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.

FACTUM OF 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. (collectively, the "Class A LPs")

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PART I - OVERVIEW

1. The Class A LPs appeal from a March 19, 2024 order (the "**Order**") of Justice Kimmel (the "**Motion Judge**") that (a) ignored the Motion Judge's own prior order and directions regarding the Class A LPs' standing, (b) failed to conclude that the Profit-Sharing Agreement (defined below) is unenforceable, despite established, binding precedent, and (c) nevertheless held that the conclusion that the Profit-Sharing Agreement was enforceable would be binding on the Class A LPs in other proceedings. The Motion Judge erred in those respects.

2. The Profit-Sharing Agreement is a secret profit-sharing agreement between the Debtors and the Respondent Maria Athanasoulis, one of the Debtors' senior officers. That agreement is unenforceable. The claim flowing from it is not a provable claim in this proceeding under the *Bankruptcy and Insolvency Act*, RSC 1985, c B-7 ("***BIA***"). Had the Motion Judge considered the arguments raised by the Class A LPs, the Motion Judge would have dismissed Athanasoulis' appeal from the Disallowance (defined below).

3. The Class A LPs ask this Court to replace the Order with one that affirms the Disallowance or declares the Profit-Sharing Agreement unenforceable.

4. The Debtors are a limited partnership and bare trustee company that held title to the partnership's primary asset, a condominium development near Yonge Street and Gerrard Street in Toronto, the "**YSL Project**". The Class A LPs are arms-length investors in the Debtors. They were induced to invest by Athanasoulis, who told the Class A LPs that they

would be repaid their investments, plus 100% return thereon, before Cresford (the developer) received any return.

5. Athanasoulis is the former President and Chief Operating Officer of the "**Cresford**" group of companies, including the Debtors. She was the "face" of Cresford.

6. Athanasoulis never told the Class A LPs that she had entered into a secret profit-sharing agreement with Cresford (the "**Profit-Sharing Agreement**") to receive 10% (and later, 20%) of the profit from the YSL Project.

7. Athanasoulis' position is that her claim for breach of the Profit-Sharing Agreement (the "**Profit-Sharing Claim**") is an enforceable, provable claim in this *BIA* proceeding that should be paid ahead of the Class A LPs' entitlement.

8. The Debtors' proposal trustee (the "**Proposal Trustee**") disallowed the Profit-Sharing Claim (the "**Disallowance**"). Athanasoulis appealed. In a prior decision, the Motion Judge allowed the Class A LPs to make arguments regarding the enforceability of the Profit-Sharing Agreement.

9. The Motion Judge erred in setting aside the Disallowance by:

   (a) restricting the Class A LPs' standing to a single issue, despite the Motion Judge's own prior directions;

   (b) declining to determine the issues raised by the Class A LPs that undermine the enforceability of the Profit-Sharing Agreement, despite holding that this decision would be *res judicata* and binding on the Class A LPs; and

   (c) failing to find that the Profit-Sharing Agreement is unenforceable.

10. The Class A LPs stand to lose their entire investment if Athanasoulis' Profit-Sharing Agreement is upheld as an enforceable obligation of the Debtors.

11. The Order is contrary to established, binding precedent on the heightened duty of disclosure by fiduciaries for self-dealing transactions. Failing full, informed disclosure of such transactions to parties such as the Class A LPs, who are vulnerable to the fiduciary's discretion, such transactions must be set aside.

12. The effect of the Order is unjust. Unless corrected on appeal, the result will be that a fiduciary to a failed partnership can reap the benefits of a side agreement, entered into with another fiduciary and kept secret from the partners, based on a hypothetical profit that will never be realized.

13. The Motion Judge committed other errors addressed in the Proposal Trustee's appeal. The Class A LPs adopt the submissions of the Proposal Trustee and support its appeal.

PART II - FACTS

A. The Parties

14. 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.

15. The Partnership is governed by an Amended and Restated Limited Partnership Agreement (the "**LP Agreement**"). The general partner of YG Limited Partnership, 9615334 Canada Inc. (the "**GP**"), is also a Cresford entity.

16. The Class A LPs are arms-length investors. They invested $14.8 million in the Partnership. They are at risk of losing their entire investment if Athanasoulis' Profit-Sharing Claim is allowed. If the Proposal Trustee's Disallowance is restored then the Class A LPs will recover as much as $13.8 million of their investment.

17. The Respondent, Athanasoulis, is the former President and Chief Operating Officer ("**COO**") of Cresford and, along with Daniel Casey ("**Casey**"), controlled the Partnership through the GP. 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.

> Affidavit of Maria Athanasoulis sworn May 5, 2023 ("**Athanasoulis Affidavit**") at **paras 1 and 14**, Appeal Book and Compendium ("**ABCO**"), **Tab 8**, pp 133 and 134 ; Transcript from the examination of Athanasoulis on February 22, 2023, in the Arbitration, **p 163**, **ABCO, Tab 7**, p 132; Partial Award of William G. Horton dated March 28, 2022 ("**Arbitration Award**") at **para 72**, **ABCO, Tab 15**, p 214.

B. Athanasoulis' Representations to the Class A LPs

18. Athanasoulis "cultivated relationships" with investors and real estate agents and leveraged those relationships to obtain financing for the YSL Project. She, directly or through brokers, actively solicited investments from the Class A LPs and, in an attempt to induce them to invest, represented that they would recover their investment plus 100% return on investment prior to any profits being paid to Cresford.

> Athanasoulis Affidavit at **paras 21-24 and 29**, **ABCO, Tab 8**, pp 135 and 136; Affidavit of Lue (Eric) Li sworn December 20, 2022 (the "**Li Affidavit")** at **paras 3-11**, **ABCO, Tab 9**, pp 143-145; Affidavit of Yuan (Michael) Chen sworn December 14, 2022 (the "**Chen Affidavit**") at **paras 2-8**, **ABCO, Tab 11**, pp 163 and 164.

19. Specifically, Athanasoulis presented the "**Waterfall**" to the Class A LPs both orally and in writing, which provides that the profits of the YSL Project would be distributed first to

external lenders, then to the Class A LPs on account of their principal and return on investment, **before** any profit would be distributed to Cresford.

> Athanasoulis Affidavit at **paras 30**, **32** **and 34**, **ABCO, Tab 8**, pp 137 and 138; Li Affidavit at **paras 6-8** **and 14**, **ABCO, Tab 8**, pp 143-146; Chen Affidavit at **paras 6-8** and **Exhibit A**, **ABCO, Tabs 11 and 12**, pp 163, 164 and 178; June 13, 2017 email from Howard Ng to Paul Lam copying Maria Athanasoulis, with attached investor presentation, Exhibit A to Affidavit of Paul Lam sworn November 28, 2022 ("**Lam Affidavit**), **ABCO, Tab 14**, **pp 185** **and 196**; Lam Affidavit at **para 8**, **ABCO, Tab 13**, p 183.

20. The Class A LPs were entirely reliant on Cresford for information. They relied on the representations regarding the Waterfall and their priority to any profits in making their investments.

> Li Affidavit at **paras 7-10** **and 19**, **ABCO, Tab 9**, pp 144 and 146; **Exhibit B** to Li Affidavit – YSL Investor Presentation, **ABCO, Tab 10**, p 158; Athanasoulis Affidavit at **para 32**, **ABCO, Tab 8**, p 137.

21. The Waterfall became a material term of the Class A LPs' subscription agreements and was reflected in the LP Agreement. In total, the Class A LPs expected, and were told by Athanasoulis to expect, to be paid $29.6 million.

> Li Affidavit at **paras 19-21**, **ABCO, Tab 9**, pp 146 and 147; Chen Affidavit at **paras 15-17**, **ABCO, Tab 11**, p 165; LP Agreement **s. 6.3(b)**, **ABCO, Tab 16**, p 270; and **Subscription Agreement** of 2504670 Ontario Inc., **ABCO, Tab 17**, p 310.

22. Finally, it was so important to the Class A LPs that they be repaid before any profit was distributed to Cresford that the LP Agreement was amended to provide that no class of limited partner could be created in priority to the Class A LPs without their unanimous consent.

> Li Affidavit at **paras 6-8** **and 14**, **ABCO, Tab 9**, pp 143-146; LP Agreement, **s. 10.14(d)**, **ABCO, Tab 16**, pp 280 and 281.

23. At no point before or after inducing the Class A LPs to make the investments did Athanasoulis disclose, orally or in writing, that she would or could receive a distribution of the profits from the YSL Project before the Class A LPs. Athanasoulis' explanation for the non-disclosure is "I did not at that time have any idea that it might be relevant to them" because she never contemplated a scenario where the Partnership would be insolvent and the Class A LPs would not recover the entire investment and guaranteed return. This explanation does not stand up to what the law requires and, if accepted, would mean that fiduciaries have a residual discretion whether or not to disclose self-dealing transactions.

> Athanasoulis Affidavit at **para 49**, **ABCO, Tab 8**, p 140; Li Affidavit at **paras 20-21**, **ABCO, Tab 9**, p 147.

24. The first time that the Class A LPs learned that Athanasoulis was claiming a personal entitlement to the Partnership's notional profits was after she was terminated by Cresford and commenced litigation to pursue her Profit-Sharing Claim.

C. Procedural History

i. The BIA Proposal

25. 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 failed 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.

> *YG Limited Partnership and YSL Residences (Re)*, 2021 ONSC 4178 at paras 11, 34-36, **Appellants' Book of Authorities [AOA], Tab 1**

26. The Class A LPs opposed 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.

27. The new proposal was approved by the Court (the "**Proposal**") and does not cap unsecured creditor recovery. Unsecured creditors may yet recover 100% of their claims, subject to the determination of the Profit-Sharing Claim. By way of the Proposal, the Debtors transferred the YSL Project lands to another developer.

> *YG Limited Partnership and YSL Residences (Re)*, 2021 ONSC 5206 at paras 9-11, 32, **AOA, Tab 2**

28. The Proposal Trustee conducted a claims process and disallowed the Profit-Sharing Claim. It remains the outstanding issue. Subject to the determination of that claim, $13.8 million will be available for distribution to the Class A LPs.

> Disallowance, **Footnote 3**, **ABCO, Tab 4,** p 58.

ii. Athanasoulis Profit-Sharing Claim

29. The Proposal Trustee and Athanasoulis initially agreed to a bifurcated arbitration to determine certain facts related to the Profit-Sharing Claim, specifically: whether an oral agreement existed between Athanasoulis and Cresford's other principal, Daniel Casey, and, if so, what terms were agreed to.

30. In the first phase, the Arbitrator found that: (a) Athanasoulis had an agreement with Cresford whereby she would share in the profits of the YSL Project (the Profit-Sharing

Agreement); and (b) after the Class A LPs had invested, the Profit-Sharing Agreement was amended to increase Athanasoulis' share of profits from 10% to 20%.

> Arbitration Award at **paras 133**, **148 and 191**, **ABCO, Tab 15**, pp 225, 231 and 191.

31. Neither Athanasoulis nor Casey disclosed the existence of the Profit-Sharing Agreement or the subsequent agreement to increase her share of profits to the Class A LPs. There is no dispute regarding this fact.

32. The Class A LPs were not involved or allowed to participate in the arbitration. They were not informed about its scope until after a decision had been released in the first phase. Thereafter, they immediately took steps to challenge the arbitration process for Athanasoulis' claim. The Class A LPs objected to being left out of the determination of Athanasoulis' claim and to the narrow focus of the arbitration process, which did not address any of the partnership law, fiduciary duty or misrepresentation issues that impacted the validity of the Profit-Sharing Claim, issues that they were uniquely positioned to advance.

33. The first phase of the arbitration between the Proposal Trustee and Athanasoulis **did not** raise or address any of the following issues about 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 Athanasoulis and GP to the Partnership and the Class A LPs, (iii) Athanasoulis' knowing assistance in the GP's breach of its fiduciary duties and/or (iv) Athanasoulis' misrepresentations to the Class A LPs; and

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

34. The Motion Judge held that the arbitration agreement between the Proposal Trustee and Athanasoulis was *ex juris* section 135 of the *BIA* to the extent that it purported to go beyond a mere fact-finding exercise regarding the existence of an oral agreement. Her Honour directed the Proposal Trustee to determine and value the Profit-Sharing Claim.

> *YG Limited Partnership (Re)*, 2022 ONSC 6138 at paras 12-14, 48-52, 81 and 83, **AOA, Tab 3**; *YG Limited Partnership (Re)*, 2023 ONSC 4638 at para 5, **AOA, Tab 4**

iii. Motion Judge's Procedural Directions

35. By decision dated February 10, 2023, the Motion Judge gave directions for the determination of the Profit-Sharing Claim and any appeal therefrom, including that the Class A LPs had standing on an appeal to raise 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.

> Endorsement dated January 16, 2023 ("**Procedural Direction**") at **para 61i**, **ABCO, Tab 18,** pp 324-326.

36. The Class A LPs submitted evidence and made submissions on those issues. Athanasoulis had the opportunity to, and did, respond to that evidence and submissions. Affidavit

evidence was exchanged. Athanasoulis elected not to cross-examine the Class A LPs although she had the opportunity to do so.

iv. Motion Judge Allowed Athanasoulis' Appeal

37. The Proposal Trustee disallowed the Profit-Sharing Claim. On appeal by Athanasoulis, the Motion Judge set aside the Disallowance and made the following findings:

(a) there is no basis to conclude that the Profit-Sharing Agreement is unenforceable as a result of the alleged breaches of the LP Agreement;

(b) the issues of breach of fiduciary duty, misrepresentation, and knowing assistance are outside the scope of the standing granted to the Class A LPs, and are more appropriately adjudicated outside the context of these proceedings; and

(c) findings regarding the enforceability, validity and priority of the Profit-Sharing Agreement will be binding upon the Class A LPs in any other proceedings.

Motion Judge's Decision dated March 19, 2024 ("**Decision**") at **paras 126 and 129**, **ABCO, Tab 3**, p 50.

PART III - STATEMENT OF ISSUES, LAW AND AUTHORITIES

38. The Motion Judge committed several errors of law with respect to the Class A LPs' rights and claims regarding the enforceability of the Profit-Sharing Agreement:

(a) The Motion Judge erred by ignoring her own Procedural Direction and restricting the Class A LPs' standing to a single issue;

(b) That error led directly to the Motion Judge failing to consider the arguments raised by the Class A LPs as to why the Profit-Sharing Agreement was unenforceable or

should be set aside. Had the Motion Judge not made those errors, the Motion Judge would have concluded that Profit-Sharing Agreement is unenforceable due to:

(i) Athanasoulis' breach of fiduciary duty or knowing assistance of the GP's breach, including that the Profit-Sharing Agreement amounts to a breach of the GP's obligations under the LP Agreement; and

(ii) Athanasoulis' misrepresentations to the Class A LPs.

(c) Finally, despite not addressing the Class A LPs' full argument on why the Profit-Sharing Agreement was unenforceable, the Motion Judge declared that her conclusion that the Profit-Sharing Agreement was enforceable would bind the Class A LPs in other litigation.

A. Error by Failing to Follow Own Directions

39. The Motion Judge erred by (a) restricting the Class A LPs' standing on Athanasoulis' appeal to a single issue (whether the Profit-Sharing Agreement violated the LP Agreement) and (b) dissecting the Class A LPs' interconnected arguments regarding enforceability, despite the Motion Judge's own Procedural Directions. The Procedural Directions gave the Class A LPs standing to address the enforceability of the Profit-Sharing Claim. The Class A LPs' arguments regarding enforceability were not divisible because the breach of the LP Agreement was a factor relevant to the related breach of fiduciary duty, knowing assistance and misrepresentation arguments.

40. The Motion Judge incorrectly refused to engage with the other issues that the Class A LPs raised regarding enforceability on the basis that:

(a) those issues fall outside the scope of the Class A LPs' standing; and

(b) the proceeding is not the proper forum for determining those issues because there are "contentious factual disputes and credibility assessments".

Decision at **paras 126 and 129**, **ABCO, Tab 3**, p 50.

41. The key facts underpinning the Class A LPs' argument that the Profit-Sharing Agreement was improper and unenforceable against the Partnership were undisputed:

(a) Athanasoulis was the President and COO of Cresford, including the GP;

(b) Athanasoulis and Casey entered into an oral agreement to pay her 10% of the profits on future Cresford projects. This agreement was made before the Class A LPs made their advances. The agreement was later revised, in 2018, to increase Athanasoulis' share of profits to 20%;

(c) the Profit-Sharing Agreement was never disclosed to the Class A LPs;

(d) the LP Agreement prohibits the GP from entering into any related party transaction unless on market terms; and

(e) Athanasoulis represented to the Class A LPs that they would be repaid their investment, plus a return, before Cresford received any profit.

42. None of the parties' factums asserted that the Class A LPs lacked standing to raise any of the issues that the Procedural Directions provided the Class A LPs could raise. The Class A LPs had no notice that their arguments would not be considered, and no opportunity to explain why they should be. It was an error for the Motion Judge not to follow the Procedural Directions.

B. Error to Conclude that the Profit-Sharing Agreement was Enforceable

43. Whether the Profit-Sharing Agreement is unenforceable (and thus not a provable claim) is inextricably linked to Athanasoulis' and the GP's breaches of their obligations to the Class A LPs. The Motion Judge erred by not considering those obligations, instead focusing only on the terms of the LP Agreement in a vacuum. Had those critical obligations been considered, the Motion Judge would have concluded that the Profit-Sharing Agreement was unenforceable.

i. Athanasoulis Breached her Fiduciary Duties to the Class A LPs

44. It is well-established that fiduciaries may not engage in transactions where there is a conflict of interest unless they obtain full, informed consent to the transaction from their beneficiaries. Without such consent, any such transaction is voidable and the fiduciary must account for profits.

> *Extreme Venture Partners Fund I LP v Varma*, 2021 ONCA 853 at paras 68, 78 [*Extreme Venture*], **AOA, Tab 5**, leave to appeal refused by the SCC, *Amar Varma, et al v Extreme Venture Partners Fund I LP, et al*, 2022 CarswellOnt 10973 (SCC), **AOA, Tab 6**; *Molchan v Omega oil and Gas Ltd*, [1988] 1 SCR 348 at paras 37 (majority), 71 (dissent) [*Molchan*], **AOA, Tab 7**; *Rochwerg v Truster* (2002), 58 OR (3d) 687 (Ont CA) at para 36, **AOA, Tab 8**; *Klana v Jones*, 2003 CanLII 42363 at para 44 (Ont Sup Ct J), **AOA, Tab 9**; *Ontario Securities Commission v Go-To Developments Holdings Inc, et al*, 2023 ONSC 6578 at paras 16, 20, 25-26 [*Go-To Developments*], **AOA, Tab 10**; *Advanced Realty Funding Corp v Bannink* (1979), 27 OR (2d) 193 (Ont CA), **AOA, Tab 11**; *Naramalta Development Corporation v Therapy General Partner Ltd*, 2012 BCSC 191 at paras 63-64, 71 [*Naramalta*], **AOA, Tab 12**

45. In *Extreme Venture*, this Court adopted the following principles:

(a) directors **and officers** have a duty not to engage in self-dealing;

(b) any officer who knowingly causes the corporation to commit a breach of trust is personally liable to the beneficiary of the trust (here, the Class A LPs);

(c) a director **or officer** of a corporate trustee (like the GP) who improperly acquires an interest in trust property (like the proceeds of the YSL Project) is subject to personal liability to the beneficiaries; and

(d) the directors **and officers** of a corporate trustee are in a fiduciary relation not merely to the corporation but to the beneficiaries of the trust (the Debtor YG Limited Partnership) administered by the corporation.

> *Extreme Venture* at paras 104-106, **AOA, Tab 5**; see also *Merklinger v Jantree No 3 Limited Partnership & Snapdragon Ltd*, 2004 CanLII 54553 at paras 104-106 (Ont Sup Ct J), **AOA, Tab 13**; *Molchan* at para 36, **AOA, Tab 7**.

46. Athanasoulis was the President and COO of Cresford, including the GP, when the Class A LPs made their investments. She was the "face" of Cresford. She and Casey controlled the Partnership through the GP.

> Athanasoulis Affidavit at **paras 1 and 14**, **ABCO, Tab 8,** p 133 and 134**;** Arbitration Award at **para 72**, **ABCO, Tab 15**, p 214.

47. In that context, Athanasoulis owed a fiduciary duty to the Class A LPs. Concluding otherwise leads to the "anomalous" result where Athanasoulis could act "with impunity to damage the interests of the limited partnership, including by engaging in self-dealing".

> *Extreme Venture* at paras 96, 99-106, **AOA, Tab 5**; *Go-To Developments* at para 13, **AOA, Tab 10**

48. The duty to make full disclosure is a high standard. Athanasoulis made **no disclosure** of the Profit-Sharing Agreement. Her argument that disclosure was not necessary because the Class A LPs did not inquire was rejected as "specious" by this Court in *Extreme Venture*.

> *Go-To Developments* at paras 26-27, **AOA, Tab 10**; *Extreme Venture* at para 78, **AOA, Tab 5**.

49. Courts have refused to enforce secret deals in similar contexts:

(a) *Extreme Venture* involved a secret deal between a limited partnership and the directors and officers of its general partner, Varma and Madra. This Court accepted that Varma and Madra owed a fiduciary duty to the limited partnership and the limited partners, and breached that duty by failing to disclose their secret contract;

(b) *Naramalta* involved a management fee agreement between the general partner of a limited partnership, on the one hand, and a corporation controlled by the sole director and officer of that general partner, on the other. The Court refused to enforce the agreement because it was not disclosed to the limited partners; and

(c) *Go-To Developments* involved a fee arrangement in favour of the sole director of the limited partnership's general partner. Even though some disclosure of the arrangement was made to the limited partners, the Court refused to enforce it because full disclosure was not made. The failure to give that full disclosure was a breach of fiduciary duty that should not be condoned by enforcing the agreement.

ii. Athanasoulis Knowingly Assisted the GP's Breach of Fiduciary Duty

50. Athanasoulis' argument that she did not owe fiduciary duties to the Class A LPs is a technical one and contrary to this Court's decision in *Extreme Venture*. It also fails to

address the argument that Athanasoulis knowingly assisted the GP's breach of fiduciary duty. In addition to Athanasoulis' own direct duty, the GP owed a fiduciary duty to the Class A LPs. It had similar obligations to not enter into, without giving full disclosure, the Profit-Sharing Agreement that Athanasoulis did.

> *Extreme Venture* at para 98, **AOA, Tab 5**; *YG Limited Partnership and YSL Residences (Re)* at para 69, **AOA, Tab 1**

51. Athanasoulis participated in the GP's breach of fiduciary duty by entering into the Profit-Sharing Agreement and keeping it secret from the Class A LPs. In that context, she was in the same position as the GP *vis-à-vis* the Class A LPs.

> *Extreme Venture* at paras 74, 86-89, **AOA, Tab 5**; see also *Naramalta* at para 75, **AOA, Tab 12**;*DBDC Spadina Ltd v Walton*, 2018 ONCA 60 at para 211-217 (dissent), **AOA, Tab 14**, dissent aff'd *Christine DeJong Medicine Professional Corp v DBDC Spadina Ltd*, 2019 SCC 30, [2019] 2 SCR 530, **AOA, Tab 15**

iii. The LP Agreement is Relevant to the Scope of the Fiduciary Duty

52. The Motion Judge erred in finding that,

> 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.
>
> Decision at **para 121**, **ABCO, Tab 3**, p 49.

53. By characterizing the issue as only being about whether the Profit-Sharing Agreement was unenforceable "as a result" of violations of the applicable agreements, the Motion Judge misunderstood the Class A LPs' argument. The argument is that the terms of the LP Agreement, and the Sales Management Agreement which was incorporated by reference

into the LP Agreement, are relevant to the scope of the fiduciary duties owed by Athanasoulis and the GP.

Extreme Venture at para 103, **AOA, Tab 5**; *Molchan* at para 37, **AOA, Tab 7**.

54. By breaching the LP Agreement, Athanasoulis and the GP breached their fiduciary duties to the Class A LPs. The LP Agreement was breached because the LP Agreement requires the GP to "exercise its powers and discharge it duties under this Agreement honestly, in good faith and in the best interest of the Limited Partners". Entering into the Profit-Sharing Agreement was not in the best interests of the Class A LPs if it has the effect of depriving them from their contracted for preferred return.

LP Agreement, **s.3.5(a)**, **ABCO, Tab 16,** p 259.

55. The LP Agreement also prohibits the GP from entering into any contract with any Related Party, other than on market terms. Athanasoulis is a "Related Party" (as defined in the LP Agreement) because she was an officer and employee of the Affiliates of the GP - the entire Cresford group. As a result, any agreement between Athanasoulis and the GP had to be on market terms. Athanasoulis adduced no evidence that it was.[1]

LP Agreement, **ss. 1.1**, **3.5(a)**, **3.6(b)** and **4.2(a)**, **ABCO, Tab 16**, pp 251, 254, 259, 260, 262 and 263.

56. The evidence before the Motion Judge was that the LP Agreement expressly authorized three non-arm's length agreements between the Partnership and Cresford entities related to the development of the YSL Project: a Development Management Agreement, a

[1] The Class A LPs did not participate in the arbitration and could not make submissions on this issue, so any findings made in the arbitration in this respect are not binding on them: *Bedard v Bedard*, 2018 ONSC 2220 at paras 9-12, **AOA, Tab 16**.

Construction Management Agreement and a Sales Management Agreement. All three agreements were entered into and disclosed to the Class A LPs before they made their initial investments. This contrasts with the secret Profit-Sharing Agreement.

LP Agreement, **s. 3.4**, **ABCO, Tab 16,** p. 259.

57. The Sales Management Agreement is particularly relevant since it provides that the Partnership was to pay fees to another Cresford entity, based upon a prescribed fee formula, for the very same sales and marketing services that Athanasoulis claims justify her receiving $18 million under the Profit-Sharing Agreement. According to Athanasoulis, the Partnership has already paid Cresford $11.6 million for marketing services related to the YSL Project pursuant to the Sales Management Agreement.

Athanasoulis Affidavit at **paras 44-45**, **ABCO, Tab 8**, p 139; Sales Management Agreement, **ss. 3.1** and **3.2**, **ABCO, Tab 19**, pp 333-335.

58. The Sales Management Agreement also contained restrictions on Cresford entering into non-arm's length contracts (like the Profit-Sharing Agreement) or charging additional fees for the sales and marketing services covered by the agreement.

Sales Management Agreement, **ss. 4.2 and 5.5**, **ABCO, Tab 19**, pp 335-337 and 339.

59. These terms inform Athanasoulis' and the GP's duties owed to the Class A LPs. At the same time, the duty to disclose related-party transactions informs whether the terms of the LP Agreement were complied with. The Class A LPs' argument was that those duties were breached rendering the Profit-Sharing Agreement unenforceable by Athanasoulis. The Motion Judge's characterization and treatment of the enforceability argument misapprehended the issues and how they intersect in the context of a fiduciary seeking to benefit from undisclosed self-dealing.

iv. Athanasoulis made Misrepresentations to the Class A LPs

60. The Motion Judge erred by failing to conclude that Athanasoulis' misrepresentations to the Class A LPs rendered the Profit-Sharing Agreement unenforceable. The Motion Judge held that "mere allegation of an 'omission' to make disclosure is not sufficient" to determine the misrepresentation claim. With respect, the Motion Judge misunderstood the issue.

> Decision at **para 128**, **ABCO, Tab 3**, p 50.

61. The misrepresentation claim is not based solely on the "mere allegation of an 'omission' to make disclosure". Rather, it is based on the Class A LPs' unchallenged evidence of Athanasoulis' representations to them regarding the priority of their entitlements to distribution from the Project's profits (i.e. the Waterfall), their reliance on those representations in deciding to advance funds to the Partnership, and Athanasoulis making no disclosure of the Profit-Sharing Agreement.

> Athanasoulis Affidavit at **paras 30**, **32** **and 34**, **ABCO, Tab 8**, pp 137 and 138; Li Affidavit at **paras 6-8** **and 14**, **ABCO, Tab 8**, pp 143-146; Chen Affidavit at **paras 6-8** and **Exhibit A**, **ABCO, Tabs 11 and 12**, pp 163, 164 and 178; June 13, 2017 email from Howard Ng to Paul Lam copying Maria Athanasoulis, with attached investor presentation, Exhibit A to Lam Affidavit, **ABCO, Tab 14**, **pp 185** **and 196**; Lam Affidavit at **para 8,** **ABCO, Tab 13**, p 183.

62. The Class A LPs' allegations are the same ones that the Court accepted as true in an earlier decision in this proceeding. When the initial Proposal was rejected, the Court found that there were "direct written representations" made to the Class A LPs "as part of the subscription process" that,

> after payment of 'project expenses' only 'external lenders' debt would be repaid ahead of them and that distributions to 'Cresford' - unambiguously referencing the group of companies rather than one entity – would come after repayment of invested capital and the agreed return on investment to the [Class A LPs].

YG Limited Partnership and YSL Residences (Re) at paras 44-47, **AOA, Tab 1**

63. Athanasoulis induced the Class A LPs to invest by representing that profits would be distributed to them first according to the Waterfall. She knew that they relied on her for information and breached her duty of disclosure despite knowing the importance the Class A LPs placed on having first claim to the YSL Project's profits. In those circumstances, it is inequitable to enforce the Profit-Sharing Agreement.

C. Error to Determine that the Enforceability of the Profit-Sharing is *res judicata*

64. The Motion Judge's errors, discussed above, were compounded by the further error in concluding that the enforceability of the Profit-Sharing Agreement would be binding on the Class LPs "in any future proceedings".

Decision at **para 131**, **ABCO, Tab 3,** p 51.

65. There is an existing proceeding against Athanasoulis, commenced by certain Class A LPs, that challenges the enforceability of the Profit-Sharing Agreement and seeks, among other things, damages for breach of fiduciary duty, knowing assistance and misrepresentation. The Motion Judge was aware of that other proceeding, which is at the pleadings stage.

Amended Statement of Claim dated May 18, 2023, **ABCO, Tab 20**, pp 356-375.

66. In error, the Motion Judge (a) determined a central issue in that proceeding without considering the arguments raised by the Class A LPs, and (b) held that they would be subject to *res judicata* with respect to Her Honour's declaration that the Profit-Sharing Agreement was enforceable. That conclusion undercuts the Class A LPs' claim against Athanasoulis without addressing it on its full merits. This conclusion is manifestly unjust and incorrect.

D. Jurisdiction

67. Leave to appeal is not required because: (a) the issues on appeal involve the parties' future rights to the residual cash pool held by the Proposal Trustee; and (b) the property involved in the appeal exceeds $10,000. Athanasoulis' claim is for approximately $18 million.

> *Bankruptcy and Insolvency Act*, RSC, 1985, c B-3, s 193; *Temple Consulting Group Ltd v Abakhan & Associates Inc*, 2011 BCCA 540 at para 7 and 8, **AOA, Tab 17**; *Roman Catholic Episcopal Corporation of St George's v John Doe - 49 - GBS*, 2007 NLCA 17 at paras 25-27, **AOA, Tab 18**

68. In the alternative, if leave to appeal is required, it should be granted because it raises an issue of general importance to the practice in insolvency matters, is *prima facie* meritorious and would not unduly hinder the progress of the proceeding because the outcome may eliminate the need for any further steps in this proceeding, such as the valuation of the Profit-Sharing Claim.

> *Flight (Re)*, 2022 ONCA 526 at para 27, **AOA, Tab 19**, leave to appeal refused, *In the matter of the bankruptcy of Brian Wayne Flight, et al v John Adamson*, 2023 CanLII 28900 (SCC), **AOA, Tab 20**

69. This appeal addresses whether:

(a) a claim by one of the controlling minds of a debtor based on a secret side agreement that prejudices interests of vulnerable parties like the Class A LPs, without their knowledge, is a provable claim; and

(b) a Court can refuse to consider arguments that undermine a claim being enforceable (and thus provable) while nevertheless holding that parties are bound by that conclusion in other litigation.

70. Those issues are of general importance to the insolvency bar. It would be manifestly unfair if the Class A LPs had no right to appeal the Motion Judge's errors.

PART IV - ORDER REQUESTED

71. The Class A LPs respectfully request that this Court set aside the Order and replace it with one that:

(a) affirms the Proposal Trustee's disallowance of the Profit Share Claim;

(b) in the alternative, declares that the Profit Share Claim is unenforceable; and

(c) awards the Class A LPs their costs of this appeal and the appeal below.

Estimated time for oral argument of the appeal (not including reply): 1.5 hours.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 7th day of June, 2024.

Shaun Laubman / Xin Lu (Crystal) Li

Alexander Soutter

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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.

CERTIFICATE

I estimate that 1.5 hours will be needed for the Class A LPs' oral argument of the appeal, not including reply. An order under subrule 61.09(2) (original record and exhibits) is not required. The factum complies with subrule 61.09(3). There are 5,803 words in Parts I to V.

The person signing this certificate is satisfied as to the authenticity of every authority listed in Schedule "A".

DATED AT Toronto, Ontario this 7th day of June, 2024.

Shaun Laubman / Xin Lu (Crystal) Li

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SCHEDULE "A"
LIST OF AUTHORITIES

Tab	Title
1	*YG Limited Partnership and YSL Residences (Re)*, 2021 ONSC 4178
2	*YG Limited Partnership and YSL Residences (Re)*, 2021 ONSC 5206
3	*YG Limited Partnership (Re)*, 2022 ONSC 6138
4	*YG Limited Partnership (Re)*, 2023 ONSC 4638
5	*Extreme Venture Partners Fund I LP v Varma*, 2021 ONCA 853
6	*Amar Varma, et al v Extreme Venture Partners Fund I LP, et al*, 2022 CarswellOnt 10973 (SCC)
7	*Molchan v Omega oil and Gas Ltd*, [1988] 1 SCR 348
8	*Rochwerg v Truster* (2002), 58 OR (3d) 687 (Ont CA)
9	*Klana v Jones*, 2003 CanLII 42363 (Ont Sup Ct J)
10	*Ontario Securities Commission v Go-To Developments Holdings Inc, et al*, 2023 ONSC 6578
11	*Advanced Realty Funding Corp v Bannink* (1979), 27 OR (2d) 193 (Ont CA)
12	*Naramalta Development Corporation v Therapy General Partner Ltd*, 2012 BCSC 191
13	*Merklinger v Jantree No 3 Limited Partnership & Snapdragon Ltd*, 2004 CanLII 54553 (Ont Sup Ct J)
14	*DBDC Spadina Ltd v Walton*, 2018 ONCA 60
15	*Christine DeJong Medicine Professional Corp v DBDC Spadina Ltd*, 2019 SCC 30, [2019] 2 SCR 530
16	*Bedard v Bedard*, 2018 ONSC 2220
17	*Temple Consulting Group Ltd v Abakhan & Associates Inc*, 2011 BCCA 540

Tab	Title
18	*Roman Catholic Episcopal Corporation of St George's v John Doe - 49 - GBS*, 2007 NLCA 17
19	*Flight (Re)*, 2022 ONCA 526
20	*In the matter of the bankruptcy of Brian Wayne Flight, et al v John Adamson*, 2023 CanLII 28900 (SCC)

SCHEDULE "B"
TEXT OF STATUTES, REGULATIONS & BY-LAWS

***Bankruptcy and Insolvency Act*, R.S.C., 1985, c. B-3**

Appeals

Court of Appeal

193 Unless otherwise expressly provided, an appeal lies to the Court of Appeal from any order or decision of a judge of the court in the following cases:

(a) if the point at issue involves future rights;

(b) if the order or decision is likely to affect other cases of a similar nature in the bankruptcy proceedings;

(c) if the property involved in the appeal exceeds in value ten thousand dollars;

(d) from the grant of or refusal to grant a discharge if the aggregate unpaid claims of creditors exceed five hundred dollars; and

(e) in any other case by leave of a judge of the Court of Appeal.

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

Factum of 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. (collectively, the "Class A LPs")

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