereinafter collectively called the **"Transfer Documents"**) and in the Transfer Documents shall warrant that the Vendor has good and marketable title to its Units, free from all claims and encumbrances and confirm the truth and accuracy at that time of the representations and warranties set forth in Section 3.11. The Transfer Documents will include all those which the Purchaser may deem necessary or desirable to effectuate the sale and transfer of the Vendor's Units and will be legally sufficient to transfer to the Purchaser the Vendor's Units. At the closing, the purchase price will be paid to the Vendor in cash in full and the Purchaser will assume all obligations of the Vendor in connection with the Units that have been transferred arising after the date of closing;

(iii) at the closing, all amounts due by the Purchaser to the Vendor, and vice versa, will be settled and paid in full, either by way of set-off against the purchase price (if not already reflected in such purchase price) if the amount is owing by the Vendor or by payment if the amount is owing to the Vendor;

(iv) if the Vendor is not represented at closing or is represented but fails for any reason whatsoever to produce and deliver the Transfer Documents to the Purchaser, then the purchase price may be deposited by the Purchaser into a trust account of the solicitors for the Purchaser, with interest earned thereon to accrue to the benefit of the Vendor. Such deposit will constitute valid and effective payment of the purchase price to the Vendor even though the Vendor has, in breach of this Agreement, voluntarily encumbered or disposed of any of its Units and notwithstanding the fact that a Transfer of any of the Vendor's Units may have been delivered in breach of this Agreement to any alleged pledgee, transferee or other Person. If the purchase price is deposited as aforesaid, and the Purchaser has complied with the other requirements of this Section 7.2(c), then from and after the date of such deposit, and even though the Transfer Documents have not been delivered to the Purchaser, the purchase of the Vendor's Units will be deemed to have been fully completed and all right, title, benefit and interest, both at law and in equity, in and to such Units will be conclusively deemed to have been transferred and assigned to and become vested in the Purchaser and all right, title, benefit and interest, both in law and in equity, of the Vendor, or of any transferee, assignee or any other Person having any interest, legal or equitable, therein or thereto will cease and determine, provided, however, that the Vendor will be entitled to receive the purchase price so deposited, without interest, upon delivery to the purchaser of the Transfer Documents;

(v) as of the closing date, the Vendor's rights and obligations hereunder and under any other agreements with the other Partners entered into pursuant

hereto in the capacity as a Limited Partner with respect to the Property will terminate except as to items accrued as of such date and except for any indemnity obligations of the Vendor attributable to acts or events occurring prior to such date. Thereupon, except as limited by the preceding sentence, this Agreement will no longer be binding upon or enure to the benefit of the Vendor;

(vi) the Purchaser will co-operate (without having to make any payment) with the Vendor to obtain the release of the Vendor (and any other Person Affiliated with the Vendor who guaranteed any obligations or liabilities of the Partnership) from all liability to any lender to the Partnership or other Person to whom the Partnership is obligated, as the case may be, in connection with the Property and to obtain a release of any guarantees of the Vendor of any indebtedness in connection with the Property held by any lender or secured party. If such releases cannot be obtained, the Purchaser will indemnify the Vendor in writing from all liabilities and costs that may be sustained by the Vendor if it is called upon to honour any such obligations or guarantees;

(vii) the Vendor will pay all of the expenses incurred by the Purchaser in connection with such purchase;

(viii) the obligation of the Purchaser to complete the transaction of purchase and sale will be conditional upon the Vendor obtaining all approvals which it may be required to obtain, or the lapsing of any mandatory waiting periods which may apply without the making of any order or application or a request for information by any governmental authority, in each case, under any agreement binding the Partners, or any law, statute or regulation then in force under the laws of Canada or any Province or municipality thereof, provided that the Vendor uses its reasonable commercial efforts to obtain any required approval or to commence promptly the running of any applicable mandatory waiting period, and provided further that such condition may be waived by the Purchaser; and

(ix) the Purchaser will either provide evidence satisfactory to the Vendor, acting reasonably, that the Purchaser is registered under the provisions of the *Excise Tax Act* relating to HST, that the Vendor has no obligation under the *Excise Tax Act* to collect HST in connection with the purchase and sale or the Purchaser will pay any applicable HST to the Vendor; and/or

(d) if the Defaulting Partner is the General Partner, replace the General Partner.

7.3 **Additional Rights**

In addition to the rights listed in Section 7.2, if an Event of Default has occurred, until such Event of Default is cured, any Non-Defaulting Partner will have the right to remedy such default

and any other default under this Agreement or under any other agreement entered into by or on behalf of the Partnership and will be entitled on demand to be reimbursed by the Defaulting Partner for any monies expended by it to remedy any such default and any other expenses (including legal fees on a substantial indemnity basis) incurred by the Non-Defaulting Partner, together with interest at a rate equal to the at the Prime Rate plus 5% per annum calculated and payable monthly, and to bring any legal proceedings for the recovery thereof.

7.4 **Distributions and Voting Rights**

After the occurrence and during the continuance of an Event of Default in respect of a Partner, (i) whenever the vote, consent or decision of a Limited Partner is required or permitted pursuant to this Agreement or under the MPA, a Defaulting Partner who is a Limited Partner shall not be entitled to participate in such vote or consent, or to make such decision, and such vote, consent or decision shall be tabulated or made as if such Defaulting Partner were not a Partner, and (ii) the Defaulting Partner will cease to be entitled to any distributions under Section 6.3 and all such distributions will be distributed to the Non-Defaulting Partners only.

ARTICLE 8 - ATTORNEY

8.1 **Power of Attorney**

Each Limited Partner hereby irrevocably nominates, constitutes and appoints the General Partner, with full power of substitution, as its true and lawful attorney and agent, with full power and authority in its name, place and stead and for its use and benefit to do the following, namely:

(a) execute, swear to, acknowledge, deliver and file as and where required any and all of the following:

(i) all documents and instruments necessary or appropriate to form, qualify or continue and keep the Partnership in good standing as a limited partnership and to comply with applicable laws;

(ii) all documents, instruments and certificates necessary to reflect any amendment to this Agreement made pursuant to the provisions hereof; and

(iii) all conveyances, agreements and other instruments necessary or desirable to facilitate and implement the dissolution and termination of the Partnership pursuant to the provisions hereof including cancellation of any certificates or Declarations and the execution of any elections under the *Tax Act*, as amended or re-enacted from time to time, and any analogous provincial legislation;

(b) execute and file with any governmental body or instrumentality thereof any documents necessary to be filed in connection with the business, property, assets and undertaking of the Partnership;

(c) execute and deliver all such other documents or instruments on behalf of and in the name of the Partnership and for the Limited Partners or any Limited Partner as

may be deemed reasonably necessary or desirable by the General Partner to carry out fully the provisions of this Agreement or any other agreement approved by the General Partner;

(d) execute any instrument which may be necessary or requested to effect the continuation of the Partnership or the admission of any Person as a Limited Partner; or

(e) execute any instrument or document necessary or required to sell a Limited Partner's Units in circumstances if it is or becomes a "non-resident" of Canada as that expression is defined in the *Tax Act.*

8.2 **Irrevocable**

The power of attorney granted herein is irrevocable, is a power coupled with an interest, shall survive the death, disability or other legal incapacity of a Limited Partner and will survive the assignment (to the extent of the Limited Partner's obligations hereunder) by the Limited Partner of the whole or any part of its Units and extends to the administrators, successors and permitted assigns of such Limited Partner. Such power of attorney may be exercised by the General Partner executing on behalf of each Limited Partner any instrument by listing all of the Limited Partners to be bound by such instrument with a single signature as attorney and agent for all of them. Each Limited Partner agrees to be bound by any representation or action made or taken in good faith by the General Partner pursuant to such power of attorney in accordance with the terms thereof and hereby waives any and all defences which may be available to contest, negate or disaffirm the action of the General Partner taken in good faith under such power of attorney.

ARTICLE 9 - ACCOUNTING AND REPORTING; BANKING

9.1 **Books and Records**

The General Partner shall keep or cause to be kept on behalf of the Partnership books and records reflecting the assets, liabilities, income and expenditures of the Partnership and a register listing all Limited Partners, Capital Contributions and their Units. Such books, records and register shall be kept available for inspection by any Limited Partner or its duly authorized representative (at the expense of such Limited Partner) during business hours at the offices of the General Partner.

9.2 **Appointment of Accountants**

The General Partner shall from time to time appoint the Accountants of the Partnership to review and report to the Partners on the financial statements of the Partnership for, and as at the end of, each Fiscal Year.

9.3 **Annual Report**

Within 120 days after the end of each Fiscal Year, the General Partner shall deliver to each Limited Partner who was a Limited Partner at the end of such Fiscal Year:

(a) an annual report for such Fiscal Year consisting of:

(i) financial statements of the Partnership, reviewed by the Accountants;

(ii) a report on allocations and distributions to the Partners; and

(iii) such other information as, in the opinion of the General Partner, is material to the business of the Partnership;

(b) information concerning the income tax allowances available to Limited Partners, the amount of Net Income or Losses and credits and charges to their Capital Accounts; and

(c) such other information and forms as are necessary to enable a Limited Partner to file returns under the *Tax Act* and the income tax legislation of the provinces and territories of Canada with respect to its income from, and expenses and deductions derived from, its participation in the Partnership in such Fiscal Year and shall file on behalf of all Limited Partners the partnership information return required by the *Tax Act* and the income tax legislation of the provinces and territories of Canada.

9.4 **Costs**

The cost of all such reporting shall be paid by the Partnership as a Partnership expense.

9.5 **Banking**

A separate bank account with a Canadian chartered bank shall be opened and maintained for the Partnership in the name of the Partnership at such bank as the General Partner may from time to time determine. All monies received from time to time on account of the Partnership's business shall be paid immediately into such bank account for the time being in operation in the same drafts, cheques, bills or cash in which they are received, and all disbursements on account of the Partnership shall be made by cheque on such bank. All cheques drawn on such bank account and other banking documents, including authorization and security documents in connection therewith required to be executed by the Partnership from time to time shall be executed by the proper signing officers of the General Partner. The funds of the Partnership shall not be commingled with other funds of the General Partner and shall be used only for the purposes of the Partnership.

ARTICLE 10 - MEETINGS

10.1 **Meetings**

The General Partner may convene a meeting of the Partners at any time upon the giving of notice as hereinafter provided. Every meeting, however convened, shall be conducted in accordance with this Agreement.

10.2 **Place of Meeting**

Every meeting of the Partners shall be held at the principal place of business of the Partnership or at some other location in Toronto, Ontario selected by the General Partner.

10.3 **Notice of Meeting**

Notice of any meeting of the Partners shall be given to each Partner by prepaid registered mail or by personal delivery not less than ten days prior to such meeting, and shall state:

(a) the time, date and place of such meeting; and

(b) in general terms, the nature of the business to be transacted at the meeting.

10.4 **Accidental Omissions**

Accidental omission to give notice of a meeting to, or the non-receipt of notice of a meeting by, any Limited Partner shall not invalidate the proceedings at that meeting.

10.5 **Proxies**

Any Partner entitled to vote at a meeting may vote by proxy if a proxy has been received by the General Partner or the chairman of the meeting for verification prior to the meeting.

10.6 **Validity of Proxies**

A proxy purporting to be executed by or on behalf of a Partner shall be considered to be valid unless challenged at the time of or prior to its exercise. The Person challenging shall have the burden of proving to the satisfaction of the chairman of the meeting that the proxy is invalid. Any decision of the chairman concerning the validity of a proxy will be final.

10.7 **Form of Proxy**

Every proxy shall be substantially in the form which follows or such other form as may be approved by the General Partner or as may be satisfactory to the chairman of the meeting at which it is sought to be exercised:

"I
of the
in the Province of
being a Partner of YG Limited Partnership,
hereby appoint
of
in the Province of
as my proxy, with full power of substitution to vote for me and on my behalf at the meeting of Partners to be held on the day of , 20 , and every adjournment thereof and every poll that may take place in consequence thereof.
As witness my hand this day of , 20 ."

10.8 **Corporations which are Partners**

A Partner which is a corporation may appoint under seal, or otherwise an officer, director or other Person as its representative to attend, vote and act on its behalf at a meeting of Partners.

10.9 **Attendance of Others**

Any officer or director of the General Partner and representatives of the Accountants shall be entitled to attend any meeting of Partners.

10.10 **Chairman**

The General Partner may nominate an individual (who need not be a Partner) to be chairman of a meeting of Partners and the Person nominated by the General Partner shall be chairman of such meeting.

10.11 **Quorum**

A quorum at any meeting of Partners shall consist of two or more Persons present in person who collectively hold or represent by proxy more than 50% of all outstanding Units and who are entitled to vote on any resolution.

10.12 **Voting**

Every question submitted to a meeting shall be decided by a vote conducted in such fashion as the chairman of the meeting may decide. In the case of an equality of votes, the chairman shall not have a casting vote and the resolution shall be deemed to be defeated. The chairman shall be entitled to vote in respect of any Unit held by him or for which he may be proxy holder. On any vote at a meeting of Partners, a declaration of the chairman concerning the result of the vote shall be conclusive.

10.13 **Resolutions Binding**

Any resolution passed in accordance with this Agreement shall be binding on all the Partners and their respective heirs, executors, administrators, successors and assigns, whether or not any such Partner was present in person or voted against any resolution so passed.

10.14 **Powers Exercisable by Special Resolution**

None of the following actions shall be taken unless it has first been approved by Special Resolution:

(a) approving or disapproving the sale or exchange of all or substantially all of the business or assets of the Partnership;

(b) changing the fiscal year end of the Partnership;

(c) amending, modifying, altering or repealing any Special Resolution previously passed by the Partners;

(d) any amendments to this Agreement or any decision to vary or amend the terms of any of the Units or to create a class of Units ranking superior to any other class of Units; and

(e) dissolving or terminating the Partnership with the concurrence of the General Partner.

10.15 **Minutes**

The General Partner shall cause minutes to be kept of all proceedings and resolutions at every meeting, and copies of any resolutions of the Partnership to be made and entered in books to be kept for that purpose, and any minutes, if signed by the chairman of the meeting, shall be deemed to be conclusive evidence of the matters stated in them and that the meeting was duly convened and held and all resolutions and proceedings shown in them shall be deemed to have been duly passed and taken.

10.16 **Additional Rules and Procedures**

To the extent that the rules and procedures for the conduct of a meeting of the Partners are not prescribed in this Agreement, the rules and procedures shall be determined by the chairman of the meeting.

10.17 **Authorized Attendance**

The General Partner has the right to authorize the presence of any Person at a meeting regardless of whether the Person is a Partner and, with the approval of the General Partner, such Person shall be entitled to address the meeting.

10.18 **Joint Holders**

Where two or more Partners hold the same Unit or Units jointly, one of those holders present, in person or by proxy, at a meeting of Partners may, in the absence of the other or others, vote the Unit or Units, but if two or more of those Persons are present, in person or by proxy, and vote, they shall only be entitled to vote jointly (and not severally) in respect of the Unit or Units jointly held by them.

10.19 **Record Date**

The General Partner may fix in advance a date, preceding the date of any meeting of Partners by not more than 20 days and not less than 7 days, as a record date for the determination of the Partners entitled to notice of the meeting. Any Partner who was a Partner as of the close of business on the record date specified above shall be considered a Partner for the purposes set out in this Section notwithstanding the fact that the Partner may have disposed of its Units subsequent to such record date and any Person acquiring Units after such record date shall not be

entitled to vote in respect of such Units at the meeting or be entitled to execute the resolution circulated in respect of which such record date was fixed.

ARTICLE 11 - RESIGNATION, REMOVAL, INCAPACITY OF THE GENERAL PARTNER

11.1 No Assignment

The General Partner shall not make any assignment of its obligations under this Agreement, except (a) to an Affiliate of the General Partner, in which event the General Partner shall be released from its obligations hereunder and (b) that the General Partner may substitute in its stead as General Partner any entity which has, by merger, amalgamation, consolidation or otherwise, acquired substantially all of its assets, without such consent.

11.2 Removal or Cessation of the General Partner

(a) The General Partner may be removed as General Partner without its consent only if a court of competent jurisdiction determines ultimately that the General Partner has engaged in fraud, wilful misconduct or gross negligence in the operations of the Partnership and that such fraud, wilful misconduct or gross negligence has a material adverse effect on the business or properties of the Partnership, provided that a successor General Partner is appointed to continue the business of the Partnership within 60 days of such removal.

(b) The General Partner shall cease to be the general partner of the Partnership if:

(i) the General Partner is dissolved,

(ii) an order for relief against the General Partner is entered under the *Bankruptcy and Insolvency Act* (Canada),

(iii) the General Partner makes a general assignment for the benefit of creditors,

(iv) the General Partner makes a voluntary application under the *Bankruptcy and Insolvency Act* (Canada),

(v) the General Partner files a petition or answer seeking for the General Partner any reorganization, arrangement, composition, readjustment, liquidation, dissolution or similar relief under any statute, law, or regulation,

(vi) the General Partner files an answer or other pleading admitting or failing to contest the material allegations of a petition filed against the General Partner in any proceeding seeking reorganization, arrangement, composition, readjustment, liquidation, dissolution or similar relief under any statute, law or regulation,

(vii) the General Partner seeks, consents to, or acquiesces in the appointment of a trustee, receiver or liquidator of the General Partner or of all or any substantial part of the General Partner's properties,

(viii) within 60 days after the commencement of any proceeding against the General Partner commenced by any third Person seeking reorganization, arrangement, composition, readjustment, liquidation, dissolution or similar relief under any statute, law or regulation, the proceeding has not been dismissed, or

(ix) within 60 days after the appointment without the General Partner's consent or acquiescence of a trustee, receiver or liquidator of the General Partner or of all or any substantial part of the General Partner's properties, the appointment is not vacated or stayed, or within 60 days after the expiration of any such stay, the appointment is not vacated.

(c) The General Partner may resign as general partner by providing notice to the Limited Partners that it intends to resign, with an effective date no sooner than 90 days following such notice. Immediately prior to the effective date of such resignation, a successor General Partner shall be appointed by the General Partner to continue the business of the Partnership.

(d) If the General Partner is removed under Subsection 11.2(a) or ceases to be General Partner under Subsection 11.2(b), then the Limited Partners shall have the right to appoint a new general partner by Special Resolution.

(e) Any successor General Partner appointed to replace a General Partner pursuant to this Article 11 shall, beginning on the date of admission to the Partnership, have the same rights and obligations under this Agreement as the replaced General Partner would have had subsequent to such date if the replaced General Partner had continued to act as General Partner.

11.3 **Admission of a Successor General Partner**

(a) The admission of a successor General Partner pursuant to Section 11.2 shall be effective only if and after the following conditions are satisfied:

(i) the admission of such successor General Partner shall not adversely affect the classification of the Partnership as a limited partnership for income tax and corporate purposes; and

(ii) any Person designated as a successor General Partner pursuant to Section 11.2 shall have become a party to, and adopted all of the terms and conditions of, this Agreement.

(b) The appointment of any Person as a successor General Partner in accordance with the terms hereof shall occur, and for all purposes shall be deemed to have

occurred, prior to the effective date of the removal, resignation or other termination of the General Partner.

11.4 **Liabilities and Rights of a Replaced General Partner**

Any General Partner who shall be replaced as General Partner shall remain liable for its portion of any obligations and liabilities incurred by it as General Partner prior to the time such replacement shall have become effective, but it shall be free of any obligation or liability incurred on account of the activities of the Partnership from and after such time. Such replacement shall not affect any rights of such General Partner which shall mature prior to the effective date of such replacement.

ARTICLE 12 - DISSOLUTION AND TERMINATION OF THE PARTNERSHIP

12.1 **Dissolution**

(a) The Partnership shall continue notwithstanding the death, incompetency, bankruptcy, insolvency, dissolution, liquidation, winding-up or receivership of any Limited Partner or the admission, retirement or withdrawal of any Limited Partner or the General Partner or the transfer of any Unit. No Limited Partner may require dissolution of the Partnership. Each of the General Partner and the Limited Partners hereby covenants and agrees not to cause a dissolution of the Partnership by his or its individual acts and should any of the Limited Partners cause the Partnership to be dissolved or this Agreement to be terminated prior to the occurrence of any event of dissolution or termination otherwise provided for herein, such Limited Partner shall be liable to all the other Partners for all damage thereby occasioned.

(b) The Partnership will be dissolved on the earliest of:

(i) the effective date of the resignation or deemed resignation by the General Partner as the general partner of the Partnership unless within 90 days after such resignation or deemed resignation of the General Partner, the Limited Partners agree in writing to continue the business of the Partnership and to the appointment, effective as of the date of the resignation or deemed resignation of the General Partner, of one or more general partners; and

(ii) any date which is approved by the General Partner and by Special Resolution.

In the event of the termination and dissolution of the Partnership, upon satisfaction of all the rights of the Partners under the terms hereof, this Agreement shall terminate and be of no further force and effect.

12.2 **Administrator**

The General Partner shall serve as the administrator of the Partnership in the event that the Partnership is to be dissolved, unless such dissolution is as a result of the removal of the General Partner pursuant to Subsection 11.2(a) or the General Partner ceased to be the General Partner under Subsection 11.2(b) or if the General Partner is unable or unwilling to so act. If the General Partner is so disqualified or unable to act as administrator, then the Limited Partners by Special Resolution shall appoint some other appropriate Person to act as the administrator of the Partnership.

12.3 **Liquidation of Assets**

As soon as practicable after the authorization of the dissolution of the Partnership, the administrator of the Partnership shall prepare or cause to be prepared a statement of financial position of the Partnership which shall be reported upon by the Accountants and a copy of which shall be forwarded to each Limited Partner. The administrator of the Partnership shall proceed diligently to wind up the affairs of the Partnership and all assets of the Partnership shall be disposed of in an orderly fashion having regard to prevailing market conditions. In selling the Partnership's assets, the administrator shall take all reasonable steps to locate potential purchasers in order to accomplish the sale at the highest attainable price. A reasonable time shall be allowed for the orderly liquidation of the assets of the Partnership so as to minimize any losses. During the course of such liquidation, the administrator of the Partnership shall operate the undertakings of the Partnership and in so doing shall be vested with all the powers and authorities of the General Partner in relation to the business and affairs of the Partnership under the terms of this Agreement. The administrator of the Partnership shall be paid its reasonable fees and disbursements incurred in carrying out its duties as such.

12.4 **Distribution Upon Liquidation**

After the payment of all liabilities owing to the creditors and the General Partner, the administrator shall set up such Reserves as it deems reasonably necessary for any contingent or unforeseen liabilities or obligations of the Partnership. Said Reserves may be paid over by the administrator to a bank, to be held in escrow for the purpose of paying any such contingent or unforeseen liabilities or obligations and, at the expiration of such period as the administrator may deem advisable, such Reserves shall be distributed to the Partners or their assigns as provided below. After provision has been made for the payment or other satisfaction of all liabilities of the Partnership, the net assets of the Partnership will be distributed on dissolution in the manner provided for in Section 6.3(b)(i).

12.5 **Events Not Causing Dissolution**

Notwithstanding any rule of law or equity to the contrary, the Partnership shall not be dissolved except in accordance with this Agreement. In particular, but without restricting the generality of the foregoing, the Partnership shall not be dissolved or terminated by the removal, actual or deemed resignation, death, incompetence, bankruptcy, insolvency, other disability or incapacity, dissolution, liquidation, winding-up or receivership, or the admission, resignation or withdrawal of the General Partner (except as provided for herein) or any Limited Partner.

ARTICLE 13 - DISPUTE RESOLUTION

13.1 Dispute Resolution

Any dispute among the Parties arising out of or in connection with this Agreement,

(a) will first be attempted to be resolved by the parties through good faith negotiations and in connection therewith, any party may request in writing that any other party meet and commence such negotiations within a reasonable period of time (in any event no later than seven days) after the request, and such negotiations will be between the most senior executive of each of the parties, or an individual for each of the parties of senior status designated by such senior executive;

(b) if within 20 days after commencement of the negotiations under Section 13.1(a), the dispute has not been resolved, any party may refer the matter to arbitration in accordance with the provisions set out below by giving notice to the other parties specifying the particulars of the matter(s) in dispute and proposing the name of the individual it wishes to be the single arbitrator. Within 15 days after receipt of such notice, the other parties to the dispute shall give notice to the first party advising whether such party accepts the arbitrator proposed by the first Party (a "responding notice"). If a responding notice is not given by such a party within such 15 day period, such party shall be deemed to have accepted the arbitrator proposed by the first party. If the parties do not agree upon a single arbitrator within 20 days of delivery of the responding notice, any party may apply to the Superior Court Justice of Ontario (on notice to the other parties to such dispute) for the appointment of the arbitrator;

(c) any dispute which cannot be resolved by negotiation will be determined by arbitration, by a single arbitrator, in accordance with the *Arbitration Act, 1991* (Ontario) and the National Arbitration Rules of the ADR Institute of Canada Inc.;

(d) there will be a single arbitrator who will have qualifications relevant and suitable to the issue in dispute, and will be disinterested in the dispute and will be independent and impartial with respect to all parties thereto;

(e) the determination of the arbitrator will be final and binding upon the parties and will not be subject to any appeal or review;

(f) unless otherwise specifically provided herein, each party will bear its own costs in connection with the arbitration, provided that, if the arbitrator finds that any party has acted unreasonably, the arbitrator may, in his discretion, award costs against such party;

(g) the arbitrator will have the discretionary authority to grant specific performance, rectification, injunctions and other equitable relief as may be requested by a party including interim preservation orders and notwithstanding Section 13.1(c), any party may, before or after an arbitration has commenced, apply to the Superior

Court of Justice of Ontario for interim relief as contemplated by the *Arbitration Act, 1991* (Ontario) including injunctive relief;

(h) any order of the arbitrator may be entered with a court of competent jurisdiction for the purposes of enforcement;

(i) the place of arbitration will be Toronto, Ontario;

(j) the arbitrator will resolve the dispute in accordance with the laws of Ontario;

(k) the parties will act in good faith and use commercially reasonable efforts to resolve disputes in a timely manner;

(l) all aspects of the arbitration will be kept confidential; and

(m) all awards for the payment of money will include prejudgement and postjudgement interest in accordance with sections 127 to 130 of the *Courts of Justice Act* (Ontario) with necessary modifications.

ARTICLE 14 - MISCELLANEOUS

14.1 Waiver of Partition

Except as may be otherwise required by law in connection with the winding up, liquidation and dissolution of the Partnership, each Partner hereby irrevocably waives any and all rights that it may have to maintain an action for partition of any of the assets of the Partnership.

14.2 Governing Law

Notwithstanding the place where this Agreement may be executed by any of the parties, the parties expressly agree that all the terms and provisions hereof shall be construed under the laws of the Province of Manitoba and the laws of Canada applicable therein and each of the Partners irrevocably attorns to the non-exclusive jurisdiction of the courts of the Province of Ontario with respect to any matter arising out of this agreement.

14.3 Severability

If any provision of this Agreement or the application thereof to any party or circumstance shall be determined by any court of competent jurisdiction to be invalid or unenforceable to any extent, the remainder of this Agreement or the application of such provision to such Person or circumstance, other than those as to which it is so determined invalid or unenforceable, shall not be affected thereby, and each provision hereof shall be valid and shall be enforced to the fullest extent permitted by law. Any default hereunder by a Limited Partner shall not excuse any obligation of any other Limited Partner.

14.4 **Notice**

Any notice or other communication to be given under this Agreement to the Partnership or to any Partner shall be in writing and may either be delivered personally or by email:

(a) if to the Partnership or the General Partner, by delivery only, addressed to it at its principal office, or

(b) if to any Limited Partner, at the address or email address of such Partner as shown on the records of the Partnership.

Such notice shall be deemed to have been given when so delivered or sent by email, as the case may be, provided that any notice to the Partnership or the General Partner shall be effective only if and when received.

14.5 **Declaration of Limited Partnership**

The General Partner shall provide a copy of the Declaration or any amendment or restatement relating thereto to each Limited Partner that makes a request therefor, but shall not otherwise be required to provide such copies.

14.6 **Headings**

The titles of the Articles and the headings of the Sections of this Agreement are for convenience of reference only and are not to be considered in construing the terms and provisions of this Agreement.

14.7 **Pronouns**

All pronouns shall be deemed to refer to the masculine, feminine, neuter, singular or plural, as the identity of the Person or Persons, firm or corporation may require in the context thereof.

14.8 **Successors and Assigns**

This Agreement shall inure to the benefit of the Partners, and shall be binding upon them, and their respective successors and permitted assigns.

14.9 **Entire Agreement**

This Agreement and any Subscription Agreements constitute the entire agreement among the Partners with respect to the subject matter hereof, and supersede any prior agreement or understanding among them with respect to such matters. The representations and warranties of the General Partner and the Limited Partners in this Agreement and in any Subscription Agreements (and all other provisions of the Subscription Agreements) shall survive the execution and delivery of this Agreement.

14.10 **Confidentiality**

Each Limited Partner agrees that it shall not disclose without the prior consent of the General Partner (other than to such Limited Partner's officers, directors, shareholders, employees, accountants or counsel) any information with respect to the Partnership, provided that a Limited Partner may disclose any such information:

(a) as has become generally available to the public;

(b) as may be required or appropriate in any report, statement or testimony submitted to any municipal, provincial or federal regulatory body having jurisdiction over such Limited Partner;

(c) as may be required or appropriate in response to any summons or subpoena or in connection with any litigation;

(d) to the extent necessary in order to comply with any law, order, regulation, ruling or other governmental request applicable to such Limited Partner; and

(e) to its professional advisors.

14.11 **Counterparts**

This Agreement may be executed in any number of counterparts, and each of such counterparts shall constitute an original of this agreement and all such counterparts together shall constitute one and the same agreement. This Agreement or counterparts hereof may be executed by facsimile or electronic transmission, and the parties adopt any signatures provided or received by facsimile or electronic transmission as original signatures of the applicable party or parties, provided that any party providing its signature by facsimile or electronic transmission shall promptly forward to the other party or parties a copy of this agreement with an original signature.

14.12 **Amendment**

This Agreement may be amended only by written agreement signed by all of the Partners and, for greater certainty, the power of attorney granted to the General Partner pursuant to Article 8 shall not entitle the General Partner to execute any amendment to this Agreement on behalf of any Limited Partner without the express written consent of such Limited Partner.

IN WITNESS WHEREOF, the undersigned have executed this Agreement as of the date first above written.

General Partner:

9615334 CANADA INC.

Per: _____
Name:
Title

Limited Partners:

CRESFORD (YONGE) LIMITED PARTNERSHIP, by its general partner, 2502156 Ontario Limited

Per: _____
Name:
Title:

8451761 CANADA INC.

Per: _____
Name:
Title:

2504670 CANADA INC.

Per: _____
Name:
Title:

SCHEDULE "A"

INITIAL CAPITAL CONTRIBUTIONS AND UNITS

Name	Initial Capital Contribution	Initial Units Held
CRESFORD (YONGE) LIMITED PARTNERSHIP	$15,000,000	15,000 Class B Units
8451761 CANADA INC.	$2,000,000	2,000 Class A Preferred Units
2504670 CANADA INC.	$2,000,000	2,000 Class A Preferred Units
TOTALS	$19,000,000	15,000 Class B Units and 4,000 Class A Preferred Units

SCHEDULE "B"

DESCRIPTION OF PROPERTY

363-365 Yonge St., Toronto, ON:

PIN: 21101−0049 (LT)

PT LT 31 E/S YONGE ST PL 22A TORONTO AS IN EP126440; TORONTO, CITY OF TORONTO

367 Yonge St., Toronto, ON:

PIN: 21101−0048 (LT)

PT LT 31 E/S YONGE ST, 32 E/S YONGE ST PL 22A TORONTO AS IN CA761626; TORONTO, CITY OF TORONTO

369-371 Yonge St., Toronto, ON:

PIN: 21101−0047 (LT)

PT LT 32 E/S YONGE ST PL 22A TORONTO AS IN CA472341; TORONTO, CITY OF TORONTO

373-375 Yonge St., Toronto, ON:

P.I.N.: 21101-0046 (LT)

PT LT 33 E/S YONGE ST PL 22A TORONTO AS IN CA540937; TORONTO, CITY OF TORONTO

377 Yonge St., Toronto, ON:

PIN: 21101−0045 (LT)

PT LT 33 E/S YONGE ST PL 22A TORONTO AS IN CA310343; TORONTO, CITY OF TORONTO

379 Yonge St., Toronto, ON:

PIN: 21101−0044 (LT)

PT LT 34 E/S YONGE ST PL 22A TORONTO AS IN CT497024; TORONTO, CITY OF TORONTO

381 Yonge St., Toronto, ON:

PIN: 21101-0043 (LT)

PT LT 34 E/S YONGE ST PL 22A TORONTO; AS IN OT46105; TORONTO, CITY OF TORONTO

385 Yonge St., Toronto, ON:

PIN: 21101−0042 (LT)

LT 35 E/S YONGE ST, 36 E/S YONGE ST PL 22A TORONTO; TORONTO, CITY OF TORONTO

YG LIMITED PARTNERSHIP

SUBSCRIPTION FORM, POWER OF ATTORNEY AND ACKNOWLEDGEMENT

TO: YG LIMITED PARTNERSHIP, Toronto, Ontario

AND TO: 9615334 CANADA INC. (the "**General Partner**")

1. Subscription

1.1 The undersigned (the "**Subscriber**") hereby subscribes for 2,000 Class A Preferred Units (the "**Units**") in YG Limited Partnership (the "**Partnership**") pursuant to the amended and restated limited partnership agreement dated July 31, 2017 (the "**Limited Partnership Agreement**") in respect of the Partnership.

1.2 All capitalized terms used herein, unless otherwise defined, have the meanings given to them in the Limited Partnership Agreement.

1.3 The Subscriber hereby acknowledges receipt of a copy of the Limited Partnership Agreement and confirms that it has thoroughly read its contents and understands the nature of the proposed investment. The Subscriber acknowledges that the Units may not be transferred except in accordance with the provisions of the Limited Partnership Agreement.

1.4 The Subscriber agrees to pay the subscription price of $2,000,000 and tenders herewith a certified cheque or bank draft in the amount of $2,000,000 payable to the Partnership or, at the request of the General Partner, agrees to wire transfer the subscription price to the Partnership or to whomever the Partnership directs.

1.5 This subscription may be accepted in whole or in part and the Subscriber acknowledges that participation in the Partnership is subject to acceptance of this subscription by the General Partner and to certain other considerations set forth in the Limited Partnership Agreement.

1.6 It is understood and agreed that this subscription and all funds enclosed herewith or wire transferred in accordance herewith shall be returned to the Subscriber without interest or deduction at the address indicated below if this subscription is not accepted by the General Partner.

1.7 The parties to this Subscription Agreement confirm that, for the purposes of section 4.2 of the Limited Partnership Agreement, the date on which the Capital Contribution (as defined in the Limited Partnership Agreement) referred to in section 1.4 above was made by the Subscriber to the Partnership was July 5, 2017.

2. Covenants, Representations and Warranties

2.1 The Subscriber hereby represents and warrants that:

(a) the Subscriber is not a non-resident of Canada for the purposes of the *Income Tax Act* (Canada);

(b) the Subscriber is a resident of Canada;

(c) the Subscriber is not a non-Canadian for the purposes of the *Investment Canada Act*;

(d) the Subscriber is (and will at the time of acceptance of this Subscription be) a person whose investing experience and whose relationship to a director, officer, founder or control person of the General Partner and/or the Partnership enables it to assess and rely upon the General Partner's and the Partnership's capabilities, trustworthiness and business acumen when investing in the Partnership and, in particular, the Subscriber understands that the Partnership is a "private issuer" as defined under applicable securities laws and that the Subscriber is not a member of the public (as may be defined under such laws);

(e) the Subscriber is familiar with the proposed business of the Partnership (the "**Partnership Business**") and the risks associated with an investment in the Partnership. The Subscriber expressly acknowledges and agrees that it has received, reviewed and fully understands the financial information provided to it in connection with the Partnership, which is attached hereto as Schedule "A";

(f) the Subscriber has had ample opportunity to make or has made an independent investigation of the Partnership Business and the risks associated therewith, and the Subscriber has such knowledge in financial and business affairs as to be capable of evaluating the merits and risks of its investment in the Partnership and the Subscriber is able to bear the economic risk of loss of its entire investment;

(g) prior to its execution of this Agreement, (i) the Subscriber received all information it desired with respect to the Partnership Business and the Partnership and it has examined such information or caused such information to be examined by its representatives and lawyers, or has had ample time and opportunity to examine or cause its representatives and attorneys to examine such information if it so chose; (ii) the Subscriber and its representatives or lawyers are familiar with this Agreement and the Partnership's intentions to enter into and operate the Partnership Business; (iii) the Subscriber does not desire any further information or data with respect to the Partnership Business, the Partnership or the General Partner; and (iv) the Subscriber has obtained, or had the opportunity to obtain, legal advice independent of the legal counsel retained by the General Partner, and the Subscriber is not relying, and has not relied, upon the legal counsel retained by the General Partner in connection with the Subscriber's investment in the Partnership or the assumption or execution of the Limited Partnership Agreement or any other document, instrument or other writing;

(h) the Subscriber (i) has either obtained or has had ample opportunity to obtain professional advice with respect to the taxation of the Subscriber in respect of or as a result of this Agreement, including, without limitation, the taxation of the Subscriber upon distribution of available funds under the Limited Partnership Agreement and distributions and allocations of Net Income, Loss, Taxable Income and Tax Loss; (ii) has not relied and is not relying, in any respect whatsoever, upon the General Partner or any Affiliate of the General Partner or any of their respective officers, directors, shareholders, employees, lawyers and other professional advisors, consultants, agents or other representatives, for any advice in respect of such taxation matters as aforesaid; and (iii) has not relied and is not relying on any

warranty, representation, promise, condition, inducement or otherwise by the General Partner or any Affiliate of the General Partner or any of their respective officers, directors, shareholders, employees, lawyers and other professional advisors, consultants, agents or other representatives, for any advice with respect to such taxation matters as aforesaid and no such warranty, representation, promise, condition, inducement, advice or otherwise exists;

(i) the Subscriber (i) is acquiring an interest in the Partnership as principal solely for its own account for investment purposes only and not with a view to, or for, resale and does not at the time of acquisition of an interest in the Partnership intend to resell, assign or otherwise dispose of all or any part of such interest; (ii) has been independently advised as to the restrictions with respect to assignment or transfer of its interest in the Partnership imposed by the Limited Partnership Agreement, confirms that no representation has been made to it by or on behalf of the Partnership with respect thereto, and acknowledges that it is aware of the risks relating to its investment in the Partnership and that the Partnership is not a reporting issuer (or the equivalent thereof) in any jurisdiction; and (iii) its agreements, representations and warranties contained in this Agreement are being relied upon by the Partnership and by the General Partner as the basis for the exemption of the Subscriber's investment in the Partnership from the prospectus requirements of applicable securities laws and in order for the General Partner to establish that no registrations are required pursuant to any such legislation;

(j) the Subscriber shall and does hereby agree to indemnify and save harmless the Partnership and each of the General Partner and the other Partners, from any liability, loss, cost, damage and expense (including, without limitation, the costs of litigation and lawyers' fees) arising out of, resulting from, or in any way related to the misrepresentation or breach of any representation or warranty of the Subscriber set forth in this Agreement;

(k) the Subscriber has not become aware of, and its investment in the Partnership was not made through or as a result of, any general solicitation or any advertisement in printed media of general and regular paid circulation (or other printed public media), radio, television or telecommunications or other form of advertisement (including electronic display such as the Internet);

(l) if the Subscriber is a corporation, it has been duly incorporated, is valid and subsisting under the laws of its jurisdiction of incorporation, has the corporate power and capacity to enter into, be bound by and take all actions required pursuant to this Agreement and the Limited Partnership Agreement, and all necessary corporate action necessary to authorize its entering into or assuming this Agreement and the Limited Partnership Agreement has been taken;

(m) the entering into of this Agreement will not result in a violation of any of the terms or provisions of any law applicable to the Subscriber, or, if the Subscriber is a corporation, any of the Subscriber's constating documents, or any agreement to which the Subscriber is a party or by which the Subscriber is bound;

(n) the Subscriber acknowledges that:

(i) no securities commission or similar regulatory authority has reviewed or passed on the merits of the investment in the Partnership;

(ii) there is no government or other insurance covering its investment in the Partnership; and

(v) no statutory rights of rescission or damages will be available to the Subscriber in connection with its investment in the Partnership; and

(o) the Subscriber has been informed of the proposed use of the proceeds of the sale of Units.

2.2 In consideration of the General Partner accepting this subscription, and conditional thereon, the Subscriber hereby:

(a) agrees to be bound, as a party to the Limited Partnership Agreement, by the terms of the Partnership Agreement, as from time to time amended and restated and in effect, all in accordance with the terms of the Limited Partnership Agreement;

(b) expressly ratifies and confirms all acts, deeds and other things done by the General Partner in the exercise of its authority to carry on the Partnership Business in accordance with the Limited Partnership Agreement; and

(c) agrees that, at the request of the General Partner, it will provide such evidence of its status as the General Partner may require to comply with the requirements of any applicable securities legislation or other legislation affecting the Partnership and the Limited Partners.

3. Acknowledgement

3.1 The Subscriber hereby acknowledges and agrees that it has obtained independent legal, accounting, tax and financial advice in connection with its investment in Units and has not relied on the advice of the General Partner or any of its Affiliates.

3.2 This Agreement may be executed in any number of counterparts, and each of such counterparts shall constitute an original of this agreement and all such counterparts together shall constitute one and the same agreement. This Agreement or counterparts hereof may be executed by facsimile or electronic transmission, and the parties adopt any signatures provided or received by facsimile or electronic transmission as original signatures of the applicable party or parties, provided that any party providing its signature by facsimile or electronic transmission shall promptly forward to the other party or parties a copy of this agreement with an original signature.

3.3 The Subscriber hereby acknowledges receipt of a copy of the Limited Partnership Agreement.

NUMBER OF UNITS SUBSCRIBED FOR: 2,000

DATED at Toronto, in the Province of Ontario the _____ day of _____, 2017.

2504670 CANADA INC.

(Name of Subscriber - Please print)

Per: _____
Authorized Signing Officer

(Address of Subscriber)

(City, Prov., Postal Code of Subscriber)

SUBSCRIPTION ACCEPTED AND AGREED BY:

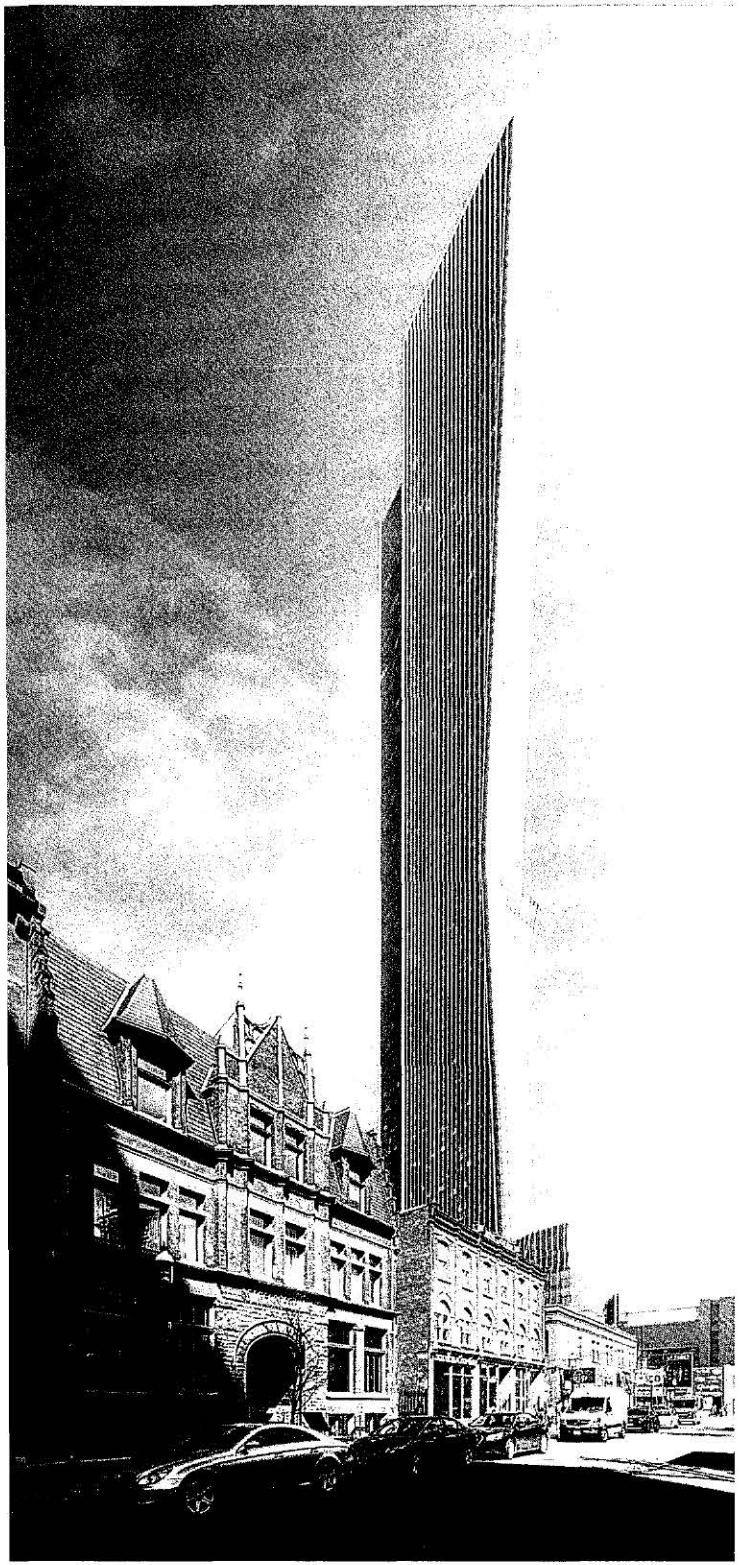
9615334 CANADA INC., in its capacity as general partner of, and for and on behalf of, YG LIMITED PARTNERSHIP

Per: _____
Authorized Signing Officer

Date of Acceptance: _____

SCHEDULE "A"

(see attached)



YSL

YONGE STREET LIVING RESIDENCES

Cresford

ABC - 300

Overview of Cresford

Cresford Developments (Cresford) is a group of private companies and partnerships wholly owned by Daniel C. Casey and his family trust.

In business for over 40 years, under the leadership of Mr. Casey and his talented Executive Management Team, Cresford has completed over 60 residential developments and over 20,000 residences.

With a proven track record, Cresford relies on its understanding of the Toronto real estate market and in-depth knowledge to transform each location through thoughtful decisions on architecture, product and quality. The ability to execute a winning sales formula and the capability to control its own construction management have solidified the company's success. Cresford's commitment to deliver on its promise to the consumer has helped define Cresford as a mid market luxury brand in the Downtown Toronto condominium market.

Cresford has a long-standing and solid relationship with all levels of government in Canada including municipal, provincial and federal. It is proud to have met the exacting governance standards and rigorous due diligence requirements of various public institutions and to have been selected by them to partner on real estate transactions that strengthen Toronto communities. Most recent partners include The Children's Aid Society, YMCA, Canada Post Corporation, British Columbia Investment Management Corporation and Ryerson University.

Mr. Casey's business experience extends beyond his primary focus on residential development. He is also a founding shareholder and board member of Onex Corporation, one of the largest publicly traded private equity investment firms in Canada.

Cresford's successful history has led to alliances with top professionals, consultants and business owners to create the very best residential communities.

For the past 40 years, our mission is to be Canada's number one choice for modern, luxury condominium living. We strive to bring the latest, most innovative condominium lifestyles that appeal to today's smart, savvy, sophisticated purchasers. We associate with world-leading fashion and luxury brands as well as renowned architects and design firms to create the ultimate signature expression of elegant condominium living. We are driven by our commitment to create products that are truly special that meet our consumers demands. Cresford has a reputation of building timeless, high quality, design focused landmark developments.

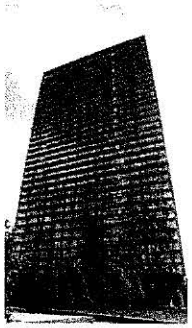
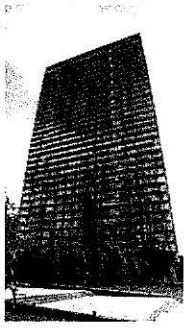
The Cresford Difference

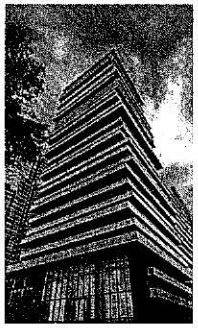
- ✓ Timeless architecture
- ✓ Exceptional locations
- ✓ Marketing experience that connects the purchaser with the location and product
- ✓ Strong branding
- ✓ Well-established company with a proven track record

Timeline 2009 – Current

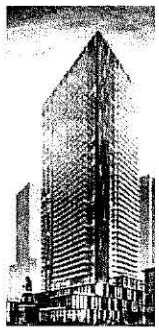
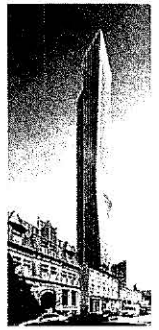
Cresford commands a high price per square foot in comparison to its competitors and the premium is reflected in its product.

In the last 8 years, Cresford has cultivated a combined portfolio of over 6,000 residential units, 187,000 sf of retail space, 220,000 sf of office, totaling over $3 billion dollars of value.



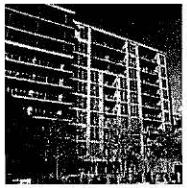


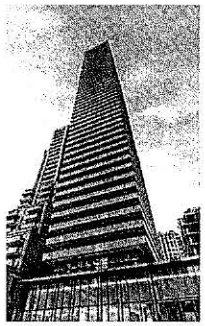
CASA Completed — 2009
NXT Completed — 2010
NXT 2 Completed — 2013
MYC Completed — 2014
1Thousand Bay Completed — 2016
CASA III Under Construction — 2017
VOX Under Construction — 2018
The Clover Under Construction — 2019
Halo Construction 2017 — 2020
YSL Under Development — 2022

BSN Completed — 2009

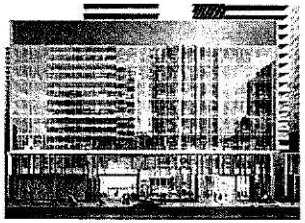
Lofts399 Completed — 2013



CASA II Completed — 2016



59 Hayden Under Construction — 2017



YSL Investment Opportunity

With Cresford's strength in the market place for over 40 years and a well-established business model, we want to provide investors with the opportunity to experience the Cresford difference and create a long term relationship with an exclusive few to share in our continued successes.

Exceptional Location

- ✓ High profile position at the corner of Yonge and Gerrard
- ✓ One block from the Toronto Eaton Centre, which attracts the most visitors of any of Toronto's tourist attractions. It is North America's busiest mall
- ✓ Steps from Yonge & Dundas, ranked as Toronto's Busiest Intersection with 129,704 in weekly traffic volume (Source: City of Toronto Transportation Services, 2015)
- ✓ The Property is also in close proximity to the University of Toronto, Ryerson University, Mount Sinai Hospital, Toronto General Hospital, SickKids Hospital, Dundas Square and Toronto Eaton Centre

Highly Accessible

- ✓ The College and Dundas subway stations are just steps from the Property, providing direct access to the Yonge-University subway line and connections to the Bloor-Danforth subway line.

- ✓ Union Station, Toronto's main transit hub is only three stops south of Dundas subway station and offers commuter services throughout the GTA and the surrounding areas via Toronto Transit Comission (TTC), GO Transit bus and train routes, Greyhound buses, and the VIA Rail system.

Overview of Investment

- Investors invest in the Class A preferred partnership units as limited partners of YG LP.

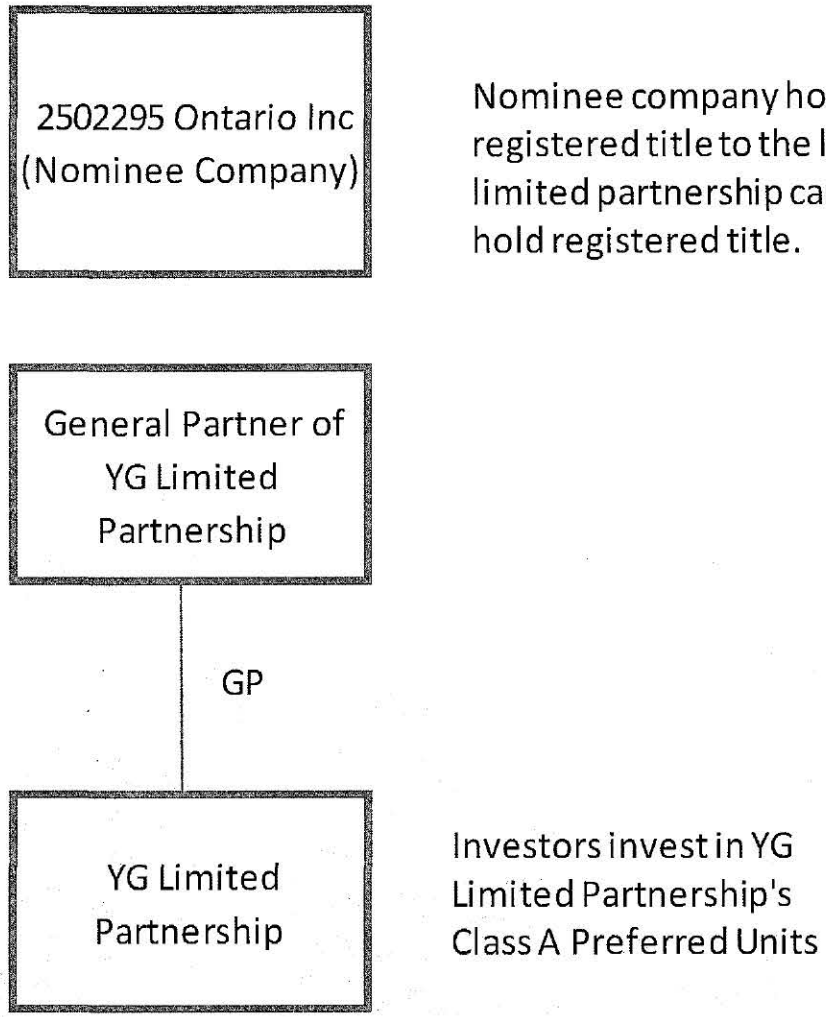
- Upon the completion of the project, we are projecting that the investor will receive its invested capital along with an investment return of 100% of the invested capital.

Overview of Security

The limited partners of the Class A preferred units of YG LP have the following security for their investments:

- The nominee company, the registered owner of the land provides a corporate guarantee and Dan Casey provides a personal guarantee to the limited partners of the Class A preferred units of YG LP.

Overview of Investment Structure



YSL
YONGE STREET LIVING (REDEVELOPED)

Cresford

Distribution of Invested Capital and Return

Revenue proceeds (after payment of project expenses) will be distributed at the end of the project in the following priority:

- First, repayment of all external lenders;
- Second, return of invested capital to the investor;
- Third, distribute the agreed upon return on investment to the investor; and
- Fourth, distribution to Cresford.

YSL Pro Forma Income Statement

YSL pro forma income statement		
Total building area	1,046,241	s.f
Total saleable area - Residential	756,453	s.f
Total saleable area - Office	105,817	s.f
Total saleable area - Retail	92,493	s.f
Project revenue	**$**	
Residential	820,756,750	
Office	38,080,834	
Retail	123,010,746	
Parking and lockers and other	35,550,000	
Recoveries (Tarion/development charges)	23,572,845	
Total project revenue	**1,040,971,173**	
Project costs		
Land purchase	168,000,000	
Land transfer tax	5,082,400	
Development levies and permits	72,396,998	
Construction costs	309,871,381	
Design, marketing and administration	126,368,532	
Tarion fees	1,571,545	
Total project costs	**683,290,855**	
Net project income before financing	**357,680,318**	
Financing costs	225,052,212	
Net project income	**132,628,106**	

YSL
YONGE STREET LIVING RESIDENCES

Cresford

Contact

Daniel C. Casey
416.971.7757
dan@cresford.com

Forward-looking Statements

This presentation may contain forward-looking statements and information relating to expected future events and financial and operating results and projections, including statements regarding growth and investment opportunities and targeted returns, that involve risks and uncertainties. Such forward-looking information is typically indicated by the use of words such as "will", "may", "expects" or "intends". The forward-looking statements and information contained in this presentation include statements regarding expected or targeted investment returns and performance. These statements are based on management's current expectations, intentions and assumptions which management believes to be reasonable having regard to its understanding of prevailing market conditions and the current terms on which investment opportunities may be available.

Projected returns are based in part on projected cash flows for incomplete projects. Numerous factors, many of which are not in Cresford's control, and including known and unknown risks, general and local market conditions and general economic conditions (such as prevailing interest rates and rates of inflation) may cause actual investment performance to differ from current projections. Accordingly, although we believe that our anticipated future results, performance or achievements expressed or implied by the forward-looking statements and information are based upon reasonable assumptions and expectations, the reader should not place undue reliance on forward-looking statements and information. If known or unknown risks materialize, or if any of the assumptions underlying the forward-looking statements prove incorrect, actual results may differ materially from management expectations as projected in such forward-looking statements.

Cresford and its affiliates disclaim any intention or obligation to update or revise any forward-looking statements, whether as a result of new information, future events or otherwise, unless required by applicable law.

SUPERIOR COURT OF JUSTICE

COUNSEL SLIP/ENDORSEMENT

COURT FILE NO.: **BK-21-2734090-0031** **HEARING DATE:** **Monday January 16, 2023**

NO. ON LIST: **2**

TITLE OF PROCEEDING: **IN THE MATTER OF THE NOTICES OF INTENTION TO MAKE A PROPOSAL OF YG LIMITED PARTNERSHIP AND YSL RESIDENCES INC. OF THE CITY OF TORONTO, IN THE PROVINCE OF ONTARIO**

BEFORE JUSTICE: **KIMMEL**

PARTICIPANT INFORMATION

For Plaintiff, Applicant, Moving Party, Crown:

Name of Person Appearing	Name of Party	Contact Info
Matthew Milne-Smith	Counsel for KSV Restructuring Inc. (Proposal Trustee)	mmilne-smith@dwpv.com

For Defendant, Respondent, Responding Party, Defence:

Name of Person Appearing	Name of Party	Contact Info

For Other, Counsels:

Name of Person Appearing	Name of Party	Contact Info
Alexander Soutter	Counsel for Yonge SL Investment Limited Partnership	asoutter@tgf.ca
Mark Dunn	Counsel for Maria Athanasoulis	mdunn@goodmans.ca
Sarah Stothart	Counsel for Maria Athanasoulis	sstothart@goodmans.ca

Jason Berall	Counsel for Concord Properties Development Corp.	berallj@bennettjones.com

For Other, Counsels:

Name of Person Appearing	Name of Party	Contact Info
Shaun Laubman	Counsel for 2504670 Canada Inc., 8451761 Canada Inc., & Chi Long	slaubman@lolg.ca
Crystal Li	Counsel for 2504670 Canada Inc., 8451761 Canada Inc., & Chi Long	cli@lolg.ca

ENDORSEMENT OF JUSTICE KIMMEL:

Background to the Proposal Trustee's Motion for Directions

1. Maria Athanasoulis filed a proof of claim against YG Limited Partnership and YSL Residences Inc. (together, the "Debtor"). The proof of claim was filed in the context of a court approved proposal (the "Proposal") under the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (the "BIA") in respect of unsecured claims she asserts as follows (together, the "Athanasoulis Claim"):
    a. $1 million in respect of damages for wrongful dismissal (the "Wrongful Dismissal Claim"); and
    b. $18 million in respect of damages for breach of an oral agreement that Ms. Athanasoulis would be paid 20 percent of the profits earned on the YSL Project (the "Profit Share Claim").
2. The Debtor was developing the YSL Project, which was part of a broader development group controlled by Daniel Casey that used the brand name "Cresford".
3. As part of the Proposal that was eventually approved by the court on July 16, 2021, Concord Properties Developments Corp. (the "Sponsor") acquired the YSL Project and set aside $30.9 million to satisfy proven creditor claims, with the balance of that fund to be distributed to equity stakeholders (including the limited partners of the YG Limited Partnership, the "LPs").
4. My November 1, 2022 endorsement dealt with the Sponsor's obligation to fund administrative fees and expenses incurred by KSV Restructuring Inc. (the "Proposal Trustee") in connection with the resolution of the Athanasoulis Claim: see *YG Limited Partnership (Re)*, 2022 ONSC 6138 (the "Funding Decision").
5. The Funding Decision determined that the Sponsor was not obligated to fund phase 2 of an arbitration in which Ms. Athanasoulis and the Proposal Trustee had agreed to participate (the "Arbitration"). That determination was made on the basis that phase 2 of the proposed arbitration improperly delegated to the arbitrator the responsibility of determining the Athanasoulis Claim. In phase 2 of the arbitration, the arbitrator was asked to determine any damages payable in respect of the Wrongful Dismissal Claim and/or the Profit Share Claim, based on his findings in phase 1 of the arbitration (the "Phase 1 Arbitration Findings") that: Ms. Athanasoulis was wrongfully terminated (constructively dismissed) in December 2019 and that she had entered into a valid and enforceable oral profit sharing agreement that entitled her to 20 percent of the profits earned on any of Cresford's (including the Debtor's) current and future projects (the "Profit Sharing Agreement").
6. The Funding Decision determined that the Sponsor is obligated to indemnify the Proposal Trustee for Administrative Fees and Expenses (as defined in the Funding Decision) reasonably incurred to itself determine the Athanasoulis Claim.
7. The following specific orders and directions were provided in the Funding Decision with respect to the Proposal Trustee's determination of the Athanasoulis claim:

a. The Proposal Trustee shall reasonably determine and value the Athanasoulis Claim in a timely and principled manner. It will be afforded significant deference. All parties agree that it can use the Arbitration Award from phase 1 of the Arbitration and build on it so that time and effort is not wasted.
b. The Proposal Trustee shall, in its discretion, determine an appropriate procedure to receive the further evidence and submissions of Ms. Athanasoulis and other interested stakeholders. The Proposal Trustee may choose to share its proposed procedure with the other participating stakeholders and seek their input.
c. If expert inputs are deemed necessary to determine the Athanasoulis Claim, the Proposal Trustee may choose to invite expert evidence and input from Ms. Athanasoulis and then determine if it needs its own expert to review and comment upon what is provided.
d. The process by which the Proposal Trustee will determine the Athanasoulis Claim may need to account for the fact that the LPs are expected to advance claims that may require determinations from the Proposal Trustee and/or the court regarding the subordination and/or priority of their claims in relation to the Athanasoulis Claim, the enforceability of any proven Athanasoulis Claim as against them and the damages that they claim to be entitled to for alleged breaches of fiduciary and other duties and contractual obligations that they seek to set-off against the Athanasoulis Claim, if the Athanasoulis Claim is allowed.

8. In the Funding Decision, the court indicated that if the Proposal Trustee chose to share its proposed procedure for the determination of the Athanasoulis Claim with the Sponsor and/or other stakeholders, and if the parties require some further direction and assistance from the court, they may arrange a case conference before me.
9. The Proposal Trustee engaged in a consultative process with Ms. Athanasoulis, the Sponsor and the LPs about the procedure for determining the Athanasoulis Claim. There were fundamental points of disagreement, largely between Ms. Athanasoulis on one side and the Sponsor and the LPs on the other.
10. Based on the input received, the Proposal Trustee suggested the following compromise procedure for resolving the Athanasoulis Claim:
    a. The Proposal Trustee will issue a notice pursuant to ss. 135(2) and (3) of the BIA, substantially in the form of the draft attached as an appendix to its report (the "Notice of Determination"). Under the draft Notice of Determination, the Proposal Trustee would allow the Wrongful Dismissal Claim in part (in the amount of $880,000) as an unsecured claim but would disallow the Profit Share Claim in its entirety. The Proposal Trustee bases its Notice of Determination upon:
        i. the proof of claim, as filed;
        ii. all material on the record in these proposal proceedings to date, together with all material on the record in the proceedings by the LPs against YSL Residences Inc. et al in court file numbers CV-21-00661386-00CL and CV-21-00661530-00CL and some additional submissions provided by the LPs to the Proposal Trustee (that were initially not shared with Ms. Athanasoulis but eventually were shared with her counsel prior to the January 16, 2023 hearing);
        iii. the partial arbitration award of Mr. William G. Horton (the "Arbitrator") dated March 28, 2022 (the "Partial Award");
        iv. all material filed and produced, and all testimony given, in phase 1 of the Arbitration; and
        v. all responses received by the Proposal Trustee from counsel to the LPs and counsel to Ms. Athanasoulis in respect of any information requests made by the Proposal Trustee.
    b. Consistent with the Funding Decision, the Partial Award and factual findings and determinations therein form part of the "factual predicate upon which the determination of [Ms. Athanasoulis'] claim will proceed".
    c. Ms. Athanasoulis may file any appeal pursuant to s. 135 of the BIA.

d. In the appeal, Ms. Athanasoulis shall not be required to adduce detailed evidence valuing and quantifying her profit share claim, but may address any issues raised in the Notice of Determination.
e. The LPs shall be entitled only to raise issues in the appeal that pertain directly to: (a) whether the LPs must be repaid in full prior to any payments being made on the Athanasoulis Claim; and (b) the enforceability of any element of the Athanasoulis Claim given the terms of the Limited Partnership Agreement (a point not decided in the Arbitration that may be separately advanced by the LPs if the enforceability is being argued on an appeal).
f. Ms. Athanasoulis will be entitled to make a full response to any materials filed by the LPs in this regard.
g. The LPs shall not be entitled to raise issues relating to any counterclaim or set-off that they may assert against Ms. Athanasoulis. Such issues will be addressed, if necessary, at a future distribution motion (see below), after the LPs breach of contract, tort and other claims against Ms. Athanasoulis have been decided in the separate legal proceedings in which they are being advanced (the "LP's Claims").
h. To the extent that the decision on appeal finds that a debt is owing and payable to Ms. Athanasoulis under her Profit Sharing Agreement, then a summary trial to quantify her damages will be scheduled.
i. Thereafter, if the Profit Share Claim is proven and determined to have any value then the LPs priority, subordination, and set-off arguments (in turn, dependent upon the determination of the LP's Claims against Ms. Athanasoulis being pursued in separate proceedings) can be raised for consideration in the context of any proposed distribution in respect of the Profit Share Claim.

11. None of the other stakeholders wholly accepted or endorsed the Proposal Trustee's compromise procedure. Thus, the Proposal Trustee requested a case conference (held on December 21, 2022) at which the Proposal Trustee's within motion for directions regarding the procedure for determining the Athanasoulis Claim and related issues was scheduled. Despite the Proposal Trustee's discretion to determine the procedure and impose it on the stakeholders, it was appropriate for the Proposal Trustee bring this motion for directions given the divergent positions and competing interests at stake.

The Competing Positions

12. Each stakeholder filed extensive materials on this motion. The focus of the motion, the submissions and this endorsement are on the procedure for determining the Profit Share Claim and any appeal therefrom. The procedure for the determination of the Wrongful Dismissal Claim and any appeal therefrom, and the positions of the parties regarding that procedure, will be addressed at the end of this endorsement.

a) The Proposal Trustee's Position

13. The Proposal Trustee's position, reflected in its suggested, and rejected, compromise, is as follows:
    a. The Proposal Trustee says that it does not require any further evidence or submissions to make its determination to disallow the Profit Share Claim. It anticipates that it will disallow the Profit Share Claim for the reasons set out in its draft Notice of Determination, as follows:
        i. The Profit Share Claim is, in substance, a claim in equity, rather than in debt, and is therefore not a provable claim under s. 121(1) of the BIA.
        ii. The Profit Sharing Agreement was to be based on profits calculated using *pro forma* budgets, to be paid by the project owner when earned, usually upon the completion of a project (according to the Phase 1 Arbitration Findings). Under the Proposal, the YSL Project was effectively transferred to the Sponsor and the Debtor could no longer earn profits. As of the date of the Proposal, the Debtor had not completed the YSL Project. It

was nothing more than a hole in the ground, such that there was no profit earned or to be shared by the Debtor at that time.

iii. Insofar as the Athanasoulis Claim relies on projected future profitability of the YSL Project as a contingent claim as at the date of the Proposal, that contingent and unliquidated claim is too speculative, and the alleged damages are too remote, to be considered a provable claim or subject to any meaningful and reasonable computation. Therefore, the claim is valued at zero dollars.

iv. Any claim by Ms. Athanasoulis for unrealized hypothetical gains (future profitability) of the YSL Project prior to the Proposal, dating back to the date of her wrongful termination, is inconsistent with the Phase 1 Arbitration Findings that profits were only payable under the Profit Sharing Agreement when earned at the completion of the YSL Project.

v. Even if she could predicate her claim on earned but unrealized profits at a point in time, Ms. Athanasoulis has admitted under oath that any entitlement she may have to a profit share would arise only after the LPs are repaid their original investment, and the Profit Share Claim is therefore subordinated to the LP's Claims since the LPs will not be receiving a full return of their equity investment in the YSL Project.

b. On this basis the Proposal Trustee suggests that it should issue its Notice of Determination based on the identified matters of principle and law, Ms. Athanasoulis should then appeal that determination (within the 30 days prescribed under s. 135(4) of the BIA) and the appeal should be decided based on the reasons provided for the disallowance in the Notice of Determination. This defers the significant time and expense that will be incurred to value the aspects of the Athanasoulis Claim that are dependent on the future profitability of the YSL Project (whether as at the date of her wrongful termination in December 2019 or as at the date of the Proposal) that will entail further evidence and expert analysis, at least until it is determined on appeal whether the Profit Share Claim is a provable claim.

c. The valuation of the Athanasoulis Claim, if found on appeal to be provable, will be determined in a summary trial thereafter, only if necessary.

d. The priorities, set-offs and other arguments of the LPs in relation to the Athanasoulis Claim will be determined in a later distribution hearing.

b) Ms. Athanasoulis' Position

14. Ms. Athanasoulis does not accept the Proposal Trustee's determination that her claim is a claim in equity, although she does not dispute that her appeal of that ground of disallowance could be argued based on the existing record (as defined by the Proposal Trustee).

15. However, Ms. Athanasoulis does not accept the Proposal Trustee's premise that profits were only payable upon completion of the YSL Project. This leads her to a different view of what is required for the determination of her Profit Share Claim on any appeal, because:

    a. She claims that the damages from her Profit Share Claim (in other words, its value) should be calculated as at the date she was wrongfully terminated from her employment (the repudiation date), or as of the Proposal Date, based on the real and significant chance that existed at that time that the YSL Project would ultimately generate profits ("Future Oriented Damages").

    b. Alternatively, she maintains that there is a distinction between earned vs. realized profits, and that her Profit Share Claim can be proven and valued based on "earned profits" even if none were realized because of the Proposal. She claims to have already received documents from the Debtor in the Arbitration that establish that, as of the date of the Proposal, the expenses of the YSL Project did not exceed its revenues, which she points to as an indication that it was "profitable" at least in that sense. Further, she claims to have documents evidencing the withdrawal or distribution of funds (profits) to others prior to the date of the Proposal. These are not future oriented profit

calculations, and could be proven without the time and expense of significant further evidence, including from experts.

16. Ms. Athanasoulis seeks to appeal all of the grounds upon which the Proposal Trustee intends to disallow her Profit Share Claim. If successful, she will ask the court to value her entitlements. She says that, while she has some of the necessary documents that she could submit now, she requires further disclosure from the Debtor and/or Cresford and others to establish the value of her Profit Share Claim (which she had anticipating obtaining in phase 2 of the Arbitration process). Ms. Athanasoulis asks that the court either order that disclosure and permit her to complete the evidentiary record before she is required to appeal the disallowance of her Profit Share Claim, or to declare now that the appeal will be *de novo* and she will be at liberty to put in further evidence on the appeal.
17. Further, Ms. Athanasoulis challenges the premise of the Proposal Trustee's suggested procedure since its purported efficiency (in terms of time and cost savings) will only be achieved if she loses on appeal. If she wins, there will be at least three separate steps beyond the appeal itself:
    a. The valuation of her claim at a summary trial.
    b. The determination of the LPs damages in a separate proceeding, and then the determination of any entitlement that they have to set-off.
    c. A distribution hearing (at which priorities will be determined).
18. Ms. Athanasoulis argues that the Proposal Trustee's suggested incremental process is inefficient and not in keeping with the principles of speed, economy and finality that s. 135 of the BIA demands of a trustee in the determination and valuation of claims.
19. At the hearing of this motion, Ms. Athanasoulis conceded that there might be a way to defer the briefing and argument of her Future Oriented Damages claims until after the determination of the appeal of whether the Profit Share Claim is a provable claim with a value of more than "zero".
20. Ms. Athanasoulis challenges the LPs standing to participate in the appeal of the disallowance of the Athanasoulis Claim on any matters that are being addressed by the Proposal Trustee. However, she submits that since there is overlap between the priority and subordination issues as between the Profit Share Claim and the LPs allegation against her for breach of contract and misrepresentation, she considers it to be most expeditious for the LP's Claims to be adjudicated all at once in this proceeding to avoid a multiplicity of proceedings in respect of overlapping claims.

c) The LPs' and Sponsor's Positions

21. The LPs' and the Sponsor's positions are largely aligned. Coming into the motion, they both argued that it was premature and unnecessary for any directions to be provided by the court, in particular (for the LPs) with respect to limiting the scope of the participation in the appeal. However, once at the hearing, all were content to make submissions and receive the court's advice and directions so that the matter can move forward.
22. The LPs and Sponsor oppose the suggestion that the court can now order that Ms. Athanasoulis' appeal of the disallowance of her claim be heard as a *de novo* appeal. They contend that under s. 135 of the BIA, an appeal is to be a true appeal, and not *de novo*, unless the court is satisfied that there was some unfairness in the process of the determination of the claim under appeal.
23. Neither the Sponsor nor the LPs expect to be providing any further evidence or submissions if the Proposal Trustee's suggested process is adopted. They have no objection to the court allowing Ms. Athanasoulis to file further evidence and submissions addressing the specific grounds of disallowance, the points raised in the LPs further brief and submissions on the issues of enforceability of the Profit Share Agreement under the Limited Partnership Agreement and/or on the issues of subordination and priority. They invite Ms. Athanasoulis to file further evidence relevant to the Proposal Trustee's grounds for its determination to disallow her Profit Share Claim so that the record is complete before the Notice of Determination is formally issued and she can then appeal (a true appeal) based on that record.

24. The Sponsor and the LPs agree with the Proposal Trustee that the valuation questions (including any further factual or expert evidence to decide those questions) ought to be deferred with further directions to be provided when the appeal is decided, if necessary, as to how the Athanasoulis Claim will be valued and finally determined if the preliminary grounds of disallowance are not found to preclude the proof of her Profit Share Claim. The parties concede that further evidence will be required if the Profit Share Claim is to be valued.
25. The Proposal Trustee suggests the LPs play a limited role in the appeal process since the stated grounds for disallowance would only engage issues associated with their claims insofar as they relate to their entitlement to be repaid in full prior to any payments being made on the Athanasoulis Claim and the enforceability of any element of the Athanasoulis Claim given the terms of the Limited Partnership Agreement.
26. Other aspects of the LPs' Claims and their claimed set-off would only arise in the event that the Athanasoulis Claim is allowed and valued above zero (upon or after any appeal). The LPs maintain that the LP's Claims cannot be determined in these bankruptcy proceedings. However, they acknowledge that there may be some overlap with the subordination/priority arguments that they seek to advance in relation to the determination of the Athanasoulis Claim and the LP's Claims being prosecuted outside of these proceedings. To that extent, they recognize that there may be some issues that, if determined in this process, will become *res judicata* and subject to issue estoppel in the LP's Claims civil proceeding. They are prepared to accept that outcome.
27. The LPs are not content with the restricted role suggested for them by the Proposal Trustee in the appeal process. They contend that they should have full party standing on all issues if there is to be an appeal. They have also requested the opportunity to respond to any further evidence or submissions provided by Ms. Athanasoulis to the Proposal Trustee in support of her claim.

Analysis and Directions – Profit Share Claim

28. The following issues require advice and direction from the court regarding the procedure for determining the Profit Share Claim:
    a. Can and should the court provide directions now about whether the appeal of the Proposal Trustee's disallowance of the Profit Share Claim will be a true appeal or an appeal *de novo*?
    b. What will the appeal record be comprised of if it is not an appeal *de novo*?
        i. Should Ms. Athanasoulis be permitted to obtain additional evidence by way of production from the Debtor and/or Cresford or others and an examination for discovery of a representative of them?
        ii. Should Ms. Athanasoulis be permitted to submit additional evidence and make further submissions before a final Notice of Determination is issued so that it is available to be considered by the Proposal Trustee and in the context of any appeal from the Notice of Determination?
    c. What issues will the LPs have standing to participate in on the appeal?
    d. What directions should the court provided regarding the procedure to be followed for the determination of the Profit Share Claim?

a) True Appeal or Appeal de novo

29. The default for appeals of a trustee's decision under s. 135 of the BIA is that appeals are to proceed as true appeals, based on the materials relied upon by the trustee in its decision, and not *de novo*: see e.g. *Galaxy Sports Inc. (Re)*, 2004 BCCA 284, 29 B.C.L.R. (4th) 362, at para. 40; *Asian Concepts Franchising Corporation (Re)*, 2017 BCSC 1452, 51 C.B.R. (6th) 313, at para. 24. This is in keeping with the efficient and cost-effective administration of bankrupt estates and the objective of the BIA to enable parties to

have their rights and claims determined in an expeditious fashion: see *Credifinance Securities Limited v. DSLC Capital Corp.*, 2011 ONCA 160, 74 C.B.R. (5th) 161, at para. 26.

30. The court has discretion to conduct an appeal *de novo* "if the Trustee committed an error or the interests of justice require it": *Bambrick (Re)*, 2015 ONSC 7488, 32 C.B.R. (6th) 228, at para. 18. An appeal *de novo* may be ordered where to proceed otherwise would result in an injustice to the creditor: see *Credifinance*, at paras. 1, 18, 24.
31. However, there is no basis for finding that there will be an injustice to Ms. Athanasoulis without an appeal *de novo*, or that the interests of justice require an appeal *de novo*. She was invited to provide further evidence and make further submissions if she wishes to do so before the Proposal Trustee makes the final determination of whether the Profit Share Claim is provable. No one opposes this. All parties agree that Ms. Athanasoulis should be provided with all material that the Proposal Trustee has received in connection with the Athanasoulis Claim, including material received from the LPs in December 2022 that was not initially provided to her but now has been.
32. I do not agree with Ms. Athanasoulis' submission that there is an inherent injustice in the claims process simply because the Proposal Trustee originally agreed to arbitrate the entirety of her claim. The court ruled that procedure was an improper delegation of the Proposal Trustee's duty to determine whether the Athanasoulis Claim is provable and, if so, to value it. There is no injustice in the procedure for the determination of her claim being reset now, even if that means that the Profit Share Claim may not be fully valued (in respect of her Future Oriented Damages claims) until the determination of whether it is a provable claim and/or that it does not have a value greater than zero has been appealed and, only then, if she is successful.
33. Nor do I agree that the Proposal Trustee's participation in phase 1 of the Arbitration and advocating for an outcome that is now reflected in its draft Notice of Determination creates an inherent injustice by allowing the Proposal Trustee to determine that her Profit Share Claim is not provable and should be disallowed. The Proposal Trustee intends to do so on similar grounds to those that it was urging the Arbitrator to consider to reach that same determination in the Arbitration. The fact that the Proposal Trustee had urged the Arbitrator to reach the same determination on the same grounds that the Proposal Trustee has now determined that the Profit Share Claim is not a provable claim, or should be valued at zero, does not derogate from the integrity of that determination. The Proposal Trustee is a court appointed officer. There is nothing in the record before the court to suggest that the Proposal Trustee did not impartially and fairly reach its determination regarding the Profit Share Claim.
34. Ms. Athanasoulis' concern about the injustice of a true appeal is predicated on her preclusion from filing any further evidence or submissions in support of the Athanasoulis Claim before the Notice of Determination is formally issued. In circumstances where a creditor has not had a full opportunity to put forward its claim or to respond to the disallowance of a trustee, or the interests of justice otherwise require it, an appeal *de novo* may be appropriate: see *Credifinance*, at para. 24; *Charlestown Residential School, Re*, 2010 ONSC 4099, 70 C.B.R. (5th) 13; *Poreba, Re*, 2014 ONSC 277, at para. 27. See also *Bambrick*, at paras. 16-18.
35. In any event, this claimed prejudice can be avoided by the directions that the court provides in this endorsement regarding additional evidence and submissions to be filed by Ms. Athanasoulis before the Notice of Determination is finalized. Ms. Athanasoulis raises a secondary concern about the delay that this procedure will entail while she gathers the necessary evidence. Notably, much of the anticipated delay would be for the retention and instruction of experts in connection with her Future Oriented Damages claims, that she has acknowledged could be deferred until after the appeal as long as her rights are preserved. However, some delay will be inevitable, particularly because, to avoid the prospect of any injustice, the Proposal Trustee will also be required to review and consider any such new evidence filed before making the final decision and issuing its Notice of Determination.
36. I prefer to provide advice and directions now with a view to avoiding these injustices. In a complicated situation such as this, in which it is acknowledged that there are stakeholders with specific interests and

evidence, it makes sense that a process be put in place to create a complete record for the Proposal Trustee's determination and for any appeal.

37. I am not prepared to provide any directions now about whether any appeal taken from the final Notice of Determination issued by the Proposal Trustee will proceed *de novo*, rather than presumptively as a true appeal. If some injustice or prejudice ensues, those concerns will have to be raised with the appeal court.

b) The Appeal Record: Further Discovery and Evidence

38. Section 135(1.1) of the BIA requires the Proposal Trustee to determine whether any contingent claim or unliquidated claim is provable and, if provable, the Proposal Trustee shall value it. The wording of this section at least allows for the possibility that the determination of whether a claim is provable might happen before the claim is valued.
39. Ms. Athanasoulis was understandably concerned with the suggested procedure for determining the Athanasoulis Claim, in which the Proposal Trustee would issue its Notice of Determination of the Profit Share Claim based on the record to date and Ms. Athanasoulis would appeal that disallowance based on the existing record. When the court concluded that phase 2 of the Arbitration amounted to an improper delegation of the Proposal Trustee's responsibility for determining the Athanasoulis Claim, it was not intended that Ms. Athanasoulis be precluded from relying on any further evidence in support of the proof of her Profit Share Claim. Up until that time, she had quite justifiably assumed that there would be an opportunity for her to support her claim through the agreed upon arbitration process, which was cut short because of my Funding Decision, through no fault of her own.
40. A trial-like procedure is not something that a claimant in a bankruptcy proceeding is entitled to, nor is it the norm. The proposed expansion of the Arbitration into that type of trial-like process is in part to blame for the court's decision to put an end to that process. The s. 135 claims process under the BIA is "intended to be an efficient and summary process" for the determination of claims: *Asian Concepts Franchising Corporation (Re)*, 2018 BCSC 1022, 62 C.B.R. (6th) 123, at para. 53.
41. That said, the court recognizes that the Profit Share Claim is the most significant claim in this bankruptcy proceeding and that it is a complex fact-dependent claim. If there is information and documents to support the Athanasoulis Claim that she anticipated having the ability to obtain from the Proposal Trustee or the Debtor and/or Cresford in the context of the Arbitration, it is reasonable to make some accommodation to enable her to access that information and documentation and include it with the material that the Proposal Trustee will be asked to consider and that will be in the record for appeal purposes.
42. While all parties recognize that there may be some efficiency in carving out the Future Oriented Damages from the Profit Share Claim pending the determination of whether it is a provable claim under s. 135(1.1) of the BIA, there remain aspects of the procedure suggested by the Proposal Trustee that are too limiting and unfair to Ms. Athanasoulis. They include:
    a. Having been advised of the grounds upon which the Proposal Trustee intends to determine that the Profit Share Claim is not a provable claim, Ms. Athanasoulis should be permitted to put the evidence that she relies upon to counter the identified grounds for this determination.
    b. Similarly, having now just received the materials and submissions provided by the LPs to the Proposal Trustee in respect of the positions they seek to assert on the question of whether the Profit Share Claim is a provable claim and on the question of the subordination of that claim to the LPs' interests which they say should be given priority, fairness requires that Ms. Athanasoulis be given the opportunity to put into the record any evidence and submissions that she relies upon to counter the LPs' positions.
43. A procedure must be established that will ensure that the evidence that Ms. Athanasoulis seeks to rely upon is available in an established record before the Proposal Trustee makes its determination of whether the Profit Share Claim is provable.
44. Under a reservation of rights, the valuation of the Future Oriented Damages included in the Profit Share Claim (beyond the ascribed "zero" valuation by the Proposal Trustee for reasons that do not involve an

actual valuation) can be deferred, along with all evidence and submissions about the calculation of these Future Oriented Damages, until after the appeal of the Proposal Trustee's determination to disallow it.

45. As mentioned earlier, during oral argument, counsel for Ms. Athanasoulis agreed that it might be more efficient and economical to defer the valuation of her Future Oriented Damages claims (based on the repudiation date or the date of the Proposal), given that those valuations will be dependent upon expert input, until the appeal of the determination of whether the Profit Share Claim is provable on the principled/legal grounds (equity vs. profit, earned vs. realized profits and subordinated to the LPs' Claims) has been decided (with a reservation of her right to pursue those Future Oriented Damages if the appeal succeeds).
46. In addition to evidence that Ms. Athanasoulis may already have and that could be compiled for submission to the Proposal Trustee, she has identified further evidence that she may need to obtain from the Debtor (and/or Cresford). For example, evidence to counter the Proposal Trustee's determination that the Profit Share Claim is to be valued at zero predicated on the assumption that there were no profits in the YSL Project at, or at any time prior to, the date of the Proposal (because it was not built). Ms. Athanasoulis is entitled to test that determination. To do so she may need additional production from the Debtor and/or Cresford of historic financial documents, beyond those that she has already received. Insofar as the Proposal Trustee is in control of any of the Debtor's records that Ms. Athanasoulis may ask for, it too may be required to produce documents to Ms. Athanasoulis.
47. I agree with Ms. Athanasoulis that if the goal is to create a record now that can be used for a true appeal, the issues identified in the Proposal Trustee's draft Notice of Determination warrant an opportunity for a further exchange of materials and some (circumscribed and limited) cross-examinations so that there is a complete record for the appeal.
48. While the claims process is intended to a summary process and not a full adjudicative process with a trial, this is a complex claim with a multitude of competing interests. Fairness requires that Ms. Athanasoulis be given access to documentary records (and a witness from the Debtor or Cresford who can explain/prove them, if necessary) that she needs to prove her claim and counter the grounds upon which it is expected to be ruled by the Proposal Trustee not to be provable.
49. The court has the jurisdiction to order this under its general discretionary powers in s. 183(1)(a) of the BIA. See also *Toronto-Dominion Bank v. Brad Duby Professional Corporation*, 2022 ONSC 6066, at para. 33. In this instance, the use of those powers in the unique circumstances of this case is appropriate to ensure procedural fairness in the determination of the Athanasoulis Claim and any appeals that may arise from the Proposal Trustee's determination.

c) Standing of the LPs on the Appeal of the Profit Share Claim Disallowance

50. The LP's Claims are not part of this proceeding, except to the extent that they are relevant to the identified grounds for the Proposal Trustee's intended disallowance of the Profit Share Claim. I cannot accede to the request from Ms. Athanasoulis to order the LP's Claims to be adjudicated on their merits in this proceeding, absent the consent of the LPs, which is not forthcoming.
51. The Proposal Trustee suggests that the LPs be entitled only to raise issues in the appeal that pertain directly to: (a) whether the LPs must be repaid in full prior to any payments being made on the Athanasoulis Claim (the enforceability of the Profit Share Claim as against the LPs, which in turn is tied into preliminary questions of subordination and priority); and (b) the enforceability of any element of the Athanasoulis Claim given the terms of the Limited Partnership Agreement."
52. The LPs argue that because they would be the ones most immediately and directly impacted by any aspect of the Athanasoulis Claim that is allowed, and by the value ascribed to any allowed claim, they should have full participation rights on all issues. At some level, every creditor has an interest in minimizing or eliminating the claims of other creditors on equal footing. That is not a reason to grant the LPs advance standing on an appeal, or even to give them full standing in the determination of the Athanasoulis Claim.

53. The Proposal Trustee's suggestion is reasonable and strikes the appropriate balance. Subject, always, to the discretion of the judge hearing the appeal, I see no reason to grant the LPs *carte blanche* to double down on all the arguments already being made by the Proposal Trustee. The LPs have a legitimate interest in bringing forward any unique evidence, claims and arguments that they can offer, but not to duplicate or pile onto arguments already being made by the Proposal Trustee.
54. I consider this situation to be distinguishable from another situation that arose in this case, in relation to a different proof of claim: see *YG Limited Partnership and YSL Residences Inc.*, 2022 ONSC 6548 (now under appeal). In that circumstance, the LPs were held not to have any standing to participate in the adjudication of a creditor's claim at the *de novo* appeal of a claim filed by CBRE involving a contract that the LPs had no involvement in or evidence to offer in respect thereof. The justification for not granting the LPs standing in that situation was fact specific (as it often is). Notably, as well, no one in the circumstances of this case is suggesting that the LPs should have no standing to address any issues on appeal.
55. Here, the LPs have been afforded standing to provide evidence and make submissions to the Proposal Trustee in connection with the Notice of Determination regarding the "provability" of the Profit Share Claim. They have a unique perspective to offer with respect to their argument that the Profit Share Agreement should be found to be unenforceable because it is contrary to the Limited Partnership Agreement (a ground not relied upon by the Proposal Trustee but raised and therefore forms part of the record for appeal purposes that Ms. Athanasoulis must respond to).
56. The LPs may also have a unique perspective on the preliminary question of whether the Profit Share Agreement can be enforced in the face of Ms. Athanasoulis' admissions that she agreed with the LPs that they would be paid out before her. These unique perspectives have been placed before the Proposal Trustee; Ms. Athanasoulis will be permitted to respond to and challenge them, and they will be "in play" on any appeal.
57. Subject to the discretion and views of the judge hearing the appeal, I would anticipate that the LPs will have at least some status at the appeal to address at least these points, but perhaps not beyond them.
58. Finally, the certainty and finality that the determination of these issues will bring is important because of the LP's Claims outside of this proceeding. The LPs need to be given standing to participate in order for an issue estoppel to arise so as to prevent the re-litigation of the same points in the context of the LP's Claims.
59. For all these reasons, it is anticipated that the LPs will be afforded an opportunity to participate on the appeal to the extent of any unique or added perspective or submissions that they have that are not advanced by the Proposal Trustee, or that the Proposal Trustee defers to the LPs on. In contrast, the LPs should not expect to be permitted to make submissions on points already being addressed by the Proposal Trustee, such as, the argument that the Profit Share Claim is a claim in equity, not a debt owing by the Debtor.
60. The LPs asked to be afforded the opportunity to make further submissions in response to Ms. Athanasoulis' further evidence and submissions. I do not consider that to be necessary or appropriate. However, if the Proposal Trustee asks them for further information or documents after receiving the further evidence and submissions from Ms. Athanasoulis, whatever the LPs provide must be given to Ms. Athanasoulis as well.

d) Directions Regarding the Procedure for the Determination of the Profit Share Claim

61. Having considered all the written and oral submissions received, and in the exercise of my discretion, the following directions are provided in respect of the suggested procedure by the Proposal Trustee for the determination and appeal of the Profit Share Claim:
    a. Within one week of the release of this endorsement, Ms. Athanasoulis will be provided with a complete record of all evidence and submissions received from other stakeholders in connection with the Proposal Trustee's draft Notice of Determination with respect to her Profit Share Claim.

This may have already occurred by the delivery of materials previously provided by the LPs to the Proposal Trustee just prior to the hearing of this motion; however, in the interests of completeness a further week is being afforded to ensure that she has now been provided with all materials.

b. Within two weeks of the release of this endorsement, Ms. Athanasoulis may make reasonable and targeted document requests from the Proposal Trustee, the Debtor and/or Cresford, or any other participating party for documents that she does not have and claims she needs to support the proof of the Athanasoulis Claim and to establish that it should be valued at more than "zero" (for example, in support of any grounds upon which she challenges the Proposal Trustee's determination that there were no profits in the YSL Project as at the date of the Proposal or at any time prior to that date).
c. Ms. Athanasoulis' requests shall be responded to, and any documents that are in the possession, control or power of the Proposal Trustee or the Debtor and/or Cresford shall be provided, within three weeks of any such request.
d. Within two months of the release of this endorsement, Ms. Athanasoulis shall deliver her submissions and a supplementary record containing any further evidence that she relies upon in support of the Athanasoulis Claim or that she relies upon to challenge any determination that may be made to disallow her Profit Share Claim on the grounds that:
    i. it is equity, not debt;
    ii. the YSL Project did not generate any profits at, or at any time prior to, the date of the Proposal;
    iii. it is to be subordinated to the LPs return of equity (that will inevitably be subject to a shortfall) because of representations to that effect made to the LPs by Ms. Athanasoulis; and/or
    iv. it is not enforceable as against the LPs because it was entered into in breach of the Limited Partnership Agreement, breach of fiduciary duties owed to the LPs by the general partner and/or misrepresentations made to the LPs by Ms. Athanasoulis.
e. The Proposal Trustee may request further submissions, evidence or documents in respect of its consideration and assessment of the supplementary material provided by Ms. Athanasoulis, the Debtor, the LPs or elsewhere as it deems appropriate. Any such evidence or documents shall be requested by the Proposal Trustee and provided to Ms. Athanasoulis within four weeks of the delivery of her supplementary record.
f. Within two weeks after the provision of any further evidence or documents received by the Proposal Trustee (or the deadline for so doing),
    v. the Proposal Trustee may question (by way of an examination under oath) Ms. Athanasoulis about any evidence or submissions she provides in support of the proof of the Athanasoulis Claim;
    vi. Ms. Athanasoulis may examine a representative of the Debtor and/or Cresford under oath on the question of whether there were any profits in the YSL Project as at the date of the Proposal or at any time prior to that date.
g. The Proposal Trustee shall deliver to all interested parties its final Notice of Determination in accordance with s. 135(3) of the BIA (which may, in the Proposal Trustee's discretion, be revised from the draft Notice of Determination previously delivered, taking into account the additional evidence and submissions it receives) within two weeks of the completion of any questioning/cross-examinations (or the date for their completion having lapsed).
h. Ms. Athanasoulis may thereafter appeal the Proposal Trustee's Notice of Determination and its anticipated disallowance of any aspect of the Athanasoulis Claim in the normal course in accordance with s. 135(3) of the BIA.
i. Subject to the discretion of the appeal judge, the LPs standing on the appeal shall be limited to submissions in respect of the impact of the prohibition contained in the Limited Partnership Agreement on non-arm's length agreements (such as the Profit Sharing Agreement), on the

question of enforceability of the Profit Share Claim and in respect of the priority/subordination of the Profit Share Claim to the LPs recovery of their initial investment based on alleged breaches of contractual and fiduciary duties and alleged misrepresentations.

j. If the parties require further directions or clarifications from the court as they progress through these steps, a case conference may be requested before me through the Commercial List scheduling office.

62. I realize that this will result in a number of months delay in the ultimate determination of the Athanasoulis Claim before any appeal; however, it is still a far less cumbersome process than what was contemplated by the Arbitration, and it is a process that places the determination of the provability of the Athanasoulis Claim, and its valuation, in the hands of the Proposal Trustee.
63. To be clear, it is not expected that there will be any material or submissions at this time regarding the Future Oriented Damages (whether calculated at the repudiation date or the Proposal date). If Ms. Athanasoulis is successful on appeal of any disallowance of the Profit Share Claim, the parties shall make an appointment for a case conference before me (if my schedule permits within the time frame requested) to seek directions about the process for the determination of the more complex valuation question that will likely require expert input.

Analysis and Directions – Wrongful Dismissal Claim

64. The Proposal Trustee allowed the Wrongful Dismissal Claim in part and valued it at $880,000. $120,000 was discounted because the Proposal Trustee determined that this amount had already been paid to Ms. Athanasoulis in the context of another proceeding. It has not been suggested that there is a need for further evidence or submissions in respect of the Proposal Trustee's determination of this claim reflected in the draft Notice of Determination. If Ms. Athanasoulis has further evidence or submissions on the narrow question of whether she has already received $120,000 on account of this claim, those may be provided to the Proposal Trustee when she delivers her supplementary record in connection with the Profit Share Claim (as indicated in the previous section, to be provided within two months of this endorsement).
65. The issues raised for the court's consideration in respect of this aspect of the Athanasoulis Claim are:
    a. Whether the LPs have standing in respect of the determination of the Wrongful Dismissal Claim.
    b. Should the allowed portion of this claim be paid out in a manner consistent with other employee claims, or deferred until the appeal and other steps in the determination of the entire Athanasoulis Claim have been resolved?
66. The Proposal Trustee is of the view that the LPs have no standing with respect to the Proposal Trustee's determination of the Wrongful Dismissal Claim for the reasons set out in the decision of Osborne J. in respect of the CBRE claim (discussed earlier in this endorsement at paragraph 54, *YG Limited Partnership and YSL Residences Inc.*). The Proposal Trustee is aware that certain of the LPs have appealed this decision.
67. There has been no indication that the LPs have any unique perspective or evidence to offer in respect of this issue (unlike the Profit Share Claim, where they do, and have accordingly been afforded rights of participation commensurate with their unique perspective and evidence). I do not see any basis on which they should be involving themselves in the determination or valuation of the Wrongful Dismissal Claim.
68. It will be a matter for the Proposal Trustee to decide, but it was indicated at the hearing that the "allowed" portion of the Wrongful Dismissal Claim will be treated in same way as "like" employee claims which, if not appealed, have been paid out at 70 cents on the dollar.

Costs and Final Disposition

69. The Proposal Trustee does not seek costs from any party in respect of this motion.

70. Ms. Athanasoulis and the LPs asked that the court reserve to the parties the ability to request their costs of this motion if there is a future adjudication of costs in connection with the determination and valuation of the Athanasoulis Claim. That makes sense and I so order.
71. The Court's orders and directions are set out in paragraph 61 in the previous sections of this endorsement and will not be repeated. This endorsement and the orders and directions contained in it shall have the immediate effect of a court order without the necessity of a formal order being taken out. Any party may take out a formal order by following the procedure under r. 59.

Kimmel J.

February 10, 2023

9615334 CANADA INC.
AS GENERAL PARTNER FOR AND ON BEHALF OF
YG LIMITED PARTNERSHIP

– and –

2503425 ONTARIO LIMITED

SALES MANAGEMENT AGREEMENT

Yonge & Gerrard
Toronto, Ontario

THIS SALES MANAGEMENT AGREEMENT made as of the 16th day of February, 2016.

AMONG:

9615334 CANADA INC., a corporation incorporated under the laws of the Province of Ontario, as general partner for and on behalf of **YG LIMITED PARTNERSHIP** (hereinafter referred to as the "**Owner**"),

– and –

2503425 ONTARIO LIMITED, a corporation incorporated under the laws of the Province of Ontario (hereinafter referred to as the "**Sales Manager**").

WHEREAS the Owner and the Sales Manager have agreed to enter into this Agreement for the Sales Manager to act on behalf of the Owner in connection with the marketing and sale of the Dwelling Units to be constructed on the Property;

NOW THEREFORE, in consideration of the mutual covenants and agreements set forth herein and the sum of $1.00 paid by each party hereto to the other party hereto (the receipt and sufficiency of which is hereby acknowledged by each party hereto), the parties hereto covenant and agree as follows:

ARTICLE 1
CONSTRUCTION

1.1 Definitions

In this Agreement unless there is something in the subject matter or context inconsistent therewith, the following words shall have the respective meanings set forth in this Section 1.1:

"**Affiliate**" has the meaning set out in the Partnership Agreement;

"**Accounting Standard**" has the meaning set out in the Development Management Agreement.

"**Approved by the Owner**" means the written approval, whether by resolution or otherwise, of the Owner and "Approval by the Owner", "Approved" and "Approve" and similar terms will have corresponding meanings;

"**Bad Boy Act**" has the meaning set out in Section 6.6(c).

"**Business Day**" means any day other than a Saturday, Sunday or statutory or civic holiday in the Province of Ontario and British Columbia;

"**Claims**" means any and all debts, dues, accounts, claims, costs, charges, losses, liabilities, obligations, fees, fines, penalties, interest, deficiencies, expenses, damages of any and every nature and kind whatsoever and howsoever arising, at law or equity, including but not limited to loss of value, together with any and all actions, causes of action, suits, proceedings, demands,

claims, costs, legal and other expenses related or incidental thereto, including legal expenses on a substantial indemnity basis and any amounts paid to settle an action or a claim or to satisfy a judgement; "**Claim**" has a corresponding meaning.

"**Commencement of Construction of the Project**" means the date on which excavation first commences for the foundations for the Project;

"**Completion of Construction**" means the date that all contracts with respect to the construction of the Project have been substantially performed within the meaning of the *Construction Lien Act*, Ontario;

"**Condominium**" has the meaning set in the Partnership Agreement.

"**Condominium Act**" means the Condominium Act 1998, S.O. 1998, as amended and the regulations promulgated thereunder.

"**Construction Management Agreement**" means the construction management agreement of even date herewith between the Construction Manager and the Owner, with respect to the construction of the Project, as may be amended, modified, supplemented, restated or replaced from time to time;

"**Construction Manager**" means 2503425 Ontario Limited, any permitted successor or permitted assign and any replacement construction manager appointed in accordance with the provisions of the Partnership Agreement and Shareholders Agreement;

"**Default Notice**" has the meaning given thereto in Section 6.1 hereof;

"**Deposit Trust Agreement**" means the agreement between the Owner, the Escrow Agent and Tarion or the Surety, if applicable, pursuant to which all monies paid or payable by purchasers on account of agreements of purchase and sale relating to the Dwelling Units, together with all interest earned or accrued thereon, shall be held by the Escrow Agent in a trust account in accordance with the provisions of Section 81 of the Condominium Act;

"**Development Management Agreement**" means the development management agreement of even date herewith between the Development Manager and the Owner, with respect to the development of the Project, as may be amended, modified, supplemented, restated or replaced from time to time;

"**Development Manager**" means 2503425 Ontario Limited, and any permitted successor or permitted assign and any replacement Development Manager appointed in accordance with the provisions of the Partnership Agreement and Shareholders Agreement;

"Dwelling Units" means all of the residential dwelling units, storage units and parking units forming part of the Condominium. "Dwelling Unit" means any one of them;

"**Escrow Agent**" means a trustee of a class prescribed pursuant to the provisions of the Condominium Act or the Owner's solicitors;

"**Event of Default**" has the meaning given thereto in Section 6.2 hereof;

"**Financing**" has the meaning set out in the Development Management Agreement.

"**First Class Manager**" means a knowledgeable, competent and adequately staffed manager which (i) is acting prudently; and (ii) conducting its business in accordance with the best practices, processes and procedures which are in use from time to time by leading marketing managers in similar circumstances to the Project in the City of Toronto;

"**IFRS**" has the meaning set out in the Partnership Agreement.

"**Municipality**" means the City of Toronto;

"**Partner**" has the meaning set out in the Partnership Agreement;

"**Partnership Agreement**" means the limited partnership agreement of even date herewith among the Owner, 9615334 Canada Inc. as general partner, and Cresford Capital Corporation and bcIMC Real Estate (Yonge) Limited Partnership, as limited partners, as same may be amended and restated or supplemented from time to time;

"**Person**" means any individual, partnership, limited partnership, joint venture, syndicate, sole proprietorship, company or corporation with or without share capital, unincorporated association, trust, trustee, executor, administrator or other legal personal representative, governmental authority or entity however designated or constituted;

"**Project**" has the meaning set out in the Partnership Agreement;

"**Project and Rental Lands**" has the meaning set out in the Partnership Agreement;

"**Project Budget**" or "**Budget**" has the meaning set out in the Development Management Agreement.

"**Property**" means, collectively, the Project and Rental Lands, and the Project and all other improvements thereto and any and all other property, assets and rights arising out of or in connection with the Project and Rental Lands and the Project, but specifically excludes the Rental.

"**Quarterly Report**" has the meaning set out in the Development Management Agreement.

"**Sales Centre**" has the meaning given to such term in Section 4.2(k);

"**Sales Management Fee**" has the meaning given to such term in Section 3.1 hereof;

"**Sales Management Services**" has the meaning given to such term in Section 4.2 hereof;

"**Senior Management**" has the meaning set out in the Development Management Agreement.

"**Shareholders Agreement**" means the Shareholders Agreement of even date herewith among Cresford Holdings Limited and bcIMC Holdco (2007) Inc., as shareholders, governing the rights of the shareholders of 9615334 Canada Inc.;

"**Tarion**" means the Tarion Warranty Corporation;

"**Term**" has the meaning given to such term in Section 2.1 hereof;

"**Termination Notice**" has the meaning set out in Section 6.5 or hereof, as the context requires; and

1.2 Headings

Headings contained herein are inserted for convenience of reference only and are not to be considered for the purposes of interpretation.

1.3 Currency

All monetary references are to Canadian dollars.

1.4 Business Day

Any notice to be delivered or act to be performed under this Agreement on a day other than a Business Day, shall not be required to be delivered or performed until the first Business Day immediately following such day.

1.5 Further Assurances

The Owner and the Sales Manager, from time to time and upon every reasonable written request so to do, shall give, execute and deliver all such further assurances as may be required for more effectually implementing and carrying out the true intent and meaning of this Agreement.

1.6 Entire Agreement

This Agreement constitutes the entire agreement among the parties hereto with respect to the subject matter hereof and supersedes any prior understanding or agreement, whether or not in writing or expressed to be binding among them.

1.7 Accounting Principles

All calculations made or referred to herein shall be made in accordance with IFRS except where otherwise indicated herein. All reporting required to be made by the Sales Manager in this Agreement shall be prepared, to the extent applicable, in accordance with the Accounting Standards.

ARTICLE 2
TERM AND APPROVALS

2.1 Term

The Term of this Agreement (herein called the "**Term**") shall commence on the date of this Agreement and continue until the earlier of: (i) the date on which the Sales Manager completes its services hereunder and is paid in full for such services; and (ii) the date on which this Agreement is otherwise sooner terminated pursuant to the terms hereof.

2.2 Approvals

The Sales Manager will implement and carry out all decisions from time to time which are Approved by the Owner in respect of the Sales Manager's scope of responsibilities set out in this Agreement. Should any decision required to be made by the Sales Manager in respect of the Project not be specifically provided for in this Agreement, the Sales Manager will obtain the prior Approval of the Owner in respect of such decision, except in the case of an emergency situation, including a life threatening situation or a situation where the Project or any adjoining property is in imminent danger of suffering material damage, in which case the Sales Manager, acting reasonably, will take whatever minimum action is required to protect the Project from damage or the Owner from liability. Immediately thereafter, the Sales Manager will provide written notice to the Owner of the emergency and the Sales Manager's response.

ARTICLE 3
FEES

3.1 Sales Management Fees

In consideration of the Sales Management Services to be provided by the Sales Manager, the Owner shall pay to the Sales Manager a fee (the "**Sales Management Fee**") of four percent (4.0%) of the gross sale price (excluding HST), without duplication, for any Dwelling Unit (other than storage units and commercial parking units) that is sold by the Sales Manager or its agents or employees, which fee shall be payable to the Sales Manager as follows:

(a) prior to the commencement of sales of Dwelling Units, an advance in the amount of $40,000.00 per month to cover the costs associated with the Sales Manager's duties. The payment of such advances shall (i) commence on the first month following the date of this Agreement; and (ii) cease on the earlier of: (A) the date the Sales Manager has received $640,000 in Sales Management Fee advances; or (B) the Commencement of Construction. The total amount of the advances paid to the Sales Manager shall be set off against any Sales Management Fee payable to the Sales Manager pursuant to Section 3.1(b)(ii). For greater certainty: (i) where the Sales Management Fee payable to the Sales Manager pursuant to Section 3.1(b)(i) exceeds $40,000.00 in a given month, no advance shall be paid pursuant to this Section 3.1(a) for such month.

(b) with respect to purchase agreements entered into prior to the Commencement of Construction of the Project:

(i) 45% of the Sales Management Fee on a firm and binding purchase and sale agreement for a Dwelling Unit being entered into where the purchaser's rescission rights under the Condominium Act have expired;

(ii) 25% of the Sales Management Fee on Commencement of Construction of the Project less the aggregate Sales Management Fee advances paid to the Sales Manager pursuant to Section 3.1(a); and

(iii) the balance on closing of the sale of such Dwelling Unit, including the transfer of title thereto to the purchaser and the payment in accordance with the purchase agreement of the balance of the purchase price payable thereunder.

(c) with respect to purchase agreements entered into following Commencement of Construction of the Project:

(i) 70% of the Sales Management Fee on a firm and binding purchase and sale agreement for a Dwelling Unit being entered into where the purchaser's rescission rights under the Condominium Act have expired; and

(ii) the balance on closing of the sale of such Dwelling Unit, including the transfer of title thereto to the purchaser and the payment in accordance with the purchase agreement of the balance of the purchase price payable thereunder.

Notwithstanding the foregoing, no Sales Management Fee shall be payable unless and until the respective proposed buyer has delivered the first deposit due under the respective sales agreement. For certainty, but save as provided below, the above Sales Management Fee is separate and distinct from and does not include any fee payable to a co-operating agent or broker who has entered into a commission agreement with a proposed buyer independent of the Sales Manager, provided such co-operating agent or broker is not employed by or under contract arrangements with the Sales Manager or its Affiliates with respect to the Project.

Except as otherwise provided for in this Agreement or with the Approval of Owner, the Sales Manager shall not be entitled to any other compensation, reimbursement or payment for performance of the Sales Management Services. Where an agreement of purchase and sale for a Dwelling Unit is terminated, other than as a result of a default by the Owner, no Sales Management Fee shall be payable to the Sales Manager in connection with such transaction after the date of termination.

3.2 No Duplication of Fees

The Sales Manager acknowledges and agrees that there shall be no duplication of any of the fees or other reimbursements payable to the Sales Manager hereunder and any fees or other reimbursements payable to the Construction Manager or Development Manager under the Construction Management Agreement, or Development Management Agreement as applicable. For greater certainty Cresford Capital Corporation and its Affiliates shall not be entitled to any

fees, compensation or reimbursement of expenses for performing any services, duties or responsibilities in connection with the Project or the Property that is not specifically set out in this Agreement, the Development Management Agreement, or the Construction Management Agreement.

ARTICLE 4
SALES MANAGEMENT SERVICES

4.1 Appointment

The Owner hereby appoints the Sales Manager and the Sales Manager agrees to be responsible in accordance with the standards of a First Class Manager, for the management and supervision of the marketing and sale of the Dwelling Units on the terms and conditions and for the remuneration, in each case set out in this Agreement. The Sales Manager represents and warrants to the Owner that it has the expertise, experience and resources to carry out its duties and responsibilities under this Agreement and that it will dedicate sufficient staff and personnel in order to market and sell Dwelling Units on an expeditious basis in accordance with the standards of a First Class Manager. At the option of the Owner, the Sales Manager's duties may be extended, by written amendment to this Agreement, to include the retail and office components of the Project.

4.2 Duties of the Sales Manager

Without limiting the generality of Section 4.1, the services to be performed by the Sales Manager under this Agreement (the "**Sales Management Services**") shall include, without limitation, the following:

(a) consulting with the Development Manager and Construction Manager to prepare a cost plan, unit pricing strategy including allowable discounts and deposit structure, and marketing strategy for the sale of Dwelling Units in the Project and each phase thereof for the Approval of the Owner, including without limitation, a marketing plan and budget for the Dwelling Unit sales including sales targets, expenses relating to costs for media, operations and other marketing and promotional expenses;

(b) marketing the Dwelling Units (including without limitation, coordinating the preparation and presentation of all advertising and promotional material relating to the sales program for the Dwelling Units);

(c) hiring and employing sufficient competent real estate agents and brokers to sell the Dwelling Units, including without limitation acting as the listing broker;

(d) making all reasonable efforts to obtain suitable purchasers to purchase all of the Dwelling Units in the Project, either through its own efforts (by advertising, posting signs, preparing circulars or attending public relations functions or otherwise as Approved by the Owner) or through real estate brokers or agents;

(e) preparing and negotiating the terms of agreements of purchase and sale in the form Approved by the Owner, with bona fide, arm's length purchasers of Dwelling Units;

(f) executing on behalf of the Owner offers to purchase Dwelling Units submitted in accordance with the price list and deposit structure previously Approved by the Owner and identifying to the Owner and Development Manager and obtaining the Approval of the Owner for any material deviations from the Approved form of Dwelling Unit agreement of purchase and sale;

(g) reporting not less than monthly to the Owner and the Development Manager with respect to the Sales Manager's activities, the details of sales of Dwelling Units and comparisons of actual results to budgets;

(h) preparing such reports regarding sales of Dwelling Units as the Development Manager, the Owner, or the Lenders under any Financing as they may reasonably require;

(i) preparing and reviewing with the Owner and Development Manager suggested price lists for Dwelling Units and revising them in accordance with the requirements of the Owner, including without limitation, recommendations on pricing strategy and the development of a pricing grid incorporating competitive product pricing and an analysis thereof;

(j) attending to the preparation, execution, delivery and filing of the legal documentation required for the sale of Dwelling Units, including disclosure statements and amendments to disclosure statements and receipts therefor, purchase and sale agreements and transfer documents and, if applicable, documentation required for securities legislation compliance, all of the foregoing subject to final Approval of the Owner;

(k) overseeing and administering the on-site or off-site sales centre (the "**Sales Centre**") in respect of the Dwelling Units;

(l) co-operating with any real estate agents for the sale of Dwelling Units;

(m) such other duties and responsibilities as are normally carried out by a sales manager in connection with the marketing and sale of real property similar to the Dwelling Units, to the intent that the Sales Manager shall cause the Dwelling Units to be marketed and sold in conformity with the requirements of applicable laws;

(n) advising on Dwelling Unit layouts and configurations and considering the marketability of same, as well as advising on amenities provided as part of the Project insofar as marketability of Dwelling Units are concerned;

(o) coordinate the collection of deposit monies from Dwelling Unit purchasers for remittance to the Escrow Agent;

(p) coordinate and use commercially reasonable efforts on behalf of the Owner to fulfil its obligations under all agreements of purchase and sale and associated addenda entered into with Dwelling Unit purchasers; and

(q) facilitate the development of a model suite and scale model for the Project.

4.3 Books of Account

Proper books of account shall be kept by the Sales Manager at the Sales Manager's expense for the Owner and entries shall be made therein of all such matters, terms, transactions and things which are usually written and entered in books of account kept by others engaged in an enterprise of a similar nature and the Owner shall have free access at all reasonable times upon reasonable notice to inspect, examine and copy them.

4.4 Compliance with Laws

If the Sales Manager becomes aware of any failure of the Project or any part thereof to comply with any Applicable Laws and, if in the reasonable opinion of the Sales Manager such non-compliance does or may have a material adverse effect on the Project, then the Sales Manager will promptly notify the Development Manager and the Owner of such non-compliance and make recommendations to the Development Manager and the Owner as to how such non-compliance may be rectified.

ARTICLE 5
BUDGET AND CASH MANAGEMENT

5.1 Budget and Cash Requirements

The Sales Manager shall provide information to and work together with the Development Manager and the Construction Manager to prepare and implement the Project Budget as Approved by the Owner and shall be authorized to make the expenditures and incur the obligations provided for therein without the further Approval of the Owner. Notwithstanding the foregoing, any contract, agreement or other instrument to be entered into by the Sales Manager , or any other cost, expense or other liability to be incurred by the Sales Manager, in each case that results or will result in a liability to the Owner which exceeds $200,000 in the aggregate (an "**Approval Cost**") shall require the Approval of the Owner. Such Approval of the Owner shall be deemed to be provided if the applicable Approval Cost is specifically set out in a line item contained in a Quarterly Report, and the Sales Manager has not received Notice from the Owner objecting to the applicable Approval Cost set out in the Quarterly Report, within 5 Business Days of the date on which the Development Manager has delivered the applicable Quarterly Report by Notice to the Owner. In the event that either of bcIMC Holdco (2007) Inc. or Cresford Holdings Limited objects to an Approval Cost, such party shall be entitled to commence dispute resolution proceedings under the Shareholders Agreement and issue written notice thereof (a "Dispute Notice") to the Sales Manager within 5 Business Days of receipt by the Owner of the applicable Quarterly Report. Upon receipt of a Dispute Notice, the Sales Manager shall refrain from incurring the disputed Approval Cost until it has received written Approval thereof from the Owner.

5.2 Costs and Expenses of the Project

Except as specifically set out in this Agreement, all direct out-of-pocket, Arm's Length third party costs and expenses reasonably incurred, paid or payable by the Sales Manager in connection with the performance of its duties and responsibilities under this Agreement, in connection with the sale of the Dwelling Units and in accordance with the Project Budget or otherwise Approved by the Owner in advance shall be for the account of the Owner including without limitation all costs for model suites, advertising, Project scale models, signage and marketing materials. Notwithstanding anything contained in this Agreement, the fulfilment of the covenants, obligations and agreements of the Sales Manager pursuant to this Agreement shall always be subject to the receipt by the Sales Manager of sufficient funds to meet such obligations.

5.3 Non-Reimbursable Costs

The following matters, costs and expenses which may be incurred by the Sales Manager in connection with the performance by the Sales Manager of its services under this Agreement are hereby deemed to be the responsibility of the Sales Manager and shall not be charged to the Owner:

(a) the Sales Manager's head office, rental charge therefor, head office staff, supplies and all other matters incidental to the maintenance and operation of such head office and all accounting services and functions which are necessary for the performance of the Sales Manager's obligations hereunder;

(b) all costs and expenses incurred by the Sales Manager on account of salaries and benefits paid to its head office clerical employees, executives, principals and management personnel generally, including Worker's Compensation contribution costs or deductions, unemployment insurance and Canada Pension Plan contributions, costs or deductions for such employees, insurance policies of any nature or kind whatsoever, including medical or dental, life, sickness, accident or liability policies, obtained with respect to any head office clerical employees, executives, principals and management personnel generally of the Sales Manager;

(c) costs related to agents' and brokers' licences, education and insurance;

(d) any entertainment expenses or charitable contributions;

(e) any travel costs or other costs or expenses of Senior Management;

(f) any remuneration of Senior Management; and

(g) any costs or expenses paid by the Manager to any contractor or other Person in contravention of this Agreement.

To the extent that any costs and expenses not set forth above are Approved in the Project Budget and only to the extent that such costs or expenses relate specifically to the sale of the Dwelling Units, such costs shall be Owner's costs and the Owner shall reimburse the

Sales Manager, without mark-up or duplication. All expenses incurred by the Sales Manager shall be charged at net cost and the Owner shall receive credit for all rebates, commissions, discounts and allowances. The Sales Manager shall keep appropriate records to document all expenses, which records shall be made available for inspection by Owner or its representatives upon request.

5.4 Project Revenues

All deposits and other amounts paid by purchasers in connection with the sale of Dwelling Units, whether in the form of cash, cheques or other negotiable instruments shall be received and collected by the Sales Manager on behalf of the Owner and promptly remitted to the Escrow Agent for deposit into the bank account maintained by the Escrow Agent pursuant to the terms of the Deposit Trust Agreement, until disbursed as set out therein.

5.5 Non-Arms' Length Contracts

Unless the Sales Manager obtains the prior Approval of the Owner after specific disclosure to the Owner of the non-Arm's Length relationship, the Sales Manager will not enter into any contract, agreement or legally binding arrangement in respect of the Project, including in connection with the furnishing of goods or services to the Project, if any party to such contract, agreement or legally binding arrangement is an Affiliate or employee of the Sales Manager or the Sales Manager does not deal at Arm's Length with such party. For the purposes of this Section 5.5, any question as to whether someone is dealing at arm's length will be determined in accordance with Section 251 of the *Income Tax Act* (Canada) as at the date hereof.

5.6 Concessions

The Sales Manager hereby undertakes not to accept for its own account in the execution of its duties and responsibilities hereunder or in connection with the Project, any commissions, reductions, finder's fees or other concessions (whether in the form of money, goods or other advantage or benefit) from tradesmen, suppliers, contractors, insurers or others. If such concessions are received by the Sales Manager they shall be remitted to or credited to the Owner forthwith after receipt.

5.7 Insurance

(a) During the Term, the Sales Manager shall maintain the following insurance, at its sole cost and expense, relating to its services hereunder:

INSURANCE	LIMITS
Workers' Compensation	Coverage A:

INSURANCE	LIMITS
And Employer's Liability	Limits required by statute in the Province where the Property is located and where a Developer has employees performing services pursuant to this Agreement. Coverage B: $1,000,000 Bodily Injury by Accident (each accident) $1,000,000 Bodily Injury by Disease (policy limit) $1,000,000 Bodily Injury by Disease (each employee)
Commercial General Liability Insurance, including Contingent Employer's Liability	$1,000,000 per occurrence/ $2,000,000 aggregate
Business Automobile Coverage	$1,000,000 per accident
Fidelity or Commercial Crime (Employee Dishonesty), including Third Party Coverage	$5,000,000 per occurrence
Umbrella Liability Insurance	$10,000,000 per occurrence and annual aggregate

(b) Each commercial general liability insurance policy will contain a provision of cross-liability or severability of interests as between the Owner and the Sales Manager. All such policies shall contain a waiver of subrogation rights which the Sales Manager's insurers may have against the Owner and the Owner's insurers and Persons under each of the Owner's care and control. The Sales Manager shall from time to time upon request furnish the Owner and any lender under a Financing, with certified copies of all such insurance policies and the renewals thereof.

(c) The Sales Manager may fulfill its liability insurance obligations through primary or umbrella coverage. Any deductibles or self-insured retentions associated with the policies will be wholly for the account of the Sales Manager and, with respect to the Owner, will be treated as though it were first dollar insurance. The Sales Manager agrees to give notice to the Owner, or to cause the Owner to be given notice, no less than 30 days in advance of any cancellation or termination of any such coverage.

5.8 Inspection

The Owner, or any agent designated by the Owner, will be entitled to examine, at the offices of the Sales Manager and copy all books of account and records maintained by the Sales Manager in connection with the sale of the Dwelling Units, provided that any such inspection will only be conducted during business hours and upon prior written notice to the Sales Manager. The Sales Manager will at all times furnish correct information, accounts and statements to the Owner concerning the Dwelling Units and the assets, liabilities and contracts related thereto and all transactions pertaining to the sale of Dwelling Units without any concealment or suppression and will otherwise provide such co-operation as may be reasonably required in connection with any audit of the books and records maintained in connection with the sale of the Dwelling Units.

ARTICLE 6
DEFAULT AND TERMINATION

6.1 Termination for Default

If at any time: (i) an Event of Default has occurred and is continuing under this Agreement, the Owner shall give written notice to the Manager specifying the Event of Default in reasonable detail (the "**Default Notice**") and, if upon the expiration of thirty (30) days following the date of the Default Notice, the Event of Default is continuing, the Owner may terminate this Agreement by notice to the Manager stating that this Agreement is terminated and the reasons therefor.

6.2 Events of Default

An "**Event of Default**" on the part of the Sales Manager shall mean:

(a) fraud, bad faith, improper benefit, material misrepresentation, breach of fiduciary duty, wilful misconduct or negligence of the Sales Manager or any of its officers, directors, shareholders or employees in the performance of its or their obligations under this Agreement;

(b) a breach by the Sales Manager of its obligations under this Agreement other than by reason of the failure of the Owner to perform its duties and responsibilities and discharge its obligations under this Agreement;

(c) an act or omission which constitutes a crime; or

(d) the failure of the Sales Manager to dedicate sufficient resources and staff to the Sales Management Services in accordance with the standards of a First Class Manager; and

(e) an Event of Insolvency of the Sales Manager.

6.3 Event of Insolvency

An "**Event of Insolvency**" with respect to the Sales Manager shall mean the occurrence of any one of the following events:

(a) if the Sales Manager shall be wound-up, dissolved, liquidated or have its existence terminated or has any resolution passed therefor or shall make a general assignment for the benefit of its creditors or a proposal under the *Bankruptcy and Insolvency Act* (Canada), as amended or re-enacted from time to time, or is adjudged bankrupt or insolvent or if it proposes a compromise or arrangement under the *Companies' Creditors Arrangement Act* (Canada), as amended or re-enacted from time to time, or shall file any petition or answer seeking any reorganization, arrangement, composition, readjustment, liquidation, dissolution or similar relief for itself under any present or future law relative to bankruptcy, insolvency or other relief for or against debtors generally; or

(b) if a court of competent jurisdiction shall enter a receiving order against the Sales Manager or shall enter an order, judgment or decree approving a petition filed against the Sales Manager seeking any reorganization, arrangement, composition, readjustment, liquidation, dissolution, winding-up, termination of existence, declaration of bankruptcy or insolvency or similar relief under any present or future law relating to bankruptcy, insolvency or other relief for or against debtors generally, and the Sales Manager shall acquiesce in the entry of such order, judgment or decree or such order, judgment or decree shall remain unvacated and unstayed for an aggregate of twenty (20) days (whether or not consecutive) from the date of entry thereof or if any trustee in bankruptcy, receiver, receiver and manager, liquidator or any other officer with similar powers is appointed whether privately or judicially for the Sales Manager with the consent or acquiescence of the Sales Manager and such appointment remains unvacated and unstayed for an aggregate of twenty (20) days (whether or not consecutive);

(c) if the ability of the Sales Manager to carry out its duties and responsibilities hereunder has been materially adversely affected by an encumbrancer taking possession of the Sales Manager's property and such encumbrancer remains in possession thereof for an aggregate of twenty (20) days (whether or not consecutive); and/or

(d) if such party shall be insolvent.

6.4 Termination by Owner

(a) In the event the Owner decides not to proceed with or complete the Project, the Owner shall have the right to terminate this Agreement at any time on thirty (30) days prior written notice to the Sales Manager, without cause.

(b) If the Sales Manager is an Affiliate of: (a) a Partner, and an Event of Default (as defined in the Partnership Agreement or Shareholders Agreement as applicable) with respect to such Partner has occurred under the Partnership Agreement or Shareholders Agreement as applicable, beyond any applicable cure period; or (b) the Construction Manager and/or the Development Manager, and such manager is in default under the Construction Management Agreement or Development Management Agreement as applicable beyond any applicable cure period, then in

each case the Owner shall have the right to terminate this Agreement by written notice to the Sales Manager. Such termination shall be effective as of the date which is thirty (30) days after the date on which such notice is delivered to the Sales Manager.

(c) In the event that the Project is sold or otherwise no longer owned by the Owner, the Owner shall have the right to terminate this Agreement by written notice to the Sales Manager. Such termination shall be effective thirty (30) days after the date on which such notice is delivered to the Sales Manager.

(d) In the event of damage, destruction or expropriation in respect of the Property which, in the reasonable opinion of the Owner, is sufficient to materially detrimentally affect the continuation of the Project, the Owner shall have the right to terminate this Agreement, by notice to the Sales Manager. Such termination shall be effective on the date which is thirty (30) days after the date on which such notice is delivered to the Sales Manager

6.5 Termination by Sales Manager

If at any time the Owner shall have failed to make any payment to which the Sales Manager shall be entitled hereunder, the Sales Manager shall give written notice to the Owner specifying in reasonable detail the matter complained of and if, within thirty (30) days following receipt thereof, the matter complained of is not cured, the Sales Manager may terminate this Agreement or its appointment as Sales Manager hereunder by written notice (a "**Termination Notice**") to the Owner stating that such appointment is terminated and the reasons therefor.

6.6 Obligations of Sales Manager on Termination

(a) Promptly following termination of the Sales Manager, it shall deliver to the Owner:

(i) all records and documents including, without limitation, all executed agreements and correspondence relating to the sale of the Dwelling Units, and all books of account maintained in accordance with the provisions of this Agreement including, without limitation, all computer data, computer tapes, disks, diskettes and any other storage media;

(ii) all materials and supplies for which the Sales Manager has been paid by the Owner and which were purchased in accordance with the provisions of this Agreement or the Project Budget;

(iii) vacant possession of any Sales Centre and all furniture, fixtures, equipment and other personalty therein in a clean, tidy and working condition together with all pass codes relating to security systems; and

(iv) all equipment, tools, books, records, keys, plans and specifications, drawings, estimates, studies, analyses, schedules, memoranda, licenses, permits, governmental approvals, purchase agreements, contracts, receipts

for deposits, paid and unpaid bills, bank statements and all other materials, papers, records and documents pertaining to the sale of the Dwelling Units,

which in each case are in the possession or control of the Sales Manager and relate to the sale of the Dwelling Units, provided, however, that the Sales Manager may retain copies of such records, documents and books of account and, both before and after termination.

(b) The Sales Manager will: (i) promptly account for and make delivery to the Owner, of any funds of the Owner held by the Sales Manager with respect to the performance of its duties and responsibilities under this Agreement (whether such funds are received before or after the expiration or earlier termination of this Agreement), which funds will be held in trust by the Sales Manager for the benefit of the Owner until the same are so delivered; (ii) at the request of the Owner transfer to Owner any commitments, contracts and agreements with respect to the sale of the Dwelling Units which the Owner elects; and (iii) furnish such information and take all such action (including the provision of transitional services) as the Owner reasonably requires to effectuate an orderly and systematic termination of the Sales Manager's duties and responsibilities under this Agreement and an orderly and systematic transfer of duties and responsibilities to the successor of the Sales Manager, all in accordance with the standards of a First Class Manager.

(c) If this Agreement is terminated pursuant to Subsections 6.4(a), (c) and the Project is cancelled, or (d) hereof, or as a result of the fraud, misrepresentation, gross negligence or criminal activity of the Sales Manager, its Affiliate, and/or those who it is law responsible (each a "**Bad Boy Act**"), the Owner will not be under any obligation to pay to the Sales Manager any amount whatsoever for services performed or disbursements incurred by the Sales Manager after the effective date of such termination unless such performance has been actually requested by the Owner and, in that event, the Sales Manager will be entitled to be paid on a quantum merit basis. For clarification, if this Agreement is terminated, other than in respect of any Bad Boy Act, (i) pursuant to Section 6.1, Subsection 6.4(b) or Section 6.5 hereof, the Sales Manager shall be entitled to any then unpaid Sales Management Fee as and when it becomes payable pursuant to the terms of this Agreement, subject to the right of set-off by the Owner for any outstanding amounts due and payable by the Sales Manager to the Owner under this Agreement (the "**Owner Set Off**") or (ii) pursuant to Subsection 6.4(c) and the Project continues, the Sales Manager shall be entitled to any then unpaid Sales Management Fee upon the sale of the Project by the Owner subject to the Owner Set Off.

(d) If this Agreement is terminated pursuant to Section 6.4(a) any Sales Management Fees actually paid to the Sales Manager shall be subject to a refund by the Sales Manager to the Owner in an amount equal to 100 percent of any fees paid under Sections 3.1(a), 3.1(b) and 3.1(c), provided that the Sales Manager may retain an

amount equal to $40,000.00 for each month, or prorated for any partial month, commencing with the first month following the date of this Agreement to the earlier of (i) the date on which the Sales Manager receives written notice of termination from the Owner pursuant to Section 6.4(a) or (ii) the date on which the Sales Manager receives written notice from either bcIMC Holdco (2007) Inc. or Cresford Holdings Limited advising that dispute resolution proceedings have been commenced under the Shareholders Agreement in connection with the decision to terminate the Project. For greater certainty such refund shall be paid without setoff or deduction to the Owner within 15 days of the date this Agreement is terminated pursuant to Section 6.4(a).

(e) This Section 6.6 shall survive the expiration of termination of this Agreement.

6.7 Obligations of Owner on Termination

Upon termination of this Agreement, the Owner shall pay for and indemnify the Sales Manager against the costs for all services, material and supplies, if any, which have been ordered by the Sales Manager prior to the date of termination or expiration of this Agreement in the proper performance of its obligations under this Agreement but which have not been paid for by the Sales Manager and reimbursed as required hereunder at the time of termination. This Section 6.7 shall survive the expiration of termination of this Agreement.

6.8 Rights on Termination

Any termination of this Agreement shall terminate all rights and obligations under this Agreement between the Sales Manager and the Owner, except those relating to amounts owing, including, without limitation, amounts owing pursuant to any indemnities, or to remedies in respect of any defaults. In the event of termination pursuant to Subsections 6.4(a), (c) and the Project is cancelled or (d) hereof, the Sales Management Fee earned by the Sales Manager shall be payable to the Sales Manager up to the effective date of termination. In the event of termination pursuant to Section 6.1, Subsection 6.4(b) or Section 6.5 hereof other than in respect of any Bad Boy Act, the Sales Manager shall be entitled to any then unpaid Sales Management Fee as and when it becomes payable pursuant to the terms of this Agreement, subject to the Owner Set Off. In the event of termination pursuant to Subsection 6.4(c) hereof other than in respect of any Bad Boy Act, and the Project continues, the Sales Manager shall be entitled to any then unpaid Sales Management Fee upon the sale of the Project by the Owner, subject to the Owner Set Off. The Sales Manager, and the Owner will otherwise continue to be fully liable for their respective obligations and liabilities under this Agreement that accrued prior to the effective date of the expiration or earlier termination of this Agreement or that expressly survive such expiration or earlier termination pursuant to the terms of this Agreement.

6.9 Authority

The Sales Manager acknowledges and agrees that any decisions to be made by the Owner to terminate this Agreement pursuant to Section 6.1 or Subsection 6.4(b) hereof, shall be made solely by bcIMC Holdco (2007) Inc. as a shareholder of 9615334 Canada Inc., the general partner of the Owner.

6.10 Authority to Contract

Except as set out herein, the Sales Manager will have no authority to enter into any contracts or agreements on behalf of the Owner or to bind the Owner in respect of the Project without the Approval of the Owner. Notwithstanding anything to the contrary in this Agreement or any other agreement or instrument executed in connection herewith, the Sales Manager will have no authority to take any action, incur any obligation or any liability, enter into any contract or agreement for or on behalf of the Owner, or in any other way bind any Owner to any obligation, unless such action, obligation, liability, contract or agreement has been Approved by the Owner or expressly authorized by the Owner in writing.

6.11 Limited Recourse

Notwithstanding any other provision of this Agreement to the contrary, the obligations of and rights against the Owner under this Agreement with respect to any obligation under this Agreement shall be performed, satisfied and paid only out of and enforced only against, and recourse hereunder shall be had only against, the Owner's interest in the Property and no obligation of the Owner hereunder is personally binding upon, nor shall any resort or recourse be had, judgment issued or execution or other process levied against, the Owner or against any other assets or revenues of the Owner or any partner, shareholder, unitholder, Affiliate, officer, agent, employee, trustee or director of the Owner. The provisions of this Section 6.11 shall survive termination of this Agreement.

ARTICLE 7
INDEMNITIES

7.1 Indemnity by Sales Manager

The Sales Manager hereby indemnifies and saves harmless the Owner and its directors, officers, employees, agents, authorized representatives or other Persons for whom it is in law responsible, from any Claims arising directly or indirectly, in whole or part by reason of (i) the negligent acts or omissions or wilful misconduct of the Sales Manager or its directors, officers, employees, agents or other authorized representations in providing services in respect of, or in connection with this Agreement; and/or (ii) by reason of any breach of this Agreement by the Sales Manager or those Persons for whom the Sales Manager is in law responsible. The indemnity provided under this Section 7.1 shall not extend to any Claims for which insurance proceeds are recoverable and actually paid to the Owner. Notwithstanding anything contained in this Agreement to the contrary, this indemnity shall survive the expiry or early termination of this Agreement.

7.2 Indemnity by Owner

The Owner hereby indemnifies and saves harmless the Sales Manager and its directors, officers, employees, agents, authorized representatives or other Persons for whom it is in law responsible, from any Claims arising directly or indirectly, in whole or in part by reason of (i) the negligent acts or omissions or wilful misconduct of the Owner or its directors, officers, employees, agents or other authorized representations in providing services in respect of, or in connection with this Agreement; and/or (ii) by reason of any breach of this Agreement by the Owner or those Persons

for whom the Owner is in law responsible. The indemnity provided under this Section 7.2 shall not extend to any Claims for which insurance proceeds are recoverable and actually paid to the Sales Manager. Notwithstanding anything contained in this Agreement to the contrary, this indemnity shall survive the expiry or early termination of this Agreement.

ARTICLE 8
ASSIGNMENT AND CHANGE OF CONTROL

8.1 Assignment

The Sales Manager shall have no right to assign or subcontract all or any part of its rights and obligations under this Agreement without the prior consent in writing of the Owner.

ARTICLE 9
CONFIDENTIALITY

9.1 Confidentiality

Each of the parties covenants and agrees to keep all information pertaining to or concerning this Agreement and the other party or the identity of the beneficial owners of the other party in strictest confidence, and not to disclose at any time hereafter any such information to any other Person, except legal counsel on a need to know basis as may be required in connection with the Project, provided that no party shall be obligated to keep in confidence or shall incur any liability for disclosure of information which:

(a) was already in the public domain or comes into the public domain without any breach of this Agreement by the disclosing party;

(b) is required to be disclosed pursuant to applicable laws or pursuant to policies or regulations of any regulatory authority or private or public body having jurisdiction over a party or of which a party is a member;

(c) is required to be disclosed in any arbitration or legal proceeding;

(d) in the case of an interest held in trust, disclosure of information to the beneficiaries of such trust; or

(e) is contained in this Agreement from any consultant, accountant, lawyer or Project lender to the extent such Person requires disclosure in accordance with activities to be performed by it in connection with the Project or a Project financing.

To the extent that a party is required to disclose any confidential information pursuant to subparagraph (b) above, such party shall promptly, to the extent permissible, notify the other party in writing, which notification shall include the nature of the legal requirement and the extent of the required disclosure, and shall cooperate with the other party to preserve the confidentiality of such information consistent with applicable law.

ARTICLE 10
GENERAL

10.1 Duty of Care

The Sales Manager shall in accordance with the standards of a First Class Manager perform, discharge and exercise the powers, duties, responsibilities and discretions entrusted to it under this Agreement honestly, in good faith and in the best interests of the Owner and the Project and, in connection therewith, it shall exercise that degree of care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances.

10.2 Independent Contractor

The Sales Manager will perform all services on behalf of the Owner as an independent contractor, and neither the Sales Manager nor any of its officers, employees, agents or servants will, in the performance of the services hereunder, be considered for any reason to be partners, employees or servants of the Owner or, except to the extent expressly permitted hereunder, as agent of the Owner.

10.3 Additional Services

The Sales Manager and Owner acknowledge that from time to time the Sales Manager may also perform services, other than those contemplated under this Agreement, for the Owner. With respect to the performance of such other services, such services will not form part of services rendered or compensated hereunder.

10.4 Governing Law

This Agreement shall be governed by the laws of the Province of Ontario and the federal laws of Canada applicable therein.

10.5 Compliance with Law

The Sales Manager will take reasonable steps to ensure compliance at the cost and expense of the Owner as hereinafter provided with all restrictions and obligations, statutory, municipal or otherwise, with respect to the Property and imposed upon the Owner or for which the Owner may be liable at law.

10.6 Fiduciary Relationship of the Manager

Nothing in this Agreement shall be construed as to or shall constitute a partnership or joint venture between the Owner and the Sales Manager. The duties and responsibilities to be performed and the obligations assumed by the Sales Manager shall be performed and assumed by it as an independent contractor and the Sales Manager is not authorized to bind the Owner, or any other Person outside the scope of its authority as Sales Manager pursuant to this Agreement.

10.7 Invalidity of Provisions

If any covenant, obligation or agreement of this Agreement, or the application thereof to any Person or circumstance shall, to any extent, be invalid or unenforceable, the remainder of this Agreement or the application of such covenant, obligation or agreement to Persons or circumstances other than those to which it is held invalid or unenforceable shall not be affected thereby and each covenant, obligation or agreement of this Agreement shall be separately valid and enforceable to the fullest extent permitted by law.

10.8 Successors

This Agreement and all rights, entitlements, duties and obligations arising from it shall enure to the benefit of and be binding upon the parties hereto and their respective successors and permitted assigns

10.9 Force Majeure

Whenever any party hereto, shall be unable to fulfil or shall be restricted in the fulfilment of any obligation under this Agreement by reason of any circumstance beyond the reasonable control of such party (as the case may be) despite the use of all reasonable efforts, such party shall be relieved from the fulfilment of such obligation so long as, and to the extent that, such circumstance continues to exist and operates to prevent or delay the fulfilment thereof. Without limiting the generality of the foregoing, any strike, lockout, labour dispute, act of God, inability to obtain labour or materials or to obtain any necessary governmental permit or approval, any laws, ordinances, rules, regulations or orders of governmental authorities, any enemy or hostile action, civil commotion, fire or other casualty, any of which shall operate to prevent or delay the fulfilment of any obligation, shall be deemed to be a circumstance beyond the reasonable control of a party (as the case may be), but the financial condition of a party will not be, or be deemed to be, a circumstance beyond the reasonable control of such party.

10.10 Notices

Any notice or other communication required or permitted to be given hereunder will be in writing and will be given by prepaid first class mail, by facsimile or other means of electronic communication or by delivery as hereafter provided. Any such notice or other communication, if mailed by prepaid first class mail at any time other than during a general discontinuance of postal service due to strike, lock-out or otherwise, will be deemed to have been received on the fourth Business Day after the postmarked date thereof, or if sent by facsimile or other means of electronic communication, will be deemed to have been received on the Business Day following the sending, or if delivered by hand will be deemed to have been received at the time it is delivered to the applicable address noted below either to the individual designated below or to an individual at such address having apparent authority to accept deliveries on behalf of the addressee. Notice of change of address will also be governed by this Section 10.10. In the event of a general discontinuance of postal service due to strike, lock-out or otherwise, notices or other communications will be delivered by hand or sent by facsimile or other means of electronic communication and will be deemed to have been received in accordance with this Section. Notices and other communications will be addressed as follows:

(a) if to the Owner at:

170 Merton Street
Toronto, Ontario
M4S 1A1

Attention: Daniel C. Casey and Edward Dowbiggin

Telephone: (416) 971-7411
Facsimile: (416) 971-7227

with a copy to bcIMC Holdco (2007) Inc. at the address set out below:

c/o British Columbia Investment Management Corporation
Suite 300 – 2950 Jutland Road
Victoria, British Columbia
V8T 5K2

Attention: Senior Vice-President, Real Estate

Telephone: (778) 410-7293
Facsimile: (778) 410-7321

and with a copy to British Columbia Investment Management Corporation at the addresses set out below:

British Columbia Investment Management Corporation
Suite 300 - 2950 Jutland Road
Victoria, British Columbia
V8T 5K2

Attention: SVP, Real Estate

Telephone: (250) 387-7161
Facsimile: (250) 387-7874

and:

British Columbia Investment Management Corporation
Suite 300 – 2950 Jutland Road
Victoria, British Columbia
V8T 5K2

Attention: Senior Vice-President Real Estate

Telephone: (250) 387-5472
Facsimile: (250) 387-5103

(b) if to the Manager at:

170 Merton Street
Toronto, Ontario
M4S 1A1

Attention: Daniel C. Casey and Edward Dowbiggin

Telephone: (416) 971-7411
Facsimile: (416) 971-7227

ARTICLE 11
RECORDS, LIAISON AND ACCESS TO INFORMATION

11.1 Records

In connection with its duties and responsibilities under this Agreement, the Sales Manager will, during the Term, carry out all necessary or desirable administrative duties and responsibilities and will:

(a) keep proper and separate books of account and records for the Project;

(b) at its own cost, provide reception, secretarial, clerical, administrative, office management and communications services, use of general office equipment, and office supplies in connection with the services provided to the Owner pursuant to this Agreement; and

(c) submit periodic written reports to the Owner on the status of the expenditures made against the Project Budget, and any amendments to the Project Budget, if required.

11.2 Liaison

The Owner will have the right at reasonable times and intervals to cause inspections of the books and records maintained by the Sales Manager relating to the services provided hereunder and the operation of the business of the Owner. Upon the termination of this Agreement, the Sales Manager will deliver to Owner all books of account and other records maintained by the Sales Manager on Owner's behalf or for the purposes of this Agreement, provided that the Sales Manager will be entitled to retain copies at its own cost thereof for its own records.

11.3 Access for Auditors

Upon reasonable notice, not to be less than two Business Days, the Sales Manager will make available to the auditors of Owner such information and material as may be required by such auditors for purposes of its audit being undertaken and the Sales Manager will give such other cooperation as may be necessary for the auditors to carry out their duties to the Owner in a proper manner.

11.4 Dispute Resolution

If a dispute arises between the parties in connection with this Agreement (including a dispute as to whether a party is in default hereunder), the parties agree to use the following procedure as a condition precedent to any party pursuing other available remedies:

(a) any party may notify the other party by written notice ("**Notice of Dispute**") of the existence of a dispute and a desire to resolve the dispute by mediation;

(b) a meeting will be held promptly between the parties, attended by individuals with decision-making authority regarding the dispute, to attempt in good faith to negotiate a resolution of the dispute;

(c) if, within forty eight (48) hours after such meeting or such further period as is agreeable to the parties (the "**Negotiation Period**"), the parties have not succeeded in negotiating a resolution of the dispute, they agree to submit the dispute to mediation;

(d) the parties will jointly appoint a mutually acceptable mediator (who must be an expert in the subject matter of the dispute) within forty eight (48) hours of the conclusion of the Negotiation Period;

(e) the parties agree to participate in good faith in the mediation and negotiations related thereto for a period of fifteen (15) days following appointment of the mediator or for such longer period as the parties may agree;

(f) if there is a dispute as to whether or not the Manager was properly terminated pursuant to Article 6, then the parties agree that the dispute will be settled by a single arbitrator in accordance with the *Arbitration Act* (Ontario), as amended. The decision of the arbitrator will be final and binding and will not be subject to appeal on a question of fact, law, or mixed fact and law; and

(g) the costs of mediation or arbitration will be awarded by the mediator or arbitrator in his or her absolute discretion.

For greater certainty, this Section 11.4 will survive any termination of this Agreement to the extent necessary to resolve any outstanding dispute.

IN WITNESS WHEREOF the parties hereto have caused this Agreement to be signed by their respective duly authorized officers as of the date first written above.

9615334 CANADA INC., as general partner for and on behalf of
YG LIMITED PARTNERSHIP

per: _____
Name: SCOTT BUTCHART
Title: A.S.O.

per: _____
Name:
Title:

I/We have authority to bind the Corporation.

2503425 ONTARIO LIMITED

per: _____
Name: Daniel C. Casey
Title: President

I have authority to bind the Corporation.

IN WITNESS WHEREOF the parties hereto have caused this Agreement to be signed by their respective duly authorized officers as of the date first written above.

9615334 CANADA INC., as general partner for and on behalf of
YG LIMITED PARTNERSHIP

per: _____
Name:
Title:

per: _____
Name: DANIEL C. CASEY
Title: VICE PRESIDENT

I/We have authority to bind the Corporation.

2503425 ONTARIO LIMITED

per: _____
Name: Daniel C. Casey
Title: President

I have authority to bind the Corporation.

Schedule "A"

PROJECT AND RENTAL LANDS

	Municipal Address	Legal Description
1.	363-365 Yonge Street, Toronto, Ontario	PIN: 21101−0049 (LT) PT LT 31 E/S YONGE ST PL 22A TORONTO AS IN EP126440; TORONTO , CITY OF TORONTO
2.	367 Yonge Street, Toronto, Ontario	PIN: 21101−0048 (LT) PT LT 31 E/S YONGE ST, 32 E/S YONGE ST PL 22A TORONTO AS IN CA761626; TORONTO , CITY OF TORONTO
3.	369-371 Yonge Street, Toronto, Ontario	PIN: 21101−0047 (LT) PT LT 32 E/S YONGE ST PL 22A TORONTO AS IN CA472341; TORONTO , CITY OF TORONTO
4.	373-375 Yonge Street, Toronto, Ontario	PIN.: 21101-0046 (LT) PT LT 33 E/S YONGE ST PL 22A TORONTO AS IN CA540937; TORONTO, CITY OF TORONTO
5.	377 Yonge Street, Toronto, Ontario	PIN: 21101−0045 (LT) PT LT 33 E/S YONGE ST PL 22A TORONTO AS IN CA310343; TORONTO , CITY OF TORONTO
6.	379 Yonge Street, Toronto, Ontario	PIN: 21101−0044 (LT) PT LT 34 E/S YONGE ST PL 22A TORONTO AS IN CT497024; TORONTO, CITY OF TORONTO
7.	381 Yonge Street, Toronto, Ontario	PIN. 21101-0043 (LT) PART OF LOT 34 ON THE EAST SIDE OF YONGE STREET, PLAN 22A AS DESCRIBED IN INSTRUMENT NO. OT46105, CITY OF TORONTO
8.	385 Yonge Street, Toronto, Ontario	PIN: 21101−0042 (LT) LT 35 E/S YONGE ST, 36 E/S YONGE ST PL 22A TORONTO; TORONTO , CITY OF TORONTO

Court File No. CV-22-00688107-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

AMENDED THIS May 18th, 2023 PURSUANT TO

☐ RULE 26.02 (_____)
☒ THE ORDER OF Justice Penney
DATED May 17th, 2023

Camryn Booth Digitally signed by Camryn Booth Date: 2023.05.18 13:40:54 -04'00'

REGISTRAR

SUPERIOR COURT OF JUSTICE

B E T W E E N:

(Court Seal)

~~2504670 CANADA INC.~~ 2504670 ONTARIO INC., 8451761 CANADA INC. and CHI LONG INC.

Plaintiffs

and

MARIA ATHANASOULIS, 9615334 CANADA INC. and DANIEL CASEY

Defendants

AMENDED STATEMENT OF CLAIM

TO THE DEFENDANT(S)

A LEGAL PROCEEDING HAS BEEN COMMENCED AGAINST YOU by the Plaintiff. 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 Plaintiff's lawyer or, where the Plaintiff does not have a lawyer, serve it on the Plaintiff, 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.

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 ~~September , 2022~~ May 18, 2023 Issued by _____

Local Registrar

Address of court office: Superior Court of Justice
330 University Avenue, 8th Floor
Toronto ON M5G 1R7

TO: Maria Athanasoulis

AND TO: 9615334 Canada Inc.

AND TO: Daniel Casey

CLAIM

1. The Plaintiffs claim:

   (a) a Declaration that the "Profit Sharing Agreement" alleged by Maria Athanasoulis ("**Athanasoulis**") is unenforceable and/or a nullity as against YSL Residences Inc., YG Limited Partnership (the "**Partnership**") and the Plaintiffs as it was entered into in breach of the LP Agreement (defined below) and/or in breach of the fiduciary duties owed by the Defendants to the Plaintiffs;

   (b) in the alternative, a Declaration that Athanasoulis is not entitled to any payment under the Profit Sharing Agreement until the Plaintiffs have recovered their full investment capital and return on investment pursuant to the LP Agreement and the Defendants' representations;

   (c) in the further alternative, damages:

      (i) against the Defendant, 9615334 Canada Inc., (the "**General Partner**"), in the amount of any payment Athanasoulis receives under the Profit Sharing Agreement, for breach of the LP Agreement, breach fiduciary duty, breach of trust and/or misrepresentation;

      (ii) against the Defendant, Daniel Casey ("**Casey**"), in the amount of any payment Athanasoulis receives under the Profit Sharing Agreement, for breach of fiduciary duty, breach of trust, knowing assistance, inducing breach of contract and/or misrepresentation; and/or

(iii) against Athanasoulis, in the amount of any payment she receives under the Profit Sharing Agreement, for breach of fiduciary duty, breach of trust, knowing assistance, knowing receipt, inducing breach of contract, misrepresentation and/or unjust enrichment;

(d) prejudgment interest in accordance with section 128 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, as amended;

(e) postjudgment interest in accordance with section 129 of the *Courts of Justice Act*;

(f) the costs of this proceeding, plus all applicable taxes; and

(g) Such further and other Relief as this Honourable Court may seem just.

The Parties

2. The Plaintiffs are companies incorporated pursuant to the laws of Ontario or Canada and are limited partners of the Partnership.

3. The Defendant, the General Partner, was the general partner of the Partnership and is affiliated with a group of companies operating under the "Cresford" name (the "**Cresford Entities**"). The Cresford Entities together marketed themselves as "**Cresford**", "The Cresford Group" or "Cresford Developments".

4. The Defendant, Casey, is an individual residing in the province of Ontario. Casey was the founder and President of Cresford and the sole director of all Cresford Entities at all material times.

5. The Defendant, Athanasoulis, is an individual residing in the province of Ontario and held various roles as a Cresford employee from 2004 until January 2, 2020.

The Partnership

6. The Partnership is a limited partnership established under the laws of the Province of Manitoba to own, construct, develop, and sell a high-rise condominium building near the intersection between Yonge Street and Gerrard Street in Toronto, Ontario (the "**YSL Project**"). The Partnership was the direct or indirect owner of YSL Residences Inc., a bare trustee that owned the lands on which the Project is located.

7. The Plaintiffs entered into an Amended and Restated Limited Partnership Agreement (the "**LP Agreement**") dated August 4, 2017 with the General Partner, the Cresford (Yonge) Limited Partnership (a Cresford-related entity, holding Class B Units) and the other limited partners to establish the Partnership.

8. The "equity" in the partnership effectively resided in the Class "A" unit holders (including the Plaintiffs) with approximately $14.8 million in capital and a capped right to return on that capital equivalent to the greater of 12.25% annually or 100% of the capital. After payment of the Class "A" unit holders, the Class "B" unit holders would receive all the residual profits without limit.

9. The General Partner had only nominal capital and nominal interest in the Partnership.

10. Both the Class "B" Units holders and the General Partner were Cresford Entities.

11. The LP Agreement provides that:

(a) the General Partner shall exercise its powers and discharge its duties honestly, in good faith and in the best interests of the limited partners and it shall exercise the care, diligence and skill that a reasonably prudent operator of a similar business would exercise in comparable circumstances (Section 3.5(a));

(b) the General Partner shall not enter into any contract with any Related Party, other than on market terms (Section 3.6(b));

(i) Related Party means any of the affiliates of the General Partner or any of their respective directors, officers, employees and shareholders (Section 1.1);

(ii) Affiliate includes any entity directly or indirectly controlling, controlled by, or under common control with the General Partner (Section 1.1);

(c) the Plaintiffs as Class A Preferred Unit holders are entitled to a preferred return of the profits and Distributable Cash (as defined in the LP Agreement), reimbursement of all their capital contributions plus *the greater of*

(i) an amount equal to the Plaintiffs' capital contribution (i.e.100% of the invested capital); and

(ii) compounded and cumulative preferred annual return of 12.25% interest, calculated from the date that each capital contributions was made (Section 4.2); and

(d) the LP Agreement and any Subscription Agreements constitute the entire agreement among the General Partner and limited partners of the Partnership with respect to the subject matter hereof, and supersede any prior agreement or understanding among them with respect to such matters. The representations and warranties of the General Partner and the limited partners in the LP Agreement and in any Subscription Agreements (and all other provisions of the Subscription Agreements) shall survive the execution and delivery of the LP Agreement (Section 14.9).

12. The Plaintiffs each became a limited partner in the Partnership pursuant to one or more Subscription Agreements entered into with the General Partner.

13. The Subscription Agreement attached and incorporated an information package that Cresford presented to investors. The presentation, attached as Schedule "A" to the Subscription Agreement, made the following representations regarding the YSL Project:

(a) a projection of full return of the investment capital plus an investment return of 100% of the invested capital;

(b) the limited partners would receive security for their investments in the form of a corporate guarantee by the registered owner of the land and a personal guarantee by Casey;

(c) revenues would be paid in the following order:

(i) external lenders;

(ii) return of invested capital to the limited partners plus distribution of agreed upon return on investment to the limited partners; and

(iii) lastly, distribution to Cresford.

14. The Plaintiffs' capital contributions to the Partnership and the return on investment are in the sum of $9.4 million:

(a) $2 million capital contribution from 8451761 Canada Inc., plus $2 million return on investment/accrued interest;

(b) $2 million capital contribution from ~~2504670 Canada Inc.~~ 2504670 Ontario Inc. plus $2 million return on investment/accrued interest; and

(c) $700,000 capital contribution from Chi Long Inc. plus $700,000 return on investment/accrued interest.

15. The Defendants repeatedly represented to the Plaintiffs that Cresford would not be paid any amounts by the Partnership until after the Plaintiffs and the other limited partners had received their full return of capital and profit entitlement.

Athanasoulis Made Representations to the Plaintiffs

16. Maria joined Cresford as Manager, Special Projects in 2004.

17. She was promoted to Vice-President, Sales and Marketing in 2005, and President, Sales and Marketing in 2012.

18. She became the President and Chief Operating Officer of Cresford in or around August 2018 and held that role until her departure from Cresford.

19. Athanasoulis oversaw the sales and marketing for the YSL Project and introduced potential investors to Cresford, including one or more of the Plaintiffs. She solicited the Plaintiffs' investments in the Project and was the primary representative of Cresford who dealt with them.

20. To induce the Plaintiffs to invest in the YSL Project, Athanasoulis (as well as Casey and the General Partner, which is a Cresford Entity) repeatedly represented to them that they would be paid their investment capital plus 100% investment return before the General Partner or Cresford (and by extension, Athanasoulis), as memorialized in the LP Agreement and the Subscription Agreement.

21. At no time prior to or after the Plaintiffs made their investments and the LP Agreement was entered into did Athanasoulis or the other Defendants advise them that she had an agreement entitling her to any share of the profits in connection with the YSL Project.

Athanasoulis Commences Action Against Cresford

22. Athanasoulis left Cresford on January 3, 2020.

23. On January 21, 2020, Athanasoulis commenced an action against Casey and Cresford Entities, including the YG Limited Partnership and YSL Residences Inc., seeking $1,000,000 in damages for wrongful dismissal, as well as 20% of the profits earned on the Cresford Projects (including the YSL Project and other Cresford projects) under an alleged Profit Sharing Agreement with Cresford through Casey.

24. She alleged that since the expected profits at the time of her departure from Cresford was $242 million, she was entitled to a profit share of $48 million.

25. None of the Defendants had ever informed the Plaintiffs of the existence of any such Profit Sharing Agreement.

26. In her original claim, Athanasoulis did not allege that she was entitled to any share of YSL Project profits in priority to the Plaintiffs. She admitted that Casey and YSL Residences Inc. had guaranteed that the Plaintiffs' investments would be repaid along with interests.

27. Athanasoulis also filed a Proof of Claim for an identical claim with respect to another Cresford project, the "Clover Project", which was subject to a *Companies' Creditors Arrangement Act* proceeding (the "**Clover CCAA Proceeding**").

28. The Monitor in the Clover CCAA Proceeding disallowed the claim because it found the profit sharing claim was contingent on the Clover Project earning a profit, which remained unknown at that stage.

29. Justice Hainey in the Clover proceedings also described the profit sharing claim as being too speculative.

30. Similarly, the YSL Project has not generated any profit to date and has been placed under a Proposal pursuant to the *Bankruptcy and Insolvency Act* (the "***BIA***"), as further described below.

31. The Plaintiffs have not been repaid any of their investments nor have they received any interest or return on capital.

YSL Placed under *BIA* Proposal

32. On April 30, 2021, the General Partner filed a Notice of Intention to Make a Proposal under the *BIA* with respect to the Partnership and YSL Residences Inc.

33. On May 27, 2021, the General Partner filed a Proposal under the *BIA* despite objections from the limited partners and an application by the limited partners to remove the General Partners.

34. On June 29, 2021, Justice Dunphy rejected the Proposal and found that the General Partner had breached its fiduciary duties to the limited partners, the LP Agreement and *The Partnership Act* (Manitoba) in filing the Proposal.

35. The General Partners subsequently filed an amended proposal on July 9, 2021, which Justice Dunphy approved on July 16, 2021 (the "***BIA* Proposal**"). Justice Dunphy left undisturbed his findings regarding the General Partner's breaches of the LP Agreement, *The Partnership Act*, and fiduciary duty.

Proposal Trustee and Athanasoulis Agreed to Arbitrate Her Claim

36. Subsequent to the Partnership and YSL Residences Inc. being placed under the *BIA* Proposal, Athanasoulis and KSV Restructuring Inc., the designated trustee for the *BIA* Proposal (the "**Proposal Trustee**"), agreed to refer certain issues with respect to her claim to a private and confidential arbitration.

37. The Plaintiffs and the other limited partners were not invited to be a part of the arbitration, nor were they parties to the arbitration agreement between the Proposal Trustee and Athanasoulis or were even provided a copy of the agreement.

38. Athanasoulis filed an amended claim in the arbitration suggesting, for the first time, that she had a Profit Sharing Agreement that entitled her to a share of profits of the YSL Project regardless of whether the Plaintiffs and other limited partners received any return of their investment or guaranteed interest.

39. However, Athanasoulis has subsequently admitted that any payment she is entitled to under the alleged Profit Sharing Agreement would rank lower in priority to the limited partners' entitlement to their investment capital and returns.

40. As mentioned above, the YSL Project has not been profitable. Athanasoulis is therefore not entitled to any payment under the Profit Sharing Agreement even if it is enforceable.

41. Further, any payment Athanasoulis is entitled to under the alleged Profit Sharing Agreement would rank lower in priority to the limited partners' entitlement to their investment capital and returns.

42. Following objections from the Plaintiffs and the other limited partners, they were invited to participate in any subsequent arbitration proceedings. However, to date, no such proceedings have taken place and it is uncertain whether they will at all given objections raised by third parties.

Profit Sharing Agreement Unenforceable

43. The alleged Profit Sharing Agreement is in breach of the LP Agreement, the Defendants' fiduciary duties and contrary to their representations to the Plaintiffs and is therefore unenforceable as against YSL Residences Inc., the Partnership and its limited partners.

44. In the alternative, Athanasoulis is not entitled to any payment under the Profit Sharing Agreement until after the Plaintiffs have recovered their full investment capital and profit pursuant to the LP Agreement and the Defendants' representations.

45. In the further alternative, the Plaintiffs are entitled to damages in the amount of any payment Athanasoulis receives under the Profit Sharing Agreement, for breach of fiduciary duty, breach of trust, breach of the LP Agreement, knowing assistance, knowing receipt, inducing breach of contract, misrepresentation and/or unjust enrichment.

Breach of the LP Agreement

46. The alleged Profit Sharing Agreement breaches the LP Agreement.

47. The LP Agreement provides that the Plaintiffs are entitled to a preferred return of their investment capitals and profits. It also requires the General Partner to act honestly, in good faith and in the best interests of the limited partners.

48. The LP Agreement further provides that the General Partner cannot enter into any contract on behalf of the Partnership with an affiliate, including its directors or officers, other than on market terms.

49. Cresford is an affiliate of the General Partner, and Athanasoulis was a director or officer of Cresford. The alleged Profit Sharing Agreement is not on market terms.

50. If Athanasoulis and Casey/Cresford entered into the alleged Profit Sharing Agreement that has the effect of subordinating the Plaintiffs' payment entitlements to Athanasoulis', then they breached the terms of the LP Agreement.

Inducing Breach of Contract

51. Further, if Athanasoulis and Casey/Cresford entered into the alleged Profit Sharing Agreement, Athanasoulis and Casey are liable to the Plaintiffs for inducing the General Partner to breach the LP Agreement.

52. As directors and officers of Cresford (and by extension, the General Partner), both Athanasoulis and Casey were aware of the existence of the LP Agreement, which was a valid and enforceable contract between the General Partner and the limited partners.

53. If Athanasoulis and Casey/Cresford entered into the alleged Profit Sharing Agreement, they intended to and did procure the General Partner's breach of the LP Agreement, as described above.

54. To the extent Athanasoulis receives any payment under the alleged Profit Sharing Agreement, the Plaintiffs have suffered damages in the corresponding amount.

Breach of Fiduciary Duties

55. The Defendants owed fiduciary duties to the Partnership and the Plaintiffs:

(a) as described above, Athanasoulis became the President, Sales and Marketing of Cresford in 2012 and became its President and Chief Operating Officer in 2018;

(b) she also directly dealt with the Plaintiffs in soliciting their investments for the YSL Project;

(c) further, Athanasoulis undertook to act in the best interests of the Partnership and the Plaintiffs;

(d) the Partnership and the Plaintiffs as limited partners were vulnerable to the control of Athanasoulis by virtue of her role with the General Partner and Cresford;

(e) the legal and substantial practical interests of the Partnership and the limited partners stood to be and in fact were adversely affected by Athanasoulis' exercise of discretion;

(f) as such, Athanasoulis owed a fiduciary duty to the Partnership and the Plaintiffs;

(g) the General Partner also owed a fiduciary to the Partnership and the Plaintiffs; and

(h) Casey, being the directing mind of Cresford including the General Partner, also owed a fiduciary duty to the Partnership and the Plaintiffs.

56. The Defendants breached their fiduciary duties to the Partnership and the Plaintiffs by entering into the alleged Profit Sharing Agreement contrary to the terms of the LP Agreement and their representations to the Plaintiffs, and subordinating the interests of the Plaintiffs to those of the Defendants'.

Breach of Trust

57. The General Partner had a trust relationship with the Plaintiffs as limited partners.

58. By virtue of their roles in Cresford, including with the General Partner, Athanasoulis and Casey also had trust relationships with the Plaintiffs.

59. The Defendants are liable for breach of trust by entering into the alleged Profit Sharing Agreement that purportedly prioritizes Athanasoulis' interests to those of the Plaintiffs, contrary

to the terms of the LP Agreement and the Defendants' fiduciary duties and representations to the Plaintiffs.

Knowing Assistance

60. In the alternative, Athanasoulis and Casey knowingly assisted the General Partner in its breach of fiduciary duty to the Plaintiffs:

(a) as described above, the General Partner owes a fiduciary duty to the Plaintiffs;

(b) the General Partner breached the duty in a dishonest manner by entering into the alleged Profit Sharing Agreement with Athanasoulis in breach of the LP Agreement and contrary to the representations to the Plaintiffs;

(c) Athanasoulis and Casey, being directors and officers of Cresford (and by extension, the General Partner), had actual knowledge of the fiduciary relationship between the General Partner and the Plaintiffs, as well as the General Partner's dishonest conduct; and

(d) if Athanasoulis entered into the alleged Profit Sharing Agreement with the General Partner through Casey, Athanasoulis and Casey knowingly participated in or assisted the General Partner's dishonest conduct.

Knowing Receipt

61. If Athanasoulis receives any payment under the alleged Profit Sharing Agreement, she is liable for knowing receipt:

(a) any such payment flows directly from the General Partner's breach of fiduciary duty and/or breach of trust to the Plaintiffs;

(b) Athanasoulis receives the resulting payment for her own benefit in her own personal capacity; and

(c) Athanasoulis receives the payment with actual or constructive knowledge that the payment directly resulted from the General Partner's breach of fiduciary duty and/or breach of trust to the Plaintiffs.

Misrepresentation

62. As described above, there was a special relationship between the Defendants and the Plaintiffs.

63. The Defendants represented to the Plaintiffs that they would receive preferred return of their investment capital plus profits. The Defendants made the representations by, among other means:

(a) meeting with Anthony Szeto and Lorraine Ng, owners of the Plaintiff ~~2504670 Canada Inc.~~, 2504670 Ontario Inc., on or around June 14, 2017, and assuring them at the meeting that investors' investment capital would be repaid along with the 100% investment return, and that investors would be paid their investment capital and return before any payment to Cresford;

(b) shortly after the June 14, 2017 meeting, causing the information package regarding the YSL Project (later attached to the Subscription Agreement, as

described above) to be sent to Mr. Szeto and Ms. Ng. The information package expressly states that the Plaintiffs would be paid their investment capital and profit before any payment to Cresford;

(c) causing the Plaintiffs' real estate broker, Paul Lam, to assure the Plaintiffs that the repayment of their investment capital and the payment of the investment profit will be guaranteed, and in priority to any payment to Cresford or its principals;

(d) causing Mr. Lam to send to the Plaintiffs the LP Agreement and Subscription Agreement, both of which confirmed that the Plaintiffs would be paid their investment capital and profit prior to payment to Cresford; and

(e) preparing and circulating (or causing to be circulated) to the Plaintiffs, for the purpose of soliciting their investments, the information package expressly stating that the Plaintiffs would be paid their investment capital and profit before any payment to Cresford.

64. If the Defendants entered into the Profit Sharing Agreement and it prioritizes Athanasoulis' interests over those of the Plaintiffs, the Defendants' representations to the Plaintiffs regarding their entitlements were untrue, inaccurate or misleading.

65. The Defendants made the misrepresentations knowing they were false or were reckless as to its truth.

66. In the alternative, the Defendants made the misrepresentations in a negligent manner.

67. The Plaintiffs invested $4.7 million into the Partnership and the YSL Project in reasonable reliance of the representations.

68. The Plaintiffs relied on the representations to their detriment because any amount Athanasoulis is allowed to receive under the alleged Profit Sharing Agreement would reduce the amount the Plaintiffs are able to recover on their investments and returns.

Unjust Enrichment

69. To the extent Athanasoulis receives any payment under the alleged Profit Sharing Agreement in priority to the Defendants, Athanasoulis would be enriched by the amount of the payment.

70. The Defendants would suffer a corresponding deprivation in that their ability to recover their investment capital and return would be reduced.

71. There would be no juristic reason for Athanasoulis to retain the benefit, as the alleged Profit Sharing Agreement is directly contrary to her obligations under the LP Agreement and her fiduciary duty and representations to the Plaintiffs.

72. This action should be heard in Toronto on the Commercial List.

~~September , 2022~~
May 18 , 2023
(Date of issue)

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~~2504670 CANADA INC.~~ 2504670 ONTARIO INC. et al.
Plaintiffs

-and-

MARIA ATHANASOULIS et al.
Defendants

Court File No.

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

PROCEEDING COMMENCED AT TORONTO

AMENDED STATEMENT OF CLAIM

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ABC - 376

Court of Appeal File No. COA-24-CV-0550
Court File No. BK-21-02734090-0031

COURT OF APPEAL FOR ONTARIO

IN THE MATTER OF THE *BANKRUPTCY AND INSOLVENCY ACT*, R.S.C 1985, c. B-3 AS AMENDED

IN THE MATTER OF THE NOTICES OF INTENTION TO MAKE A PROPOSAL OF YG LIMITED PARTNERSHIP AND YSL RESIDENCES INC

APPELLANTS' CERTIFICATE RESPECTING EVIDENCE

The Appellants, YongeSL Investment Limited Partnership, 2124093 Ontario Inc., SixOne Investment Ltd., E&B Investment Corporation, TaiHe International Group Inc., 2504670 Ontario Inc., 8451761 Canada Inc. and Chi Long Inc. (the "**Class A LPs**"), certify that the following evidence is required for the Appeal, in the Appellants' opinion:

1. Motion Record of Maria Athanasoulis dated September 8, 2023;

2. Responding Record of the Proposal Trustee, KSV Restructuring Inc., dated October 16, 2023;

3. Supplementary Motion Record of Ms. Athanasoulis dated October 31, 2023;

4. Supplemental Responding Record of the Proposal Trustee dated November 10, 2023; and

5. Second Supplemental Responding Record of the Proposal Trustee dated December 14, 2023.

April 2, 2024

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IN THE MATTER OF *THE BANKRUPTCY AND INSOLVENCY ACT*, R.S.C. 1985, c. B-3 AS AMENDED.

IN THE MATTER OF THE NOTICES OF INTENTION TO MAKE A PROPOSAL OF YG LIMITED PARTNERSHIP AND YSL RESIDENCES INC.

Court of Appeal File No.: COA-24-CV-0550

Court File No. BK-21-02734090-0031

COURT OF APPEAL FOR ONTARIO
IN BANKRUPTCY AND INSOLVENCY

PROCEEDING COMMENCED AT TORONTO

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Court of Appeal File No. COA-24-CV-0550
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COURT OF APPEAL FOR ONTARIO

IN THE MATTER OF THE *BANKRUPTCY AND INSOLVENCY ACT*,
R.S.C. 1985, c. B-3, as amended

**IN THE MATTER OF THE NOTICES OF INTENTION
TO MAKE A PROPOSAL OF
YG LIMITED PARTNERSHIP AND YSL RESIDENCES INC.**

B E T W E E N:

CERTIFICATE OF COMPLETENESS

I, Xin Lu (Crystal) Li, lawyer for the Appellants, 2504670 Ontario Inc., 8451761 Canada Inc. and Chi Long Inc., and on behalf of Alexander Soutter, lawyer for the Appellants, YongeSL Investment Limited Partnership, 2124093 Ontario Inc., SixOne Investment Ltd., E&B Investment Corporation, and TaiHe International Group Inc., certify that the appeal book and compendium in this appeal is complete and legible.

June 7, 2024

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IN THE MATTER OF THE NOTICES OF INTENTION OT MAKE A PROPOSAL OF YG LIMITED PARTNERSHIP AND YSL RESIDENCES INC. OF THE CITY OF TORONTO, IN THE PROVINCE OF ONTARIO

Court of Appeal File No.: COA-24-CV-0550
Court File No. BK-21-02734090-0031

COURT OF APPEAL FOR ONTARIO
IN BANKRUPTCY AND INSOLVENCY

PROCEEDING COMMENCED AT TORONTO

CERTIFICATE OF COMPLETENESS

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Court of Appeal File No.: COA-CV-24-0550
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COURT OF APPEAL FOR ONTARIO
IN BANKRUPTCY AND INSOLVENCY

PROCEEDING COMMENCED AT TORONTO

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