Court File No. BK24-00000230-0033

ONTARIO
SUPERIOR COURT OF JUSTICE

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c C-36, AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF MIZRAHI DEVELOPMENT GROUP (1451 WELLINGTON) INC.

Applicant

FACTUM OF THE APPLICANT,
MIZRAHI DEVELOPMENT GROUP (1451 WELLINGTON) INC.
(Application for an Initial Order under the *CCAA*)

Date: October 15, 2024

COZEN O'CONNOR LLP
Bay Adelaide Centre – North Tower
40 Temperance Street, Suite 2700
Toronto, ON M5H 0B4

Steven J. Weisz (32102C)
Tel: 647-417-5334
Emaill: sweisz@cozen.com

Robert Sottile (68587E)
Tel: 416-361-6680
Email: rsottile@cozen.com

Dilina Lallani (90453E)
Tel: 647-417-5349
Email: dlallani@cozen.com

Lawyers for the Applicant, Mizrahi Development Group (1451 Wellington) Inc. and the General Contractor, Mizrahi Inc.

TO: THE SERVICE LIST

PART I – NATURE OF THIS APPLICATION

1. This factum is filed in support of an application by Mizrahi Development Group (1451 Wellington) Inc. ("**WellingtonCo**" or the "**Applicant**") for an Initial Order (the "**Initial Order**") and other relief under the *Companies Creditors' Arrangement Act*, RSC 1985, c C-36 (the "**CCAA**").

2. The Initial Order sought by the Applicant provides for, among other things, (i) a stay of proceedings (the "**Stay of Proceedings**") for the permitted ten (10) day period in respect of the Applicant, together with a limited stay in favour of Mizrahi Inc. (the "**General Contractor**"), (ii) the appointment of MNP Ltd. ("**MNP**" or the "**Proposed Monitor**") as the Court-appointed Monitor, (iii) the granting of an Administration Charge and DIP Lender's Charge (as each term is defined below); and (iv) authorizing the Applicant to borrow up to a principal amount of $25,000,000.00 under a debtor-in-possession credit facility (the "**DIP Facility**") from TCC Mortgage Holdings Inc. ("**TCC**" or the "**DIP Lender**") in order to finance the Applicant's critically required working capital requirements and other general corporate purposes, post-filing expenses and costs.

3. The Applicant is a single purpose real estate development company. It was incorporated for the purpose of developing and constructing a residential, mixed-use luxury condominium development known as "*1451 Wellington – The Residences at Island Park Drive*" (the "**Project**"). The General Contractor, Mizrahi Inc., is the general contractor for the construction of the Project and entered into contracts with trades, suppliers and other goods and service providers in furtherance of the Project.

4. Despite making significant progress, the Project has suffered certain setbacks, including cost overruns and extended construction delays. Currently, the Applicant finds itself in a liquidity crisis and, absent approval of the additional financing which is proposed to be made available under the DIP Facility, is not able to meet its obligations as they become due.

5. The Applicant requires access to additional funding for the work necessary to complete the Project. However, it has been subject to enforcement action by secured creditors, in particular, V2I (as defined below). Due to these actions, the TCC is only willing to advance more funds to the

Applicant if it receives priority in respect of these funds. While it is open to the Construction Lender to obtain this priority by advancing this funding under a receivership, this will put the financial viability of the Project in jeopardy.

6. A significant portion of the Units have yet to be sold. A receivership would reduce the value of those Units, making them harder to sell and reducing the overall revenue from the Project. Reducing the potential revenue earned through the sale of these Units creates the risk of a shortfall where WellingtonCo may not be able to repay its loan obligations in connection with the Project and other creditors, such as suppliers, trades and subtrades.

7. Given the need to obtain further financing to complete the Project, the current financial viability of the Project and the damage to its reputation and value within a receivership, a CCAA restructuring is the only viable path forward to permit the Applicant to secure the funding necessary to complete the Project in a stable environment that preserves its reputation and financial viability on a going forward basis. Absent the Stay of Proceedings and the DIP Facility (as defined below), the Application will not be able to continue construction and the Project will likely fall into receivership.

PART II – FACTS

A. The 1451 Wellington Project

8. WellingtonCo is a single purpose real estate development company. It was incorporated for the purpose of developing and constructing the Project and holding the Property. One hundred percent (100%) of the shares in WellingtonCo are owned by Mizrahi Developments Inc.[1]

9. WellingtonCo owns certain real property having a municipal address of 1451 Wellington Street West, Ottawa, Ontario and the following legal description:

> PIN 04030-0261 (LT) LOTS 1, 2 & 3 & PART LOT 4, PLAN 145, N/S RICHMOND ROAD (NOW WELLINGTON STREET), PARTS 1 & 2 PLAN

[1] Affidavit of Sam Mizrahi, sworn October 15, 2024, Application Record at Tab 2 ["**Mizrahi Affidavit**"], at paras 9-10.

4R35696; SUBJECT TO AN EASEMENT AS IN OC2360765; SUBJECT TO AN EASEMENT AS IN OC2671330; CITY OF OTTAWA (the "**Real Property**").[2]

10. The Property is comprised of 19,833 square feet of developable land. It was formerly two, separate properties: (i) 1451 Wellington Street West, Ottawa, Ontario (PIN 04030-0259) (the "**1451 Parcel**"); and (ii) 1445 Wellington Street West, Ottawa, Ontario (PIN 04030-0260) (the "**1445 Parcel**").[3]

11. WellingtonCo is in the process of developing and building the Project which consists of a twelve (12) storey concrete frame, condominium building featuring ninety-three (93) high-end individual suites, 5,268 square feet of retail space at grade, 100 storage lockers and 130 underground parking spaces. The Project was expected to be completed in the fall of 2024 and, as of the date of filing, is approximately 85% complete and interior finishings on the lower floors are in an advanced stage.[4]

12. Pre-sales launched in or about 2017. Approximately seventy-two (72) of the ninety-three (93) units (each a "**Unit**" and collectively, the "**Units**") have been sold.[5]

13. WellingtonCo's assets are comprised almost exclusively of the Project, including the Real Property, development costs, prepaid expenses, deposits and certain agreements of purchase and sale (the "**Pre-Sale Agreements**") (collectively, the "**Property**").

C. Indebtedness and Security of the Applicant

(i) Project Financing

(a) WellingtonCo financed the Project through the following credit facilities: (a) Trez Capital Limited Partnership, by its general partner, Trez Capital (2011) Corporation (the "**Construction Lender**"), advanced loans of $68,000,000 and $6,000,000, each of which are secured by, among other things, mortgages against the Real Property; and (b) Westmount provided deposit insurance in the amount of

[2] Mizrahi Affidavit, at para 11.
[3] *Ibid*, at para 12.
[4] *Ibid*, at para 13.
[5] *Ibid*, at para 15.

$24,000,000, which is secured by, among other things, a mortgage against the Real Property.[6]

1. The First Lien Loan Commitment

14. The Construction Lender, as lender, and the Applicant, as borrower, entered into a Commitment Letter dated October 2, 2019, as has been amended, supplemented and/or renewed from time to time (collectively, the "**First Lien Commitment Letter**"). Pursuant to the terms of the Commitment Letter, the Construction Lender agreed to extend the following loan facilities to the Debtor: (a) a Construction Loan Facility with a maximum principal amount of the lessor of: (i) $67,000,000; and (ii) 73.6% of eligible project costs, as determined by the Construction Lender (the "**Construction Loan**"); and (b) Letter of Credit Facility with a maximum principal amount of $1,000,000 (the "**LOC Facility**", and together with the Construction Loan, the "**First Lien Loan Facilities**").[7]

15. Together, the First Lien Loan Facilities have a maximum aggregate principal amount of $68,000,000. As of October 1, 2024, there was in aggregate $73,146,752.97 outstanding under the First Lien Loan Facilities (the "**First Lien Indebtedness**") with interest, fees and costs continuing to accrue.[8]

16. The payment and performance of all of the obligations under the First Lien Loan Facilities have been guaranteed by: (i) Sam Mizrahi pursuant to a Guarantee and Postponement of Claim dated October 29, 2019; and (ii) Mizrahi Developments Inc. ("**MDI**") pursuant to a Limited Recourse Guarantee and Postponement of Claim dated October 29, 2019.[9]

17. As general and continuing security for the payment and performance of the First Lien Indebtedness, the Applicant, among others, granted certain security (the "**First Lien Security**") including, *inter alia*, a first mortgage in favor of Computershare Trust Company of Canada ("**Computershare**") who holds the interest on behalf of the Construction Lender [10], which was

---

[6] Mizrahi Affidavit, at para 18.
[7] *Ibid*, at para 18.
[8] *Ibid*, at para 19-20.
[9] *Ibid*, at para 21.
[10] Computershare, among other things, acts as an agent, nominee and bare trustee for the Construction Lender, from time to time, in respect of certain mortgage loans and security.

registered against the Real Property on October 29, 2019 and was amended by a mortgage amending agreement increasing the principal amount to CAD $70,000,000.00 (collectively as the "**First Mortgage**").[11]

18. Section 9.02 of the First Loan Commitment provides that WellingtonCo cannot permit the registration of any other encumbrances against the Property without the consent of the Construction Lender.[12]

2. The Second Lien Loan Commitment

19. The Construction Lender, as lender, and the Applicant, as borrower, entered into a further Commitment Letter dated October 18, 2021, as has been amended, supplemented and/or renewed from time to time (collectively, the "**Second Lien Commitment Letter**"). Pursuant to the terms of the Second Commitment Letter, the Construction Lender agreed to extend a further loan facility to the Applicant with a principal amount of $6,000,000 (the "**Second Lien Loan Facility**" and together with the First Lien Loan Facilities, the "**Construction Loan Facilities**").[13]

20. As of October 1, 2024, there was in aggregate $7,908,211.34 outstanding under the Second Lien Loan Facility (the "**Second Lien Indebtedness**") with interest, fees and costs continuing to accrue.[14]

21. As general and continuing security for the payment and performance of the First Lien Indebtedness, the Applicant, among others, granted certain security (the "**Second Lien Security**" and together with the First Lien Security, the "**Security**") including, *inter alia*, a second mortgage in favor of Computershare which was registered against the Real Property on December 1, 2021 (the "**Second Mortgage**").[15]

3. Westmount Deposit Insurance

---

[11] Mizrahi Affidavit, at para 23.
[12] *Ibid*, at para 24.
[13] *Ibid*, at para 26.
[14] *Ibid*, para 27.
[15] *Ibid*, at para 28.

22. Westmount Guarantee Services Inc. ("**Westmount**") made available to the Applicant a surety facility in the amount of $24,000,000 (the "**Surety Facility**") pursuant to a Deposit Insuring Agreement dated December 5, 2018 (the "**Deposit Insuring Agreement**"). The Deposit Insuring Agreement was entered into in connection with the insurance of deposits paid by the Purchasers (as defined below).[16]

23. In order to secure the Surety Facility, Westmount was granted certain security including, among other things, a mortgage in favor of Westmount which was registered against the Property on October 29, 2019 (the "**Westmount Security**").[17]

24. Pursuant to a Priority Agreement dated October 24, 2019, as amended and restated by the Amended and Restated Priority Agreement dated April 22, 2021, by and between Westmount and Computershare (together, the "**Westmount Priority Agreement**"), the Westmount Security is subordinated and postponed, save and except for the deposit monies received from time to time from Purchasers and accrued interest thereon, in favor of the Security.[18]

(ii) Additional Indebtedness and Encumbrances

1. The V2 Investments Loan

25. On October 31, 2019, Sam Mizrahi ("**Sam**"), as borrower, entered into a loan agreement (the "**V2I Loan Agreement**") with V2 Investment Holdings Inc. ("**V2I**"), as lender, pursuant to which V2I advanced a loan in the principal amount of $12,900,000 (the "**V2I Loan**"). The rate of interest applicable to the V2I Loan is ten present (10%), compounded annually. As of October 10, 2024, there was in aggregate $13,300,000.00 outstanding under the V2I Loan with interest, fees and costs continuing to accrue.[19]

[16] Mizrahi Affidavit, at para 30.
[17] *Ibid*, at para 32.
[18] *Ibid*, at para 30.
[19] *Ibid*, at para 34-35.

26. WellingtonCo is a guarantor of the V2I Loan, pursuant to section 9.01 of the V2I Loan Agreement where WellingtonCo guaranteed, among other things, payment of the obligations under the V2I Loan Agreement.[20]

27. The security granted to V2I in respect of the V2I Loan includes, among things: (a) a charge over the Real Property in favor of V2I (the "**V2I Mortgage**"); and (b) a charge over WellingtonCo's present and future personal property[21].

28. Section 8.02 of the V2I Loan Agreement provides that the V2I Mortgage shall not be registered on title to the Real Property until there was a default to the V2I Loan Agreement. As is further detailed below, on April 15, 2024, V2I registered the V2I Mortgage.[22]

2. The CWB Maxium Loan

29. WellingtonCo engaged in an environmental remediation of certain aspects of the Property and applied for a tax credit under the municipal Brownfield Financial Tax Incentive Program (the "**Brownfield Credit**") with the City of Ottawa.[23]

30. Pursuant to a Promissory Note, (the "**CWB Note**"), CWB Maxium Financial Inc. ("**CWB**") advanced a loan to the Applicant in the principal amount of $675,930.46 in connection with WellingtonCo's remediation efforts and the underlying Brownfield Credit. Currently, $564,400.20 plus accrued interest is owing pursuant to the CWB Note.[24]

31. The CWB Note was secured by a General Security Agreement dated December 1, 2022 (the "**CWB GSA**") granting CWB a security interest in WellingtonCo's present and after acquired personal property and undertakings, all tangible and intangible intellectual property and all real and immovable property, both freehold and leasehold. A *Personal Property Security Act*, RSA 1990, c P 10 ("***PPSA***") registration against WellingtonCo was made CWB pursuant to the CWB GSA.[25]

---

[20] Mizrahi Affidavit, at para 38.
[21] *Ibid*, at para 40.
[22] *Ibid*, at para 41.
[23] *Ibid*, at para 45.
[24] *Ibid*, at para 42-43.
[25] *Ibid*, at paras 45-46.

3. The Berry Loan

32. By way of a Term Sheet dated June 6, 2016 and subsequent Loan Agreement dated June 29, 2016 (collectively as the "**Berry Loan Agreement**"), David Berry ("**Berry**") advanced a loan to MDI in the original principal amount of $10,000,000, through two (2) loan facilities of: (i) $4,000,000.00 ("**Berry Loan #1**"); and (ii) $6,000,000.00 ("**Berry Loan #2**" and together with Berry Loan #1, the "**Berry Loan**").[26]

33. The security granted to Berry in respect of the Berry Loan includes, among other things: (a) guarantees provided by WellingtonCo and Sam Mizrahi, for all indebtedness of MDI under Berry Loan #1 and Berry Loan #2 (the "**Berry Loan Guarantees**"); (b) a general security agreement securing all present and after acquired personal property of MDI and WellingtonCo for registration pursuant to the *PPSA* (the "**Berry GSA**"); and (c) an Acknowledgment and Direction executed by WellingtonCo in favor of Berry's solicitors annexing a mortgage against the Property setting out the amounts due under Loan Facility 1, which is held in escrow by Berry's solicitors and not to be registered unless Loan Facility 1 is not repaid in full by the two (2) year deadline provided for in the Berry Loan Agreement. [27]

34. Section 2.3 of the Berry Loan Agreement provides that Berry Loan #1 shall mature on the earlier of: (i) two (2) years from the date of the initial advance of Berry Loan #1; (ii) issuance of the above-grade building permit in connection with the Project; and (iii) the receipt of proceeds or funds from a credit facility obtained to finance the Project.[28]

35. Berry Loan #1 has been repaid to Berry in full.[29]

36. Berry and Sam Mizrahi entered into a Supplementary Agreement dated June 28, 2016 (the "**Supplementary Agreement**") in connection with the Berry Loan Agreement and the Berry Loan.[30]

---

[26] Mizrahi Affidavit, at para 47.
[27] *Ibid*, at para 49.
[28] *Ibid*, at para 50.
[29] *Ibid*, at para 51.
[30] *Ibid*, at para 54.

37. Berry entered into an Agreement of Purchase and Sale (the "**Berry APS**") to purchase Suite PH 901, a condominium unit in a development project (the "**Hazelton Project**") located at 128 Hazelton Avenue, Toronto, Ontario (the "**Berry Unit**"). The Supplementary Agreement provides that, in the event that the closing of the Berry Unit occurs prior to the full repayment of the Berry Loan, then Sam Mizrahi, in his personal capacity, agreed to pay to Mizrahi (128 Hazelton) Inc. (the developer of the Hazelton Project and hereinafter referred to as "**Mizrahi Hazelton**"), any amounts due by Berry for the Berry Unit pursuant to the Berry APS (the "**Berry Balance**"), up to a maximum amount of the principal that remains outstanding under the Berry Loan, plus all accrued interest (the "**Mizrahi Bridge Payment**"). Sam Mizrahi, in his personal capacity and in accordance with the Supplementary Agreement, effected the Mizrahi Bridge Payment to Mizrahi Hazelton in satisfaction of the Berry Balance.[31]

38. In satisfaction of the remaining amounts owing to Berry under the Berry Loan Agreement following the Mizrahi Bridge Payment, Berry was: (i) assigned corporate shares in 2659100 Ontario Inc.; and (ii) provided with two (2) units in the Project and two (2) units in a separate development at One Bloor Street, Toronto, Ontario. In light of the foregoing, it is the Applicant's position that there remains no amounts outstanding under the Berry Loan, and specifically, Berry Loan #2.[32]

39. Despite the foregoing, Berry takes the position that additional amounts remain outstanding under the Berry Loan.[33]

4. Consideration Owing to the Seller of the 1451 Parcel

40. The 1445 Parcel was acquired by way of an Agreement of Purchase and Sale dated April 17, 2013 (the "**1445 Purchase Agreement**") with Alfredo Giannuzzi, Mario Giannuzzi and Eugenio Milito (collectively as the "**1445 Seller**").[34]

41. The consideration contemplated under the 1445 Purchase Agreement included the 1445 Seller receiving 4,027 square feet of space in the Project (the "**Conveyed Project Space**"). The

[31] Mizrahi Affidavit, at para 55.
[32] *Ibid*, at para 56.
[33] *Ibid*, at para 57.
[34] *Ibid*, at para 58.

1445 Purchase Agreement contemplates that approximately 2,080 square feet of the Conveyed Project Space shall be commercial ready space on the ground floor of the Project, nearest the corner of Island Park Drive and Wellington Street, fronting on Wellington Street. The remaining approximately 1,947 square feet of the Conveyed Project Space is to be a residential Unit(s). [35]

5. Additional Liabilities

42. The Applicant is also indebted to certain trades, suppliers and related parties supplying goods and services in connection with the Project. As of October 2024, the Applicant has approximately $5,051,684.37 in amounts outstanding to such parties.[36]

43. On September 19, 2024, Alenfrage Designer Paint Inc. o/a Alenfrage Painting Services ("**Alenfrage**") registered a construction lien against the Real Property for its claim for payment in the amount of $107,293.50.[37]

D. Enforcement Actions against the Applicant

44. On February 28, 2024, V2I delivered a Notice of Default to WellingtonCo, MDO and Sam (the "**V2I Notice of Default**"), which alleged a default under the V2I Loan Agreement.[38]

45. Discussions about extending the maturity date occured into March and April of 2024. These included a meeting on March 3, 2024, where V2I was advised that the amounts owing for the V2I Loan were intended to be repaid from proceeds of the Unit sales from the Project. The following matters were also discussed:

(a) an agreement to contact the Construction Lender about registering a mortgage against the Real Property in respect of the V2I Loan behind the Construction Lender's existing Security, namely the First Mortgage and Second Mortgage; and

[35] Mizrahi Affidavit, at para 59.
[36] *Ibid*, at paras 60-61.
[37] *Ibid*, at paras 61-62.
[38] *Ibid*, at para 64.

(b) that Sam Mizrahi would continue to make monthly interest payments for the term of the V2I Loan.[39]

46. During this March 3, 2024 meeting, Henry Wofond ("**Wofond**"), the President of V2I, also expressed his intention to register a charge against the Real Property. Sam Mizrahi advised him that if he did so, this would cause WellingtonCo to be in default of the First and Second Mortgages. Wofond advised that the charge would not create this problem because he would sign a standstill and intercreditor agreement with the Construction Lender and avoid this default on the part of WellingtonCo.[40]

47. In early April, V2I was advised by the Construction Lender that it was prepared to continue funding if V2I entered into a fulsome subordination and standstill agreement, in the form of an intercreditor agreement, which, among other things, would subordinate V2I's interest to any further financing taken out by the Construction Lender to continue funding the Project.[41]

48. The Construction Lender's primary concern was, absent an intercreditor agreement that would subordinate V2I to any further advances by the Construction Lender under the existing Security, those fresh advances would likely result in recovery of those funds being subordinate to V2I's recovery. An intercreditor agreement was becoming increasingly critical in light of the potential default under the First Mortgage and the Second Mortgage and the imminent need for additional funding to continue moving to Project towards completion.[42]

49. After draft intercreditor agreements were exchanged, V2I refused to execute it in its current form and insisted on more security. In particular, V2I requested a pledge of shares.[43]

50. On April 15, 2024, V2I served a Notice of Intention to Enforce Security (the "**V2I NITES**") under section 244 of the *Bankruptcy and Insolvency Act* (R.S.C., 1985, c. B-3) (the "**BIA**") and registered the V2I Mortgage against the Real Property. On May 6, 2024, V2I commenced an Application requesting, *inter alia*: (i) judgment against WellingtonCo, MDI and

---

[39] Mizrahi Affidavit at paras 66-67.
[40] *Ibid*, at paras 67-68.
[41] *Ibid*, at para 70.
[42] *Ibid*, at para 71.
[43] *Ibid*, at para 73.

Sam Mizrahi for the amounts owing in connection with the V2I Loan; and (ii) the appointment of a receiver over the Project (the "**V2I Receivership Application**").[44]

51. On April 15, 2024, on no notice to the Construction Lender, V2I registered the V2I Mortgage. [45]

52. On 28, 2024, the Construction Lender advised that in order for it to provide additional funding to complete the Project, the Construction Lender required V2I to agree to a priority and standstill agreement to ensure that the V2I Loan was subordinated to any financing taken out to replace the existing debts owed to the Construction Lender under the First Commitment Letter and the Second Commitment Letter.[46]

53. Ultimately, no second amendment agreement was ever signed by V2I.[47]

54. Following the registration of the V2I Mortgage, the Construction Lender advised the Applicant that it was unwilling to advance further funds under the existing Security given its ongoing concern that any fresh advances, in the present circumstances, would likely be subordinate to V2I.[48]

55. On June 6, 2024, the Construction Lender delivered a demand letter and a Notice of Intention to Enforce Security under section 244 of the BIA with respect to the First Commitment Letter (the "**Construction Lender Demand**").[49]

56. The V2I Receivership Application is currently scheduled for a hearing on November 26, 2024. However, by way of an email dated August 14, 2024, counsel for V2I indicated that V2I was no longer seeking the appointment of a receiver and was simply seeking a judgment against the respondents to the V2I Receivership Application.[50]

---

[44] Mizrahi Affidavit, at para 74.
[45] *Ibid*, at para 75.
[46] *Ibid*, at para 76.
[47] *Ibid*, at para 79.
[48] *Ibid*, at para 81.
[49] *Ibid*, at para 85.
[50] *Ibid*, at para 86.

57. TCC has advised the Applicant that it is only willing to advance further funds to advance and complete the Project if any such advance is in priority to V2I. While TCC is aware that this option is available to it following the appointment of a receiver, which is provided for under the Security, TCC has agreed to support the Applicant's CCAA proceedings subject to the terms of the DIP Agreement.[51]

E. Debtor-in-Possession Financing

58. By way of a DIP Loan Agreement dated October 15, 2024 (the "**DIP Agreement**"), the DIP Lender agreed to provide financing to the Applicant by way of a super-priority, debtor in possession, non-revolving loan under the DIP Facility to the maximum principal amount of $25,000,000.00 (the "**Maximum Amount**").[52]

59. Pursuant to the DIP Loan Agreement, funds will be advanced as draws against the Maximum Amount as follows: (a) a first advance in the amount of $2,345,000.00 (the "**First DIP Advance**") by the DIP Lender to the Applicant in accordance with section 9 of the DIP Agreement; and (b) one or more subsequent advances (each a "**Subsequent Draw**" and together with the First DIP Advance a "**DIP Advance**").[53]

60. All obligations of the Applicant, as are further detailed in the DIP Agreement, owing to the DIP Lender under or in connection with the DIP Facility, the DIP Agreement or these CCAA proceedings (collectively, the "**DIP Obligations**") are secured by a super-priority charge (the "**DIP Lender's Charge**") over all present and after-acquired property, assets and undertakings of the Applicant, including, among other things, the Project, including all proceeds therefrom.[54]

61. Any Subsequent Draws under the DIP Facility are conditional upon, among other things: (i) the ARIO and any subsequent Court Orders being issued and in full force and effect; and (ii) delivery to the DIP Lender of a drawdown certificate certifying that proceeds of the Subsequent DIP Draw requested thereby will be applied solely in accordance with the DIP Agreement Cash

[51] Mizrahi Affidavit, at para 87.
[52] *Ibid*, at para 89.
[53] *Ibid*, at para 90.
[54] *Ibid*, at para 91.

Flow Projection (as defined in the DIP Agreement), that the Applicant is in compliance with Court Orders and that no Default or Event of Default has occurred or is continuing.[55]

F. Urgent Need for CCAA Releif

62. The Applicant is no longer able to meet its financial obligations as they become due. As discussed below, absent protections afforded by the CCAA and approval of the proposed DIP Facility, the Applicant faces immediate liquidity challenges and is at risk of the Project becoming subject to various enforcement proceedings.[56]

63. WellingtonCo has been subject to several enforcement actions. Repayment of the Applicant's indebtedness is dependent on the successful completion of the Project and closing of the sales of the Units. As previously noted, if CCAA protection is not granted and the Project cannot be completed by WellingtonCo, the Project is likely at risk of falling into receivership. Any option other than the proposed CCAA proceedings risks driving up the costs of construction, delays to completion, the sale of the remaining Units and general uncertainty for the Applicant's stakeholders at large.[57]

PART III – ISSUES AND THE LAW

64. The principal issues on this Application are whether:

a) the Applicant meets the criteria to obtain relief under the CCAA;

b) the stay of proceedings should be granted to the Applicant and extended to the General Contractor;

c) this Court should approve the DIP Facility and grant the DIP Lender's Charge; and

d) this Court should grant the Administration Charge.

A. The Applicant Meets the Threshold Criteria for CCAA Relief

[55] Mizrahi Affidavit, at para 93.
[56] *Ibid*, at para 96.
[57] *Ibid*, at para 101.

65. The CCAA applies to a "debtor company" or affiliated debtor companies where the total claims against the debtor or its affiliates exceeds five million dollars.[58] The total claims against the Applicant are in excess of this amount.

66. Section 2 of the CCAA provides that a "debtor company" means, among other things, a company that is insolvent.[59] Whether a company is insolvent for the purposes of the definition of "debtor company" is evaluated by reference to the definition of "insolvent person" in the *BIA* and to the expanded concept of insolvency accepted by this Court in *Stelco*.[60]

67. In order to give effect to the CCAA objectives of allowing a debtor company breathing room to restructure, a debtor is insolvent under the *Stelco* approach if there is a looming liquidity crisis such that it is reasonably foreseeable that the debtor will run out of cash unless its business is restructured.[61]

68. The Applicant is insolvent. Both the test under the *BIA* and the expanded *Stelco* test are satisfied. It faces a looming liquidity crisis given the urgent need of funding to complete construction of the Project, which it is not able to secure in its current situation given the enforcement steps taken by certain secured creditors. The Applicant is also exposed to financial risk given the anticipated costs to complete the Project and the financing costs, the Project, in its current state, is not profitable and will result in substantial losses for some of the secured lenders as well as the Applicant.

69. Accordingly, the Applicant is an "insolvent person" and "debtor company" to which the CCAA applies.

B. The Stay of Proceedings Should be Granted

70. Section 11.02(1) of the CCAA permits this Court to grant an initial stay of up to ten (10) days on an application for an initial order, provided that such a stay is appropriate, and the Applicant has acted with due diligence and in good faith.[62] In exercising its discretionary authority

---

[58] CCAA, ss. 2(1) and 3(1).
[59] CCAA, ss. 2, 3(1).
[60] *Re Stelco Inc.* (2004), 48 CBR (4th) 299 (Ont SCT [Commercial List]), [*Stelco*],
[61] *Stelco*, at para 40.
[62] CCAA, s. 11.02(3)(a)-(c).

to grant a stay under the CCAA, the Court must be informed by the purpose behind the CCAA, which should be broadly and liberally interpreted.[63]

71. The primary purpose of the CCAA stay of proceedings is to maintain the status quo while the debtor company consults with its stakeholders with a view to continuing its operations for the benefit of its creditors and preserving the value of its ongoing operations.[64]

72. The stay of proceedings has been described as the "engine" that drives the broad and flexible statutory scheme of the CCAA.[65] As such, it has been broadly interpreted to apply to both judicial and extra judicial proceedings that could prejudice an eventual arrangement.[66] This Court also has broad jurisdiction under section 11 of the CCAA to grant any order that it thinks fit, subject to the limitations in the CCAA, including in the new section 11.001 of the CCAA.

73. In *Lydian*[67], one of the first cases to interpret this provision, Morawetz C.J. stated that, "absent exceptional circumstances", the relief granted during the Initial Stay Period should be limited and where possible, the status quo should be maintained during that period.[68] The Initial Stay Period allows for operations to be stabilized and negotiations to occur, followed by requests for expanded relief on proper notice to affected parties at the full comeback hearing.[69]

74. Whether particular relief is necessary to stabilize a debtor company's operations during the Initial Stay Period is an inherently factual determination, based on all of the circumstances of the particular debtor. Although Morawetz C.J. provided examples in *Lydian* of the types of relief that might be appropriate in the Initial Stay Period,[70] there are no "hard and fast" rules. Consistent with the objectives of the CCAA and its flexibility, it remains open to this Court, where circumstances dictate it, to grant relief during the Initial Stay Period in one CCAA restructuring that may not be appropriate in another.

---

[63] *Stelco*, at paras 23-26; *Nortel Networks Corporation (Re)*, 2009 CarswellOnt 4467 (Ont. Sup. Ct. J. [Commercial List]) [*Nortel*] at para 31; *Sino-Forest Corporation (Re)*, 2010 ONSC 2063, at para. 40.
[64] *Re JTI-Macdonald Corp*, 2019 ONSC 1625 at para 12;
[65] *Nortel* at para. 34.
[66] *Ibid*, at para 36.
[67] *Re Lydian International Limited*, 2019 ONSC 7473 [Commercial List] [Lydian].
[68] *Lydian* at para 26.
[69] *Ibid*, at para 30.
[70] *Ibid*, at para 27.

75. The Applicant requires the Stay of Proceedings and the other relief set out in the Initial Order to preserve the *status quo* and provide it with the breathing room necessary to advance its restructuring efforts, secure the remaining funding necessary to complete the Project and to progress the Project towards completion in a stable environment that maintains its reputation and value, to the benefit of all stakeholders.

76. Each aspect of the relief sought by the Applicant in the initial stay period is interdependent. It is critical to respond to the circumstances the Applicant finds itself and consist of exactly the type of essential "keep the lights on" measures that are contemplated by section 11.01 of the CCAA.

C. The Stay of Proceedings should be Extended to the General Contractor

77. The Applicant requests that the benefit of the Stay of Proceedings be extended to the General Contractor.

78. It is well established that this Court has inherent jurisdiction to extend the stay of proceedings to non-applicant parties where it is important to the restructuring process, and it is just and reasonable to do so.

79. This Court has found it just and reasonable to extend protection of the stay of proceedings to non-applicant affiliates[71] where such parties are integrally and closely interrelated to the debtor companies' business in order to ensure that the purposes of the CCAA can be achieved.

80. The Applicant submits that it is just and reasonable to extend the Stay of Proceedings to the General Contractor. Given that Mizrahi Inc., the General Contractor, entered into contracts with, among others, suppliers and trades for the supply of goods and services for the Project, a temporary stay in favour of the General Contractor is necessary for the Applicant's restructuring process to proceed. Otherwise, the General Contractor and thereby the Project could be subject to

[71] *Laurentian University of Sudbury,* 2021 ONSC 659 at para. 40; *Imperial Tobacco Canada Limited, et al, Re*, 2019 ONSC 1684 at paras. 11-12; *Lydian* at para. 39; *Re Chalice Brands Ltd.*, 2023 ONSC 3174 at para. 34; *McEwan Enterprises Inc.*, 2021 ONSC 6453 at para. 45; *Nordstrom Canada Retail, Inc.*, 2023 ONSC 1422 at para. 36; *Re Tamerlane Ventures Inc. and Pine Point Holding Corp.,* 2013 ONSC 5461 at para. 20.

enforcement actions by trades, suppliers or others, which would risk completion of the Project in a timely fashion or at all.

2. Furthermore, maintaining the stability and operational continuity of the General Contractor is crucial to safeguarding the interests of all stakeholders, including avoiding disruptions in the supply chain and ensuring that quality standards are consistently met throughout the construction process.

3. An extension of the Stay of Proceedings to the General Contractor is will also prevent any cascading financial distress that could arise from actions against the General Contractor, which could further complicate the Applicant's restructuring efforts. By stabilizing the General Contractor's position, the Applicant aims to preserve the collaborative efforts that are essential for the successful completion of the Project.

D. Approval of DIP Financing

81. The DIP Facility and related DIP Lender's Charge are essential elements of the measures required during the Initial Stay Period to ensure the survival of the Applicant and for completion of the Project to continue to move forward.

82. Section 11.2 of the CCAA gives the Court the statutory authority to grant a DIP financing charge. The Court may also make an order, on notice to secured creditors who are likely to be affected by the security, granting a priority charge to the DIP provider over the debtor's property. The security or charge may not secure a pre-filing obligation.[72]

83. When an application for interim financing is made at the same time as an initial application, the applicant must satisfy the court that the terms of the loan are "limited to what is reasonably necessary for the continued operations of the debtor company in the ordinary course of business during that period [i.e. the Initial Stay Period].[73]

[72] CCAA s. 11.2(1).
[73] CCAA, 2. 11.2(5).

84. The foregoing provisions of the CCAA do not preclude DIP financing and a related DIP charge – including very material amounts – from being approved during the Initial Stay Period, as long as such amounts are required in order to "keep the lights on" during this time period.

85. Section 11.2(4) of the CCAA lists the factors to be considered by the Court in deciding whether to approve DIP financing and grant a DIP financing charge. These factors favour the requested relief in this instance.

86. The Applicant urgently requires interim financing to provide stability, continue going concern operations, and to restructure its business. It is in urgent need of funding to continue work on the Project towards completion. Securing this financing is not possible outside of a CCAA restructuring without harming the Project's reputation, which will result in a corresponding devaluing of Units, reducing the overall value and revenue that can be obtained from unsold Units and thereby diminishing the likelihood the Applicant will be able to fully repay its loan obligations in connection with the Project.

87. TCC is only willing to advance more funds to WellingtonCo to complete the project if it receives priority to V2I in respect of these funds. While it is open to TCC to obtain this priority by advancing this funding under a receivership, this will put the financial viability of the Project in jeopardy. As detailed above, a significant portion of the Units have yet to be sold. A receivership would reduce the value of those Units, making them harder to sell and reducing the overall revenue from the Project. Reducing the potential revenue that can be earned through the sale of these Units creates the risk of a shortfall where WellingtonCo may not be able to repay its loan obligations in connection with the Project and other creditors, such as suppliers, trades and subtrades.

88. In light of the need to obtain further financing from TCC to complete the Project, the V21's registration of a charge and refusal to enter into an intercreditor agreement, and the threat to its reputation and value with a receivership, a CCAA restructuring is the only viable path forward to permit the Applicant to secure the funding necessary to complete the Project in a stable environment that preserves its reputation and financial viability on a going forward basis.

89. The funds available under the DIP Facility will be used to meet the Applicant's funding requirements during the CCAA proceedings to further construction in accordance with its cash

flow forecasts. The Applicant, with the assistance of the Proposed Monitor, have sized the First DIP Advance to address the Applicant's urgent liquidity needs over the first ten days of this proceeding.

90. The Applicant therefore seeks approval for an initial advance of $2,345,000.00 to enable it to pay specified amounts that amounts that are known to be due during the Initial Stay Period. These amounts are specified in the Cash Flow Forecast. The Applicant is acting in good faith in the face of its current financial challenges.

91. No viable compromise or arrangement is possible without the DIP Facility. In fact, without the immediate liquidity provided by the First DIP Advance, the Applicant's business and the Project is in serious jeopardy, is at risk of a receivership and may not survive beyond the Initial Stay Period.

92. DIP financing will be ordered where the benefits of financing to all stakeholders outweigh the potential prejudice to some creditors. Even if it can be established that some creditor is materially prejudiced, this factor is only one factor to be considered in equal measure with the others listed in s. 11.2(4) of the CCAA.[74]

93. In all of the circumstances, this Court should approve the DIP Facility and the DIP Lender's Charge so that the Applicant can gain access to funding it urgently needs to complete the Project.

E. Approval of the Administrative Charge

94. The Applicant proposes that the Monitor, its counsel, and counsel to the Applicant be granted a typical court-ordered charge on all of the present and future assets, property and undertaking of the Applicant as security for their respective fees and disbursements relating to services rendered in respect of the Applicant up to a maximum amount of $100,000.00 for the Initial Stay Period, with a proposed increase to be addressed at the Comeback Hearing.

95. Section 11.52 of the CCAA gives this Court the jurisdiction to grant a priority charge for the fees and expenses of financial, legal and other advisors or experts.[75] In determining whether to

[74] *Re League Assets Corp.*, 2013 BCSC 2043 at para. 57.
[75] CCAA, s. 11.52.

approve an administration charge, the Court will consider: (a) the size and complexity of the businesses under CCAA protection; (b) the proposed role of the beneficiaries of the charge; (c) whether there is an unwarranted duplication of roles; (d) whether the quantum of the proposed charge is fair and reasonable; (e) the position of secured creditors likely to be affected by the charge; and (f) the position of the Monitor.139 These factors have been applied in numerous proceedings.[76]

96. The Proposed Monitor, its Counsel and the Applicant's Counsel are essential to the implementation of the CCAA Transaction. It is unlikely that these advisors will participate in the CCAA proceedings without the Administration Charge. Furthermore, the Initial Stay Period component of the Administration Charge is limited to what is "reasonably necessary" for the Initial Stay Period, given the intensive demands on the advisors leading up to the filing, together with the likely further demands prior to the Comeback Hearing.

PART IV – RELIEF REQUESTED

97. For the reasons set out above, the Applicant requests that this Court grant the relief requested by making an Order substantially in the form of the proposed Initial Order included in the Application Record.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 15th day of October, 2024

Cozen O'Connor LLP
Bay Adelaide Centre – North Tower
40 Temperance Street, Suite 2700
Toronto, ON M5H 0B4

Steven J. Weisz (32102C)
Emaill: sweisz@cozen.com

Robert Sottile (68587E)
Email: rsottile@cozen.com

Dilina Lallani (90453E)
Email: dlallani@cozen.com

Lawyers for the Applicant

[76] See for example, *Lydian*, above, paras 43 to 54; *Laurentian University*, above at paras. 48 to 59.

SCHEDULE "A"
LIST OF AUTHORITIES

1. *Re Chalice Brands Ltd.*, 2023 ONSC 3174
2. *Imperial Tobacco Canada Limited, et al, Re*, 2019 ONSC 168
3. *Laurentian University of Sudbury*, 2021 ONSC 659
4. *McEwan Enterprises Inc.*, 2021 ONSC 6453
5. *Nordstrom Canada Retail, Inc.*, 2023 ONSC 1422
6. *Nortel Networks Corp., Re*, 2010 ONSC 1304
7. *North American Tungsten Corp. (Re)*, 2015 BCSC 1382, leave to appeal to BCCA refused, 2015 BCCA 390
8. *Re JTI-Macdonald Corp*, 2019 ONSC 1625
9. *Re League Assets Corp.*, 2013 BCSC 2043
10. *Re Lydian International Limited*, 2019 ONSC 7473 [Commercial List]
11. *Sino-Forest Corporation (Re)*, 2010 ONSC 7050
12. *Re Stelco Inc.* (2004), 48 C.B.R. (4th) 299 (Ont. S.C.J. [Commercial List])
13. *Re Tamerlane Ventures Inc. and Pine Point Holding Corp.*, 2013 ONSC 5461

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

Bankruptcy and Insolvency Act, RSC, 1985, c B-3

Definitions
2. In this Act, …

insolvent person means a person who is not bankrupt and who resides, carries on business or has property in Canada, whose liabilities to creditors provable as claims under this Act amount to one thousand dollars, and

(a) who is for any reason unable to meet his obligations as they generally become due,

(b) who has ceased paying his current obligations in the ordinary course of business as they generally become due, or

(c) the aggregate of whose property is not, at a fair valuation, sufficient, or, if disposed of at a fairly conducted sale under legal process, would not be sufficient to enable payment of all his obligations, due and accruing due; (personne insolvable)

Companies' Creditors Arrangement Act, RSC, 1985, c C-36

Definitions

2 (1) In this Act, …

debtor company means any company that

(a) is bankrupt or insolvent,

(b) has committed an act of bankruptcy within the meaning of the Bankruptcy and Insolvency Act or is deemed insolvent within the meaning of the Winding-up and Restructuring Act, whether or not proceedings in respect of the company have been taken under either of those Acts,

(c) has made an authorized assignment or against which a bankruptcy order has been made under the Bankruptcy and Insolvency Act, or

(d) is in the course of being wound up under the Winding-up and Restructuring Act because the company is insolvent; (compagnie débitrice)

…

Relief reasonably necessary

11.001 An order made under section 11 at the same time as an order made under subsection 11.02(1) or during the period referred to in an order made under that subsection with respect to an initial application shall be limited to relief that is reasonably necessary for the continued operations of the debtor company in the ordinary course of business during that period.

Burden of proof on application

11.02 … (3) The court shall not make the order unless

(a) the applicant satisfies the court that circumstances exist that make the order appropriate; and

(b) in the case of an order under subsection (2), the applicant also satisfies the court that the applicant has acted, and is acting, in good faith and with due diligence.

Interim financing

11.2 (1) On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, a court may make an order declaring that all or part of the company's property is subject to a security or charge — in an amount that the court considers appropriate — in favour of a person specified in the order who agrees to lend to the company an amount approved by the court as being required by the company, having regard to its cash-flow statement. The security or charge may not secure an obligation that exists before the order is made.

…

Additional factor — initial application

(5) When an application is made under subsection (1) at the same time as an initial application referred to in subsection 11.02(1) or during the period referred to in an order made under that subsection, no order shall be made under subsection (1) unless the court is also satisfied that the terms of the loan are limited to what is reasonably necessary for the continued operations of the debtor company in the ordinary course of business during that period.

Critical supplier

11.4 (1) On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring a person to be a critical supplier to the company if the court is satisfied that the person is a supplier of goods or services to the company and that the goods or services that are supplied are critical to the company's continued operation.

Obligation to supply

(2) If the court declares a person to be a critical supplier, the court may make an order requiring the person to supply any goods or services specified by the court to the company on any terms and conditions that are consistent with the supply relationship or that the court considers appropriate.

Security or charge in favour of critical supplier

(3) If the court makes an order under subsection (2), the court shall, in the order, declare that all or part of the property of the company is subject to a security or charge in favour of the person declared to be a critical supplier, in an amount equal to the value of the goods or services supplied under the terms of the order.

Priority

(4) The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

Court may order security or charge to cover certain costs

11.52 (1) On notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of a debtor company is subject to a security or charge — in an amount that the court considers appropriate — in respect of the fees and expenses of

> (a) the monitor, including the fees and expenses of any financial, legal or other experts engaged by the monitor in the performance of the monitor's duties;
>
> (b) any financial, legal or other experts engaged by the company for the purpose of proceedings under this Act; and
>
> (c) any financial, legal or other experts engaged by any other interested person if the court is satisfied that the security or charge is necessary for their effective participation in proceedings under this Act.

Priority

(2) The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

Certain rights limited

34 (1) No person may terminate or amend, or claim an accelerated payment or forfeiture of the term under, any agreement, including a security agreement, with a debtor company by reason only that proceedings commenced under this Act or that the company is insolvent. …

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF MIZRAHI DEVELOPMENT GROUP (1451 WELLINGTON) INC.

Court File No.: BK24-00000230-0033

ONTARIO
SUPERIOR COURT OF JUSTICE

PROCEEDING COMMENCED AT
OTTAWA

FACTUM OF THE APPLICANT

COZEN O'CONNOR LLP
Bay Adelaide Centre – North Tower
40 Temperance Street, Suite 2700
Toronto, ON M5H 0B4

Steven J. Weisz (32102C)
Tel: 647-417-5334
Emaill: sweisz@cozen.com

Robert Sottile (68587E)
Tel: 416-361-6680
Email: rsottile@cozen.com

Dilina Lallani (90453E)
Tel: 647-417-5349
Email: dlallani@cozen.com

Lawyers for the Applicant,
Mizrahi Development Group (1451 Wellington) Inc.
and the General Contractor, Mizrahi Inc.