

**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

**RESPONSE TO NOTICE OF OBJECTION
(Motion for SISP Approval Returnable June 6, 2024)**

June 5, 2024

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A. Introduction and Overview

1. This is the Receiver's response to the Notice of Objection to SISP (the "**Coco Objection**") filed by Coco International Inc. and 12823543 Canada Ltd. (the "**Coco Parties**") and certain other objections described below. Capitalized terms not otherwise defined below have the meaning ascribed to them in the Receiver's Factum dated June 2, 2024 and the Receiver's Second Report dated May 28, 2024 (the "**Second Report**").

2. As set out in the Second Report, the Receiver designed the SISP (with input from affected stakeholders and experienced advisors) to maximize the likelihood of a Qualified Bid (whether in the form of a Transaction Proposal or a Development Proposal) and a successful transaction.

3. The only parties objecting to the SISP are the Coco Parties, who have repeatedly demanded that the Receiver bring on a SISP as soon as possible.

4. The Coco Parties appear to accept that they have no economic interest in the Project, because both the debt owed to them and the equity interest held by parties related to them are (according to the Coco Parties' assessment) out of the money. Nonetheless, they argue that the SISP should be changed or abandoned because the Minimum Bid Threshold is too high and the SISP will not be a true "market test".

5. The Coco Parties' objections are, with respect, entirely without merit, are based on a misapprehension of the design and purpose of the SISP, and are in fact being pursued for an ulterior and undisclosed purpose – to seek to limit or cap through an immediate sale of the Project (at any level) the extent of Ms. Coco's liability under the Coco Guarantees (as defined below) pursuant to which Ms. Coco has provided personal guarantees for all present and future amounts due to the

Senior Secured Lenders in respect of the Project. It is this motivation that explains why a party that submits it is out of the money is arguing for a *lower* Minimum Bid Threshold, or none at all.

6. The primary purpose of the SISP is to solicit viable proposals, whether in the form of a Transaction Proposal (which is subject to the Minimum Bid Threshold) or a Development Proposal (which is not subject to any Minimum Bid Threshold). It is telling that the Coco Parties completely ignore the prospect of (and benefits potentially conferred by) a Development Proposal in their submissions. Potential Development Proposals are an important part of the SISP, and a complete answer to the Coco Parties' assertion that the SISP will serve no purpose unless it yields a Transaction Proposal that exceeds the Minimum Bid Threshold.

7. The Minimum Bid Threshold enhances the integrity and transparency of the SISP by clearly communicating to prospective bidders the criteria for a successful Transaction Proposal. Removing the Minimum Bid Threshold, as the Coco Parties suggest, would invite prospective bidders to develop and submit Transaction Proposals with no meaningful chance of success and distract from the goal of identifying an executable transaction. The Receiver does not believe that this is appropriate. The Coco Parties' objections should be rejected, and the SISP should be approved.

B. The Coco Parties

8. When the Receivership Order was granted, the Debtors were indebted to one of the Coco Parties, Coco International Inc. (the "**Coco Lender**"), in the amount of approximately \$183 million (the "**Coco Debt**") pursuant to a credit agreement dated August 5, 2015.¹ The Coco

¹ First Report of the Receiver dated February 26, 2024 at paras 3.5, 3.9(iii); Motion Record, Tab 2, Appendix A, p 104 [First Report] [CL pp [E641;E103](#) and [E644; E644](#)].

Lender's debt is secured by, among other things, a charge against title to One Bloor in the principal sum of \$75 million.² The other Coco Party, 12823543 Canada Ltd., holds a 50% equity interest in the Debtors.

9. The Coco Debt is subordinate to: approximately \$1.5 billion owed to the RFCA Lender and the Senior Secured Lenders as of May 31, 2024;³ up to \$102 million potentially owing to Aviva;⁴ and, \$58 million owed to the Hana Lender as of the Receivership Date.⁵

10. In addition, one of the Coco Parties' principals, Jenny Coco, personally guaranteed payment of amounts due under the Credit Agreement between the Debtors and the Senior Secured Lenders and also provided a guarantee in respect of cost overruns and Project completion pursuant to a Cost Overrun and Completion Guarantee dated August 30, 2019 (the "**Coco Guarantees**").⁶ As set out below, the Coco Parties' objections appear to be an attempt to crystallize any liability that Ms. Coco might have under the Coco Guarantees as soon as possible. The Receiver does not believe that the Coco Guarantees are a relevant consideration in assessing the SISP.

C. The SISP was designed to maximize value

11. The Coco Parties assert that the SISP has been "intentionally designed to fail" because no bidder will meet the Minimum Bid Threshold.⁷ This is not true. The Receiver takes its obligations very seriously. It did not – and would not – design the SISP to fail. The Receiver is focused on

² First Report at para 3.9(iii); Motion Record, Tab 2, Appendix A, p 104 [CL p [E644](#); [E644](#)].

³ Coco Parties' Notice of Objection dated June 3, 2024 at Schedule A [Coco Objection] [CL p [F101](#); [F101](#)].

⁴ The amount potentially owing to Aviva is a potential debt relating to indemnity obligations of certain of the Debtors relating to deposits paid by condominium unit purchasers and used to build the Project.

⁵ First Report at para 3.5; Motion Record, Tab 2, Appendix A, p 101 [CL p [E641](#); [E103](#)].

⁶ [Affidavit of Joo Sung Yoon dated October 17, 2023](#) at para 65.

⁷ Coco Objection at para 4 [[F80](#); [F80](#)].

finding any form of viable transaction that will maximize value and assist with the completion of the Project.

12. The SISP was carefully designed to attract a broad range of potential value-maximizing proposals, whether in the form of Transaction Proposals (which are subject to the Minimum Bid Threshold) or Development Proposals (which are not subject to any Minimum Bid Threshold).⁸ Some alternative or combination may also emerge once the Project is marketed, and the SISP is flexible enough to permit that.⁹

13. The Coco Parties also argue that the SISP should have been presented earlier. This criticism is unfounded. It took significant time, and work, to advance the Project to the point that it is ready to be marketed in a value maximizing manner.¹⁰ During this period, the Project progressed substantially. The Coco Parties do not dispute this. They simply say that in other cases, with other facts, the sales process proceeded more quickly. But the projects identified by the Coco Parties are not comparable to the Project.¹¹ The facts of *those* cases do not (and should not) dictate the pace of *this* case. In this case, the Receiver determined that it was appropriate to take significant steps to advance the Project, including terminating MI as construction manager, finding and retaining Skygrid, investigating (and ultimately pursuing) reconfiguration of the Project and working with the necessary parties to obtain reliable estimates with respect to the cost to complete the Project and construction schedule. In any event, the complaint is also moot, as the Receiver has now brought forth the SISP for approval and seeks to advance it immediately.

⁸ Second Report of the Receiver dated May 28, 2024 at para 6.8; Motion Record, Tab 2, p 52 [Second Report] [CLp [E592;E54](#)].

⁹ Draft SISP Approval Order, Schedule A at para 31; Motion Record, Tab 3, p 252 [CL p [E792;E254](#)].

¹⁰ Second Report at para 6.2; Motion Record, Tab 2, p 48 [CL p [E588;E50](#)].

¹¹ The two projects cited in the Coco Objection were, in fact, significantly simpler than the Project and they were sold in very different market conditions.

D. The Minimum Bid Threshold enhances the integrity of the SISP

14. The Coco Parties' attack on the SISP is founded on their assertion that the Minimum Bid Threshold is too high.¹² They argue that "it is a certainty" that no bidder will meet or exceed the Minimum Bid Threshold.¹³ The Coco Parties even assert (without evidence) that the Receiver told them that no bidder would meet or exceed the Minimum Bid Threshold.¹⁴

15. The Receiver did not tell the Coco Parties that no bid would meet the Minimum Bid Threshold. The Receiver does not know the outcome of the SISP. No one will know the outcome of the SISP until it is completed. But the Receiver is confident that the SISP, as designed, represents the best option available to maximize the likelihood of a Qualified Bid in the form of either a Transaction Proposal, a Development Proposal or a combination thereof. Because they focus solely on the Minimum Bid Threshold, the Coco Parties completely ignore the prospect of – and benefits that will flow from – a successful Development Proposal.

16. The Minimum Bid Threshold will further the goals of the SISP by clearly communicating what will be required for a successful Transaction Proposal. This will enhance the transparency and integrity of the bid process and ensure that prospective bidders do not spend time and money formulating bids with little or no chance of success, and that the Receiver and the Broker are able to focus their attention on viable proposals. Any bidder who is not prepared to satisfy the Minimum Bid Threshold can focus on and formulate a Development Proposal if they are qualified to do so.

17. As the Coco Parties admit, the Senior Secured Lenders hold a first ranking security interest and they are likely to be the fulcrum creditor.¹⁵ In the context of a Transaction Proposal, the Senior

¹² Coco Objection at paras 8–9 [CL p [F81;F81](#)].

¹³ Coco Objection at paras 8–9 [CL p [F81;F81](#)].

¹⁴ Coco Objection at para 12 [CL p [F82;F82](#)].

¹⁵ Coco Objection at paras 3, 12 [CL pp [F80;F80](#) and [F82;F82](#)].

Secured Lenders have indicated that they will not support any bid or combination of bids that does not meet the Minimum Bid Threshold (an “**Insufficient Bid**”).¹⁶

18. It is not a viable way forward to implement a SISP based on the fiction that an Insufficient Bid would be approved over the Senior Secured Lenders’ objection, since they would be the only party with an economic interest in such a bid. The Minimum Bid Threshold communicates this fact to the market.

19. The Coco Parties argue that the Receiver should solicit bids with no prospect of success so that stakeholders and the Court can see what “options” are available and make the SISP “truly a *bona fide* market test”.¹⁷ This is based on a fundamental misapprehension of the purpose of the SISP. The SISP is not a valuation exercise, it is intended to solicit viable proposals that are reasonably likely to result in a successful transaction.

E. If the Coco Parties are correct, then they have no economic interest in the SISP

20. As noted, the Coco Parties posit that it “is a certainty” that no one will meet the Minimum Bid Threshold.¹⁸ But a potential sale would need to substantially *exceed* the Minimum Bid Threshold for any creditors *other than* the Senior Secured Lenders to recover any of the indebtedness owing to them, including the Coco Parties.

21. This Court has repeatedly stated that complaints made by parties with no economic interests should be treated with caution, and that is the case here.¹⁹ The Coco Debt is subordinated to at least \$1.5 billion of first priority, validly perfected senior secured debt owed to the Senior

¹⁶ Second Report at para 6.18; Motion Record, Tab 2, p 56 [CL p [E596;E58](#)].

¹⁷ Coco Objection at para 30 [CL p [F87;F87](#)].

¹⁸ Coco Objection at paras 8–9 [CL p [F81;F81](#)].

¹⁹ See e.g., *Kingsett Mortgage Corporation v 30 Roe Investments Corp*, [2023 ONSC 3323](#) at para [84](#).

Secured Lenders. It also ranks behind significant secured debts owed (or that might be owed) to Aviva and the Hana Lender. The Coco Parties can be taken to have – at least for themselves – confirmed that they do not have an economic interest in the outcome of the SISP. This is relevant to the weight that should be afforded to their submissions.

F. The Coco Guarantees are not relevant to the SISP

22. In light of the foregoing, it seems that the Coco Parties' real concern is limiting Ms. Coco's potential exposure under the Coco Guarantees by somehow forcing a sale of the Project now at a price that the Senior Secured Lenders do not accept, or to gather evidence about the value of the Project. In the Receiver's view, the Coco Guarantees and Ms. Coco's potential liability thereunder are not a relevant consideration for the structure or conduct of the SISP.

23. The purpose of these proceedings is not to crystalize the quantum of claims against personal guarantors as soon as possible, or to achieve a sale of the Project as soon as possible. The purpose of these proceedings is to maximize recoveries for Project stakeholders in accordance with their priorities, whether through a sale of the Project at this time, a later time, or through the completion of the Project. The Receiver has carefully considered the facts, consulted with qualified advisors, and determined in the exercise of its business judgement that the proposed SISP is the best way to identify whether there is a transaction available in the market that will achieve this goal.

G. The Coco Parties cannot require that the Senior Secured Lenders Credit Bid

24. The Coco Parties submit that they would have “no objection” [emphasis in original] to the SISP if the Senior Secured Lenders were submitting a credit bid.²⁰ They argue that this case is “fundamentally different than any other SISP” because the Senior Secured Lenders are not submitting a credit bid.²¹ The Coco Parties ignore completely the fact that there have been many cases where a sale process is run without a stalking horse bid or a credit bid from the senior secured lenders in question – and that there is no legal basis whatsoever (as evidenced by the fact that they have provided no legal basis whatsoever) for their assertion that a senior secured lender must credit bid in a SISP before their interests can be considered.

25. Moreover, in the Receiver’s submission, it is a distinction without a difference whether the Senior Secured Lenders – as the first ranking secured creditors – realize their recovery through a third party sale, a credit bid, or as the party that facilitates the construction of the Project to completion, with sales of condo units and the commercial component as a means of recovery. Unless and until there is a transaction available that repays the indebtedness owing to the Senior Secured Lenders in full (which by definition is a transaction at a significantly higher value than the Minimum Bid Threshold), the Coco Parties will not suffer (and do not claim that they will suffer) any prejudice based on the structure of a potential Senior Secured Creditor Transaction.

26. The Coco Parties proceed from the assumption that the SISP will not identify a viable transaction, and that it would be inherently improper for the Senior Secured Lenders to potentially realize on their security by completing the Project and selling units instead of purchasing the

²⁰ Coco Objection at para 13 [CL p [F82;F82](#)].

²¹ Coco Objection at para 13 [CL p [F82;F82](#)].

Project through a credit bid. They refer to this derisively throughout the Coco Objection as an attempt to “own without owning.”²²

27. As set forth above, the Receiver rejects the Coco Parties’ assertion that the SISP is doomed to fail. Moreover, the Coco Parties’ position is contrary to both the terms of the Senior Secured Lenders’ security (which permit the Senior Secured Lenders the right to, among other things, operate the Debtors’ business if the Debtors default), the priority, subordination and standstill agreement entered into by the Coco Parties in respect of the Senior Secured Lenders’ security and the Receivership Order (which authorizes the Receiver to operate the Debtors’ business).²³ In many cases, this Court has authorized a receiver to continue to operate a debtor’s business in order to realize on collateral for the benefit of stakeholders.²⁴

28. If the SISP does not yield a transaction, then the Receiver will consider the various options available to it, and return to this Court for approval of a proposed path forward. At this stage, it is sufficient to note that the Coco Parties’ position that a third party sale or a credit bid is the only appropriate way for the Senior Secured Lenders to realize on their collateral is without merit.

H. The Senior Secured Lenders need not be treated as bidders

29. Alternatively, the Coco Parties assert that the Senior Secured Lenders should be *treated* as a bidder even though they have confirmed they are not bidding. The Receiver does not agree. The Senior Secured Lenders are not bidding in the SISP and are not required to. Indeed, the Receiver believes that the Senior Secured Lender’s commitment *not* to bid enhances the prospect of identifying a potential transaction through the SISP as it gives comfort to prospective bidders that

²² Coco Objection at paras 23, 29 [CL pp [F85:F85](#) and [F87:F87](#)].

²³ [Receivership Order](#) at para 4(c).

²⁴ See e.g., *Ontario Securities Commission v Bridging Finance Inc*, [2022 ONSC 1857](#).

they will not be outbid by a potential credit bid from the Senior Secured Lenders. Further, as priority creditors, the Senior Secured Lenders are entitled to see the results of the SISP in assessing their position. As discussed above, a broad array of potential paths forward could emerge from the SISP, and the Senior Secured Lenders are entitled to see what their options are before determining their preferred course of action for the Receiver's consideration.

30. The Receiver similarly does not agree with the Coco Parties' assertion that the Receiver can create "competitive tension" between the Senior Secured Lenders and other bidders to secure the "best bid". This, too, is based on a fundamental misapprehension of the facts. The Minimum Bid Threshold is not a bid that will be increased or decreased depending on real or perceived "competitive tension" between the Senior Secured Lenders and other bidders. It is simply a mechanism to clearly convey to the market the minimum price that the first ranking secured lenders are prepared to accept in the context of a Transaction Proposal.

I. The Coco Parties vastly overstate the cost of the SISP

31. The Coco Parties allege that the SISP will cost more than \$100 million. This is completely wrong. The Coco Parties' cost calculation is comprised of: (i) approximately \$10 million in additional interest on the RFCA; (ii) approximately \$80 million in additional interest and fees on pre-receivership debt; and (iii) over \$10 million in professional costs to conduct the SISP.

32. The Coco Parties treat *all* of the financing costs and professional fees projected between now and the completion of the SISP as costs of the SISP. This is simply wrong. Financing costs will continue to accrue until the debt is repaid, whether or not the SISP proceeds. Further, only a portion of the projected professional fees relate to the SISP. Most importantly, construction of the Project will continue to progress while the SISP is ongoing.

J. The Coco Parties misapprehend the Broker Engagement

33. The Coco Parties make various arguments based on their interpretation of the Broker Engagement. But they have misunderstood the terms of the Broker Engagement, so their arguments are unsound. JLL did not agree that it would not be paid unless it secures a bid of \$800 million.²⁵ Nor did it agree that the “most extraordinary result” would be a bid of \$1.1 billion as alleged at paragraph 11 of the Coco Objection.²⁶ JLL’s fee structure is accurately described at paragraph 6.13 of the Second Report. The Coco Parties seem to misunderstand the fee structure in the Broker Engagement, and draw incorrect conclusions based on that misunderstanding. In simple terms, JLL will be paid \$1.9 million plus HST for a Third Party Transaction (as defined in the Broker Agreement). Such a transaction must meet the Minimum Bid Threshold. JLL will be paid based on a sliding scale in the event of a Development Proposal that includes a Developer Investment (as defined in the Broker Agreement). If the Developer Investment exceeds \$1.1 billion, JLL will be paid \$1.9 million.

34. The Broker Engagement was negotiated between JLL and the Receiver in order to compensate JLL fairly for its work, and incentivize it to pursue various types of value maximizing transactions. The Coco Parties’ speculation that the Broker Engagement proves that either JLL or the Receiver believe that no one will meet the Minimum Bid Threshold is baseless.

K. The Receiver has not reversed its position

35. Similarly, there has been no “drastic reversal” of the Receiver’s position about whether it should make decisions relating to the Project, as alleged at paragraph 17 of the Objection. The Receiver’s first priority has always been progressing the Project in order to maximize stakeholder

²⁵ Coco Objection at para 11 [CL p [F82:F82](#)].

²⁶ Coco Objection at para 11 [CL p [F82:F82](#)].

returns. It has made – and will continue to make – the decisions that are required for that to occur as and when necessary, such as disclaiming the contracts with the Former Developer, engaging the new Construction Manager, or developing the Reconfiguration Plan before it would be too late to implement it.

L. Response to the Coco Parties’ other objections

36. At paragraph 21 of the Coco Objection, the Coco Parties criticize and mischaracterize the nature and operation of certain provisions of the SISP. The Receiver had the benefit of the Coco Parties’ objections, in draft, when it finalized the SISP and the Second Report. It accepted certain comments suggested by the Coco Parties. It considered the balance of the Coco Parties’ objections, and determined that no change to the SISP was necessary or appropriate.

37. The Receiver notes that a number of the Coco Parties’ objections relate to discretion conferred on the Receiver by the SISP. The Court can rest assured that, at all times, the Receiver will exercise its discretion in managing the SISP so as to promote the development and submission of all viable bids, and will not exercise any such discretion in a manner that will “chill” any bidding.

38. Attached at **Appendix “A”** is a chart that (i) summarizes the Receiver’s responses to each of these criticisms (none of which the Receiver accepts or agrees with) and (ii) provides the Court with precedents of prior court-approved sales processes that contain these very same provisions, all of which the Receiver considers to be market terms.

39. For the reasons set out in **Appendix “A”**, the Receiver firmly believes that no changes need to be made to the proposed form of SISP in response to any of the Coco Parties’ criticisms or mischaracterizations.

M. MI Issues

40. MI objected to the Holdback Release Order because it was concerned that it might preclude MI's claim for payment of construction management fees on holdback released to subcontractors. The Receiver has clarified with MI that this is not the intention or, in the Receiver's view, effect of the Holdback Release Order and is working with MI address any legitimate concerns about the Holdback Release Order. MI has also asked that the Receiver increase the reserve held in respect of the MI Payment Motion. MI and the Receiver have agreed to negotiate in good faith about a potential increase to the reserve, and address the matter at a later date to be scheduled in connection with the MI Payment Motion if the Receiver and MI cannot consensually resolve the issue in the interim.

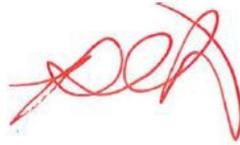
N. Conclusion

41. The Receiver is focused on finding a way to complete the Project and realize value. The SISP is one part of that effort. The Receiver has carefully considered the concerns about the SISP raised by the Coco Parties' in their Notice of Objection, and has determined that they do not warrant any change to the proposed form of SISP. The Receiver respectfully submits that the Receiver's motion should be granted.

42. The Project has a history of legacy issues between owners, guarantors and former general contractors. With each passing month, the Project moves further away from these legacy matters and closer to completion. Legacy matters may need to be dealt with separately, while the Project and the receivership advances. To the extent that the Coco Parties believe that the course of the SISP or some element of the SISP is relevant to the Coco Guarantees they can address that issue

with the Senior Secured Lenders or in the context of any litigation pertaining to the Coco Guarantees.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 5th day of June, 2024.



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APPENDIX “A”

| No. | Coco Parties’ Objection | Receiver’s Response |
|-----|---|---|
| 1. | <p>The Receiver has the unfettered ability to change the rules on bidders at any time simply because the Receiver believes it’s beneficial to do so (SISP – section 7).</p> | <p>This is a standard provision in many Court-approved SISPs – see, for example, the Court-approved SISPs in <i>MJardin Group, Inc et al</i> (Stay Extension, DIP Amendment and SISP Approval Order) at para 31, <i>The Clover On Yonge Inc et al</i> (Order (Approval of SISP)) at para 7 and <i>33 Yorkville Residences Inc et al</i> (Order (Approval of SISP)) at para 48.</p> <p>The Receiver is a Court-appointed officer who will at all times manage the SISP in a manner so as to promote the development, submission and qualification of as many implementable transactions as possible. The Receiver will manage the various rules and conduct the various procedures in the SISP with that objective and mandate in mind, based on the circumstances at hand.</p> <p>The Receiver disagrees with the Coco Parties’ characterization of the manner in which the Receiver designed or would conduct the SISP, and does not believe that the proposed form of SISP requires any modification in response to it.</p> |
| 2. | <p>The Receiver can change any milestones at any time simply because it believes it is appropriate (SISP – section 5).</p> | <p>The draft form of SISP delivered to the Coco Parties stated, as many SISPs do, that: “Any of the Milestones may be <i>amended</i> by the Receiver if it considers it appropriate to do so, after consultation with the Broker and with the consent of the Senior Secured Lenders.”</p> <p>In response to the Coco Parties’ comment, and as the Receiver never had any intention of shortening the Milestone dates in any event, this provision was amended to now say: “Any of the Milestones may be <i>extended</i> by the Receiver if it considers it appropriate to do so, after consultation with the Broker and with the consent of the Senior Secured Lenders.</p> <p>This is a standard provision (in either formulation) in many Court-approved SISPs – see, for example, the Court-approved SISPs in <i>The Clover On Yonge Inc et al</i> (Order (Approval of SISP)) at para 5, <i>33 Yorkville Residences Inc et al</i> (Order (Approval of SISP)) at para 5 and <i>Sino-Forest Corporation (Re)</i> (Sale Process Order) at para 47.</p> <p>The Receiver disagrees with the Coco Parties’ characterization of the manner in which the Receiver designed or would conduct the SISP, and does not believe that the proposed form of SISP requires any modification in response to it.</p> |

| No. | Coco Parties' Objection | Receiver's Response |
|-----|--|---|
| 3. | <p>The Receiver can eliminate from the process any bidder at any time even if it has put forward a qualifying bid (SISP – section 11).</p> | <p>Section 11 of the SISP provides that: <i>“A Potential Bidder will be deemed to be a “Participating Bidder” if it delivers an executed NDA to the Receiver and the Broker. At any time during Phase 1 or Phase 2, the Receiver may, in its reasonable business judgment, and after consultation with the Senior Secured Lenders, eliminate a Participating Bidder from the SISP, in which case such bidder will no longer be a Participating Bidder for the purposes of the SISP.”</i></p> <p>This provision only applies to Participating Bidders, and not to Qualified Bidders. Participating Bidders are early-stage potential bidders who have only executed an NDA and are not subject to any other criteria. It may be appropriate, in an exercise of the Receiver’s business judgement, to eliminate a Participating Bidder from the SISP if it becomes apparent, for instance, that the Participating Bidder does not have a <i>bona fide</i> interest in pursuing a transaction and/or is not capable of completing a transaction (e.g. so-called “tire kickers” or parties who seek to access confidential information for their own strategic purposes as opposed to any <i>bona fide</i> intention to formulate a bid).</p> <p>This is a standard provision in many Court-approved SISPs – see, for example, the Court-approved SISPs in <i>33 Yorkville Residences Inc et al</i> (Order (Approval of SISP)) at para 10, <i>MJardin Group, Inc et al</i> (Stay Extension, DIP Amendment and SISP Approval Order) at paras 7 and 13(a), and <i>Wayland Group Corp et al</i> (SISP & KERP Approval Order) at para 8.</p> <p>The Receiver disagrees with the Coco Parties’ characterization of the manner in which the Receiver designed or would conduct the SISP, and does not believe that the proposed form of SISP requires any modification in response to it.</p> |
| 4. | <p>It’s unusual to require bidders’ legal and financial advisors to sign NDAs in addition to the bidders themselves (SISP – section 13).</p> | <p>Section 13 of the SISP provides that: <i>“At the request of a Participating Bidder, the legal and financial advisor(s) and/or financing sources of such Participating Bidder may also be granted access to the materials and information described in paragraph 12 provided that, in each case, any such advisor or financing source (a) is reasonably acceptable to the Broker and the Receiver; and (b) has executed or is bound by an NDA, or is subject to an alternative confidentiality arrangement acceptable to the Receiver.”</i></p> |

| No. | Coco Parties' Objection | Receiver's Response |
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| | | <p>The language of section 13 of the SISP provides that the legal and financial advisors to Participating Bidders must either (i) sign an NDA, or (ii) be bound by an existing NDA, or (iii) be subject to an alternative confidentiality arrangement acceptable to the Receiver.</p> <p>The above language provides considerable flexibility to Participating Bidders' and their legal and financial advisors to gain access to confidential information, while at the same time protecting that confidential information. In addition to executing an NDA, it is possible a financial or legal advisor could be granted access to confidential information on the basis of a joinder to the NDA or on the basis of existing confidentiality obligations owing by professional advisors, to the extent acceptable to the Receiver.</p> <p>This is a standard provision in many Court-approved SISPs – see, for example, the Court-approved SISPs in <i>33 Yorkville Residences Inc et al</i> (Order (Approval of SISP)) at para 12, <i>The Clover On Yonge Inc et al</i> (Order (Approval of SISP)) at para 14 and <i>Sino-Forest Corporation (Re)</i> (Sale Process Order) at para 15.</p> <p>The Receiver disagrees with this position, as asserted by the Coco Parties, and does not believe that the proposed form of SISP requires any modification in response to it.</p> |
| 5. | <p>The Receiver can withhold any information it wants from bidders even though they've signed NDAs (SISP – section 14).</p> | <p>Section 14 of the SISP provides that: <i>“The Receiver and the Broker reserve the right to restrict any Participating Bidder’s access to selected due diligence information or materials at any time during Phase 1 or Phase 2, where such information or materials contain proprietary or sensitive competitive information and the Receiver determines, in its reasonable business judgement, that a Participating Bidder’s access to such information or materials may have a negative impact on the conduct of the SISP or is otherwise not in best interests of the Companies or their stakeholders.”</i></p> <p>This is a standard provision in many Court-approved SISPs – see, for example, the Court-approved SISPs in <i>MJardin Group, Inc et al</i> (Stay Extension, DIP Amendment and SISP Approval Order) at para 9, <i>Tacora Resources Inc.</i> (Procedures for the Sale, Investment and Services Solicitation Process) at para 14 and <i>Wayland Group Corp et al</i> (SISP & KERP Approval Order) at para 10.</p> <p>The purpose of this important provision in any SISP is to protect the Project’s sensitive commercial information from participating bidders who may be participating in the SISP</p> |

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| | | <p>solely to gain access to confidential information of the Project for strategic purposes unrelated to the SISP and/or highly sensitive competitive information that may not be appropriate for a particular Participating Bidder to access; here, for example, perhaps by hotel chains seeking to see the contracts in place for the Project with a competitor.</p> <p>The Receiver and its counsel are highly experienced in conducting and managing SISPs, and the commercially sensitive information involved in SISPs, and will deal with any such commercially sensitive matters as they may arise in the exercise of their reasonable professional judgement. In addition to restricting access to certain confidential information outright, alternative arrangements that may be considered include “clean team” arrangements whereby competitively sensitive information is only provided to specified representatives of a potential bidder (e.g., to professional advisors).</p> <p>The Receiver disagrees with the Coco Parties' characterization of the manner in which the Receiver designed or would conduct the SISP, and does not believe that the proposed form of SISP requires any modification in response to it.</p> |
| 6. | <p>It's aggressive that a phase 1 bid must be a “Qualified LOI” and yet even if it is, is still subject to a subjective review by the Receiver and lender to guess at whether it will become a phase 2 “Qualified Bid”. The Receiver could in theory refuse to permit a bid to continue to phase 2 even though it is a “Qualified LOI” simply because it doubts that the bid will be a “Qualified Bid” at the end of Phase 2 (SISP – sections 20(b) and s. 23).</p> | <p>This is a standard formulation in many Court-approved SISPs that allows the Receiver flexibility to consider LOIs that, although technically compliant with the specified requirements for a Qualified LOI, may nonetheless be incapable of ultimately developing into a Qualified Bid in the business judgement of the Receiver – see, for example, the Court-approved SISP in <i>33 Yorkville Residences Inc et al</i> (Order (Approval of SISP)) at para 18 and <i>The Clover On Yonge Inc et al</i> (Order (Approval of SISP)) at para 20. By way of example, a Qualified LOI may specify material conditions to closing that on their face are incapable of being satisfied, which may lead the Receiver to determine there is no reasonable prospect of that Qualified LOI developing into a Qualified Bid. As contemplated by the SISP, the Receiver would expect to work with bidders in an attempt to clarify any issues in this regard to facilitate the submission of a Qualified LOI capable of developing into a Qualified Bid.</p> <p>The Receiver disagrees with the Coco Parties' characterization of the manner in which the Receiver designed or would conduct the SISP, and does not believe that the proposed form of SISP requires any modification in response to it.</p> |

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| 7. | <p>It is unusual that the amount of the deposit is not specified in the SISP and that the receiver gets to make up any required deposit amount later (SISP – section 27(l)).</p> | <p>Section 27(l) of the SISP provides that, in order for a Final Bid (in Phase 2) to be considered a qualified Final Bid, among other things, that Final Bid must be <i>“accompanied by a deposit (the “Deposit”) in the form and in such amount as will be determined by the Receiver in consultation with the Broker based on the forms of Qualified LOIs received and set out in the Bid Process Letter”</i>.</p> <p>The SISP calls for a variety of transactions, ranging from third party acquisition proposals that must exceed the Minimum Bid Threshold of \$1.2 billion, to Development Proposals that may not involve any acquisition element at all (and are not required to meet the Minimum Bid Threshold). Accordingly, the Receiver, in consultation with the Broker, determined that it was prudent not to impose a single (“one size fits all”) up-front Deposit requirement that might not be appropriate (and therefore could discourage the submission of bids) for the broad variety of potential transactions that may emerge from the SISP.</p> <p>The Receiver disagrees with this position, as asserted by the Coco Parties, and does not believe that the proposed form of SISP requires any modification in response to it.</p> |
| 8. | <p>Section 32 gives the lender an absolute veto over a development bid.</p> | <p>Section 32 of the SISP provides that: <i>“Notwithstanding any other provision hereof, no Development Proposal shall be selected as the Selected Qualified Bid without the consent of the Senior Secured Lenders.”</i></p> <p>A Development Proposal would in essence be a contractual partnership between the Senior Secured Lenders and a developer to develop the Project together, on go-forward terms and conditions to be agreed as set out in any such Development Proposal. By its nature, any such Development Proposal needs to be acceptable to the Senior Secured Lenders as it will require their participation on a go-forward basis.</p> <p>The Receiver disagrees with this position, as asserted by the Coco Parties, and does not believe that the proposed form of SISP requires any modification in response to it.</p> |
| 9. | <p>Section 33 shouldn't require consultation with the lender – if a qualified bid is received, the Receiver alone should negotiate and finalize it.</p> | <p>Section 33 of the SISP provides that: <i>“Once a Selected Qualified Bid has been selected, the Broker and the Receiver, in consultation with the Senior Secured Lenders and their advisors, shall negotiate and settle the terms of a definitive agreement in respect of the Selected Qualified Bid, all of which will be conditional upon Court approval at which time the Selected</i></p> |

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| | | <p><i>Qualified Bid will be the "Successful Bid" hereunder and the person(s) who made the Selected Qualified Bid will be the "Successful Bidder" hereunder."</i></p> <p>This is a standard provision in many Court-approved SISPs – see, for example, the Court-approved SISPs in <i>MJardin Group, Inc et al</i> (Stay Extension, DIP Amendment and SISP Approval Order) at para 22, <i>Contract Pharmaceuticals Limited et al</i> (SISP Approval Order) at para 13 and <i>33 Yorkville Residences Inc et al</i> (Order (Approval of SISP)) at para 31.</p> <p>It is not reasonable to suggest that the Senior Secured Lenders, who are owed in excess of \$1.5 billion and are the only party to date to have committed to facilitate continuing construction of the Project (which will require substantial further funding) will not be involved in the negotiation of any definitive transaction agreement(s) that may emerge from the SISP, which transaction(s) will, at a minimum, be the source of recovery for the Senior Secured Lenders and may also involve the active participation of the Senior Secured Lenders (for instance, in the context of a Development Proposal).</p> <p>The Receiver disagrees with this position, as asserted by the Coco Parties, and does not believe that the proposed form of SISP requires any modification in response to it.</p> |
| 10. | <p>Section 34 gives the Receiver too much power to just call off Phase 2 at any time simply because it is not optimistic (i.e., if a qualified offer was received in phase 1 that warranted going to phase 2, the Receiver should have to let it play out and can't pull the plug at any point simply because it isn't optimistic).</p> | <p>Section 34 of the SISP provides that: <i>"If the Receiver, after consultation with the Broker and the Senior Secured Lenders: (a) determines, at any point during Phase 2, that there is no reasonable prospect of obtaining a Final Bid resulting in a Qualified Bid; or (b) determines that no Qualified Bid has been received at the end of Phase 2, then the Receiver, with the consent of the Senior Secured Lenders, may designate one or more Final Bids as Qualified Bids; failing which the Receiver may give notice of the termination of the SISP by email to the Service List and Qualified Bidders who submitted Final Bids."</i></p> <p>This is a standard provision in Court-approved SISPs – see, for example, the Court approved SISP in <i>MJardin Group, Inc et al</i> (Stay Extension, DIP Amendment and SISP Approval Order) at para 19.</p> <p>The Receiver is a Court-appointed officer that is highly experienced in conducting and managing SISPs, with a view to attracting and developing as many value-maximizing transactions as possible under any circumstances – and will do so here. However, if at a certain point the Receiver determines in the exercise of its reasonable business judgment that</p> |

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| | | <p>there is no longer a reasonable prospect of obtaining a Qualified Bid, it will terminate the SISP on notice to all parties. The alternative would be to require the Receiver to wait until the conclusion of Phase 2 (late September 2024) before taking this step. Requiring the SISP to remain “open” when there is no reasonable prospect of obtaining a Qualified Bid is not commercially reasonable, including because it would waste receivership resources and may unnecessarily delay progressing the receivership.</p> <p>The Receiver disagrees with this position or characterization of the manner in which the Receiver designed or would conduct the SISP, as asserted by the Coco Parties, and does not believe that the proposed form of SISP requires any modification in response to it.</p> |
| 11. | <p>There is a false pretense throughout in pretending the lender isn't a bidder and giving it extensive control and influence over the process as though it is merely a passive creditor that stands only to receive the proceeds of sale. The lender's stated objective is to be the successful bidder (albeit in disguised form because the tax obligation of a foreign buyer has now required that it find a way to do indirectly what it cannot do directly).</p> | <p>To the Receiver's knowledge, the Senior Secured Lenders have never intended or desired to be the owners of the Project – they are lenders.</p> <p>The Senior Secured Lenders are not required to credit bid. There are many court-approved SISPs where the senior secured lender has not submitted a credit bid – see, for example, <i>Sino-Forest Corporation (Re)</i> (Sale Process Order), <i>Wayland Group Corp et al</i> (SISP & KERP Approval Order) and <i>Contract Pharmaceuticals Limited et al</i> (SISP Approval Order).</p> <p>In the Receiver's view, in circumstances such as this case, the Senior Secured Lenders and the RFCA Lender are entitled to see the results of the SISP, and to then assess the best path-forward for the Project in light of any and all potentially implementable transactions.</p> <p>In circumstances such as this case, it is also standard for the senior secured creditor to have certain consent and consultation rights under the SISP, and there are many court-approved SISP examples of same – see, for example <i>MJardin Group, Inc et al</i> (Stay Extension, DIP Amendment and SISP Approval Order) and <i>33 Yorkville Residences Inc et al</i> (Order (Approval of SISP)). In the proposed SISP, the Receiver has carefully balanced the instances where consent are appropriate, and those where consultation only is appropriate.</p> <p>The Receiver disagrees with this position or characterization of the manner in which the Receiver designed or would conduct the SISP, as asserted by the Coco Parties, and does not believe that the proposed form of SISP requires any modification in response to it.</p> |

**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

**RESPONSE TO NOTICE OF OBJECTION
(Motion for SISP Approval Returnable
June 6, 2024)**

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