

**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
(Construction Continuance and Lien Regularization)
(Returnable March 7, 2024)**

March 4, 2024

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PART I – OVERVIEW

1. On October 18, 2023 (the “**Appointment Date**”), this Court granted the Applicant’s application for an Order (Appointing Receiver) (the “**Receivership Order**”), *inter alia*, appointing Alvarez & Marsal Canada Inc. (“**A&M**”) as receiver and manager (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. (collectively, the “**Debtors**”) acquired for, or used in relation to, a business carried on by the Debtors including, without limitation, in connection with the development of an 85-storey condominium, hotel and retail tower located at the southwest corner of Yonge Street and Bloor Street West in Toronto, Ontario, marketed as “The One” (the “**Project**”).¹
2. In the months following its appointment, the Receiver and its advisors undertook a comprehensive review of the status of the Project while the Receiver worked to consider next steps in the case and ensure ongoing construction. Following this review, consultations with stakeholders, and careful consideration, the Receiver determined that it is in the best interests of the Project and its stakeholders to: (a) disclaim the Construction Management Agreement and the GC Agreement with Mizrahi Inc. (the “**Former Developer**”), as authorized by, and in accordance with, paragraph 5 of the Receivership Order (the “**Disclaimer**”); and (b) engage a new construction manager for the Project, as authorized by paragraph 4(e) of the Receivership Order.

¹ All capitalized terms used herein and not otherwise defined have the meaning ascribed to them in the Receivership Order.

3. The Receiver now brings this motion seeking the following:
 - (a) an order (the “**Construction Continuance Order**”), which, among other things, approves the engagement by the Receiver of SKYGRiD Construction Inc. (“**Skygrid**”) as the new construction manager of the Project, and provides clarity, direction and certainty for contractors, subcontractors and trade suppliers engaged on the Project during the transition of construction management from the Former Developer to Skygrid; and
 - (b) an order (the “**Lien Regularization Order**”), which, among other things, establishes a Court-supervised streamlined process, administered by the Receiver, to replace the various technical requirements under the *Construction Act* (Ontario) (the “**Provincial Lien Legislation**”) for claiming, preserving and perfecting a construction lien claim (a “**Lien Claim**”) that may otherwise affect the ongoing funding and uninterrupted construction of the Project, without prejudicing the rights of lien claimants (each a “**Lien Claimant**”).
4. In the present circumstances, where the continuing construction of the Project is an essential component of the Receiver’s value maximization strategy, the relief sought by the Receiver in the proposed Orders is just and convenient, and will assist in ensuring that the transition of the Project to the new construction manager does not interfere with the progress of the Project or destabilize construction in any way.
5. Accordingly, for these and the additional reasons specified below and in the First Report of the Receiver dated February 26, 2024 (the “**First Report**”), the Receiver respectfully

requests that this Court grant the proposed Construction Continuance Order and the proposed Lien Regularization Order.

PART II – FACTS

A. Background²

6. The Debtors are entities established for the purpose of developing the Project, construction of which commenced in mid-2017.³
7. Pursuant to the Receivership Order, A&M was appointed as Receiver, without security, of all of the assets, undertakings and properties of the Debtors, acquired for, or used in relation to, a business carried on by the Debtors, including, without limitation, in connection with the Project and the Project itself, including all proceeds thereof (the “**Property**”).
8. The Receivership Order was granted upon application by the Applicant, the senior secured lenders to the Debtors, who were owed approximately \$1.26 billion as of the Appointment Date.⁴ The Applicant sought the appointment of the Receiver for the principal purposes of bringing stability and appropriate oversight to the Project to ensure the continuing construction of same, and preserving and protecting the Property to maximize recoveries from the Project for the benefit of all stakeholders.⁵

² Additional background regarding the Debtors, the Project and these receivership proceedings is set out in the Affidavit of Joo Sung Yoon dated October 17, 2023, and the First Report.

³ First Report of the Receiver dated February 26, 2024 [First Report] at para 3.4 [CL p [E28:E28](#) – [E29:E29](#)].

⁴ First Report at para 3.7 [CL p [E30:E30](#)].

⁵ First Report at para 1.2 [CL p [E24:E24](#)].

9. Pursuant to the Receivership Order, the Receiver, as borrower, IGIS Asset Management Co., Ltd., as asset manager, and KEB Hana Bank as trustee of IGIS Global Private Placement Real Estate Fund No. 530 (the “**RFCA Lender**”), as lender, entered into a \$315 million Receivership Funding Credit Agreement dated October 18, 2023 (the “**RFCA**”), to finance ongoing construction of the Project.⁶

10. Upon the Receiver’s appointment, the construction of the Project was being managed by the Former Developer. The Receiver has concluded that it is in the best interests of the Project and its stakeholders to proceed with the Disclaimer, as expressly authorized by paragraph 5 of the Receivership Order, and to engage Skygrid as the new construction manager of the Project, as permitted by paragraph 4(e) of the Receivership Order.⁷ The decision to disclaim was made as a result of, among other things, the Receiver’s concerns regarding the Former Developer’s performance on the Project, its view that the Disclaimer was more likely to facilitate a successful sale and investment solicitation process (the “**SISP**”), the misalignment between the Receiver and the Former Developer on value maximization opportunities for the Project and the inability of the Receiver and the Former Developer to agree on terms regarding post-receivership work.⁸

11. Notwithstanding that the Disclaimer is in the best interests of the Project, the transition of construction management from the Former Developer to Skygrid may cause some uncertainty for contractors, subcontractors and trade suppliers having contractual

⁶ First Report at para 8.1 [CL p [E69:E69](#) – [E70:E70](#)].

⁷ First Report at para 5.30 [CL p [E55:E55](#)].

⁸ First Report at para 5.1 [CL p [E45:E45](#)].

arrangements with the Former Developer in connection with their work on the Project, and may present an increased risk that construction liens could be registered against the Project, potentially impacting the Receiver's ability to obtain future advances under the RFCFA to fund ongoing construction.⁹

12. The relief sought on the Receiver's motion is intended to proactively address these issues in a fair and reasonable manner to ensure that construction of the Project continues in the normal course for the benefit of all stakeholders.

B. The Proposed Construction Continuance Order

13. The overarching objective of the proposed Construction Continuance Order is to ensure that the transition of the Project to the new construction manager does not impact the ongoing construction of the Project or prejudice the rights of any party.¹⁰
14. Many of the subcontractors actively engaged on the Project have a contractual relationship with the Former Developer, and not the Debtors.¹¹ As a result, the Disclaimer may create some uncertainty about the status of such contractual arrangements, which could, in a worst-case scenario, destabilize construction and impair progress on the Project.¹²
15. The Receivership Order addresses some aspects of this concern. Pursuant to paragraph 17 of the Receivership Order, all Persons (defined broadly in the Receivership Order to

⁹ First Report at paras 6.4 and 7.1 [CL p [E61:E61](#) and [E65:E65](#)].

¹⁰ First Report at para 6.2 [CL p [E61:E61](#)].

¹¹ First Report at para 6.3 [CL p [E61:E61](#)].

¹² First Report at para 6.4 [CL p [E61:E61](#)].

include, among others, contractors and subcontractors) having oral or written agreements with the Debtors, or the Former Developer, or contractual, statutory or regulatory mandates for the supply of goods and/or services to the Debtors, or the Developer and/or the Project, are restrained until further Order of the Court from discontinuing, altering, interfering with or terminating the supply of goods or services, as may be required by the Receiver.¹³

16. The obligation to continue providing goods or services to the Project is not predicated upon a direct contractual relationship with the Debtors and, as a result, the Disclaimer does not give rise to any rights on behalf of subcontractors, trades, suppliers or other service providers having contractual arrangements with the Former Developer to stop providing goods or services to the Project.¹⁴
17. Notwithstanding the foregoing, these parties require clarity as to, among other things, liability for payments and other contractual obligations on a go forward basis. The proposed Construction Continuance Order seeks to provide such clarity, notably by delineating the liabilities and obligations of the Former Developer and Skygrid towards the contractors, subcontractors and trade suppliers engaged on the Project, and by maintaining or extending limited stay protection to the Former Developer and Skygrid that is necessary and appropriate to preserve the stability of the Project.¹⁵

¹³ *KEB Hana Bank v Mizrahi Commercial (The One) LP et al* (18 October 2023), Ont Sup Ct J [Commercial List] CV-23-00707839-00CL ([Order \(Appointing Receiver\)](#)) [Receivership Order] at para 17 [CL p [E101:E101](#) – [E102-E102](#)].

¹⁴ First Report at para 6.6 [CL p [E62:E62](#)].

¹⁵ Proposed Construction Continuance and Ancillary Relief Order [Construction Continuance Order] at paras 6-9 [CL p [E277:E277](#) – [E278:E278](#)].

18. The proposed Construction Continuance Order also provides certain relief that will facilitate an orderly transition to the new construction manager, including, among other things: (a) requiring that any Person shall permit the Receiver or its designee to access and take possession of Project Materials (as such term is defined in the Construction Continuance Order), and shall not interfere in that regard without leave of the Court; and (b) authorizing the Receiver to make, directly or indirectly, payments to suppliers, contractors, subcontractors and other creditors of the Project, and declaring that in making such payments, the Receiver is not affirming or assuming (and has not affirmed or assumed) any agreement or mandate for the supply of goods and/or services to the Debtors, the Former Developer, Skygrid and/or the Project.¹⁶

C. The Proposed Lien Regularization Order

19. The Receiver is seeking approval of the proposed Lien Regularization Order to establish a Court-supervised process that will ensure Lien Claims are addressed in an orderly and fair manner that does not risk impacting the Receiver's access to ongoing funding under the RFCA to allow for the continued construction of the Project.
20. There are approximately 44 suppliers, subcontractors and other trades actively engaged on the Project.¹⁷ To the Receiver's knowledge, with certain limited exceptions, these parties have been paid the amounts invoiced to date; however, there is a risk that upon being informed of the Disclaimer, these parties may proceed with registering liens against the

¹⁶ Construction Continuance Order at paras 5, 10-14 [CL p [E277:E277](#), [E278:E278](#) – [E280:E280](#)].

¹⁷ First Report at para 7.3 [CL p [E65:E65](#) – [E66:E66](#)].

Project to preserve their rights in respect of any latent claims they may have against the Former Developer.¹⁸ There is also a risk that the Former Developer itself could register a lien against the Project.¹⁹

21. Registration of liens on the Project may impact the Receiver's ability to obtain financing advances under the RFCA. Such advances are subject to, and conditional upon, satisfaction of certain conditions precedent, including that no Default or Event of Default (each as defined in the RFCA) will have occurred or be continuing on the proposed date of the applicable financing advance, or would result from same. If a lien is registered on title to the Project and not vacated in a timely manner by the Receiver, this could trigger a Default that would in turn impact the Receiver's ability to obtain future advances.²⁰
22. Further, from a practical perspective, having to consent to lift the receivership stay for any lien claimant individually to preserve and perfect its lien before then having to proceed with vacating a lien by posting security is a costly and inefficient way to proceed, and would distract from the Receiver's value maximization efforts.²¹
23. The proposed Lien Regularization Order is intended to address these issues and ensure that funding of the Project continues uninterrupted, all the while ensuring that rights of Lien Claimants are not prejudiced in any way.²² It accomplishes these objectives by establishing

¹⁸ First Report at para 7.3 [CL p [E65:E65](#) – [E66:E66](#)].

¹⁹ First Report at para 7.3 [CL p [E65:E65](#) – [E66:E66](#)].

²⁰ First Report at para 7.1 [CL p [E65:E65](#)].

²¹ First Report at para 7.5 [CL p [E66:E66](#)].

²² First Report at para 7.6 [CL p [E66:E66](#) – [E67:E67](#)].

a Court-supervised claims process, administered by the Receiver, which stays the rights of Lien Claimants to register any lien against the Project, and substitutes such rights with the ability to file a Lien Claim with the Receiver and benefit from a Court-ordered Lien Charge (as defined below) consistent with rights established under the Provincial Lien Legislation.

PART III – ISSUES, LAW & ANALYSIS

24. The issues to be considered on this motion are whether the Court should:
 - (a) grant the proposed Construction Continuance Order, among other things, approving the engagement of Skygrid as construction manager of the Project, extending the limited stay of proceedings, rights and remedies contemplated in the Receivership Order to Skygrid, and approving the First Report and the activities of the Receiver described therein; and
 - (b) grant the proposed Lien Regularization Order, among other things, staying the rights of Lien Claimants to register liens against the Project, and establishing an alternative Court-supervised process to allow such Lien Claimants to exercise their rights in a manner that will not prejudice the Lien Claimants or affect the Receiver's ability to obtain funding advances under the RFCA.

25. For the reasons set out herein, the Receiver respectfully submits that it is just and convenient to grant the foregoing relief.

A. The Construction Continuance Order Should be Granted

(i) The Engagement of Skygrid Should be Approved

26. The Receiver has determined that retaining Skygrid as the new construction manager is in the best interests of the Project. The engagement of a construction manager in insolvency proceedings involving development projects is not uncommon, and the Receiver already has the authority to retain a construction manager pursuant to paragraph 4(e) of the Receivership Order.²³
27. Notwithstanding the existing authority to retain a construction manager, given the importance of the selection of Skygrid to the Receiver’s overarching objective of maximizing the value of the Project for the benefit of all stakeholders, the Receiver has determined that it is appropriate to seek approval of the specific engagement of Skygrid, the related engagement letter between the Receiver and Skygrid dated February 26, 2024 (the “**Skygrid Engagement Letter**”), and the subsequent execution of a construction management agreement on terms consistent with the Skygrid Engagement Letter (the “**Skygrid Construction Agreement**”).
28. The broad discretion contained in section 243(1)(c) of the *Bankruptcy and Insolvency Act* (“**BIA**”)²⁴ provides the statutory basis for the Court to approve the Receiver’s engagement

²³ See [Receivership Order](#) at para 4(e) [CL p [E94:E94](#)]. See also, for example, *Fortis LGS Structures Inc v Station Point Developments Ltd et al* (19 September 2019), Alta Ct QB 1903-08169 ([Order \(Approving Construction Management Contract and Restricting Court Access\)](#)).

²⁴ [Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3](#), as amended [BIA], s. [243\(1\)\(c\)](#).

of Skygrid and courts regularly exercise their discretion to authorize and approve a Court-appointed receiver's entry into key agreements.²⁵

29. In the present case, in consultation with Knightsbridge Development Corporation as its project manager, the Receiver solicited proposals on a confidential basis from two construction managers regarding the opportunity to manage construction of the Project on an ongoing basis, including for an interim period until the completion of the SISP.²⁶ After carefully considering the proposals received and consulting with the RFCA Lender, the Applicant and their advisors, the Receiver selected Skygrid as the successful candidate because, among other reasons:

- (a) Skygrid is an industry-leading local construction manager with 192 completed projects, 31 active projects and approximately 280 employees, thereby having the experience necessary to provide the oversight required for a development of the scale and complexity of the Project;
- (b) Skygrid has experience taking over large development projects while construction is already in progress and in the context of insolvency proceedings, including multiple roles in the Cresford Group insolvency proceedings, which also involved major condominium projects;

²⁵ See, for example, *Third Eye Capital Corporation v Dianor Resources Inc.*, [2019 ONCA 508](#) [*Dianor Resources*] at para [85](#).

²⁶ First Report at para 5.33 [CL p [E56:E56](#)].

- (c) Skygrid was willing to accept an engagement for only an interim period up until the completion of the SISP, with the understanding that the ultimate owner of the Project could decide whether or not to continue the retention of Skygrid;
 - (d) Skygrid's fees are competitive with prevailing market rates (and less than the other proposal received by the Receiver), and are lower than the fees the Former Developer asserts are payable to it; and
 - (e) the RFCA Lender consented to the retention of Skygrid, as required by the RFCA.²⁷
30. For the foregoing reasons, it is appropriate for this Court to exercise its discretion to approve the engagement of Skygrid, the related Skygrid Engagement Letter and the subsequent entering into of the Skygrid Construction Agreement.
- (ii) Relief Should be Extended to Skygrid*
31. The proposed Construction Continuance Order extends certain protections to Skygrid, solely in its capacity as construction manager of the Project. First, the Construction Continuance Order provides that Skygrid shall have no liability in respect of services or materials provided to the Project by any contractor, subcontractor, trade supplier or other Person for any period prior to the Effective Date.²⁸ Additionally, from the Effective Date until further Order of this Court, Skygrid will benefit from the limited stay of proceedings, rights and remedies provided for in paragraphs 14 and 15 of the Receivership Order to the extent such proceedings, rights and remedies affect the Project or Skygrid's performance

²⁷ First Report at para 5.34 [CL p [E56:E56](#) – [E57:E57](#)].

²⁸ Construction Continuance Order at para 6 [CL p [E277:E277](#)].

of its obligations in respect of the Project.²⁹ Such limited stay protection was similarly provided to the Former Developer in the Receivership Order.³⁰

32. As the Supreme Court of Canada has held, the “very expansive wording” of section 243(1)(c) has been interpreted as giving judges “the broadest possible mandate in insolvency proceedings to enable them to react to any circumstances that may arise” in the context of a Court-ordered receivership.³¹ Accordingly, this broad jurisdiction permits the Court “to do not only what ‘justice dictates’ but also what ‘practicality demands.’”³²
33. Courts in restructuring proceedings will grant stay protection in favour of third parties where necessary and appropriate to facilitate restructuring efforts and in doing so, will consider a range of factors, including, but not limited to, whether extending the stay to the third party would help maintain stability and value during the restructuring proceedings.³³
34. The relief requested in favour of Skygrid is limited to what is necessary to ensure that construction continues uninterrupted during and following the transition of the Project to Skygrid as the new construction manager. If granted, such relief will help facilitate ongoing construction by ensuring that Skygrid’s ability to continue the construction of the Project is not undermined by the disruption of current contractual relationships on the Project or

²⁹ Construction Continuance Order at para 7 [CL p [E277:E277](#) – [E278:E278](#)].

³⁰ See [Receivership Order](#) at paras 14 and 15 [CL p [E100:E100](#) – [E101:E101](#)].

³¹ *Peace River Hydro Partners v Petrowest Corp*, [2022 SCC 41](#) [*Peace River*] at para [148](#), citing *DGDP-BC Holdings Ltd v Third Eye Capital Corporation*, [2021 ABCA 226](#) [*Third Eye*] at para [20](#).

³² *Dianor Resources* at para [57](#); *Canada (Minister of Indian Affairs and Northern Development) v Curragh Inc*, [1994 CanLII 7468, 114 D.L.R. \(4th\) 176](#) (Ont Ct J (GD)) at para [16](#).

³³ See, for example, *JTI-Macdonald Corp, Re*, [2019 ONSC 1625](#) at para [15](#); *McEwan Enterprises Inc*, [2021 ONSC 6453](#) at paras [42-43](#); *Laurentian University of Sudbury*, [2021 ONSC 659](#) at para [40](#).

any potential litigation, all of which is consistent with the Receiver's goal of maximizing the value of the Project for the benefit of stakeholders.

B. The Lien Regularization Order Should be Granted

(i) The Lien Regularization Order is Appropriate in the Circumstances

35. The proposed Lien Regularization Order would establish a Court-supervised streamlined claims process, administered by the Receiver, which stays the rights of Lien Claimants to register any lien against the Project, and substitutes such rights with the ability to file a Lien Claim with the Receiver and benefit from a Court-ordered Lien Charge consistent with rights established under the Provincial Lien Legislation.³⁴
36. Similar to the Construction Continuance Order, this Court's authority to approve the claims process contemplated in the proposed Lien Regularization Order is derived from the expansive wording of section 243(1)(c) of the BIA and this Court's broad mandate to react to any circumstances that may arise in the context of insolvency proceedings.³⁵
37. Courts routinely grant claims procedure orders in receivership and other Court-supervised restructuring proceedings, which are developed to respond to the specific nature of the claims or potential claims at issue.³⁶ As this Court has held, "the claims process in a

³⁴ The [Receiver's Motion Record](#), which includes the proposed Lien Regularization Order, was served on the parties listed on the Service List on February 26, 2024, as well as all contractors, subcontractors and other trade suppliers engaged on the Project for whom the Receiver has contact information on February 27, 2024.

³⁵ BIA, s. [243\(1\)\(c\)](#); *Peace River* at para [148](#), citing *Third Eye* at para [20](#).

³⁶ See, for example, *BCIMC Construction Fund Corporation et al v The Clover on Yonge Inc* (16 October 2020), Ont Sup Ct J [Commercial List] CV-20-00637301-00CL ([Halo Claims Procedure Order](#)); *BCIMC Construction Fund Corporation et al v 33 Yorkville Residences Inc et al* (11 March 2021), Ont Sup Ct J [Commercial List] CV-20-00637297-00CL ([Priority Claims Procedure Order](#)).

receivership is intended to be an efficient and flexible process in order that claims of creditors can be established expeditiously with a view to distribution of available assets as soon as reasonably possible.”³⁷ Such flexibility is a hallmark of the Canadian insolvency system.³⁸

38. In similar circumstances where the registration of liens against a development project has risked causing delays and disruption to the progress of construction or imperilling restructuring efforts, this Court has exercised its jurisdiction to establish claims processes for lien claimants similar to the process provided for in the proposed Lien Regularization Order, notably in the *Companies’ Creditors Arrangement Act* proceedings of *Comstock Canada Ltd et al* (Regional Senior Justice Morawetz, as he then was), *FirstOnSite GP Inc* (Justice Newbould) and *Carillion Canada Inc et al* (Justice Hainey).³⁹ The overarching principle governing the need for lien regularization in those cases is also applicable in the present circumstances in the receivership context: any delay or disruption to the ongoing financing of the Project risks destabilizing construction, to the detriment of all stakeholders.

³⁷ *Computershare Trust Company of Canada v Cookstown Holdings Ltd*, [2014 ONSC 685](#) at para [13](#).

³⁸ *Dianor Resources* at para [86](#).

³⁹ See *Comstock Canada Ltd et al* (7 August 2013), Ont Sup Ct J [Commercial List] CV-13-10181-00CL ([Lien Regularization Order](#)); *FirstOnSite GP Inc* (21 April 2016), Ont Sup Ct J [Commercial List] CV-16-11358-00CL ([Amended and Restated Initial Order](#)); *Carillion Canada Inc et al* (14 March 2018), Ont Sup Ct J [Commercial List] CV-18-590812-00CL ([Lien Regularization Order](#), and subsequent [Amended Lien Regularization Order](#) dated May 23, 2019).

39. The proposed Lien Regularization Order, developed based on the above-noted precedents, seeks to recognize the rights of Lien Claimants while ensuring the Receiver's continuing access to financing under the RFCA, by providing for the following process:
- (a) the rights of Lien Claimants to serve, register, preserve or perfect liens with respect to the Project pursuant to the Provincial Lien Legislation will be stayed, and Lien Claimants wishing to assert lien rights against the Project (each an "**Asserting Lien Claimant**") will be required to comply with the process provided by the proposed Lien Regularization Order;
 - (b) any Asserting Lien Claimant will be able to preserve its rights under the Provincial Lien Legislation, whether in respect of materials and/or services provided before, on or after the Appointment Date, by delivering a lien notice (the "**Lien Notice**") to the Receiver's attention in accordance with the terms of the proposed Lien Regularization Order, within the time frame prescribed by the Provincial Lien Legislation;
 - (c) any Asserting Lien Claimant that has delivered or is deemed to have delivered a Lien Notice will be granted a charge (the "**Lien Charge**") equivalent to, and only to the extent of, any security granted in respect of a Lien Claim under the Provincial Lien Legislation, but in all cases subject to the quantification and verification of such Lien Charge in accordance with the procedures to be established pursuant to the Lien Regularization Order;

- (d) the Lien Charge will rank subordinate to the Receiver's Charge and the Receiver's Borrowings Charge, which is consistent with the priorities established under the Receivership Order (which, subject to certain limited exceptions, grant the Receiver's Charge and the Receiver's Borrowings Charge priority over all security interests, trusts (including deemed trusts), liens, charges and encumbrances, statutory or otherwise)⁴⁰, and will otherwise be subject to the priority as is accorded to Lien Claims under the Provincial Lien Legislation and the federal laws of Canada applicable in Ontario;
- (e) any outstanding liens registered against the Project at the time of the granting of the proposed Lien Regularization Order will be vacated and the applicable Lien Claimant will be deemed to have delivered a Lien Notice to the Receiver in accordance with the terms of the Lien Regularization Order; and
- (f) any Lien Claimant with a Lien Claim that has been vacated prior to the granting of the Lien Regularization Order will also be deemed to have provided a Lien Notice to the Receiver in accordance with the terms of the Lien Regularization Order.⁴¹

40. For the reasons described in detail above and in the First Report, the Receiver submits that the process established pursuant to the Lien Regularization Order is necessary and appropriate in the circumstances and adequately protects and preserves Lien Claimants' rights under the Provincial Lien Legislation while also ensuring that the assertion of any

⁴⁰ [Receivership Order](#) at paras 24 and 27 [CL p [E104:E104](#) – [E105:E105](#) and [E105:E105](#) – [E106:E106](#)]. See also BIA, ss. [31\(1\)](#) and [243\(6\)](#).

⁴¹ Proposed Lien Regularization Order [CL p [E283:E283](#) – [E300:E300](#)].

construction lien claim does not imperil the Receiver's ability to obtain ongoing funding to continue progressing construction and restructuring efforts generally.

C. The First Report of the Receiver and the Receiver's Activities

(i) The First Report of the Receiver Should be Approved

41. This Court has held that there are good policy and practical reasons for approving a Court officer's report and activities, including that Court approval:

- (a) allows the court officer to move forward with the next steps in the proceedings;
- (b) brings the court officer's activities before the Court;
- (c) allows an opportunity for the concerns of stakeholders to be addressed, and any problems to be rectified;
- (d) enables the Court to satisfy itself that the court officer's activities have been conducted in a prudent and diligent manner;
- (e) provides protection for the court-officer not otherwise provided by the applicable legislation; and
- (f) protects creditors from the delay in distribution that would be caused by: (i) re-litigation of steps taken to date; and (ii) potential indemnity claims by the court-officer.⁴²

⁴² *Target Canada Co, Re*, [2015 ONSC 7574](#) at para [12](#); *Laurentian University of Sudbury*, [2022 ONSC 2927](#) at paras [13-14](#).

42. This Court has held that the same observations apply to the activities of a Court-appointed receiver because the activities of any court officer “can and should be considered by the Court as against the mandate, powers and authority of that officer.”⁴³
43. In this case, the First Report and the activities described therein should be approved because, among other reasons:
- (a) the activities described in the First Report were necessary and undertaken in good faith pursuant to the Receiver’s duties and powers set out in the Receivership Order;
 - (b) the activities were undertaken in the best interests of Project stakeholders; and
 - (c) the First Report has been served on the Service List and to all contractors, subcontractors and other trade suppliers engaged on the Project for whom the Receiver has contact information, and posted on the Receiver’s website for review by the Project’s creditors and other stakeholders, and there has been no adverse comment made to the Receiver to date.

PART IV – ORDERS REQUESTED

44. For the foregoing reasons, the Receiver respectfully requests that the proposed Construction Continuance Order and the proposed Lien Regularization Order be granted.

⁴³ *Triple-I Capital Partners Limited v 12411300 Canada Inc*, [2023 ONSC 3400](#) at para 66.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 4th day of March, 2024.

A red handwritten signature, likely of a lawyer, is written in a cursive style. The signature is positioned above a horizontal line that separates it from the firm's name.

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SCHEDULE “A”

LIST OF AUTHORITIES

- 1) *KEB Hana Bank v Mizrahi Commercial (The One) LP et al* (18 October 2023), Ont Sup Ct J [Commercial List] CV-23-00707839-00CL ([Order \(Appointing Receiver\)](#))
- 2) *Fortis LGS Structures Inc v Station Point Developments Ltd et al* (19 September 2019), Edmonton, Alta Ct QB 1903-08169 ([\(Order \(Approving Construction Management Contract and Restricting Court Access\)\)](#))
- 3) *Third Eye Capital Corporation v Dianor Resources Inc*, [2019 ONCA 508](#)
- 4) *Peace River Hydro Partners v Petrowest Corp*, [2022 SCC 41](#)
- 5) *DGDP-BC Holdings Ltd v Third Eye Capital Corporation*, [2021 ABCA 226](#)
- 6) *Canada (Minister of Indian Affairs and Northern Development) v Curragh Inc*, [1994 CanLII 7468, 114 D.L.R. \(4th\) 176 \(Ont. Ct. J. \(G.D.\)\)](#)
- 7) *JTI-Macdonald Corp, Re*, [2019 ONSC 1625](#)
- 8) *McEwan Enterprises Inc*, [2021 ONSC 6453](#)
- 9) *Laurentian University of Sudbury*, [2021 ONSC 659](#)
- 10) *BCIMC Construction Fund Corporation et al v The Clover on Yonge Inc et al* (16 October 2020), Ont Sup Ct J [Commercial List] CV-20-00637301-00CL ([Halo Claims Procedure Order](#))
- 11) *BCIMC Construction Fund Corporation et al v 33 Yorkville Residences Inc et al* (11 March 2021), Ont Sup Ct J [Commercial List] CV-20-00637297-00CL ([Priority Claims Procedure Order](#))
- 12) *Computershare Trust Company of Canada v Cookstown Holdings Ltd*, [2014 ONSC 685](#)
- 13) *Comstock Canada Ltd et al* (7 August 2013), Ont Sup Ct J [Commercial List] CV-13-10181-00CL ([Lien Regularization Order](#))
- 14) *FirstOnSite GP Inc* (21 April 2016), Ont Sup Ct J [Commercial List] CV-16-11358-00CL ([Amended and Restated Initial Order](#))
- 15) *Carillion Canada Inc et al* (14 March 2018), Ont Sup Ct. J [Commercial List] CV-18-590812-00CL ([Lien Regularization Order](#))
- 16) *Carillion Canada Inc et al* (23 May 2019), Ont Sup Ct J [Commercial List] CV-18-590812-00CL ([Amended Lien Regularization Order](#))

17) *Target Canada Co, Re*, [2015 ONSC 7574](#)

18) *Laurentian University of Sudbury*, [2022 ONSC 2927](#)

19) *Triple-I Capital Partners Limited v 12411300 Canada Inc.*, [2023 ONSC 3400](#)

SCHEDULE “B”

STATUTORY REFERENCES

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

Borrowing powers with permission of court

31 (1) With the permission of the court, an interim receiver, a receiver within the meaning of subsection 243(2) or a trustee may make necessary or advisable advances, incur obligations, borrow money and give security on the debtor’s property in any amount, on any terms and on any property that may be authorized by the court and those advances, obligations and money borrowed must be repaid out of the debtor’s property in priority to the creditors’ claims.

Security under *Bank Act*

(2) For the purpose of giving security under section 427 of the *Bank Act*, the interim receiver, receiver or trustee, when carrying on the business of the bankrupt, is deemed to be a person engaged in the class of business previously carried on by the bankrupt.

Limit of obligations and carrying on of business

(3) The creditors or inspectors may by resolution limit the amount of the obligations that may be incurred, the advances that may be made or moneys that may be borrowed by the trustee and may limit the period of time during which the business of the bankrupt may be carried on by the trustee.

Debts deemed to be debts of estate

(4) All debts incurred and credit received in carrying on the business of a bankrupt are deemed to be debts incurred and credit received by the estate of the bankrupt.

Court may appoint receiver

243 (1) Subject to subsection (1.1), on application by a secured creditor, a court may appoint a receiver to do any or all of the following if it considers it to be just or convenient to do so:

- (a)** take possession of all or substantially all of the inventory, accounts receivable or other property of an insolvent person or bankrupt that was acquired for or used in relation to a business carried on by the insolvent person or bankrupt;
- (b)** exercise any control that the court considers advisable over that property and over the insolvent person’s or bankrupt’s business; or
- (c)** take any other action that the court considers advisable.

Restriction on appointment of receiver

(1.2) In the case of an insolvent person in respect of whose property a notice is to be sent under subsection 244(1), the court may not appoint a receiver under subsection (1) before the expiry of 10 days after the day on which the secured creditor sends the notice unless

- (a) the insolvent person consents to an earlier enforcement under subsection 244(2); or
- (b) the court considers it appropriate to appoint a receiver before then.

Definition of *receiver*

(2) Subject to subsections (3) and (4), in this Part, *receiver* means a person who

- (a) is appointed under subsection (1); or
- (b) is appointed to take or takes possession or control — of all or substantially all of the inventory, accounts receivable or other property of an insolvent person or bankrupt that was acquired for or used in relation to a business carried on by the insolvent person or bankrupt — under
 - (i) an agreement under which property becomes subject to a security (in this Part referred to as a “security agreement”), or
 - (ii) a court order made under another Act of Parliament, or an Act of a legislature of a province, that provides for or authorizes the appointment of a receiver or receiver-manager.

Definition of receiver — subsection 248(2)

(3) For the purposes of subsection 248(2), the definition *receiver* in subsection (2) is to be read without reference to paragraph (a) or subparagraph (b)(ii).

Trustee to be appointed

(4) Only a trustee may be appointed under subsection (1) or under an agreement or order referred to in paragraph (2)(b).

Place of filing

(5) The application is to be filed in a court having jurisdiction in the judicial district of the locality of the debtor.

Orders respecting fees and disbursements

(6) If a receiver is appointed under subsection (1), the court may make any order respecting the payment of fees and disbursements of the receiver that it considers proper, including one that gives the receiver a charge, ranking ahead of any or all of the secured creditors, over all or part of the property of the insolvent person or bankrupt in respect of the receiver’s claim for fees or

disbursements, but the court may not make the order unless it is satisfied that the secured creditors who would be materially affected by the order were given reasonable notice and an opportunity to make representations.

Meaning of *disbursements*

(7) In subsection (6), *disbursements* does not include payments made in the operation of a business of the insolvent person or bankrupt.

**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

Respondents

**ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)**
Proceeding commenced at Toronto

**FACTUM OF THE RECEIVER
(Construction Continuance and Lien
Regularization)
(Returnable March 7, 2024)**

GOODMANS LLP

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