

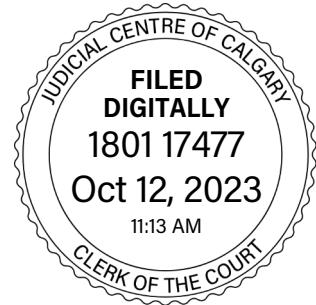
COURT FILE NO.: 1801-17477

COURT COURT OF QUEEN'S BENCH OF ALBERTA

JUDICIAL CENTRE CALGARY

PLAINTIFF 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.



AMENDED *E. Wheaton*
on Oct 12, 2023
before the close of pleadings

DOCUMENT **AMENDED STATEMENT OF DEFENCE**

PARTY FILING THIS DOCUMENT 2008164 ALBERTA LTD. AND KIRK WANKEL (IN HIS CAPACITY AS OFFICER AND DIRECTOR OF 2008164 ALBERTA LTD.)

ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT **Norton Rose Fulbright Canada LLP**
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Attention: Lara Mason / Sarah Ivany

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

Statement of facts relied on:

1. 2008164 Alberta Ltd. (**200 Alberta**) is a corporation duly incorporated pursuant to the laws of Alberta. 200 Alberta was incorporated on November 30, 2016.
2. Kirk Wankel is the sole officer and director of 200 Alberta.

3. Except where expressly admitted herein, 200 Alberta and Mr. Wankel deny each and every allegation in the Amended Amended Amended Statement of Claim (the **Claim**), and put the Plaintiffs to the strict proof thereof.
4. 200 Alberta and Mr. Wankel adopt and repeat the Statement of Facts set out at paragraphs 2 – 31 of the Amended Statement of Defence of Northwynd Resort Properties Ltd., Paul Hamilton, Ken Bateman, John Andersen, Ron Ferber, Northmont Limited Partnership, Northmont Resort Properties Ltd., and Kirk Wankel (in his capacity as CEO, CFO and Director of Northwynd Resort Properties Ltd. and Director of Northmont LP) (the **Northwynd Statement of Defence**).
5. Unless otherwise defined, capitalized terms used herein shall have the same meaning as set out in the Northwynd Statement of Defence.

The 200 PSA and the Promissory Note

6. Mr. Wankel negotiated the terms of the 200 PSA and the Promissory Note with the Trustees, who were acting on behalf of Northwynd REIT. At all material times during the negotiation of the 200 PSA and Promissory Note, Northwynd REIT was represented by counsel.
7. Mr. Wankel and the Trustees were each sophisticated parties who understood the business of the Northwynd REIT, and who understood and mutually agreed upon the terms of the 200 PSA and the Promissory Note.
8. 200 Alberta and Mr. Wankel deny that there was any inequality of bargaining power between the parties to the 200 PSA, and deny that there was any unconscionable conduct in the negotiation or formation of the 200 PSA, as alleged in the Claim or at all.
9. The express objective of the parties in entering into the 200 PSA was to facilitate the wind-up and termination of Northwynd REIT and to allow for the completion of the liquidation of certain properties and assets for the benefit of the former Unitholders.
10. The terms of the 200 PSA and the Promissory Note included:
 - a. 200 Alberta purchased all of the issued and outstanding units of Northwynd Limited Partnership (**Northwynd LP**) and all of the issued and outstanding shares of Northwynd in exchange for the Promissory Note;
 - b. By purchasing the partnership units of Northwynd LP and the shares of Northwynd, 200 Alberta also acquired unmarketable assets that had no or negative economic value in order to facilitate the wind-up of Northwynd REIT;
 - c. 200 Alberta would pay to the former Unitholders the unrestricted cash as of December 31, 2017 (excluding escrowed timeshare maintenance fees and less certain obligations and liabilities);
 - d. 200 Alberta would pay to the former Unitholders any non-cash consideration received prior to December 31, 2017 as consideration for the sale or liquidation of certain assets;

- e. 200 Alberta would operate the business in the ordinary course, reasonably and in accordance with reasonable industry standards;
 - f. 200 Alberta made no guarantee of performance of the business, only reasonable efforts, and Northwynd REIT acknowledged that the value of the Promissory Note was dependant on many factors beyond 200 Alberta's control and that the value of the Promissory Note might ultimately be \$Nil;
 - g. Mr. Wankel and Doug Frey would continue their employment, which otherwise would have terminated at the end of 2016, with a view to completing the Resort Realignment Plan in 2017; and
 - h. In the event that the Principal Amount payable by 200 Alberta was equal to or less than \$Nil on December 31, 2017, 200 Alberta would be deemed to have satisfied its obligations under the Promissory Note.
11. 200 Alberta and Mr. Wankel deny that the terms of the 200 PSA and Promissory Note, or any terms thereof, are illegal, contrary to public policy, or improvident, as alleged in the Claim or at all.
12. 200 Alberta and Mr. Wankel deny that the assets of the Northwynd REIT were transferred to 200 Alberta for no consideration or insufficient consideration. The assets of the Northwynd REIT were sold to 200 Alberta for the Promissory Note which had significant contingent value at the time the PSA was entered into on the basis of the opportunity to recover on behalf of the beneficiaries to the Promissory Note any settlement funds or asset sale proceeds received by Northmont LP in 2017. In addition, as noted above, by purchasing the partnership units of Northwynd LP and the shares of Northwynd, 200 Alberta also acquired unmarketable assets that had no or negative economic value in order to facilitate the wind-up of Northwynd REIT.
13. At all material times, 200 Alberta acted in accordance with the terms of the PSA and the Promissory Note.

The Settlement of the Timeshare Litigation and the Hillside PSA

14. In response to paragraph 43 of the Claim, 200 Alberta and Mr. Wankel deny that a settlement agreement was concluded to resolve the Timeshare Litigation before December 31, 2017. 200 Alberta and Mr. Wankel state that a Settlement Agreement between Northwynd and Northmont LP and the Geldert Group was signed on or about January 8, 2018.
15. In further response to paragraph 43 of the Claim:
- a. On or about February 28, 2018, approximately 81% of Geldert Group members paid Settlement Funds to counsel for Northmont LP;
 - b. Approximately 15% of Geldert Group members elected to pay Settlement Funds to Northmont LP via deferred payment plans pursuant to the Settlement Agreement, including in most cases requests for modified settlement amounts; and

- c. The remaining Geldert Group members defaulted on their payment of Settlement Funds to Northmont LP.
16. In further response to paragraph 43 of the Claim, Northmont LP did not receive or retain the full amount of the Settlement Funds paid by the Geldert Group pursuant to the Settlement Agreement, as an apportionment was performed to allocate and pay outstanding amounts owed to the Resort.
17. On or about March 7, 2018, the Hillside PSA was concluded following the completion of the Resort Realignment Plan, and Northmont LP subsequently received the proceeds of the sale of the Hillside Lands.

Declaration of \$Nil Value

18. In or about January of 2018, 200 Alberta, in good faith and having sought and received legal advice regarding the terms of the Promissory Note, determined that the value of the Promissory Note was \$Nil.
19. On January 15, 2018, 200 Alberta prepared a Notice of \$Nil Value and distributed the Notice to the former Unitholders by mail.

Any matters that defeat the claim of the plaintiff:

20. No Knowing Assistance or Knowing Receipt
21. In response to paragraph 61 of the Claim, 200 Alberta and Mr. Wankel deny that they knowingly or otherwise assisted the Trustees or Corp. Defendants, or any of them, to breach fiduciary duties or other obligations owed to the Unitholders in relation to the 200 PSA and Promissory Note, as alleged or at all.
22. 200 Alberta and Mr. Wankel deny that the Trustees or Corp. Defendants, or any of them, breached any fiduciary or other obligations owed to the Unitholders in relation to the 200 PSA and Promissory Note, as alleged or at all. In this regard, 200 Alberta and Mr. Wankel adopt and repeat the statements made in the Northwynd Statement of Defence at paragraphs 30 - 43.
23. In the alternative, if the Trustees did breach any fiduciary duties or obligations owed to the Unitholders in relation to the 200 PSA and Promissory Note, which is denied, 200 Alberta and Mr. Wankel, or either of them, did not have actual or constructive knowledge of any such breaches, and did not participate in any such breaches.
24. Further, 200 Alberta and Mr. Wankel deny knowingly receiving any property obtained via a breach of any fiduciary duties or obligations owed to the Unitholders, as alleged or at all. 200 Alberta purchased the assets of Northwynd REIT as a *bona fide* purchaser for value without any notice or knowledge of any breaches of trust.

No Unjust Enrichment

25. 200 Alberta and Mr. Wankel deny they were unjustly enriched as alleged at paragraph 60 of the Claim or at all.

26. In the alternative, if 200 Alberta and Mr. Wankel, or either of them, were enriched, which is denied, the Plaintiffs suffered no corresponding deprivation.
27. In the further alternative, if 200 Alberta and Mr. Wankel, or either of them, were enriched and the Plaintiffs suffered a corresponding deprivation, both of which are denied, there are juristic reasons for such enrichments. In particular:
- a. The assets of Northwynd REIT were sold to 200 Alberta in exchange for sufficient and valuable consideration, being the Promissory Note, pursuant to a valid and enforceable contract, being the 200 PSA;
 - b. The value of the Promissory Note was \$Nil on December 31, 2017, when the Plaintiffs' contingent interest in the Promissory Note expired;
 - c. The Settlement Funds were paid to Northmont LP in 2018 pursuant to a valid and enforceable contract, being the Settlement Agreement;
 - d. The proceeds from the sale of the Hillside Lands were paid to Northmont LP in 2018 pursuant to a valid and enforceable contract, being the Hillside PSA;
 - e. The Plaintiffs had no legal or beneficial interest in, nor entitlement to, the Settlement Funds, the proceeds from the sale of the Hillside Lands, or any other assets held or received directly or indirectly by 200 Alberta after December 31, 2017.
28. Further, or in the alternative, 200 Alberta and Mr. Wankel deny that the terms and conditions of the 200 PSA and the Promissory Note were unnecessarily depreciatory and deny that 200 Alberta and Mr. Wankel, or either of them, were acting in collusion with the Trustees in relation to the 200 PSA or the Promissory Note. As a result, the Plaintiffs are precluded from impeaching the 200 PSA and Promissory Note as against 200 Alberta, and in this regard 200 Alberta and Mr. Wankel plead and rely upon the *Trustee Act*, RSA 2000 ch. T-8.

Release

29. Further, or in the further alternative, 200 Alberta and Mr. Wankel, in his capacity as a director and officer of 200 Alberta, rely upon the Northmont Release. The Northmont Release is an entire bar to the claims of the Plaintiffs, or some of them, against 200 Alberta and Mr. Wankel.

Indemnity

30. Further, or in the further alternative, any liability of Mr. Wankel is expressly limited by Mr. Wankel's Amended and Restated Employment Agreement dated November 19, 2012 and Employment Agreement Amendment dated December 8, 2016 to liability for gross negligence or unlawful conduct.

No Personal Claim

31. Mr. Wankel denies there are any grounds upon which the Plaintiffs may assert a personal claim against him, as alleged in paragraph 73 of the Claim or at all, and Mr.

Wankel relies in support on the facts plead herein and in the Northwynd Statement of Defence.

No Damages

32. 200 Alberta and Mr. Wankel deny that the Plaintiffs have suffered loss or damage, whether as alleged in the Claim or at all.
33. In the alternative, if the Plaintiffs have suffered loss or damage, which is denied, then such loss or damage is less than that alleged in the Claim, which are excessive and inconsistent with the facts plead in the Claim.
34. In the further alternative, if the Plaintiffs have suffered loss or damage, which is denied, then 200 Alberta and Mr. Wankel deny that any acts or omissions of 200 Alberta or Mr. Wankel, or either of them, caused or contributed to such loss or damage. Any loss to the value of the Unitholders' interest in the Northwynd REIT as a result of the 200 PSA, which loss is expressly denied, was caused by actions entirely outside the control of the Defendants.
35. 200 Alberta and Mr. Wankel state that the progress of the Timeshare Litigation from 2013 to 2018, the failure of the Geldert Group to settle or resolve the Timeshare Litigation, and the refusal of the Legal Trustee to transfer title to the Hillside Lands and other Resort Lands to facilitate the Resort Realignment Plan was the cause of any loss or damage alleged by the Plaintiffs, which is denied.
36. Further, or in the alternative, if the Plaintiffs have suffered any loss or damage, which is denied, 200 Alberta and Mr. Wankel state that the Plaintiffs, or some of them, failed to take appropriate steps to mitigate their losses including:
 - a. failing to adequately consider and act upon the information provided by 200 Alberta and the other Defendants, which failures included, but are not limited to:
 - i. failing to review and consider, or seek legal advice on the terms of and consequence of the Wind-Up, despite being provided with notice and access to information prior to voting on the Wind-Up Resolution;
 - ii. failing to review and consider, or seek legal advice on the terms of the Promissory Note despite being provided with a copy of the Promissory Note in early 2017; and
 - iii. where a Unitholder was also a Time Share Owner;
 1. failing to attempt to settle and finalize the Timeshare Litigation in a timely manner, and in any event before December 31, 2017; and
 2. instructing counsel to proceed with multiple court actions, without consideration of the implications for the Promissory Note deadline of December 31, 2017.

37. Further, or in the further alternative, any losses suffered by the Plaintiffs resulted from the their own negligence and 200 Alberta and Mr. Wankel plead and rely upon the *Contributory Negligence Act*, RSA 2000 ch. C-27.
38. 200 Alberta and Mr. Wankel deny there are any grounds to justify an award of punitive damages as claimed at paragraph 75 of the Claim, or at all, and 200 Alberta and Mr. Wankel rely in support on the facts plead herein and in the Northwynd Statement of Defence.
39. If 200 Alberta and Mr. Wankel received any benefit from matters alleged in the Claim, which is denied, 200 Alberta and Mr. Wankel deny there are any grounds for an award of disgorgement or a constructive trust whether as alleged at paragraph 72 of the claim, or at all, and 200 Alberta and Mr. Wankel rely in support on the facts plead herein and in the Northwynd Statement of Defence.
40. 200 Alberta and Mr. Wankel deny there are any grounds plead or otherwise to justify the remedies plead at paragraph 76 (a)(iii) through (xii).

Remedy sought

41. Dismissal of the Plaintiffs claim against 200 Alberta and Mr. Wankel.
42. Costs of this action in favour of 200 Alberta and Mr. Wankel.
43. Such further and other relief as may be requested of and granted by this Honourable Court.