

Court File No. CV-22-00685200-00CL

**ONTARIO  
SUPERIOR COURT OF JUSTICE  
(COMMERCIAL LIST)**

*IN THE MATTER OF Section 101 of the Courts of Justice Act, R.S.O. 1990 c.C.43, as amended, and in the matter of Section 243(1) of the Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, as amended*

B E T W E E N:

**PRICEWATERHOUSECOOPERS INC.**

(solely in its capacity as court-appointed receiver and manager of Bridging Finance Inc. and certain related entities and investment funds)

Applicant

and

**NORTHERN CITADEL CAPITAL INC., ONE8ONE DAVENPORT INC. and 181  
DAVENPORT RETAIL INC.**

Respondents

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**RESPONDENTS' FACTUM Re: Motion to Intervene as Added Party**

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October 30, 2022

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## I. OVERVIEW

1. The respondents oppose the motion for leave brought by Khashayar Khavari (“Khash”) to be added as a party on this application. The respondents dispute that Khash has an interest in the subject matter of the proceeding or that he will be adversely affected. Further, Khash has not demonstrated how his submissions would not be duplicative of the submissions already made by the respondents.

2. There is ongoing litigation between Khash and two of the respondent corporations Northern Citadel and One8One Davenport under Court File No. CV-15-11187-00CL (the “Khavari litigation”). One of the central issues in dispute is what, if any, interest does Khash have in these corporations. While Khash claims on this motion that he is a shareholder in the respondent corporations, this court has already made findings in two decisions that (1) Khash does not have beneficial rights under a Trust<sup>1</sup> and (2) he does not have standing as a registered or beneficial owner to have the court appoint an inspector for the respondent corporations under s. 161 of the Ontario *Business Corporations Act* (“**OBCA**”) because he is not a shareholder.<sup>2</sup>

3. The respondents are concerned that adding Khash as a party to this application is not going to be of assistance to the Court but to the contrary runs the risk of importing issues from the Khavari litigation into this application. This may result in inconsistent findings about Khash’s interest in the respondent corporations without the benefit of a full record.

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<sup>1</sup> *Khavari v. Mizrahi*, [2016 ONSC 101](#) [“Wilton-Siegel Decision”]

<sup>2</sup> *Khavari v. Mizrahi*, [2016 ONSC 4934](#) [“Pattillo Decision”]

## II. FACTS

4. The respondents do not agree with Khash's characterization of the facts. In particular, the respondents do not agree that Khash is a shareholder of the respondent corporations. The facts must be read in conjunction with the findings set out in Justices Wilton-Siegel and Patillo's decisions as set out further below.

5. With respect to Khash's interest in 181 Retail, the respondents note that 181 Retail is not a party to the Khavari litigation. Khash asserts in his motion materials that he is a beneficial owner of the 181 Retail but the only evidence of such an interest is a bold assertion in Khash's affidavit on this motion that "the property of One8One Davenport Inc. was transferred to 181 Davenport Retail Inc., in which I also have an interest."<sup>3</sup> And no such claim has ever been advanced in the Khavari litigation.

## III. ISSUES AND LAW

6. The issue on this motion is whether Khash meets the legal test to be added as a party pursuant to Rule 13.01(1). The respondents submit that this Court should not exercise its discretion to grant Khash standing on this application as he does not have an interest in the subject matter of the dispute and it would not be in the interests of justice to grant him standing.

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<sup>3</sup> Khavari Motion Record, Affidavit at paragraph 12; Master F2310 [H F2310](#)

**A. The scope of Khash’s claimed interest is subject to ongoing dispute**

7. Khash states that on the Motion, the Court need not make any determinative findings regarding the nature of Khash’s interests in the Respondent corporations nor of any contested issues in the ongoing litigation (“**Khash Litigation**”) with Sam Mizrahi (“**Sam**”)<sup>4</sup>.

8. However, in his Factum, Khash’s proposed amendment to the Receivership Order speaks to the rights of a beneficiary related to the exercise of the Receiver’s powers under the Receivership Order, and makes specific reference to himself as someone with beneficial rights.<sup>5</sup> The determination on whether Khash has beneficial rights in the Respondent corporations is at the very heart of the Khash litigation.

9. As Khash’s interest as a shareholder or as someone with beneficial interest in the Respondent corporations is the subject of an ongoing dispute, his claims that he has beneficial rights in the Respondent corporations are insufficient for the purpose of intervening in the PWC Proceedings.

**B. Courts have held that the Khash does not have beneficial rights in the Respondent corporations**

10. This Court has found that Khash does not have beneficial rights under a Trust<sup>6</sup> and he does not have standing as a registered or beneficial owner to have the court appoint an inspector

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<sup>4</sup> Non-Party’s Factum, Caselines Master: F2273, para. 8. [H F2273, para. 8.](#)

<sup>5</sup> Non-Party’s Factum, Caselines Master: F2273, para. 42. [H F2273, para. 42.](#)

<sup>6</sup> *Khavari v. Mizrahi*, [2016 ONSC 101](#) [“Wilton-Siegel Decision”]

for the Respondent corporations under s. 161 of the Ontario *Business Corporations Act* (“**OBCA**”)<sup>7</sup>.

11. In 2016, Justice Wilton-Siegel dismissed the Khash’s motion to return the shares of five corporations on the basis of a Trust Agreement. The court addressed whether the parties had intended to create a trust through an agreement that would have given Khash beneficial interests in the Respondent corporations (the “**Agreement**”). The Court held that the Trust Agreement was not a trust at law, but rather a commercial agreement which contained provisions of that negated the existence of any rights in the shares in favour of Khash.<sup>8</sup>

12. In the Wilton-Siegel Decision, the Court found that the addendums to the Agreement gave Sam, through his corporation MEI, the right to retain the shares until all liabilities related to the projects, which includes the Respondent corporations, had been fully satisfied<sup>9</sup>. The Court held that Khash had no right with respect to the shares, other than the right to compel their return after all liabilities have been satisfied, which has not to date occurred.<sup>10</sup>

13. Further, the Court noted that even if MEI’s rights in the shares were not considered to constitute absolute rights of ownership, MEI had extensive rights of control over the shares that

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<sup>7</sup> *Khavari v. Mizrahi*, [2016 ONSC 4934](#) [“Pattillo Decision”]

<sup>8</sup> *Khavari v. Mizrahi*, [2016 ONSC 101](#), para. 51.

<sup>9</sup> *Khavari v. Mizrahi*, [2016 ONSC 101](#), para. 52.

<sup>10</sup> *Khavari v. Mizrahi*, [2016 ONSC 101](#), para. 52.

were intended to survive until all liabilities are fully satisfied. Such control extinguishes any rights that Khash could possibly exercise in connection with the shares (which is denied in any event).<sup>11</sup>

14. Shortly after the release of Justice Wilton-Siegel's decision, Justice Pattillo dismissed a motion brought by Khash to appoint an investigator over the Respondent corporations under section 161 of the *OBCA*. To bring this motion under s. 161 of the *OBCA*, Khash had to show that he was a registered or beneficial shareholder in the Respondent corporations<sup>12</sup>.

15. Justice Pattillo held that Justice Wilton-Siegel's determination that Khash was not a beneficial owner of shares in the Respondent corporations was binding.<sup>13</sup> Further, as Khash did not appeal the Wilton-Siegel Decision, Justice Pattillo concluded that the issue decided in by Justice Wilton-Siegel is *res judicata*.<sup>14</sup>

16. Based on the findings in the Wilton-Siegel Decision, Justice Pattillo held that Khash was not a shareholder in the Respondent corporations<sup>15</sup>, and therefore Khash did not have standing to apply for an order appointing an inspector under s. 161 of the *OBCA*.<sup>16</sup>

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<sup>11</sup> *Khavari v. Mizrahi*, [2016 ONSC 101](#), para. 61.

<sup>12</sup> *Khavari v. Mizrahi*, [2016 ONSC 4934](#), paras. 32-33.

<sup>13</sup> *Khavari v. Mizrahi*, [2016 ONSC 4934](#), para. 48.

<sup>14</sup> *Khavari v. Mizrahi*, [2016 ONSC 4934](#), para. 48.

<sup>15</sup> *Khavari v. Mizrahi*, [2016 ONSC 4934](#), para. 49.

<sup>16</sup> *Khavari v. Mizrahi*, [2016 ONSC 4934](#), para. 49.

**C. The non-party's intervention would be duplicative**

17. An intervenor cannot introduce new issues or claim new relief. They must only address issues already contained in the pleadings.<sup>17</sup> The intervenor's contribution must also be more than saying "me too" as it would not be useful nor fair for the parties to have an intervenor repeat the same arguments as one of the existing parties.<sup>18</sup> The Intervenor must also not complicate the proceedings or drive up the costs of the existing litigants.<sup>19</sup>

18. According to Khash's Factum, what he intends to offer as contribution in the PWC Proceeding is to protect his specific interest as a party with beneficial interest. However, this interest is subject to dispute, and has already been adequately addressed by the Respondent's position in the PWC Proceeding. Therefore, Khash would not be adversely affected by the decision in the PWC Proceeding, even if the courts later determined in the Khash litigation that Khash is a party with beneficial interest. <https://ontariocourts.caselines.com/s/s/ff9acc4>

19. In Khash's Factum, he states that he supports the Applicants' request to appoint a Receiver but requests several amendments to the draft Receivership Order.<sup>20</sup>

20. In particular, Khash takes issue with paragraph 4 of the draft Receivership Order and references by example the Receiver's power to exercise shareholder rights of the Respondents

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<sup>17</sup> *Feldberg v. Andrews*, [2021 ONSC 1099](#), para. 35.

<sup>18</sup> *City of Ottawa v. Clublink Corporation ULC*, [2019 ONSC 7470](#), para. 22 [*City of Ottawa*]; see also *2505243 Ontario Limited (ByPeterandPaul.com) v. Princes Gates Hotel Limited Partnership*, [2022 ONCA 700](#), para. 21.

<sup>19</sup> *City of Ottawa v. Clublink Corporation ULC*, [2019 ONSC 7470](#), para. 24.

<sup>20</sup> Non-Party's Factum, Caselines Master: F2273, para. 4. [H F2273, para. 4.](#)

and cause the Respondents to file for bankruptcy.<sup>21</sup> In essence, he takes issue with the Receiver's broad powers under the draft Receivership Order. However, the Receiver's overbroad powers have already been addressed by the Respondents, and in any event, PWC has revised its proposed Receivership Order to remove those powers.

21. The Respondents do not oppose the Applicants' request to appoint a receiver.<sup>22</sup> The three issues the Respondents take issue with in the PWC Proceeding are: (1) the appointment of a receiver over 181 Davenport; the broad investigative powers of the proposed receiver<sup>23</sup>; and the Applicant's power to assign the respondents into bankruptcy.<sup>24</sup>

22. Khash's alleged contributions would not add to the PWC Proceeding but would be duplicative as the ultimate end is aligned with the Respondents.

#### IV. ORDER REQUESTED

23. The respondents respectfully request the motion of the non-party Khasayar Khavari be dismissed with costs.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED this 30<sup>th</sup> day of October, 2022.**

*"Ewa Krajewska"*

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Ewa Krajewska

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<sup>21</sup> Non-Party's Factum, Caselines Master: F2273, para. 31. [H• F2273, para. 31](#)

<sup>22</sup> Respondent's Factum, Caseline Master: B-1-53, para. 1,2. [H• B-1-53, para. 1, 2.](#)

<sup>23</sup> Respondent's Factum, Caseline Master: B-1-53, para. 3. [H• B-1-53, para. 3.](#)

<sup>24</sup> Respondent's Factum, Caseline Master: B-1-53, para. 4. [H• B-1-53, para. 4.](#)



**SCHEDULE "A"**  
**LIST OF AUTHORITIES**

*Feldberg v. Andrews*, [2021 ONSC 1099](#)

*City of Ottawa v. Clublink Corporation ULC*, [2019 ONSC 7470](#)

*2505243 Ontario Limited (ByPeterandPaul.com) v. Princes Gates Hotel Limited Partnership*, [2022 ONCA 700](#)

*Khavari v. Mizrahi.*, [2016 ONSC 101](#)

*Khavari v. Mizrahi*, [2016 ONSC 4934](#)

B-1-166

B-1-121

WATERHOUSECOOPERS INC  
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-and-

NORTHERN CITADEL CAPITAL INC  
B-1-1

Court File No. CV-22-006852

**ONTARIO  
SUPERIOR COURT OF JUSTICE  
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PROCEEDING COMMENCED AT TORONTO

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