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This is the 1<sup>st</sup> affidavit of  
Erin Welte in this case and was  
made on August 27, 2024

No. \_\_\_\_\_  
Vancouver Registry



IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN

**NATIONAL BANK OF CANADA**

PETITIONER

AND

**BY THE BAY HOME DEVELOPMENT LTD.**

RESPONDENT

**AFFIDAVIT**

I, **Erin Welte**, of Calgary, in the Province of Alberta, senior manager, SWEAR THAT:

1. I am the Senior Manager, Special Loans at the National Bank of Canada (the "**Bank**"), the petitioner in this proceeding, and as such I have personal knowledge of the matters deposed to in this Affidavit, except where I depose to a matter based on information from an informant I identify, in which case I believe that both the information from the informant and the resulting statement are true.

2. This affidavit is made in support of the orders sought by the Bank in its petition filed in this proceeding, including an order that FTI Consulting Canada Inc. ("**FTI**") be appointed as receiver (the "**Receiver**") of the property, assets, and undertakings of By the Bay Home Development Ltd. ("**By the Bay**") pursuant to section 243(1) of the *Bankruptcy and Insolvency Act* (Canada) (the "**BIA**") and section 39 of the *Law and Equity Act* (British Columbia).

## Introduction

3. By the Bay owns development lands located at 1289 Nicola Street in Vancouver, a planned residential development of six luxury homes in Vancouver's West End (the "**Project**").

4. In connection with the development of the Project, the Bank provided By the Bay with: an uncommitted interim construction loan in the amount of \$15,500,000 (the "**Construction Loan**"); an uncommitted overdraft loan in the amount of \$500,000 (the "**Overdraft Loan**"); a letter of credit of up to \$1,000,000 (the "**Letter of Credit**"); and a demand corporate MasterCard in the amount of \$50,000 (the "**MasterCard Credit**" and, together with the Construction Loan, the Overdraft Loan, and the Letter of Credit, the "**Loan**") pursuant to a Loan Agreement dated October 2, 2019, as amended by an Amending Agreement dated March 9, 2022 ("**Amendment #1**"), and an Amending Agreement dated June 1, 2022 ("**Amendment #2**") (collectively, the "**Loan Agreement**").

5. A copy of the Loan Agreement, Amendment #1 and Amendment #2 are attached as Exhibits A – C of Affidavit #1 of Jennifer Alambre, made August 26, 2024 (the "**Alambre Affidavit**").

6. The purpose of the Loan was, among other things, to provide construction financing for the Project. The Bank advanced funds to By the Bay under the Loan Agreement and as at August 21, 2024, the amount owing to the Bank under the Loan is \$7,472,019.99 (with fees and interest continuing to accrue) (the "**Indebtedness**").

7. As is described in greater detail below, to secure payment of its obligations to the Bank, By the Bay has provided a comprehensive security package (collectively, the "**Security**") to the Bank. The Security underlying the Loan includes a mortgage on the Project in the amount of \$16,550,000 (the "**Mortgage**") and a general security agreement in favour of the Bank (the "**GSA**").

8. The Loan is guaranteed by Dimex Properties Inc. ("**DPI**"), Dimex Developments Inc. ("**DDI**") and Sundhir Dhillon (collectively, the "**Guarantors**").

9. By the Bay has been in default of its obligations under the Loan Agreement since at least September 2023. Among other defaults, By the Bay has failed to make the required interest payments owing on the Loan since September 2023, has allowed the Project to become

subject to foreclosure proceedings by a subordinate mortgage holder, Genesis Mortgage Investment Corp. (“**Genesis**”), and has allowed two claims of lien to be filed against the Project.

10. Despite being in default of the Loan since at least September 2023, By the Bay has not taken any steps to meet its commitments to the Bank or repay the Loan.

11. Further to its contractual entitlement, the Bank seeks the immediate appointment of a receiver over the assets, undertakings, and property of By the Bay to protect the Bank’s secured position, prevent against the potential impairment of value of By the Bay’s property, and assume conduct of the sale of the Project in the interests of all affected stakeholders.

## **THE PROJECT**

12. As mentioned above, the Project is a proposed development of a building containing six homes in Vancouver’s West End. It is located at 1289 Nicola Street, PID 031-425-909.

13. I understand that By the Bay is wholly owned by the Dimex Properties Group (the “**Dimex Group**”), a property development company founded by Sundhir Singh (Sunny) Dhillon.

14. The plans for development of the Project have evolved over time. The Project was originally conceived as a 13-unit development, for which a development permit was submitted in January 2018. This proposal was then revised to a 6-storey multiple dwelling consisting of 10 dwelling units and one level of underground parking. A building permit application was submitted in January 2021 proposing to construct the Project. That application was issued in July 2022.

15. As mentioned above, the number of planned units for the Project was subsequently reduced to six total units.

16. A permit for excavation and shoring was issued in July 2022 and a permit for the foundation to grade structure only was issued in November 2022.

17. Despite this, no significant construction work has been done. The Project is currently bare land.

18. I understand that the Dimex Group currently views the proposed development for the Project, for which the Dimex Group has existing planning permission, as no longer viable. I

also understand that the Dimex Group has considered both revising the Project to a more affordable five-story market wood frame townhouse project (which would require revised permits), as well as listing the Project for sale.

19. I understand the total presales completed by By the Bay with respect to the Project to be \$8,800,500 (\$2,900,000 in arm's length pre-sales, \$5,900,500 in non-arm's length pre-sales).

20. In addition to the Project, the Dimex Group has two other ongoing developments: the Lakewood Project and the Templeton Project. Both of these projects are significantly more advanced than the Project. The Bank has also provided financing with respect to the Lakewood Project and the Templeton Project.

## THE BANK LOAN AND SECURITY

### (A) The Loan

21. Pursuant to the Loan Agreement (as amended), the Bank has provided By the Bay with the following facilities:

- (a) Construction Loan: A Construction Loan in the amount of \$15,550,000 for the purpose of financing construction of the Project;
- (b) Overdraft Loan: A sub-loan to the Construction Loan in the amount of \$500,000 to assist with Project-related expenses pending a draw on the Construction Loan;
- (c) Letter of Credit: A letter of credit issued by the Bank to allow for the issuances of letters of credit to the City of Vancouver or other beneficiaries in connection with performance related requirements of the Project.
- (d) MasterCard Credit: A demand corporate MasterCard in the amount of \$50,000.

22. The original Loan Agreement contemplated that an initial drawdown of \$5,500,000 of the Construction Loan ("**Tranche #1**"), which could be made prior to By the Bay achieving certain preconditions with respect to development of and presales for the Project.

23. The amount available under Tranche #1 was subsequently increased to \$6,100,000, which By the Bay has already drawn.

24. With respect to all facilities under the Loan, the total Indebtedness owing by By the Bay under the Loan Agreement as of August 21, 2024 is approximately \$7.47 million. Attached to this Affidavit as **Exhibit "A"** is a payout statement showing the amounts owing under the Loan as of August 21, 2024, including but not limited to certain professional fees. Fees and expenses continue to accrue.

(B) Security for the Loan

25. To secure its obligations under the Loan Agreement, By the Bay granted the Bank Security over its assets, undertakings, and property. This Security includes a first-ranking collateral mortgage and assignment of rents on the Project pursuant to a mortgage registered December 19, 2019, in the amount of \$16,550,000 (the "**Mortgage**"). A copy of the Mortgage is attached to the Alambre Affidavit as Exhibit D and a copy of the Land Title Office search showing the registration of the Mortgage is attached to the Alambre Affidavit as Exhibit J. Also attached to the Alambre Affidavit as Exhibit E are the Bank's standard mortgage terms to which the Mortgage is subject.

26. By the Bay has also executed a general security agreement (the "**GSA**") with respect to all of By the Bay's property located on, or used in connection with, the Project. A copy of the GSA is attached as Exhibit F to the Alambre Affidavit. A copy of a search for By the Bay in the British Columbia Personal Property Registry is attached to the Alambre Affidavit as Exhibit Q.

27. The Guarantors have each granted a guarantee of By the Bay's obligations to the Bank under the Loan Agreement in the amount of \$16,550,000. Copies of the Guarantees are attached as Exhibits G, H and I to the Alambre Affidavit.

**SECOND RANKING LENDER**

28. By the Bay is also party to a loan agreement made with Genesis and dated May 27, 2022 (the "**Second Ranking Loan**"). I understand that the Second Ranking Loan is secured by a mortgage over the Project and a general security agreement, both dated June 9, 2022. According to the Land Title Office search attached to the Alambre Affidavit as Exhibit J, this mortgage was registered against title to the Project on June 15, 2022.

29. As discussed above, Genesis commenced foreclosure proceedings against By the Bay in November 2023 (the “**Foreclosure Proceedings**”). On January 11, 2024, this Court ordered, among other things, that the last date for redemption in that proceeding would be January 12, 2024. The Court also ordered that the Project would be offered by private sale and that Genesis would have exclusive conduct of the sale, subject to any further order of the Court. Copies of these orders are attached as Exhibits K and L of the Alambre Affidavit.

### **BY THE BAY’S DEFAULTS**

30. By the Bay has not made any interest payments on the Loan since September 2023 (the “**Financial Default**”). The amount of outstanding and accrued interest payable on the Loan as of August 21, 2024 is \$547,007.40, with interest increasing at \$1,478.69 per day.

31. In addition to failing to make the required payments of interest under the Loan, other defaults of By the Bay known to the Bank include the following:

- (a) In breach of Schedule A, Section 10(g) of the Loan Agreement, By the Bay has allowed the Foreclosure Proceedings to be commenced by Genesis in this Court (Vancouver Registry No. H-230883), in which proceedings an Order Nisi and an Order for Conduct of Sale have been made. A certificate of pending litigation has also been registered by Genesis against the Project.
- (b) In breach of section 9(5) of the Loan Agreement, By the Bay has also allow two claims of lien to be filed against the Project. The Land Title Office search attached to the Alambre Affidavit Exhibit J shows that those claims are registered against Project. They include:
  - (i) A claim of lien dated June 16, 2023, made on behalf of Fairway Demolition Ltd., for the amount of \$124,000.00; and,
  - (ii) A claim of lien dated June 25, 2024, made on behalf of London Mah & Associate Ltd., for the amount of \$69,996.13.
- (c) In breach of section 7(f) of the Loan Agreement, By the Bay has failed to pay 2024 property taxes on the Property, with an amount of \$21,776.42 outstanding. A copy

of the 2024 City of Vancouver Property Tax Certificate for the Property is attached to the Alambre Affidavit as Exhibit M.

(collectively with the Financial Default, the “**Defaults**”)

32. On February 28, 2024, the Bank wrote to By the Bay and the Guarantors to provide notice of certain of the above-noted Defaults. A copy of this correspondence is attached to the Alambre Affidavit at Exhibit R.

33. On August 2, 2024, counsel to Bank delivered a letter to By the Bay and the Guarantors demanding payment of all outstanding indebtedness and providing notices pursuant to section 244 of the *Bankruptcy and Insolvency Act*. A copy of this correspondence is attached as Exhibit S to the Alambre Affidavit.

34. On August 8, 2024, By the Bay, via email, provided counsel to the Bank with an executed Consent to Immediate Enforcement. A copy of this correspondence and the attachment are included as Exhibit T to the Alambre Affidavit.

#### **APPRAISAL OF THE PROJECT**

35. The Bank has procured an independent appraisal of the market value of the fee simple interest of the Project (the “**Appraisal**”). The Appraisal was conducted by Garnett Wilson Realty Advisors Ltd. (“**Garnett Wilson**”) dated July 19, 2024. Based on the contents of the Appraisal, the Bank has concerns that its security is in jeopardy.

36. Because the Appraisal contains commercially sensitive information, as discussed below, it is being attached to my Confidential Affidavit #2 also made on August 27, 2024.

37. The Bank provided an unredacted copy of the Appraisal to counsel to Genesis on a confidential basis on August 6, 2024.

#### **THE NEED FOR A RECEIVER**

38. By the Bay has failed to repay the amounts owing to NBC under the Loan and has failed to make payments of interest (or otherwise) since September 2023. Notwithstanding the almost year-long grace period granted by the Bank since By the Bay began defaulting on interest

payments, By the Bay has not found a solution to its financial problems. At this point, the Bank does not have confidence that By the Bay will be able to reduce or pay back the Indebtedness.

39. In addition to its Financial Default, By the Bay has failed to prevent the commencement of the Foreclosure Proceedings and allowed the Liens to be filed against the Project.

40. As indicated above, in addition to By the Bay's Defaults, the Bank has concerns that its security is in jeopardy based on the content of the Appraisal. The Bank's view is that the immediate appointment of a receiver is necessary to protect its security and realize value for all stakeholders.

**SEALING ORDER**

41. The Bank is requesting that information within the Appraisal be made subject to a sealing order. This information includes the appraised value of the Project as determined by Garnett Wilson, the disclosure of which could adversely affect any future sales process that may be required. I do not believe that keeping this information confidential will prejudice any of By the Bay's stakeholders. To the contrary, I believe that making this information publicly available could have an adverse impact on By the Bay's stakeholders, in particular with respect to efforts to sell the Project and maximize value for By the Bay's assets.

SWORN BEFORE ME at Calgary, Alberta  
on August 27, 2024

  
A Commissioner for taking Affidavits for the  
Province of Alberta

**VANESSA TSAI**  
**Barrister & Solicitor**  
A Commissioner for Oaths  
in and for Alberta

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Erin Welte



This is **Exhibit "A"** referred to in the Affidavit of Erin Welte made before me at Calgary, Alberta this 27<sup>th</sup> day of August 2024.



A Commissioner for the taking of Affidavits for the  
Province of Alberta

VANESSA TSAI  
Barrister & Solicitor



PAYOUT STATEMENT

<b>By the Bay Home Development Ltd.</b>	
<b>Indebtedness to National Bank of Canada August 21, 2024</b>	
Credit facility - Swing Line (P +1.50 % <sup>(1)</sup> )	\$500,000.00
Accrued Interest	\$34,610.67
Per diem: \$112.02	
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Credit facility -Term Loan (P +1.50 % <sup>(1)</sup> )	\$6,100,000.00
Accrued Interest	\$512,397.03
Per diem: \$1,366.67	
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Letter of Credit Maturing June 30, 2025	\$289,000.00
Letter of credit outstanding fees	\$3,263.22
Per diem: \$0.00	
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Subtotal	\$7,439,270.92
Professional Fees	
Fees/Taxes/Disbursements ("FTD") to August 21, 2024 <sup>(2)</sup>	\$27,604.07
Estimated FTD to Closing & Discharge	TBD
<b>Total</b>	<b>\$7,472,019.99</b>

<sup>(1)</sup> Subject to Prime Rate change. Canadian Prime is 6.70% as of the date of this statement.

<sup>(2)</sup> Not all fees, taxes and disbursements incurred as of the date of this statement are reflected in this amount.