

AMENDED this 23 day of  
August 2019 Pursuant to  
Rule 3.62  
Dated the 23 day of August, 2019

Clerk's Stamp:

CLERK OF THE COURT  
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AUG 23 2019  
JUDICIAL CENTRE  
OF CALGARY

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, PHILIP K MATKIN PROFESSIONAL CORPORATION, CARTHEW REGISTRY SERVICES LTD., ^, JOHN/JANE DOE 1 THROUGH 10, XYZ CORPORATION 1 THROUGH 10, and ABC PARTNERSHIP OR LIMITED PARTNERSHIP 1 THROUGH 10.

DOCUMENT **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](mailto:asunter@bdplaw.com) /

[rmartz@bdplaw.com](mailto:rmartz@bdplaw.com) /

[ascott@bdplaw.com](mailto: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 intentionally 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 Plaintiffs**

3. The proposed Representative Plaintiffs ^ are Dominic Willott, who is a resident of St. Albert, Alberta and Garfield Ganong, who is a resident of Calgary, Alberta.

4. Mr. Willott was initially a bondholder in FRPL Finance Ltd. (**FRPL**), which raised funds from bondholders and then lent those funds to Fairmont Resort Properties Ltd. (**Fairmont**). Mr. Willott purchased the bonds under the name of his unincorporated sole-proprietorship, Willdom Software & Consulting. In 2010, his FRPL bonds were converted, pursuant to a *Companies' Creditor Arrangement Act (CCAA)* proceeding, to Series A and B Trust Units in Northwynd REIT.

5. Mr. Ganong was also 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 Plaintiffs who seek 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. The Defendant, Philip K. Matkin Professional Corporation, is an Alberta Legal Professional Corporation (**Matkin**).

17. The Defendant, Carthew Registry Services Ltd., is an Alberta corporation (**Carthew**).

18. ^

19. 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 Plaintiffs (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.

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

### **III. FACTUAL BACKGROUND**

#### **A. The Resort Properties**

21. 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**).

22. 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.

23. 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**

24. 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**

25. 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**

26. 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.

27. 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.

28. 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, with Matkin and Carthew as the trustees and/or registry agents. 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.

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

30. 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.

31. 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"**

32. 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.

33. 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 cancelation 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.

34. 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**

35. 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**

36. 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.

37. 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**).



38. 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.

39. 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**

40. 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**

41. 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.

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

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

43. 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**

44. 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**

45. 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.

46. 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).

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

48. 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.

49. 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**

50. On January 15, 2018, the Northwynd REIT Unitholders received a "Notice of \$Nil Payout" on the Promissory Note from the Trustees. 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. The Trustees 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**

51. 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 <sup>^</sup>\$42,600,000 cash windfall along with valuable real estate, the combined value of which is estimated to total approximately <sup>^</sup>\$85,000,000. The Fairmont Vacation Villa Assets are currently being operated as a resort and are receiving revenues through this operation.

52. 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.

<sup>^</sup>

#### IV. CLAIMS AGAINST THE DEFENDANTS

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

53. 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.

54. 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.

55. 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.

56. Further to the above breaches, the Defendants acted in breach of the Declaration of Trust and their other obligations to the Northwynd REIT Unitholders by attempting to circumvent the beneficial interest of the Northwynd REIT Unitholders. Specifically:

- (a) The Promissory Note was wrongfully engineered to have all obligations of 200 Alberta expire if the assets of the Northwynd REIT were not sold by December 31, 2017, effectively providing that 200 Alberta would keep all of the value of those assets, for no consideration, if they were not sold in 2017;
- (b) The timing of the payment of funds from the Settlement was wrongfully engineered in an attempt to circumvent or defeat the interests of the Northwynd REIT Unitholders by, among other things, delaying the payment of the Settlement funds such that the proceeds would not be captured by the terms of the Promissory Note. and
- (c) The Defendants specifically conducted the sale to Mountain View to attempt to circumvent or defeat the interests of the Northwynd REIT Unitholders by, among other things, delaying the dates of the Mountain View transaction to attempt to conduct the transaction such that its proceeds would not be captured by the terms of the Promissory Note.

## **B. The Defendants' Conspiracy**

57. Between the time of the Wind-Up Resolution and present, the Defendants intentionally and unlawfully conspired to, among other things, surreptitiously use the authorization conferred by the Wind-Up Resolution to cause the Fairmont Vacation Villa Assets, Sale Funds, and the Settlement

Funds to be wrongfully transferred to Mr. Wankel's corporation, 200 Alberta, for no consideration and some or all of the Fairmont Vacation Villa Assets to ultimately be transferred to Mountain View.

58. In particular, the Defendants entered into an agreement, arrangement or joint plan, formed a common intention, or otherwise acted together in a planned and concerted manner for the purpose of, among other things, entering into the Sales Agreement and Promissory Note that were intentionally structured to lead to the transfer of the Fairmont Vacation Villa Assets, Sale Funds, and the Settlement Funds to 200 Alberta ^ for no consideration. The Defendants agreed to engage in the unlawful acts directed toward the Representative Plaintiffs and the Class Members, in order to further their conspiracy.

59. In particular, and among other things:

- (a) The Trustees wrongfully breached their fiduciary duties to the Northwynd REIT Unitholders, breached their obligations under the Wind-Up Resolution, exceeded their authority under the Wind-Up Resolution, and preferred the interests of Mr. Wankel's corporation over those of the Trust Unitholders;
- (b) Carthew and Matkin unlawfully assisted, facilitated, and profited from the transfer of the Fairmont Vacation Villa Assets by transferring assets pursuant to the Promissory Note despite knowing that such transfer constituted a breach of trust and that the communications regarding the Promissory Note to the Northwynd REIT Unitholders were misrepresentations.
- (c) The Defendants wrongfully concealed the Sales Agreement;
- (d) The Defendants wrongfully concealed the PSA and receipt of the Sale Funds;
- (e) The Defendants wrongfully misrepresented the state of settlement discussions with the Time Share Owners;
- (f) The Defendants wrongfully failed to inform the Northwynd REIT Unitholders when the Settlement occurred, which rendered prior statements by the Defendants misrepresentations; and

- (g) The Defendants wrongfully misrepresented the amount owing on the Promissory Note.

60. The Defendants knew, or ought to have known, that injury to the Representative Plaintiffs and the Class Members was likely to result from their unlawful conduct. In fact, the Representative Plaintiffs and Class Members suffered substantial harm as a result of the various acts undertaken by the Defendants in furtherance of their unlawful conspiracy.

### **C. The Defendants' Unjust Enrichment**

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

- (a) The 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 Plaintiffs 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 Defendants' enrichment as the transfer of the Fairmont Vacation Villa Assets, Sale Funds, and the Settlement Funds was not *bona fide* and was entered into with the intent of defeating the Representative Plaintiffs and Class Members' entitlement to the value of the Fairmont Vacation Villa Assets, Sale Funds, and the Settlement Funds.

### **D. 200 Alberta, Carthew, and Matkin's ^ Knowing Assistance and Receipt**

62. 200 Alberta, Carthew, and Matkin ^ 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. In addition, Carthew and Matkin facilitated and profited from this

transaction. Moreover, 200 Alberta, Carthew, and Matkin ^ 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, Carthew, and Matkin ^.

63. Carthew and Matkin were parties to a trust agreement with Northmont Resort Properties Ltd. whereby Carthew and Matkin were the trustee that held the title to lands and other property that was beneficially owned by the Northwynd REIT Unitholders.

64. Carthew and Matkin knew of and participated in the PSA to Mountain View by, among other things, executing transfers of land to Mountain View and another company, 2095990 Alberta Ltd.

65. Further and in the alternative, Carthew and Matkin knew of, participated in, and administered transfers of property beneficially owned by the Northwynd REIT to 200 Alberta, with actual or constructive knowledge, recklessness, or willful blindness to the fact that this transfer was undervalue, in breach of the Declaration of Trust, or otherwise improper.

66. Carthew and Matkin knew or ought to have known that the land that they transferred to Mountain View and 2095990 Alberta Ltd. was beneficially owned by the Northwynd REIT Unitholders and was transferred in breach of the Declaration of Trust.

67. Further, or in the alternative, Carthew and Matkin knew or ought to have known that the purported sale of all of the assets of the Northwynd REIT to 200 Alberta did not take place as represented to the Northwynd REIT Unitholders.

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

68. 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.



69. 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.

70. The Plaintiffs plead and relies on the remedies for oppression found in the Business Corporations Act, RSA 2000, c. B-9.

**F. Harm Suffered by the Representative Plaintiffs and Class Members as a Result of the Defendants' Misconduct**

71. As a result of the Defendants' misconduct, the Representative Plaintiffs 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.

72. It is estimated that the combined losses incurred by the Representative Plaintiffs and the Class Members as a result of the Defendants' misconduct total approximately \$85,000,000.

**G. Disgorgement and Constructive Trust**

73. As a result of their misconduct described herein, the 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 Plaintiffs and the Class Members. In particular, among other things:

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

#### **H. Claim against Mr. Wankel**

74. The Representative Plaintiffs 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 a wrongful attempt by Mr. Wankel to avoid liability for knowingly wrongful conduct.

75. 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 wrongful conduct was directed separate and apart from Mr. Wankel's role in 200 Alberta.

#### **I. Punitive Damages**

76. 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**

77. The Representative Plaintiffs claim on their 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 Plaintiffs as the representative of the Class Members;
  - (ii) judgment for damages for conspiracy, 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 Plaintiffs 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 Plaintiffs 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 Plaintiffs' 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 Plaintiffs against you after a notice of the application has been served on you.