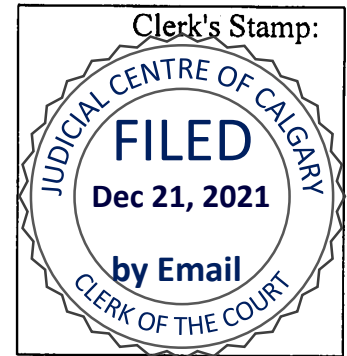


COURT FILE NUMBER 1801-17477  
COURT COURT OF QUEEN'S BENCH OF ALBERTA  
JUDICIAL CENTRE CALGARY  
PLAINTIFFS DOMINIC WILLOTT and GARFIELD GANONG  
DEFENDANTS NORTHWYND RESORT PROPERTIES LTD., PAUL HAMILTON, KEN BATEMAN, JOHN ANDERSEN, RON FERBER, NORTHMONT LIMITED PARTNERSHIP, NORTHMONT RESORT PROPERTIES LTD., 2008164 ALBERTA LTD., KIRK WANKEL, JOHN/JANE DOE 1 THROUGH 10, XYZ CORPORATION 1 THROUGH 10, and ABC PARTNERSHIP OR LIMITED PARTNERSHIP 1 THROUGH 10.  
DOCUMENT CERTIFICATION ORDER



ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT

**Burnet, Duckworth & Palmer LLP**  
2400, 525 – 8 Avenue SW  
Calgary, Alberta T2P 1G1  
Lawyers: Andrew Sunter, Robert Martz, and Alison Scott  
Phone Number: (403) 260-0283/0393/5733  
Fax Number: (403) 260-0332  
Email Address: asunter@bdplaw.com /  
rmartz@bdplaw.com /  
ascott@bdplaw.com  
File No. 76221-1

DATE ON WHICH ORDER WAS PRONOUNCED:

September 21, 2021

NAME OF JUSTICE WHO MADE THIS ORDER:

Justice R.A. Neufeld

## CERTIFICATION ORDER

**ON THE APPLICATION OF** the Plaintiffs pursuant to the *Class Proceedings Act*, S.A. 2000, c. C-16.5, for an order certifying this action as a class proceeding; **AND ON THE APPLICATION OF** the Defendants to strike the Plaintiffs' Amended Amended Statement of Claim (the **Statement of Claim**); **AND ON READING** the submissions of the Parties; **AND ON HEARING** counsel for the Parties on June 28 and 29, 2021;

### **IT IS HEREBY ORDERED THAT:**

1. The Plaintiffs' application is granted in part, and:
  - (a) This action, apart from the Conspiracy Claim and Wrongful Engineering Claim (defined below), is certified as a class proceeding (the **Class Proceeding**); and
  - (b) Garfield Ganong is appointed as the representative plaintiff (the **Representative Plaintiff**) for the Class (defined below) (Dominic Willott is not appointed as a representative plaintiff).
2. The Defendants' application to strike the Statement of Claim is granted in part, and:
  - (a) Paragraphs 56-59 of the Statement of Claim, which contain the allegations of conspiracy (the **Conspiracy Claim**), are struck; and
  - (b) The allegations of wrongful engineering included at paragraph 55 of the Statement of Claim are struck (the **Wrongful Engineering Claim**).
3. The Defendants' application to strike the Statement of Claim for being frivolous and vexatious is denied.

### **Class Definition**

4. The class in the Class Proceeding (the **Class**) consists of:
  - (a) All persons who held Series A and B Trust Units of Northwynd Properties Real Estate Investment Trust (the **Northwynd REIT**) between June 3, 2014 and the Final Notice of Wind-Up and Termination of Northwynd REIT dated January 16, 2017; and
  - (b) In the class definition, "person" means any individual, partnership, corporation, cooperative, communal organization, trust, band or other association, excluding the Defendants.

### **Common Issues**

5. The list of issues attached as **Schedule A** are hereby approved as the common issues for the Class Proceeding.

### **Notice of Certification and Mechanism for Opting Out**


6. Notice of Certification of the Class Proceeding will be provided to members of the Class (**Class Members**) as follows:
  - (a) The Notice of Certification provided to Class Members will be in the form attached as **Schedule B** (the **Notice of Certification**).
  - (b) Counsel for the Representative Plaintiff (**Class Counsel**) will provide Defendants' counsel with any information it has regarding the last known addresses, including e-mail addresses, of all known Class Members.
  - (c) Based on the Defendants' own information and on the information provided by Class Counsel, Defendants' counsel will arrange to send a copy of the Notice of Certification to all known Class Members.
  - (d) Class Counsel will publish the Notice of Certification on the website [www.northwyndclassaction.com](http://www.northwyndclassaction.com).
  - (e) Notice will be provided to Class Members in accordance with paragraphs 7(c) and 7(d) by no later than January 7, 2022 (the **Notice Deadline**).
  - (f) Defendants' counsel will provide Class Counsel with a list of all known Class Members, together with their names and last known addresses, including e-mail addresses, and will advise Class Counsel when and how delivery of the Notice of Certification on each Class Member was completed.
  - (g) Defendants' counsel will provide Class Counsel with any communications received from Class Members over the course of the Class Proceeding.
  - (h) The opt-out period for Class Members will be 70 days from the Notice Deadline, or March 8, 2022.

### **Complex Litigation Plan**

7. The Complex Litigation Plan attached as **Schedule C** is hereby approved.

### **General**

8. The Plaintiffs are granted leave to and shall file the amendments to the Statement of Claim in the form attached as **Schedule D**.
9. Costs of the applications shall be argued before the Case Management Justice.

  
Justice of the Court of Queen's Bench of  
Alberta

APPROVED AS TO FORM AND CONTENT

**Burnet, Duckworth & Palmer LLP**

Per: 

Andrew Sunter and Robert Martz

Counsel to the Plaintiffs

**Gowling WLG**

Per: 

David Bishop and Ricki Johnston

Counsel for the Defendants, Northwynd Resort  
Properties Ltd., Paul Hamilton, Ken Bateman, John  
Andersen, Ron Ferber, Northmont Limited  
Partnership, Northmont Resort Properties Ltd.  
and Kirk Wankel

**Norton Rose Fulbright Canada LLP**

Per: \_\_\_\_\_

Lara Mason and Sarah Ivany

Counsel to the Defendants, 2008164 Alberta Ltd.  
and Kirk Wankel

---

**Justice of the Court of Queen's Bench of  
Alberta**

**APPROVED AS TO FORM AND CONTENT**

**Burnet, Duckworth & Palmer LLP**

**Gowling WLG**

Per: \_\_\_\_\_

Per: \_\_\_\_\_

Andrew Sunter and Robert Martz

David Bishop and Ricki Johnston

Counsel to the Plaintiffs

Counsel for the Defendants, Northwynd Resort  
Properties Ltd., Paul Hamilton, Ken Bateman,  
John Andersen, Ron Ferber, Northmont Limited  
Partnership, Northmont Resort Properties Ltd.  
and Kirk Wankel

**Norton Rose Fulbright Canada LLP**

Per:



Lara Mason and Sarah Ivany

Counsel to the Defendants, 2008164 Alberta Ltd.  
and Kirk Wankel

## SCHEDULE A

### LIST OF CERTIFIED COMMON ISSUES<sup>1</sup>

The common issues of the Class are as follows:

(a) **Common Issues Relating to Breach of Contract Allegations**

- (i) Did the Trustees owe contractual obligations to the Unitholders pursuant to the Declaration of Trust or Wind-Up Resolution?
- (ii) If the Trustees owed contractual obligations to the Unitholders, did the Trustees breach any of these contractual obligations?
- (iii) Did the Trustees act outside the power and authority granted to them by the Declaration of Trust or the Wind-Up Resolution?

(b) **Common Issues Relating to Breach of Fiduciary Duty Allegations**

- (i) Did the Trustees owe fiduciary obligations to the Unitholders with respect to their management and administration of the Northwynd REIT?
- (ii) If the Trustees owed fiduciary obligations to the Unitholders, did the Trustees breach any such fiduciary obligations in their management and administration of the Northwynd REIT or in connection with the Wind-Up Resolution, the Sales Agreement, or the Promissory Note?

(c) **Common Issues Relating to Negligence Allegations**

- (i) Did the Trustees owe a duty of care to the Unitholders with respect to their management and administration of the Northwynd REIT?
- (ii) If the Trustees owed a duty of care to the Unitholders, what was the standard of care that the Trustees owed to the Unitholders?
- (iii) If the Trustees owed a duty of care to the Unitholders, did the Trustees breach that duty of care in their management and administration of the Northwynd REIT or in connection with the Wind-Up Resolution, the Sales Agreement, the Mountain View Transaction, or the Promissory Note?

(d) **Unjust Enrichment**

- (i) Were the Northmont Defendants enriched through their receipt and use of the Assets formerly belonging to the Northwynd REIT?

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<sup>1</sup> Defined terms used in this List of Certified Common Issues have the meanings ascribed to them in the Amended Amended Amended Statement of Claim (and any subsequent amendments thereto).

- (ii) Did the Unitholders suffer a corresponding deprivation?
- (iii) Was there a juristic reason for the enrichment of the Northmont Defendants?

(e) **Knowing Receipt**

- (i) Were the Assets impressed with a trust or did the Trustees owe the Unitholders a fiduciary duty?
- (ii) Did the Sales Agreement, the Wind Up Resolution, the Mountain View Transaction, or the Promissory Note, or any conduct of the Trustees in connection with the Sales Agreement, the Wind Up Resolution, the Mountain View Transaction, or the Promissory note constitute a breach of that trust or fiduciary duty?
- (iii) Did the Northmont Defendants receive the Assets for their own benefit?
- (iv) Did the Northmont Defendants have actual or constructive knowledge that the Assets were transferred in breach of trust or fiduciary duty?

(f) **Knowing Assistance**

- (i) Were the Assets impressed with a trust or did the Trustees owe the Unitholders a fiduciary duty?
- (ii) Did the Trustees breach their duties in the management and administration of the Northwynd REIT or connection with the Sales Agreement, the Wind Up Resolution, the Mountain View Transaction, or the Promissory Note?
- (iii) Did the Northmont Defendants participate in or assist that conduct?
- (iv) Did the Northmont Defendants either have actual knowledge of the Trustees' conduct or were they reckless or willfully blind to that conduct?

(g) **Oppressive Conduct**

- (i) Did the Defendant corporations, or officers or directors of those corporations, unfairly or prejudicially disregard the interests of the Unitholders in facilitating, participating, and administering the transfer of trust assets to other entities, including a non-arm's length entity?

(h) **Void Agreements**

- (i) Are the Sales Agreement and/or Promissory Note void, voidable, or unenforceable by reason of:
  - (A) a lack of consideration;

- (B) failure to reach a consensus ad idem;
  - (C) unconscionability;
  - (D) illegality; or
  - (E) being contrary to public policy?
- (ii) If the Sales Agreement and/or Promissory Note are void, voidable, or unenforceable by reason of any of para. 26(a-e) what is the appropriate remedy available to the Unitholders?

(i) **Personal Liability of Kirk Wankel**

- (i) As a result of his involvement in the Sales Agreement, Wind Up Resolution, the Mountain View Transaction, and Promissory Note, is Kirk Wankel:
- (A) as the sole shareholder and director of 200 Alberta, personally liable for the claims in respect of 200 Alberta?; and/or
  - (B) as an officer of Northmont Ltd. and Northwynd Ltd., personally liable for the claims in respect of Northmont Ltd. and Northwynd Ltd.?

(j) **Disgorgement and Constructive Trust**

- (i) Would the Northmont Defendants have generated or obtained the revenue that they generated in connection with the Sales Agreement, Promissory Note, the Mountain View Transaction, or Wind Up Resolution, but for their misconduct?
- (ii) Is an equitable remedy such as disgorgement or constructive trust against the Northmont Defendants appropriate for ensuring that the Defendants do not profit from their wrongful acts and to deter others like the Northmont Defendants from engaging in similar misconduct?
- (iii) Is there anything that would render the imposition of an equitable remedy against the Northmont Defendants unjust or improper in the circumstances?

(k) **Punitive Damages**

- (i) Was the conduct of the Defendants, or some of them, harsh, high-handed, malicious and oppressive so as to warrant an award of punitive or exemplary damages?



## **SCHEDULE B**

CLASS ACTION REGARDING NORTHWYND RESORT PROPERTIES LTD., PAUL HAMILTON, KEN BATEMAN, JOHN ANDERSEN, RON FERBER, NORTHMONT LIMITED PARTNERSHIP, NORTHMONT RESORT PROPERTIES LTD., 2008164 ALBERTA LTD., and KIRK WANKEL

### **NOTICE OF CERTIFICATION**

#### **What is the Class Action about?**

A lawsuit has been certified as a Class Action against Northwynd Resort Properties Ltd., Paul Hamilton, Ken Bateman, John Andersen, Ron Ferber, Northmont Limited Partnership, Northmont Resort Properties Ltd., 2008164 Alberta Ltd. and Kirk Wankel (collectively the **Defendants**).

The Amended Amended Amended Statement of Claim (the **Claim**) alleges that the Defendants breached their obligations owed to the investors in the Northwynd Properties Real Estate Investment Trust (the **REIT**) in the disposal of the REIT's assets.

The Claim alleges that Class Members who held Series A and B Trust Units in the REIT between June 3, 2014 and January 16, 2017 suffered losses and damages or are otherwise entitled to relief.

The Claim seeks compensation for Class Members, plus other relief including costs and interest.

The Representative Plaintiff is Garfield Ganong. In this lawsuit, the Representative Plaintiff is seeking compensation on their own behalf and on behalf of other individuals who held Series A and B Trust Units in the REIT between June 3, 2014 and January 16, 2017.

#### **How do I know if I am a member of the Class?**

The Class has been defined by the Court as follows:

... all individuals who held Series A and B Trust Units in the REIT between June 3, 2014 and January 16, 2017.

The "Class Period" has been defined by the Court as being the period from and including June 3, 2014 to January 16, 2017.

If you held Series A and B Trust Units in the REIT between June 3, 2014 and January 16, 2017 you are a Class Member. If you are not sure whether or not you are a Class Member, you should speak to Class Counsel, whose address is set out below.

#### **What if I do not want to participate in this Class Action?**

Class Members who wish to participate in the Class Action do not need to do anything at this time. They are automatically included in the Class Action.

Any Class Member who wishes to opt out of the Class Action must do so by sending a written opt-out form, signed by the Class Member, stating that he or she opts out of the Class Action. The written opt-out form can be obtained from Class Counsel, and must be sent by pre-paid mail, courier or by e-mail to Class Counsel at the following address:

Andrew Sunter  
Burnet, Duckworth & Palmer LLP  
#2400, 525-8 Ave SW  
Calgary, Alberta T2P 1G1

The written opt-out form must be received by Class Counsel no later than **March 8, 2022**.

No Class Member will be permitted to opt out of the Class Action after **March 8, 2022**. If you opt out of the Class Action on or before that date, you will take full responsibility for initiating your own lawsuit against the Defendants and for taking all legal steps necessary to protect your claim, if you wish to proceed with a claim. Your interests will not be addressed or represented in the Class Action.

#### **What are the costs to me?**

Class Members will not be personally liable to pay any legal fees or disbursements to Class Counsel.

If the Class Action is successful in establishing that the Defendants are liable to pay money to the Class Members, the Court will then proceed to determine which Class Members may be entitled to that money, and how such amounts should be distributed to those Class Members.

The Representative Plaintiff has retained Class Counsel to represent him and the Class Members in this lawsuit. Class Counsel will only be paid legal fees if the lawsuit is successful, which will be deducted from the amounts recovered on behalf of the Class Members. If the lawsuit is successful, Class Counsel will request that legal fees be set by the Court. The Court must approve all legal costs.

#### **How do I find out more about this Class Action?**

Questions about the matters in this Notice must not be directed to the Court. The Certification Order and other information with respect to the Class Action can be obtained at the following website: [www.northwyndclassaction.com](http://www.northwyndclassaction.com).

In addition, questions for Class Counsel may be directed by e-mail or telephone to:

Andrew Sunter  
Burnet, Duckworth & Palmer LLP  
#2400, 525-8 Ave SW  
Calgary, Alberta T2P 1G1  
(403) 260-0283  
[asunter@bdplaw.com](mailto:asunter@bdplaw.com)

Robert Martz  
Burnet, Duckworth & Palmer LLP  
#2400, 525-8 Ave SW  
Calgary, Alberta T2P 1G1  
(403) 260-0393  
[rmartz@bdplaw.com](mailto:rmartz@bdplaw.com)

**OPT-OUT FORM**

**TO: Burnet, Duckworth & Palmer LLP (BDP)**

I, \_\_\_\_\_ (insert full name), have received notice of the Class Action claim commenced against Northwynd Resort Properties Ltd., Paul Hamilton, Ken Bateman, John Andersen, Ron Ferber, Northmont Limited Partnership, Northmont Resort Properties Ltd., 2008164 Alberta Ltd., and Kirk Wankel, (collectively the **Defendants**).

I believe that I am a Class Member as I held Series A and B Trust Units in the REIT between June 3, 2014 and January 16, 2017.

I understand that the Class Action relates to allegations that the Defendants breached their obligations owed to the investors in the Northwynd Properties Real Estate Investment Trust (the **REIT**) in connection with the disposal of the REIT's assets.

I do **NOT** wish to participate in the Class Action.

I understand that by opting out of this Class Action, I will not be eligible for any benefit that may be available to the Class Members on resolution of this matter.

I understand that, if I wish to pursue any remedy with respect to the REIT, I must do so on my own.

I further understand that my rights to pursue any remedy may be limited by statutory or common law limitation periods in my jurisdiction of residence.

Dated the \_\_\_\_ day of \_\_\_\_\_ 2022

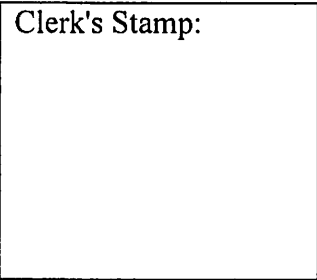
\_\_\_\_\_  
(signature)

\_\_\_\_\_  
(witness)

Mailing Address: \_\_\_\_\_

Telephone Number: \_\_\_\_\_

Email Address: \_\_\_\_\_

**SCHEDULE C**Clerk's Stamp:  


COURT FILE NUMBER 1801-17477

COURT COURT OF QUEEN'S BENCH OF ALBERTA

JUDICIAL CENTRE CALGARY

PLAINTIFF DOMINIC WILLOTT

DEFENDANTS NORTHWYND RESORT PROPERTIES LTD., PAUL HAMILTON, KEN BATEMAN, JOHN ANDERSEN, RON FERBER, NORTHMONT LIMITED PARTNERSHIP, NORTHMONT RESORT PROPERTIES LTD., 2008164 ALBERTA LTD., KIRK WANKEL, JOHN/JANE DOE 1 THROUGH 10, XYZ CORPORATION 1 THROUGH 10, and ABC PARTNERSHIP OR LIMITED PARTNERSHIP 1 THROUGH 10.

DOCUMENT COMPLEX CASE LITIGATION PLAN

Proceeding under the *Class Proceedings Act*, SA 2003

ADDRESS FOR SERVICE AND  
CONTACT INFORMATION OF  
PARTY FILING THIS DOCUMENT

**Burnet, Duckworth & Palmer LLP**  
2400, 525 – 8 Avenue SW  
Calgary, Alberta T2P 1G1  
Lawyer: Andrew Sunter and Robert  
Martz  
Phone Number: (403) 260-0283/0393  
Fax Number: (403) 260-0332  
Email Address: asunter@bdplaw.com /  
rmartz@bdplaw.com  
File No. 76221-1

## ADDRESS FOR SERVICE AND CONTACT INFORMATION OF OTHER PARTIES:

Party	Counsel	Contact Information
Northwynd Resort Properties Ltd.	David Bishop	Gowling WLG (Canada) LLP Suite 1600, 421 – 7 Avenue SW Calgary, AB T2P 4K9 (403) 298-1941 david.bishop@gowlingwlg.com
Paul Hamilton	David Bishop	Gowling WLG (Canada) LLP Suite 1600, 421 – 7 Avenue SW Calgary, AB T2P 4K9 (403) 298-1941 david.bishop@gowlingwlg.com
Ken Bateman	David Bishop	Gowling WLG (Canada) LLP Suite 1600, 421 – 7 Avenue SW Calgary, AB T2P 4K9 (403) 298-1941 david.bishop@gowlingwlg.com
John Andersen	David Bishop	Gowling WLG (Canada) LLP Suite 1600, 421 – 7 Avenue SW Calgary, AB T2P 4K9 (403) 298-1941 david.bishop@gowlingwlg.com
Ron Feber	David Bishop	Gowling WLG (Canada) LLP Suite 1600, 421 – 7 Avenue SW Calgary, AB T2P 4K9 (403) 298-1941 david.bishop@gowlingwlg.com
Northmont Limited Partnership	David Bishop	Gowling WLG (Canada) LLP Suite 1600, 421 – 7 Avenue SW Calgary, AB T2P 4K9 (403) 298-1941 david.bishop@gowlingwlg.com
Northmont Resort Properties Ltd.	David Bishop	Gowling WLG (Canada) LLP Suite 1600, 421 – 7 Avenue SW Calgary, AB T2P 4K9 (403) 298-1941 david.bishop@gowlingwlg.com
2008164 Alberta Ltd.	Lara Mason	Norton Rose Fulbright Canada LLP Suite 3700, 400 – 3 Avenue SW Calgary, AB T2P 4H2 (403) 267-8218 lara.mason@nortonrosefulbright.com
Kirk Wankel	David Bishop (Gowlings)	Gowling WLG (Canada) LLP Suite 1600, 421 – 7 Avenue SW Calgary, AB T2P 4K9

Party	Counsel	Contact Information
	and  Lara Mason (Norton Rose)	(403) 298-1941 david.bishop@gowlingwlg.com  Norton Rose Fulbright Canada LLP Suite 3700, 400 – 3 Avenue SW Calgary, AB T2P 4H2 (403) 264-8218 lara.mason@nortonrosefulbright.com

Step	Schedule for Completion
Providing Notice of Certification to Class Members	Notice of Certification shall be provided to Class Members in the method and form required by the Certification Order (the <b>Certification Date</b> ) by no later than January 7, 2022.
Completion of Pleadings Rule 8.4(3)(h)	<p>Statements of Defence shall be filed and served within 20 days of Certification Date.</p> <p>Any Reply to Statements of Defence shall be filed and served within 10 days of service of Statements of Defence.</p> <p>Any Third Party Claims shall be filed and served within 6 months of service of Statements of Defence.</p> <p>Any Third Party Defences shall be filed and served within 20 days of service of Third Party Claims.</p>
Reach agreement on a protocol for the organization and production of records Rule 4.5(1)(b)(ii)	Parties to reach agreement on a protocol for the organization and production of records provided within 30 days of the Certification Date.
Completion of disclosure of records Rule 4.5(1)(b)(iii)	<p>Plaintiff to provide its sworn AOR and Schedule 1 productions within 60 days of service of the Statements of Defence.</p> <p>Defendants to provide their sworn AORs and Schedule 1 productions within 60 days of service of the Plaintiff's AOR.</p> <p>Any additional Third Party Defendants not already Defendants in the Common Actions previously, to provide their sworn AORs and Schedule 1 productions within 60 days of service of their Third Party Defences.</p>
Consideration of potential early mediation	Parties shall discuss potential for early mediation within 3 months of the Certification Date.
Completion of questioning of witnesses Rule 4.5(1)(b)(iv)	<p>Parties to provide their preliminary list of witnesses and time estimates for questioning within 30 days of service of the Defendants' AORs.</p> <p>Parties to agree on a preliminary schedule for the questioning of witnesses within 45 days of the service of the Defendants' AORs.</p> <p>Parties' questioning of witnesses to commence within 60 days of service of the Defendants' AORs.</p>

Step	Schedule for Completion
	Questioning by all parties, including all questioning on undertaking responses and of corporate representatives for the purpose of acknowledging evidence under Rule 5.29, shall be completed within 14 months of service of the Defendants' AORs (the <b>Questioning End Date</b> ).
Completion of answers to undertakings	Subject to the Questioning End Date, a party will answer an undertaking within 90 days of the end of each of its witnesses' questioning.
Service of expert reports Rule 4.5(1)(b)(v)	<p>Any primary expert reports will be served within 90 days of the Questioning End Date.</p> <p>Any rebuttal expert reports will be served within 90 days of the receipt of a Primary Expert Report.</p> <p>Any surrebuttal expert reports will be served within 90 days of the receipt of rebuttal reports.</p>
Date to apply for a trial date Rules 4.5(1)(b)(vii) and 8.4	<p>The parties will agree on the anticipated length of the Common Issues Trial within 15 months of the Certification Date.</p> <p>The parties will apply to the Case Management Judge to schedule a date for the Common Issues Trial within 16 months of the Certification Date.</p>
Consideration of pre-trial mediation or JDR	Parties to discuss potential for pre-trial mediation or JDR at least 6 months prior to Common Issues Trial start date.
Major Issues List, Agreed Statement of Facts and Agreed Exhibits Protocol	Parties to attempt to agree on Major Issues List, Agreed Statement of Facts and Agreed Exhibits Protocol at least 3 months prior to Common Issues Trial start date.
Conference with Trial Judge	Parties to arrange for a pre-trial conference with Trial Judge at least 2 months prior to the Common Issues Trial start date.
Trial	Target Common Issues Trial start date of 2024



**SCHEDULE D**

**TO INSERT FORM OF AMENDED AMENDED AMENDED STATEMENT OF CLAIM**

11169707.9

Clerk's Stamp:

COURT FILE NUMBER 1801-17477

COURT COURT OF QUEEN'S BENCH OF ALBERTA

JUDICIAL CENTRE CALGARY

PLAINTIFF<sup>^</sup> <sup>^</sup> GARFIELD GANONG

DEFENDANTS NORTHWYND RESORT PROPERTIES LTD., PAUL HAMILTON, KEN BATEMAN, JOHN ANDERSEN, RON FERBER, NORTHMONT LIMITED PARTNERSHIP, NORTHMONT RESORT PROPERTIES LTD., 2008164 ALBERTA LTD., KIRK WANKEL, <sup>^</sup> JOHN/JANE DOE 1 THROUGH 10, XYZ CORPORATION 1 THROUGH 10, and ABC PARTNERSHIP OR LIMITED PARTNERSHIP 1 THROUGH 10.

DOCUMENT **AMENDED AMENDED AMENDED STATEMENT OF CLAIM**

ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT

**Burnet, Duckworth & Palmer LLP**

2400, 525 – 8 Avenue SW

Calgary, Alberta T2P 1G1

Lawyers: Andrew Sunter, Robert Martz, and Alison Scott

Phone Number: (403) 260-0283/0393/5733

Fax Number: (403) 260-0332

Email Address: asunter@bdplaw.com /  
rmartz@bdplaw.com /  
ascott@bdplaw.com

File No. 76221-1

Brought Under the *Class Proceedings Act*, SA 2003, c. C-16.5

## **NOTICE TO THE DEFENDANTS**

You are being sued. You are a defendant.

Go to the end of this document to see what you can do and when you must do it.

**Note: State below only facts and not evidence (Rule 13.6)**

### **Statement of facts relied on:**

#### **I. INTRODUCTION**

1. On January 1, 2018, the Defendant 2008164 Alberta Ltd. (**200 Alberta**) acquired (i) a large resort property in Fairmont Hot Springs, British Columbia, (ii) \$6,600,000 in sales proceeds, and (iii) a \$36,000,000 settlement of a court proceeding for absolutely no consideration. The combined value of these assets is estimated to total approximately \$85,000,000. 200 Alberta obtained these valuable assets for nothing because the trustees of Northwynd Properties Real Estate Investment Trust (**Northwynd REIT**), who owed fiduciary duties to the investors in Northwynd REIT, breached those duties by entering into a sales agreement and promissory note with 200 Alberta (a non-arms length party) that was ^ structured to ensure that 200 Alberta would not have to make any payment for these assets. As a result of this non-arms length deal, the investors in Northwynd REIT, who should have enjoyed the value of these assets, were left with nothing, while 200 Alberta got everything for no consideration.

2. This non-arms length transaction has significantly injured the investors in Northwynd REIT and wrongly deprived them of the return they otherwise would have received on their investment.

#### **II. THE PARTIES**

##### **A. The Plaintiff<sup>^</sup>**

3. The ^ Representative Plaintiff<sup>^</sup> is ^ Garfield Ganong, who is a resident of Calgary, Alberta.

4. ^

5. Mr. Ganong was ^ initially a bondholder in FRPL, which raised funds from bondholders and then lent those funds to Fairmont. In 2010, his FRPL bonds were converted, pursuant to the CCAA proceeding, to Series A and B Trust Units in Northwynd REIT. Mr. Ganong was never a Time Share Owner (as defined below).

#### **B. The Class Members**

6. This Action is brought by the Representative Plaintiff<sup>^</sup> who seeks Court approval to advance this Action as a class action on behalf of the proposed class members, being all persons in Canada who have held Series A and B Trust Units in the Northwynd REIT between June 3, 2014 and present (the **Class Members**). It is estimated that there are approximately 1000 proposed Class Members.

#### **C. The Defendants**

7. The Defendant, Northwynd Resort Properties Ltd. (**Northwynd**), is an Alberta corporation.

8. The Defendant, Paul Hamilton, at all relevant times was a trustee of Northwynd REIT.

9. The Defendant, Ken Bateman, at all relevant times was a trustee of Northwynd REIT.

10. The Defendant, John Andersen, at all relevant times was a trustee of Northwynd REIT.

11. The Defendant, Ron Ferber, at all relevant times was a trustee of Northwynd REIT.

(Mr. Hamilton, Mr. Bateman, Mr. Andersen, and Mr. Ferber are collectively referred to as the **Trustees**)

12. The Defendant, Northmont Limited Partnership (**Northmont LP**), is an Alberta Limited Partnership.

13. The Defendant, Northmont Resort Properties Ltd. (**Northmont**), is a British Columbia corporation that operated the Resort Properties (defined below). Northmont is the general partner of Northmont LP.

14. The Defendant, 200 Alberta, is an Alberta Corporation. It holds 100% of the shares in Northwynd.

15. The Defendant, Kirk Wankel, was at all relevant times the CEO, CFO, and a director of Northmont, a director of Northwynd, and the 100% shareholder and a director of 200 Alberta.

16. ^

17. ^

18. The Defendants, John/Jane Doe 1 through 10, XYZ Corporation 1 through 10, and ABC Partnership or Limited Partnership 1 through 10 are, respectively, individuals, corporations or bodies corporate and general or limited partnerships whose identity are not known to the Representative Plaintiff<sup>^</sup> (collectively the **Unknown Defendants**). The Unknown Defendants are associated with, successors to, related to, or affiliates of, and were not at arm's length to, the other Defendants.

19. As a whole, Northwynd, the Trustees, Northmont, Northmont LP, Mr. Wankel, 200 Alberta, ^ and the Unknown Defendants will be referred to as the "**Defendants**". Northwynd, Northmont, Northmont LP, Mr. Wankel and 200 Alberta are together referred to as the "**Northmont Defendants**".

### III. FACTUAL BACKGROUND

#### A. The Resort Properties

20. The Fairmont Group was a collection of private companies whose business was acquiring, developing, and operating resorts on a time-share basis. Fairmont was a part of this Fairmont Group. Between 1990 and 2009, Fairmont built, marketed and developed a number of resort properties. These included three separate residential developments:

- (a) The Riverside Villas: 80 villas in three storey buildings built between 1990 and 1994;
- (b) The Hillside Villas: 138 villas in eight three and four storey buildings built between 1994 and 2002; and

(c) The Riverview Villas: 32 villas in a four storey building built in 2004,

(collectively the **Fairmont Vacation Villa Assets**).

21. By 2004, the Fairmont Vacation Villa Assets included these 228 two-bedroom units and 22 one-bedroom units along with a recreation building and other amenities. The total area of the Fairmont Vacation Villa Assets was approximately 34 acres.

22. The Fairmont Vacation Villa Assets along with another property known as the Lake Okanagan Resort Assets are collectively referred to as the "**Resort Properties**".

### **B. The Time Shares**

23. Throughout this period Fairmont leased and sold time shares in the Fairmont Vacation Villa Assets, which provided either a 40 year leasehold interest or co-ownership interests (the **Time Shares**). Approximately 18,950 time share vacation agreements were entered into between Fairmont and various persons (the **Time Share Owners**) during this period.

### **C. The Issuance of Bonds to Raise Funds**

24. In 2005, the owners and managers of Fairmont created a financing company called FRPL to raise funds for Fairmont. Between 2006 and 2008, Fairmont and FRPL sought to raise capital for the upgrade and operation of the Resort Properties. In order to do so, FRPL Finance Ltd. (**FRPL Finance**) issued mortgage bonds as private placement exempt securities to retail investors in Alberta (the **Bondholders**). FRPL Finance raised a total of \$43,800,000 in this manner and lent the money to Fairmont. FRPL secured these bonds by placing a first charge on the title mortgages of the Resort Properties. In the Offering Memorandum issued to prospective Bondholders, FRPL assured investors that the value of the Resort Properties exceeded \$43,800,000 and therefore provided sufficient security for the bonds.

### **D. The Fairmont Default Event**

25. However, the Resort Properties were not as good an investment as expected at that time, and in January 2009, Fairmont gave notice to FRPL that they were in financial difficulty and were unable to pay the interest obligations on the bonds due December 31, 2008. Fairmont then

defaulted on the loans owing to the Bondholders. On March 30, 2009, FRPL applied for creditor protection in Alberta for Fairmont and three related entities, under the CCAA, to allow Fairmont time to potentially restructure by way of a debt/equity swap, which would convert the Bondholders into equity owners (**Northwynd REIT Unitholders**) of Fairmont and the Resort Properties. During this period, Fairmont continued in its role as manager and operator of the Resort Properties.

26. In April 2010, the Bondholders met to consider whether to implement a reorganization plan of the Resort Properties with a new ownership structure or an asset liquidation plan. Subsequent to this meeting, the Bondholders voted in favour of a reorganization plan where they would exercise their security against the Resort Properties and take over the Resort Properties and Fairmont's interest in them.

27. This reorganization would be accomplished by a transfer of the Resort Properties to Northmont in consideration of a credit of a significant amount of the debt owing, with the ultimate holders of title, and beneficial owners, being the Northwynd REIT Unitholders <sup>△</sup>. The ultimate agreement between the parties saw Fairmont transfer all of its interest in the Resort Properties to the new ownership structure, which included Northwynd Limited Partnership (**Northwynd LP**), and the later assignee of the assets, being Northmont LP. Northwynd LP also acquired all of the loans owing to the Bondholders by Fairmont and the security against Fairmont's assets held by the Bondholders. On June 15, 2010, Northwynd LP transferred its interest in the Resort Properties to Northmont LP.

28. Northmont is the general partner of Northmont LP and Northwynd Ltd. was the general partner of Northwynd LP. Northmont managed the Resort Properties.

29. Northwynd LP and Northmont LP were 100% owned by Northwynd REIT, which was in turn owned by the Northwynd REIT Unitholders pursuant to the a Declaration of Trust dated March 4, 2010 (the **Declaration of Trust**). Through this reorganization, approximately 1000 Bondholders converted their secured debt into units of Northwynd REIT and moved from being Bondholders to Northwynd REIT Unitholders.

30. The Court approved the transaction on July 7, 2010, at which point Northwynd REIT became the sole owner of the Resort Properties.

**E. 2013 – The "Resort Realignment Project"**

31. Kirk Wankel was appointed CFO of Northmont in November 2010 and CEO in November 2012. In communications by Mr. Wankel to the Northwynd REIT Unitholders, he advised that the primary objective of the business was to extract value from the Resort Properties through a monetization program and then pay this value back to the Northwynd REIT Unitholders.

32. In or around April 2013, Mr. Wankel began an aggressive program called the "Resort Realignment Project – Reason to Stay, Reason to Leave Program", the stated objective of which was to further monetize Northwynd REIT by selling off non-core assets and to increase cash flow by imposing a new capital renovation fee and cancellation fee on the Time Share Owners. Northmont assessed a renovation fee on the Time Share Owners in April 2013. In the alternative to paying this renovation fee, the Time Share Owners could surrender their Time Shares on the payment of a cancellation fee. These fees were intended to bring in over \$40,000,000 in revenues to Northwynd REIT. Mr. Wankel's plan was to force the Time Share Owners to pay for significant upgrades to the Resort Properties.

33. Between 2013 and 2015 in response to this demand, Time Share Owners paid Northwynd REIT at least:

- (a) \$18,100,000 in capital renovation fees (which were used to renovate and significantly increase the value of the Resort Properties; and
- (b) \$1,900,000 in cancellation fees, which constituted unrestricted cash owned by Northwynd REIT.

**F. 2014 – Legal Disputes with Time Share Owners**

34. Although some Time Share Owners paid the renovation and cancellation fees without complaint, many Time Share Owners objected to these fees and argued that these fees were being improperly and unilaterally imposed and were not part of their initial agreements. They argued that they were only responsible for maintenance fees as they did not hold title or ownership on any of the land or buildings and that their leasehold rights expired at the end of their term. This led some of the Time Share Owners to start an action against some of the Defendants.



## G. 2014 – Vote to Wind Up the Trust

35. In 2014, Mr. Wankel began sending correspondence to Northwynd REIT Unitholders indicating that difficulties had arisen with the Time Share Owners and that these risks were threatening the financial position of Northwynd REIT and, thereby, the Northwynd REIT Unitholders' return on their investment. The accuracy of these statements is unclear as, contrary to the original Offering Memorandum and the Declaration of Trust, Mr. Wankel never had the financial statements of Northwynd REIT audited. This failure to undertake the required audits constituted a significant breach of the Declaration of Trust that harmed the Northwynd REIT Unitholders and kept them in the dark as to Northwynd REIT's actual financial performance.

36. On the basis of Mr. Wankel's representations regarding the uncertainties facing the business, on June 3, 2014 the Trustees held a meeting of the Northwynd REIT Unitholders to authorize the winding up of Northwynd REIT. In the Information Circular for the meeting, the Trustees advised the Northwynd REIT Unitholders that, as part of the wind-up, they would retain a commercial real estate firm to market the Resort Properties in an orderly manner to maximize their value, and that the sales proceeds would be distributed to the Northwynd REIT Unitholders. Based on these representations and assurances, the Northwynd REIT Unitholders voted to wind-up Northwynd REIT by no later than December 31, 2016 (the **Wind-Up Resolution**). As part of this authorization, the Trustees approved an initial distribution of \$0.25 per Series B Trust Unit payable on August 29, 2014 to Northwynd REIT Unitholders (the **First Distribution**).

37. The First Distribution appears to have been funded by the sale of the Lake Okanagan Resort in May 2014 for \$9,100,000. At that point the only real estate assets (excluding cash amounts) of Northwynd REIT remaining were the Fairmont Vacation Villa Assets.

38. In May 2015, the Trustees advised the Northwynd REIT Unitholders that the value of the Fairmont Vacation Villa Assets was contingent on the accuracy of the Trustees' interpretation of the contractual obligations of the Time Share Owners. If the Trustees were correct, and the Time Share Owners owed significant fees under their agreements, then the property would hold significant value.

#### **H. June 2016 – The Second Distribution**

39. On June 23, 2016, the Trustees met to consider the status of the wind-up of Northwynd REIT and approved a second distribution of \$0.07 per unit (the **Second Distribution**). In combination with the First Distribution, this resulted in a total payout to the Northwynd REIT Unitholders of \$0.32 per \$1.00 unit, which represented a shortfall of almost \$30,000,000 or 68% of the funds they invested. The Trustees characterized this 68% loss as "an unmitigated success".

#### **I. December 2016 – The Non-Arms Length Sale of Assets to 200 Alberta**

40. In December 2016, the Trustees sold the Fairmont Vacation Villa Assets to 200 Alberta. 200 Alberta was a company 100% owned by Mr. Wankel, the CEO of Northmont. No commercial real estate firm was retained to market these assets, as was contemplated by the Wind-Up Resolution and they were sold to a non-arms length party. In addition, these assets were not sold for cash, but for a Promissory Note with no cash value or disclosed purchase price. Instead, the value of the Promissory Note was to be determined at a future date based on the amount of cash then available in the property.

41. None of this was disclosed to the Northwynd REIT Unitholders at the time.

#### **J. October 2017 – Update on Promissory Note**

42. On October 24, 2017, the Trustees represented to the Northwynd REIT Unitholders that the Promissory Note was likely worthless. The reasoning that the Trustees provided was that no settlement had yet been reached with the Time Share Owners. As such, unless a settlement was reached with these individuals, "the Promissory Note will be worth \$nil".

#### **K. December 2017 – Time Share Owners' Settlement**

43. On December 14, 2017, Northmont entered into a settlement (the **Settlement**) with the Time Share Owners group referred to as the "Geldert Group Owners" (**Geldert**). Under the Settlement, Geldert agreed to pay Northmont 120% of their statement balance as of November 30, 2017, by no later than February 28, 2018, and consented to judgment in the amount of 162% of their statement balance. The Settlement also required Geldert to withdraw its submissions to the court with respect to a petition to be heard on December 15, 2017, and to advise the court that they

took no position on the petition. Counsel for Northmont and Geldert signed the Settlement. The Settlement was further memorialized in an agreement made January 8, 2018, which adopted the Settlement. The Settlement resulted in approximately \$36,000,000 being recovered by Northmont (the **Settlement Funds**). The Settlement Funds should have been distributed to the Northwynd REIT Unitholders pursuant to the Wind-Up Resolution.

**L. Sale of Fairmont Vacation Villa Assets**

44. In September 2016, representatives from Fairmont Mountain View Vacation Villas Corporation (**Mountain View**) met with Doug Frey, the Executive Vice-President of Northmont to discuss the sale of certain Fairmont Vacation Villa Assets. Negotiations moved quickly and by November 20, 2016, Mountain View provided Northmont with a Letter of Intent regarding the purchase of some of the Fairmont Vacation Villa Assets. Negotiations on the purchase price occurred throughout December 2016 and January 2017 and a purchase price was eventually settled on at \$6,600,000.

45. On February 9, 2017, the Purchase and Sale Agreement (**PSA**) was executed, it provided that the following properties would be sold to Mountain View for \$6,600,000:

- (a) Lot 1 DL 46 KDP NEP71522;
- (b) Lot 1 DL 46 and 4084 KDP NEP22130;
- (c) Lot 2 DL 46 and 4084 KDP NEP22130; and
- (d) Lot 3 DL 46 and 4084 KEP NEP 22130 (collectively the **PSA Properties**).

46. The PSA also provided Mountain View with a right of first refusal over certain other Fairmont Vacation Villa Assets that was ultimately not exercised.

47. The initial deposit of \$100,000 was paid by Mountain View to Northmont on February 9, 2017. Conditions were waived on May 26, 2017, and an additional deposit was paid at that time. At that point, there was no doubt the sale would occur, however, the actual closing was delayed by Northmont until March 7, 2018.

48. Carthew held title to the PSA Properties and, as part of the sale, transferred this title to Mountain View. Carthew and Matkin were aware that these properties were being held in trust for the Class Members and that the property was subject to the Promissory Notes, but still wrongfully assisted Northmont in the transfer and profited from their participation in it. This sale resulted in Northmont being paid at least \$6,600,000 (the **Sale Funds**) that properly belonged to the Class Members.

**M. January 2018 – Notice of "\$Nil Payout" on Promissory Notes**

49. On January 15, 2018, the Northwynd REIT Unitholders received a "Notice of \$Nil Payout" on the Promissory Note from [^ 200 Alberta](#). The Notice advised that the principal amount due under the Promissory Note was "\$Nil" and that 200 Alberta was deemed to have satisfied its obligations under the Promissory Note. [^ 200 Alberta](#) provided this Notice of a \$Nil payout to Northwynd REIT Unitholders despite Northmont having agreed to the Settlement with Geldert a month before and the sale to Mountain View having been finalized with the deposits paid and the conditions waived. The Settlement Funds and Sale Funds were beneficially owned by Northwynd REIT and should have been distributed to the Northwynd REIT Unitholders. They were not.

**N. 200 Alberta's Unjustified Windfall**

50. The Trustees' decision that Mr. Wankel's company, 200 Alberta, had satisfied its obligations under the Promissory Note meant that not only did his company acquire the highly valuable remaining Fairmont Vacation Villa Assets for free, but it also meant that the \$36,000,000 in settlement funds paid to Northmont and the Sale Funds went directly to 200 Alberta (and its principal Mr. Wankel). In effect, the agreement between the Trustees and Mr. Wankel resulted in his company securing a \$42,600,000 cash windfall along with valuable real estate, the combined value of which is estimated to total approximately \$85,000,000. The Fairmont Vacation Villa Assets are currently being operated as a resort and are receiving revenues through this operation.

51. Alternatively, while it was represented to the Northwynd REIT Unitholders that Fairmont Vacation Villa Assets were transferred to 200 Alberta, that transaction was never performed, and Northwynd Resort Properties Ltd., Northmont, Northmont LP, Northwynd GP, or a combination of those entities retained ownership and control of the Fairmont Vacation Villa Assets and received

the Sale Funds, and yet did not distribute any of these assets to the Northwynd REIT Unitholders, the rightful beneficial owners of the assets.

#### **IV. CLAIMS AGAINST THE DEFENDANTS**

##### **A. The Trustees Breached their Obligations to the Northwynd REIT Unitholders**

52. The Wind-Up Resolution, which was passed based upon representations by the Trustees, authorized the Trustees to take steps to wind-up the Northwynd REIT. Among the conditions of this authorization was that the Trustees would retain a commercial real estate firm to market the Resort Properties in order to maximize their value. However, rather than engage in a transparent marketing and sale process, the Trustees instead knowingly agreed to transfer substantially all of Northwynd REIT's assets for no guaranteed consideration to a non-arms length party, 200 Alberta. Among other things, in entering into the Sale Agreement and the Promissory Note on those terms the Trustees wrongfully preferred the interests of Mr. Wankel and 200 Alberta over those of the Northwynd REIT Unitholders and breached their (i) fiduciary duties owed to the Northwynd REIT Unitholders, (ii) obligations under the Declaration of Trust, and (iii) obligations under the Wind-Up Resolution. These breaches, among other things, render the Sales Agreement and Promissory Note void or voidable.

53. In addition, the Trustees induced the Northwynd REIT Unitholders to agree to the Wind-Up Resolution based on, among other things, the misrepresentation at the meeting regarding the Wind-Up Resolution that a third-party commercial real estate firm would market the assets.

54. Further or in the alternative to the above breaches, the Trustees acted negligently in connection with the Sales Agreement, Promissory Note, and the transfer of the Fairmont Vacation Villa Assets, Sale Funds, and Settlement Funds to 200 Alberta and ultimately Mountain View. As the Trustees of Northwynd REIT, the Trustees owed a duty of care to the Northwynd REIT Unitholders and breached this duty by entering into a transaction that they knew, or ought to have known, allowed the Fairmont Vacation Villa Assets, Sale Funds, and Settlement Funds—together worth approximately \$85,000,000—to be transferred to 200 Alberta for no consideration.

55. ^

**B.** ^

56. ^

57. ^

58. ^

59. ^

**C. The Defendants' Unjust Enrichment**

60. The ^ Northmont Defendants have been unjustly enriched as a result of their conduct as described herein. In particular:

- (a) The ^ Northmont Defendants were enriched through Mountain View, 200 Alberta and Mr. Wankel's acquisition of the Fairmont Vacation Villa Assets, the Sale Funds, and the Settlement Funds, which are together worth approximately \$85,000,000;
- (b) The Representative Plaintiff<sup>^</sup> and Class Members suffered a corresponding deprivation in the amount of the value of the Fairmont Vacation Villa Assets, Sale Funds, and the Settlement Funds; and
- (c) There was no juristic reason for the ^ Northmont Defendants' enrichment as the transfer of the Fairmont Vacation Villa Assets, Sale Funds, and the Settlement Funds was not *bona fide* and ^ defeated the Representative Plaintiff<sup>^</sup> and Class Members' entitlement to the value of the Fairmont Vacation Villa Assets, Sale Funds, and the Settlement Funds.

**D. 200 Alberta's ^ Knowing Assistance and Receipt**

61. 200 Alberta ^ knowingly assisted in the Trustees' breach of trust and fiduciary duties that resulted in 200 Alberta receiving the Fairmont Vacation Villa Assets, Sale Funds, and the Settlement Funds for no consideration or, alternatively, insufficient consideration. In particular, among other things, 200 Alberta received these assets with knowledge that the transaction

constituted and resulted from the Trustees' breaches of their obligations to the Northwynd REIT Unitholders. <sup>^</sup> Moreover, 200 Alberta <sup>^</sup> knew of the fiduciary relationship between the Trustees and the Northwynd REIT Unitholders and knew that the transfer of the Fairmont Vacation Villa Assets, Sale Funds, and the Settlement Funds occurred in breach of these fiduciary duties. In addition, these transfers significantly enriched 200 Alberta <sup>^</sup>.

62. <sup>^</sup>

63. <sup>^</sup>

64. <sup>^</sup>

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66. <sup>^</sup>

#### **E. Oppressive Conduct of Northwynd, Wankel, and Northmont**

67. Pursuant to the Declaration of Trust and determinations made by the Trustees, Northwynd, Wankel, and/or Northmont, administered the Northwynd REIT, held or managed the property of the Northwynd REIT, and made representations to the unitholders of the Northwynd REIT.

68. Northwynd, Wankel, and/or Northmont unfairly and prejudicially disregarded the interests of the Northwynd REIT Unitholders by, among other things, facilitating, participating in, and administering the transfer of trust assets to:

- (a) 200 Alberta, as a non arm's-length corporation controlled by a principal of Northwynd Resort Properties Ltd., for practically no consideration; and
- (b) Mountain View, under actual or constructive knowledge that the assets were beneficially owned by the Northwynd REIT.

69. The Plaintiff<sup>^</sup> pleads<sup>s</sup> and relies on the remedies for oppression found in the Business Corporations Act, RSA 2000, c. B-9.

**F. Harm Suffered by the Representative Plaintiff<sup>^</sup> and Class Members as a Result of the Defendants' Misconduct**

70. As a result of the Defendants' misconduct, the Representative Plaintiff<sup>^</sup> and the Class Members have suffered at least the following harm:

- (a) The loss of their original investment in Northwynd REIT; and
- (b) The loss of any return on this investment.

71. It is estimated that the combined losses incurred by the Representative Plaintiff<sup>^</sup> and the Class Members as a result of the Defendants' misconduct total approximately \$85,000,000.

**G. Disgorgement and Constructive Trust**

72. As a result of their misconduct described herein, the ^ Northmont Defendants have become subject to an equitable obligation in relation to all revenues that they generated or obtained as a result of such misconduct, including their wrongful use and retention of the Fairmont Vacation Villa Assets, Sale Funds, and the Settlement Funds. Pursuant to this equitable obligation, all such revenue should be disgorged or made subject to a constructive trust in favour of the Representative Plaintiff<sup>^</sup> and the Class Members. In particular, among other things:

- (a) The ^ Northmont Defendants would not have generated or obtained such revenue but for their misconduct described herein;
- (b) An equitable remedy against the ^ Northmont Defendants is appropriate in the circumstances given their unjust enrichment and the ^ serious nature of the misconduct described herein in order to ensure that the ^ Northmont Defendants do not profit from their wrongful acts and to deter others like the ^ Northmont Defendants from engaging in similar misconduct; and
- (c) There is nothing that would render the imposition of an equitable remedy against the ^ Northmont Defendants unjust or improper in the circumstances.



## H. Claim against Mr. Wankel

73. The Representative Plaintiff<sup>^</sup> and Class Members claim against Mr. Wankel personally in regard to the claims set out herein in respect of 200 Alberta. Mr. Wankel was the sole shareholder and director of 200 Alberta. 200 Alberta was, for all intents and purposes, Mr. Wankel's alter ego. Mr. Wankel personally directed the wrongful act of acquiring the Fairmont Vacation Villa Assets, Sale Funds, and the Settlement Funds, in his capacity as the sole shareholder, sole director, and controlling mind of 200 Alberta. In this circumstance, 200 Alberta was effectively merely acting as Mr. Wankel's agent and constituted <sup>^</sup>an attempt by Mr. Wankel to avoid liability for knowingly wrongful conduct.

74. In the alternative, Mr. Wankel acted in his capacity as an officer in Northmont and Northwynd, and independently from 200 Alberta, when he arranged for the wrongful transfer of the Fairmont Vacation Villa Assets, Sale Funds, and the Settlement Funds to 200 Alberta and Mountain View. This <sup>^</sup>conduct was directed separate and apart from Mr. Wankel's role in 200 Alberta.

## I. Punitive Damages

75. The Defendants' misconduct as particularized herein was harsh, high-handed, malicious and oppressive, and warrants an award of punitive or exemplary damages.

## V. REMEDY SOUGHT

76. The Representative Plaintiff<sup>^</sup> claims on his own behalf and on behalf of the proposed Class Members:

(a) As against the Defendants:

- (i) an order certifying this action as a class proceeding and appointing the Representative Plaintiff<sup>^</sup> as the representative of the Class Members;
- (ii) judgment for damages for <sup>^</sup>unjust enrichment, knowing assistance, knowing receipt, breach of duty, oppression, breach of contract, and/or misrepresentation in the sum of \$85,000,000 or such other amount as to be proven at the trial of this action;

- (iii) a tracing, accounting, and disgorgement of, or in the alternative, a constructive trust over, all revenue that the Defendants have obtained as a result of or in any way attributable to their use of the Fairmont Vacation Villa Assets or the Settlement Funds;
- (iv) a declaration that the Sales Agreement and Promissory Note are void, voidable, and/or unenforceable;
- (v) an order for an accounting of the Fairmont Vacation Villa Assets, Sale Funds, and the Settlement Funds;
- (vi) an order for the tracing of the Settlement Funds and Sale Funds to any real or personal property the Settlement Funds and/or Sale Funds were used to purchase or with respect to which debts were paid;
- (vii) a declaration of or an order for a resulting trust over the Settlement Funds and Sale Funds and any property obtained with or through the use of the Settlement Funds and/or Sale Funds;
- (viii) in the alternative, a declaration of or an order for a constructive trust over the Settlement Funds and Sale Funds and any property obtained with or through the use of the Settlement Funds and/or Sale Funds;
- (ix) an order selling any property obtained with or through the use of the Settlement Funds and Sale Funds and transferring the proceeds to the Representative Plaintiff<sup>^</sup> and Class Members;
- (x) an order attaching the Fairmont Vacation Villa Assets, Sale Funds, the Settlement Funds or any property obtained with or through the use of the Settlement Funds and/or Sale Funds;
- (xi) a declaration that the Fairmont Vacation Villa Assets are beneficially owned by the Representative Plaintiff<sup>^</sup> and the Class Members;
- (xii) an interlocutory or permanent injunction prohibiting the Defendants from disposing of any of the Fairmont Vacation Villa Assets, Sale Funds, or the Settlement Funds, other than in the ordinary course, until final disposition of the action;
- (xiii) punitive damages in the amount of \$1,000,000;
- (xiv) interest;
- (xv) costs of this action on a solicitor-and-own-client basis; and
- (xvi) such further and other relief as this Honourable Court may deem fit and appropriate.

**NOTICE TO THE DEFENDANT:**

You only have a short time to do something to defend yourself against this claim:

20 days if you are served in Alberta

1 month if you are served outside Alberta but in Canada

2 months if you are served outside Canada.

You can respond by filing a Statement of Defence or Demand for Notice in the office of the Clerk of the Court of Queen's Bench at Calgary, Alberta, AND serving your Statement of Defence or Demand for Notice on the Plaintiff's address for service.

**WARNING**

If you do not file your Statement of Defence or Demand for Notice within your time period, you risk losing the law suit automatically. If you do not file, or do not serve, or are late in doing either of these things, a court may give a judgment to the Plaintiff against you after a notice of the application has been served on you.