

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

B E T W E E N:

KEB HANA BANK as trustee of IGIS GLOBAL PRIVATE PLACEMENT REAL ESTATE FUND NO. 301 and as trustee of IGIS GLOBAL PRIVATE PLACEMENT REAL ESTATE FUND NO. 434

Applicant

- and -

MIZRAHI COMMERCIAL (THE ONE) LP, MIZRAHI DEVELOPMENT GROUP (THE ONE) INC., and MIZRAHI COMMERCIAL (THE ONE) GP INC.

Respondents

IN THE MATTER OF AN APPLICATION PURSUANT TO SECTION 243 OF THE *BANKRUPTCY AND INSOLVENCY ACT*, R.S.C. 1985, c. B-3, AS AMENDED, AND SECTION 101 OF THE *COURTS OF JUSTICE ACT*, R.S.O. 1990, c. C.43, AS AMENDED

**FACTUM OF THE RECEIVER
(MI Miscellaneous Motion)
Returnable August 9, 2024**

August 7, 2024

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SCHEDULE “A” - LIST OF AUTHORITIES

PART I – INTRODUCTION AND OVERVIEW

1. This factum is filed by Alvarez & Marsal Canada Inc., in its capacity as court-appointed receiver and manager (in such capacity, the “**Receiver**”), without security, of all of the assets, undertakings and properties of Mizrahi Commercial (The One) LP, Mizrahi Development Group (The One) Inc., and Mizrahi Commercial (The One) GP Inc., including a mixed-use development project located at the southwest corner of Yonge Street and Bloor Street West in Toronto, Ontario, marketed as “The One” (the “**Project**”), in opposition to Mizrahi Inc.’s (“**MI**”) motion for an order requiring production of various construction documents.¹

2. MI seeks to compel the production of quantity survey reports, the daily logs of the Project’s construction manager, SKYGRiD Construction Inc. (“**SKYGRiD**”), updated construction schedules and budgets for the Project (collectively, the “**Construction Documents**”) to Sam Mizrahi (“**Mr. Mizrahi**”). MI’s motion suffers from at least two fundamental frailties:

- (a) Mr. Mizrahi has already accessed certain Construction Documents, including updated schedule and budget information, in the SISP Data Room. There is no evidence that Mr. Mizrahi needs – or is entitled to – more information about construction; and
- (b) this Court and the Ontario Court of Appeal have consistently held that a stakeholder in a receivership is only entitled to information that is relevant to issues in that

¹ Capitalized terms used herein and not otherwise defined have the meaning given to them in the Order (Appointing Receiver) of this Court dated October 18, 2023 (the “**Receivership Order**”), the [Receiver’s Third Report](#) dated June 21, 2024 (the “**Third Report**”), the [Supplemental Report to the Receiver’s Third Report](#) dated July 11, 2024 (the “**Supplemental Third Report**”), or the Second Supplemental Report to the Receiver’s Third Report dated August 7, 2024 (the “**Second Supplemental Third Report**”).

receivership. MI seeks production so that Mr. Mizrahi can evaluate his potential exposure as a guarantor of the Project's debts. This is not an issue in the Receivership proceeding, or any proceeding of which the Receiver is aware.

3. For these reasons, and those set out below, the Receiver submits that MI's motion should be dismissed.

PART II – FACTS

4. Background information regarding these Receivership Proceedings and the MI Payment Motion is set out in the Third Report, the Supplemental Third Report and the Second Supplemental Third Report. Capitalized terms not otherwise defined have the meaning ascribed to them in those Reports.

A. The MI Miscellaneous Motion

5. On June 21, 2024, MI brought a motion seeking various relief including: a prohibition on set-off claims not advanced before May 31, 2024, an increase to the reserve amount set aside to address MI's relief sought on the MI Payment Motion, production of certain documents from the Senior Secured Lenders, and production of various construction documents to Mr. Mizrahi (the "**MI Miscellaneous Motion**").²

6. The parties have agreed to resolve the majority of the MI Miscellaneous Motion, such that the outstanding MI Miscellaneous Motion solely concerns MI's final request for relief, specifically: "an order requiring the Receiver to produce to Mr. Mizrahi copies of all quantity

² Second Supplemental Third Report, Appendix B; [Supplemental Third Report](#), paras. [3.1 to 3.5](#).

survey reports, the daily logs of the Project's construction manager, SKYGRiD, updated construction schedules and budgets for the Project" (the previously-defined "**Construction Documents**").³ The request is not time-limited. It appears that Mr. Mizrahi seeks production of detailed and confidential construction documents on an ongoing basis until the Receivership Proceedings are complete.

7. Mr. Mizrahi has not tendered any evidence with respect to why he wants (or is entitled to) production of the Construction Documents. In MI's Notice of Motion, it is alleged that Mr. Mizrahi is entitled to the Construction Documents because they are "relevant to his interests in the Project as owner and guarantor to the Project's debts".⁴

8. In subsequent correspondence, Mr. Mizrahi's counsel explained that he seeks production of the Construction Documents to evaluate his potential liability pursuant to a guarantee that he gave to secure certain amounts advanced by the Senior Secured Lenders.⁵

9. Mr. Mizrahi's potential liability as guarantor is not an issue in the Receivership Proceedings. The Receiver is not a party to the guarantee and, to date, the Receiver has not been notified that any action has been taken to enforce the guarantee.

B. Mr. Mizrahi's Access to Construction Documents in the SISP Data Room

10. As set out the Receiver's Second Report dated May 28, 2024,⁶ the Receiver is in the process of conducting a sale and investment solicitation process ("**SISP**") for the Project. As part of the

³ Second Supplemental Third Report, para. 2.2 and Appendices A and C

⁴ Notice of Motion, para. 23, Second Supplemental Third Report, Appendix B

⁵ Letter dated July 30, 2024, Second Supplemental Third Report, Appendix C

⁶ [Receiver's Second Report](#) dated May 28, 2024, paras. [6.1 to 6.28](#)

SISP, the Receiver established the SISP Data Room in order to share information about the Project with SISP participants.

11. The SISP Data Room includes highly confidential information about the Project and, accordingly, each prospective participant had to execute a non-disclosure agreement (a “NDA”) to access the SISP Data Room. The SISP began on June 6, 2024, and Mr. Mizrahi expressed an interest in submitting a bid on June 21, 2024. Mr. Mizrahi, as President of Mizrahi Real Estate Group, Inc., did not actually execute an NDA until July 24, 2024, and he received access to the SISP Data Room the same day.⁷

12. The SISP Data Room contains many of the Construction Documents sought by MI on this motion. Specifically:

- (a) Mr. Mizrahi has asked for updated budget information. The budget information in the SISP Data Room includes both a “cost to date” (which captures all costs incurred on the Project up to March 12, 2024) and an estimated “cost to complete” (which captures the forecast cost of completing the Project). The cost to complete dated June 11, 2024 is “as of” March 12, 2024, but includes all forecast costs to complete the Project;⁸
- (b) Mr. Mizrahi has asked for updated schedules for the Project. The schedules included in the SISP Data Room provide projected dates for completion of all major construction and procurement activities and milestones on the Project. The “all

⁷ Second Supplemental Third Report, para. 3.1

⁸ Second Supplemental Third Report, para. 3.3(a)

tasks” schedule for the Project is 186 pages and provides detailed information with respect to when each significant task and milestone required to complete the Project is expected to occur;⁹ and

- (c) Mr. Mizrahi has asked for updated quantity survey reports. The Receiver has received cost reports from the Senior Secured Lenders’ cost consultant. These are not shared in the SISP Data Room, but they form the basis for the cost to date and cost to complete information that is shared in the SISP Data Room.¹⁰

13. The only remaining category of documents is the daily construction logs. The daily construction logs contain a very high level summary of the daily construction activities including the number of workers on site for various trades and weather conditions.¹¹ The Receiver is unable to understand how these documents are relevant to MI or Mr. Mizrahi.

14. As the Receiver has already granted Mr. Mizrahi access to significant Construction Documents, there is no evidence that Mr. Mizrahi needs information beyond what is contained in the SISP Data Room.

PART III – ISSUES, LAW & ANALYSIS

15. The sole issue to be considered on this motion is whether the Court should order the production of Construction Documents requested by Mr. Mizrahi. For the reasons set out herein, the Receiver respectfully submits that it should not.

⁹ Second Supplemental Third Report, para. 3.3(b)

¹⁰ Second Supplemental Third Report, para. 3.3(c)

¹¹ Second Supplemental Third Report, paras. 3.4-3.5

A. A Receiver’s Duty to Disclose Information

16. The Receiver has no duty to produce detailed and confidential information just because a stakeholder (in this case, Mr. Mizrahi) wants to investigate an issue that is separate from the receivership proceedings (in this case, Mr. Mizrahi’s potential exposure under his guarantee).

17. As a court-appointed receiver, the Receiver is an officer of the Court and owes a fiduciary duty to *all* stakeholders.¹² Consistent with its fiduciary duties and legal obligations, the Receiver has, and will continue to, provide reporting and information to all stakeholders and the Court in the form of reports to the Court.¹³

18. This Court, and the Court of Appeal, have held that a receiver must only respond to information requests that are “reasonable” and relate to a “specific purpose” directly relevant to the issues in the receivership.¹⁴ The information sought by Mr. Mizrahi fails both branches of this test.

19. As Justice Pattillo explained in *Pinnacle v. Kraus*:

[28] A court-appointed receiver is required to respond to reasonable requests for information from parties with an interest in the receivership: *Battery Plus Inc., Re* (2002), 31 C.B.R. (4th) 196 (Ont. S.C.J. [Commercial List]). What is reasonable must be determined, in my view, **having regard to the interest of the requesting party and the relevance of the information sought based on the issue or issues.** In addition, and as noted by Farley J. in *Bell Canada International Inc., Re* 2003 CanLII 22640 (ON SC), [2003] O.J. No. 4738 (S.C.J. [Commercial List]) at para.

¹² *Pinnacle v. Kraus*, [2012 ONSC 6376](#), para. 27 (“*Pinnacle*”)

¹³ Second Supplemental Third Report, para. 4.6

¹⁴ See *SA Capital Growth Corp. v. Mander Estate*, [2012 ONCA 681](#), paras. 7-9 (“*SA Capital*”); *Re Battery Plus Inc.*, [2002 CanLii 49569](#), paras. 19 and 21 (Ont. S.C.J. [Commercial List]) (“*Battery Plus*”); *Pinnacle*, para. 27

9, the objectivity and neutrality of the officer of the court is also a factor to consider.¹⁵ [emphasis added]

20. In *SA Capital Growth Corp. v. Mander Estate*, the Court of Appeal emphasized that a stakeholder *cannot* compel the production of information for purposes that are collateral to the receivership. In that case, the appellant sought documents allegedly relevant to Ontario Securities Commission (“OSC”) proceedings against him. The Court of Appeal held that defence of the OSC proceeding was “collateral to the receivership proceeding” and so the appellant had no right to the information sought.¹⁶

B. MI Seeks the Construction Documents for a Collateral Purpose

21. Setting aside that Mr. Mizrahi has already received access to Construction Documents, Mr. Mizrahi’s concerns about his potential exposure under the guarantee are undeniably collateral to the Receivership Proceedings. This is sufficient to dispose of the motion.

22. Mr. Mizrahi has explicitly requested the Construction Documents to evaluate his exposure as a guarantor.¹⁷ The guarantee is not an issue in the Receivership Proceedings, or any extant proceeding. If the Senior Secured Lenders seek to enforce the guarantee, then Mr. Mizrahi will have the procedural protections afforded to any litigant. There is no allegation – let alone evidence – that Mr. Mizrahi will suffer any prejudice if he does not receive production of the Construction Documents at this time.

¹⁵ *Pinnacle*, para. [28](#)

¹⁶ *SA Capital*, para. [9](#); see also, *Battery Plus*, para. [21](#)

¹⁷ MI July 30 Letter, Second Supplemental Third Report, Appendix C

C. No Evidence that Mr. Mizrahi Requires, or is Entitled to, the Construction Documents

23. MI's request is also not reasonable. Mr. Mizrahi has already *received* reasonable disclosure of the Construction Documents. Even if Mr. Mizrahi sought production for a valid purpose (which the Receiver denies) there is no evidence that further Construction Documents are required for that purpose. This, too, justifies dismissing MI's motion.

24. As noted, Mr. Mizrahi has already received information about the Project's construction schedule and budget through the SISP Data Room.¹⁸ Mr. Mizrahi has not even tried to explain why he requires more Construction Documents. He has not sworn an affidavit, nor has he brought a motion for the documents on his own behalf. The affidavit in support of the MI Miscellaneous Motion does not address why Mr. Mizrahi requires the Construction Documents.

25. Mr. Mizrahi is the principal of a bidder in the SISP. In that capacity, he is entitled to access (and presumably has accessed) the information available in the SISP Data Room. He is not entitled to demand additional information that is not available to all bidders.

26. In the circumstances, there is no basis on which to grant unique and special access to extensive production of the Construction Documents. The documents have no asserted relevance to any issue in the Receivership. As they are not reasonable requests connected to a specific purpose in these Receivership Proceedings, the request is properly denied.

¹⁸ See for e.g., Receiver August 6 Letter, Second Supplemental Third Report, Appendix E

D. The Information is Not Relevant to the MI Payment Motion

27. MI did not itself seek production of the Construction Documents, and it is not entitled to such production. MI has no entitlement to the Construction Documents by virtue of being a litigant opposite to the Receiver on the MI Payment Motion. Requests of a receiver, like requests of any other litigant, must be relevant and proportional.¹⁹

28. The MI Payment Motion was brought by MI. MI has filed a Notice of Motion and two supporting affidavits from employees of MI, including Mr. Mizrahi. These materials relate at a high level to the payment arrangements for MI as developer and general contractor on the Project until the disclaimer of the GC Agreement and the Construction Management Agreement (each as defined in the Receivership Order), which became effective on March 13, 2024. The Construction Documents have no connection to these payment arrangements.

29. MI speculates that the Construction Documents may be relevant to the Receiver's response to the MI Payment Motion. But the Receiver has not yet filed any responding material, because MI failed to produce the Project Records and financial documents that the Receiver required to complete its investigation until very recently.²⁰

30. Once the Receiver files its material, MI will have an opportunity to pose written questions, and seek production of documents, in the ordinary course.²¹ It is not necessary, at this stage, for

¹⁹ *Koolatron v. Synergex*, [2017 ONSC 4245](#), para. 48

²⁰ Second Supplemental Third Report, paras. 4.3, 5.1-5.2

²¹ Second Supplemental Third Report, para. 4.4

MI to seek production of documents that may never be relevant to the MI Payment Motion based on its assumptions about the Receiver's potential evidence.

PART IV– RELIEF REQUESTED

31. For the foregoing reasons, the Receiver respectfully requests that the MI's request for production of the Construction Documents be dismissed.

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

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SCHEDULE “A”

LIST OF AUTHORITIES

- 1) *Koolatron v. Synergex*, [2017 ONSC 4245](#)
- 2) *Pinnacle v. Kraus*, [2012 ONSC 6376](#)
- 3) *SA Capital Growth Corp. v. Mander Estate*, [2012 ONCA 681](#)
- 4) *Re Battery Plus Inc.*, [2002 CanLII 49569](#) (Ont. S.C.J. [Commercial List])

**KEB HANA BANK as trustee of IGIS GLOBAL MIZRAHI COMMERCIAL
PRIVATE PLACEMENT REAL ESTATE FUND NO. (THE ONE) LP, et al.
301 and as trustee of IGIS GLOBAL PRIVATE
PLACEMENT REAL ESTATE FUND NO. 434**

Court File No. CV-23-00707839-00CL

Applicant

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**ONTARIO
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(COMMERCIAL LIST)**
Proceeding commenced at Toronto

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