

**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

RESPONDING MOTION RECORD OF MIZRAHI INC.

April 14, 2025

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AFFIDAVIT OF SAM MIZRAHI

I, Sam Mizrahi, of the City of Toronto and the Province of Ontario SOLEMLY AFFIRM:

1. I am the principal of Mizrahi Inc. ("MI") and the beneficial owner of the Project. I am swearing this affidavit in response to the Receiver's motion and application returnable April 22, 2025. All capitalized terms used below are the same as those found in the Receiver's Eight Report unless otherwise defined.

I. MI's Claims to an Increase in the Reserve

2. MI's Payment Motion and the Receiver's cross-motion are scheduled to be heard June 17, 18 and 19, 2025. The motion was initially brought by MI on February 27, 2024.
3. MI claims a right to payment from the Project for \$7,579,792 in unpaid construction management fees and labour costs and relies on, among other things, paragraph

17 of the Appointment Order.

4. As part of MI's claim for payment in the Payment Motion, MI advances a claim for interest on unpaid amounts. In particular, it claims interest calculated in accordance with the CCDC2 Contract. In the alternative, MI will seek interest at the bank prime rate compounded monthly.
5. In the summer of 2024, MI and the Receiver reached an agreement whereby the Receiver set aside a reserve to address MI's claim for payment. In total \$10,912,000 was set aside by the Receiver. While this amount is in excess of the amount claim payable by MI in the Payment Motion, the remainder represents amounts claimed to be owed by third party subcontractors. Since MI is exposed to a claim for non-payment from these parties as the Project's former general contractor, the reserve was set to meet these claims as well.
6. When the reserve was agreed upon, the parties contemplated that the Payment Motion would be returnable in September or October 2024.
7. In its motion and application returnable April 22, 2025, the Receiver seeks to limit the amount available to address Receivership Litigation to the quantum of reserve set aside. Should this order be granted without an increase in the reserve set aside for MI, MI will be undercompensated should it succeed in its claim.
8. Attached as **Exhibit A** is an interest calculation on MI's total claim for payment on its post-receivership invoices.
9. MI seeks an increase in the reserve by \$1 million to \$11,912,000 to address MI's claim for interest, the length of time likely between the return of the hearing and the conclusion of any appeal, and MI's claim to costs.

II. The Receiver's Purported Disclaimer of the Mediator's Proposal and the Exclusive Listing Agreement

10. On March 27, 2025, the Receiver wrote to me to advise that the Receiver intended to disclaim the Exclusive Listing Agreement (the "ELA") and the Mediator's Proposal. A copy of the Receiver's letter is attached as **Exhibit B**. A copy of the ELA is attached as **Exhibit C**. A copy of the Mediator's Proposal is attached as **Exhibit D**.

i. The Exclusive Listing Agreement

11. The ELA is a contract between MI and the Project under which MI was the exclusive agent for the sale of condominium units in the Project. It entitles MI to the payment of a commission on Project sales equal to 4.89%, net of HST of the sale price of any unit (not including any extras, upgrades, and/or parking spaces). There is no commission payable to sales to Equity Investors (as defined in the ELA) and sales to Friends and Family is subject to a reduced commission of 2.25% of the sale price.

12. The commission to MI is payable under the ELA in three tranches:

- a. 33% upon the execution of the purchase agreements;
- b. 33% upon construction financing; and
- c. 34% upon the final closing of each unit.

13. MI has not received the final tranche of the fees payable under the ELA as no closings have occurred.

14. I understand that the Receiver seeks to disclaim the ELA. The Receiver has indicated that it has not yet decided and does not yet know whether the

agreements of purchase and sale that gave rise to MI's entitlement to a fee pursuant to the ELA will close, or whether those agreements will be disclaimed.

15. MI has earned \$9,627,992.64 in fees pursuant to the ELA which will be payable upon closing of the various agreements of purchase and sale. Attached as **Exhibit E** is a spreadsheet calculating MI's entitlement to a fee pursuant to the ELA.

16. Even if the agreements giving rise to MI's entitlement to a fee pursuant to the ELA are disclaimed by the Receiver, which, as discussed below, is unlikely, MI will still have a claim to a fee. In the event that the agreements are terminated, the ELA provides:

3. If a Purchase Agreement is terminated other than by the default of the suite purchaser, and if the Vendor receives from the trustee holding purchaser deposits more than 50% of the deposits contracted in the Purchase Agreement, the Vendor agrees to pay the Agent 50% of the received funds from the trustee (the "Eligible Funds"), or such lesser amount such that the sum of the Eligible Funds and previously paid commissions do not exceed the total commission that otherwise would have been payable had the Purchase Agreement not been terminated. In the event that the deposits received exceed the commissions earned, any such excess shall be adjusted in favour of the Vendor upon the final accounting of the Agent's Fee.

17. The ELA is an important contract for the Project. It provided MI with sole authority to sell Project units, which is a vital source of revenue for the Project.

ii. The Mediator's Proposal

18. The Mediator's Proposal is an agreement reached between me and the other beneficial owner of the Project, Ms. Jennifer Coco, as part of a mediated arbitration proceeding that concluded in November 2019.

19. The Mediator's Proposal sets out, among other things, MI's entitlement to a Residential Management Fee as follows:

A Residential Management Fee will be paid to MI in respect of all existing and future residential sales equal to 2.0% of the selling price, including upgrades and extras. 50% of this fee will be payable upon entering into a firm agreement of purchase and sale with payment of the appropriate deposit, and the remaining 50% will be paid on closing of each unit. The second 50% will not, however, be earned and payable unless an application for an additional six floors is submitted to the City on or before December 31, 2020.

20. MI claims entitlement to a Residential Management Fee on closing of \$6,213,429 for sales of the Project, plus \$2,794,308.20 that is currently owed. Under the terms of the Mediator's Proposal, MI is entitled to a Residential Management Fee on all future sales of the Project as well. MI and the Receiver disagree about the calculation of the Residential Management Fee. That is one issue raised in MI's Payment Motion and the Receiver's cross-motion.

21. Like the ELA, the Mediator's Proposal is an important contract for the Project. It sets out important terms about the rights, obligations and entitlements of the beneficial owners of the Project, MI's entitlement to construction management fees (for the relevant period of time), the financial controls of the Project and MI's entitlement to various fees as developer, including the Residential Management Fee.

iii. MI Worked to Secure Sales and Earn Its Fees

22. MI secured the sale of approximately 345 units in the Project. To my knowledge, on a handful of the agreements for these sales have been disclaimed by the Receiver. The fees owed to MI for these sales under the Mediator's Proposal and

the ELA are already earned. They are just not yet payable because the closings have not yet occurred.

23. As noted, MI was the exclusive agent for sales of units in the Project and, as such, I have intimate knowledge of the market conditions for such sales. The Project is truly unique. It is a worldclass supertall and ultra-luxurious mixed-use tower. The sales secured by MI for the Project provided for one of the highest prices per square foot, if not the highest, for any high-rise condominium in Canada.

24. I understand that the Receiver has not yet decided whether to disclaim the many agreements of purchase and sale that give rise to MI's entitlement to a fee under the ELA. Nonetheless, it is difficult to understand why those agreements would not be affirmed given the high valuation paid by purchasers and the current market conditions. I understand that the Receiver and Tridel have or will implement a redesign of the upper levels of the Project which has resulted in the disclaimer of some units (including my own). This layout redesign should not have any effect on the vast majority of the units in the Project.

25. MI intends to pursue the Project for its disclaimer of the Mediator's Proposal and the ELA. In particular, MI will advance a claim to a trust over the proceeds of sale and deposits paid by unit purchasers when those transactions close or are terminated. In addition, MI will rely on the disclaimer and MI's unsecured damages claim for breach of contract arising from the disclaimer as one response to the Receiver's cross-motion against MI to be argued in June 2025. As such, MI seeks certainty in the court orders for the Receiver's motion and application that these orders are without prejudice to MI's rights arising from the disclaimer of the

Mediator's Proposal and the ELA.

AFFIRMED before me by video
conference at the City of Toronto,
in the Province of Ontario, this 14th day of
April, 2025, in accordance with O. Reg.
431/20, Administering Oath or Declaration
Remotely.



D Trafford

Commissioner for Taking Affidavits
(or as may be)

SAM MIZRAHI

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

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PROCEEDING COMMENCED AT TORONTO

RESPONDING MOTION
RECORD OF MIZRAHI INC

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