

ONTARIO
SUPERIOR COURT OF JUSTICE
(Commercial List)

B E T W E E N:

DBDC SPADINA LTD.,
and THOSE CORPORATIONS LISTED ON SCHEDULE "A" HERETO

Applicants

- and -

NORMA WALTON, RONAULD WALTON, THE ROSE & THISTLE GROUP
LTD. and EGLINTON CASTLE INC.

Respondents

- and -

THOSE CORPORATIONS LISTED IN SCHEDULE "B" HERETO, TO BE
BOUND BY THE RESULT

SUPPLEMENTARY FACTUM OF THE MANAGER, SCHONFELD INC.
(Motion Returnable March 2, 2018)

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I. Introduction and overview

1. This supplementary factum is filed by Schonfeld Inc. (the “**Manager**”) in its capacity as Manager of (i) certain companies listed at Schedule “B” to the Order of Justice Newbould dated November 5, 2013 (the “**Schedule “B” Companies**”),¹ together with the properties owned by those companies (the “**Schedule “B” Properties**”); and (ii) the properties listed at Schedule “C” to the Judgment and Order of Justice Brown dated August 12, 2014 (the “**Schedule “C” Properties**” and together with the Schedule “B” Properties, the “**Properties**”).

2. The purpose of this supplementary factum is to specifically identify the facts and evidence relevant to the portion of the Manager’s motion returnable March 2, 2018. This factum is meant to supersede the factum filed in connection with the first return date for the Manager’s motion, November 16, 2017.

3. Aspects of the Manager’s motion were adjourned several times because of opposition from Trez Capital Limited Partnership (which has now been withdrawn) and the Respondents (which remains). Most of the relief sought by the Manager was granted by Orders of Justice McEwen dated November 16, 2017 and February 22, 2018. There are now two issues remaining.

4. First, the Manager has recommended distributing \$553,200 to the Applicants in partial satisfaction of the Judgment of Justice Newbould dated September 23, 2017 (the “**2017 Judgment**”). Pursuant to the 2017 Judgment, the Respondents, Norma and Ronauld Walton (the “**Waltons**”) were ordered to pay the Applicants damages totalling approximately \$67 million. The Judgment has not been paid. Based on the analysis described below, the Manager has determined that the Waltons *may* be entitled to an equity distribution from the Schedule “B” Companies. It is also possible that the Applicants are entitled to these funds.

5. If the Waltons are owed any distribution, the Applicants are likely entitled to either garnish any payment that would otherwise be made to the Waltons or seize any shares underlying that entitlement. Thus, all of the distribution in question is likely to be paid to the Applicants. There is no practical difference between payments made to the Applicants as

¹ Schedule “B” was amended by Order dated January 16, 2014.

shareholders and payments made to the Applicants as creditors. Accordingly, the Manager does not recommend that the analysis required to make a definitive determination about the Waltons' entitlement to an equity distribution be conducted.

6. The Waltons do not agree. Through an affidavit filed by Norma Walton, the Respondents assert that funds that they may be entitled to should be preserved for the benefit of other creditors. Each of the creditors referenced by the Waltons has been given specific notice of this motion. None of them have taken a position or filed material on this aspect of the motion. Moreover, there are important differences between the Applicants and the Waltons' other creditors. The creditors that Ms. Walton is ostensibly seeking to protect are not judgment creditors. They do not have the same enforcement rights as the Applicants. The Waltons have not filed for bankruptcy, so the difference between judgment creditors (the Applicants) and contingent creditors (Trez Capital and the Schedule C Investors) is significant.

7. In light of the foregoing, the Manager has not changed its recommendation in response to the Respondents' position.

8. The second disputed issue relates to certain parties other than the Applicants who may have invested \$350,000 in Twin Dragons Corporation (the "**Twin Dragons Investors**"). If they invested in Twin Dragons, the Twin Dragons Investors may be entitled to share in the proposed equity distribution from Twin Dragons. However, there is conflicting evidence with respect to whether the Twin Dragons Investors had an interest in Twin Dragons when the Manager was appointed. Accordingly, the Manager has recommended that 25% of the amount available for distribution from Twin Dragons be held by the Manager pending a determination with respect to the rights (if any) of the Twin Dragons Investors. The Applicants oppose this recommendation, and ask that the funds be distributed to them. The Respondents have asserted that funds should be distributed to the Twin Dragons Investors immediately. However, the Respondents have previously deposed that the Twin Dragons Investors "moved" their investments to other companies controlled by the Respondents before the Manager was appointed. The Twin Dragons Investors have been given notice of the Manager's motion, and, with the exception of Duncan Coopland, they have not taken a position.

9. Having considered the foregoing, the Manager has determined that its recommendation should not change.

B. History of this proceeding

10. This proceeding was commenced in October 2013. Since that time, the parties have appeared before this Court more than 200 times. More than 200 orders and endorsements have been granted. The lengthy history of this matter has been summarized in the Fiftieth Report of the Manager ("**50th Report**") to the extent that it is relevant to the relief sought in this proceeding. The facts set out in the 50th Report are all based on the findings of this Court.

Fiftieth Report of the Manager dated October 2, 2017 ("**50th Report**") at paras. 5-24, Motion Record of the Manager ("**MR**"), Tab 2, p. 16

II. Proposed Distributions

A. Background

11. The Manager's motion proposed that a total of \$2,980,000 be distributed from the following Schedule "B" Companies:

- (a) Tisdale Mews Inc. ("**Tisdale**");
- (b) Twin Dragons Corporation ("**Twin Dragons**");
- (c) Royal Gate Holdings Ltd. ("**Royal Gate**");
- (d) Royal Agincourt Corp. ("**Royal Agincourt**");
- (e) Lesliebrook Holdings Ltd. ("**Lesliebrook**" and collectively, the "**Distribution Companies**").

50th Report at para. 51, MR, Tab 2, p. 28

12. A claims process had been conducted in respect of each of the Distribution Companies, and creditors with a proven claim had been paid. Further claims (apart from a claim for payment of professional fees in this proceeding) are barred by the claims procedure order. The amount to be distributed is comprised of proceeds from the sale of the properties owned by each company and, in some cases, tax refunds. The details of the distribution proposed by the Manager are set

out in the Proposed Distribution Chart attached as Appendix “B” to the Manager’s Supplementary Report.

50th Report at para. 52, MR, Tab 2, p. 28

Proposed Distribution as of October 18, 2017, Supplementary Motion Record,
Tab 1.B, p. 9

13. A distribution of approximately \$2.45 million was authorized by the Order of Justice McEwen dated February 22, 2018.

B. Entitlement to distributions

14. Before making an equity distribution, it is first necessary to identify the shareholders of each of the Distribution Companies. The shares of each of these companies (together with all of the other Schedule “B” Companies) were originally to be divided equally between Bernstein and the Waltons. However, the August 12, 2014 Judgment of Justice Brown required that ownership of the Schedule “B” Companies be allocated based on the equity contributions made by each party. Accordingly, if Bernstein provided all of the equity paid into a company then it is entitled to all of the shares of that company. In such cases, all of the funds available for an equity distribution would be paid to Bernstein.

50th Report at para. 55, MR, Tab 2, p. 29

15. The identification of Bernstein’s equity contributions was relatively simple. These contributions were paid by Bernstein to either the Rose & Thistle Account or a bank account opened in the name of the applicable Schedule “B” Company. Each amount paid by Bernstein is referred to below as a “Direct DBDC Contribution”.

50th Report at para. 56, MR, Tab 2, p. 29

16. Identification of the Waltons’ contributions (if any) is much more complicated. The Waltons routinely diverted funds invested by Bernstein. In some cases, money paid by Bernstein into one company were transferred by the Waltons to another company and characterized as a Walton equity contribution to that company. In such cases, it is possible to establish that the Waltons used Bernstein’s money to fund their own equity contributions. Such payments are not, in the Manager’s view, Walton equity contributions in the sense required by the August 12

Judgment. Where a purported Walton equity contribution can be traced directly to funds provided by Bernstein, the relevant payment was treated as an “Indirect DBDC Contribution”.

50th Report at para. 57, MR, Tab 2, p. 30

17. Indirect DBDC Contributions and Direct DBDC Contributions have the same effect under the August 12 Judgment. Whether Bernstein made an equity contribution knowingly (in the case of a Direct DBDC Contribution) or unwillingly (in the case of an Indirect DBDC Contribution) the contribution entitles it to shares of the relevant company.

50th Report at para. 58, MR, Tab 2, p. 30

18. The converse is not necessarily true. Because the Waltons’ comingling and diversion of funds was so pervasive, it is difficult (and perhaps impossible) to make a definitive determination with respect to what (if any) equity contributions they made using their own money. Accordingly, contributions made by the Waltons that cannot be traced directly to Bernstein are referred to below as Recorded Contributions. Further analysis would be required to determine where the funds used to make the Recorded Contributions originated and, for the reasons described below, the Manager does not recommend that this analysis be undertaken at this stage.

50th Report at para. 59, MR, Tab 2, p. 30

19. To be clear, the Manager has *not* determined that the Waltons (or their other creditors) are entitled to any payment from the Schedule “B” Companies.

C. The Manager’s analysis

20. The Manager has completed an analysis in respect of each of the Distribution Companies in accordance with the principles described above. The Manager’s methodology was previously described in the Second Supplemental Report to the Manager’s 22nd Report. That methodology was accepted by Justice Newbould and used as the basis for an interim distribution approved by Order dated January 27, 2015 (the “**First Distribution Order**”).

50th Report at para. 60, MR, Tab 2, p. 30

Second Supplemental Report to the Manager’s 22nd Report, MR, Tab 2.R, p. 402

First Distribution Order, MR, Tab 2.S, p. 424

21. As described below, three of the Distribution Companies were specifically analyzed by the Manager in the First Distribution Report and funds were distributed from these companies pursuant to the First Distribution Order.

22. The Manager's analysis is based largely on the Property Investment Profile Report (the "**Investment Profile**") that was first served on the parties by the Inspector in October 2013. The accuracy of this document has not been challenged. To a more limited extent, the Manager's analysis is based on the Inspector's² analysis of the use of the largest of Bernstein's contributions to the Schedule "B" Companies. This analysis was challenged by the Waltons, but relied on by Justice Brown in granting the August 12 Judgment. The August 12 Judgment was upheld by the Court of Appeal.

50th Report at para. 62, MR, Tab 2, p. 31

Investment Profile, MR, Tab 2.T, p. 434

Inspector's Analysis of Bernstein's Contributions, MR, Tab 2.U, p. 436

23. The Manager's analysis can be summarized as follows:

- (a) If the Investment Profile shows that the Applicants made all of the equity contributions to a company (a "**Direct Contribution**"), then the Manager has concluded that the Applicants are entitled to 100% of the shares of that company;
- (b) If the Investment Profile shows that the Waltons made some of the equity contributions (a "**Recorded Contribution**") then the Manager reviewed its tracing analysis to determine whether the funds apparently contributed by the Waltons can be traced directly to one of the Applicants' equity contributions. If such a tracing is possible then the relevant contribution has been treated as an Indirect DBDC Contribution by the Applicants;
- (c) In one case, Tisdale, the Waltons have previously claimed that they are entitled to equity to reflect the increase in value between when the property was acquired

² Prior to its appointment as Manager, Schonfeld Inc. was appointed Inspector of the Schedule "B" Companies pursuant to the Order of Justice Newbould dated October 4, 2014.

and when Bernstein invested in it. This arrangement was set out in the agreement between Bernstein and the Waltons.

50th Report at para. 63, MR, Tab 2, p. 31

D. Relevance of the Recorded Contributions

24. The methodology applied by the Manager, and described above, was previously used as the basis for a distribution approved by Order of Justice Newbould dated January 27, 2015. At that time, the Manager held back funds to make an equity distribution to the Waltons or their creditors if they were found to be entitled to shares equal to their Recorded Contributions (if any) in the relevant companies.

50th Report at para. 64, MR, Tab 2, p. 32

25. The Manager has not completed the detailed tracing that would be required to determine definitively what (if any) equity contributions the Waltons made to the Schedule “B” Companies using their own money (or money taken from someone other than the Applicants, such as the Schedule “C” Investors). For the reasons described below, it is the Manager’s view that the cost of a detailed tracing analysis is not warranted.

50th Report at para. 65, MR, Tab 2, p. 32

26. The distinction between the Applicants’ contributions and the Waltons’ contributions is now less significant because on September 23, 2016 the Applicants obtained a final judgment against the Waltons for close to \$67 million. In the event that the Waltons are entitled to shares in, and/or distributions from, the Schedule “B” Companies, the Applicants would likely be entitled to seize those shares or garnish any dividends or distributions paid. Thus, it is very likely that the Applicants will receive all of the equity distributions from the Schedule “B” Companies.

50th Report at para. 66, MR, Tab 2, p. 32

27. The treatment of the Recorded Contributions is not relevant to the Waltons’ debts to Bernstein. The Manager has received a Notice of Garnishment from the Applicants. If a distribution is paid to the Waltons but garnished by Bernstein, then that distribution would be a partial payment of the Waltons’ debt to Bernstein. However, if the payment is treated as a

distribution to Bernstein then it would reduce Bernstein's damages and the amount of the Waltons' debt, by the same amount. In light of this, the Manager's tracing analysis is unlikely to have any practical effect on the Waltons.

50th Report at para. 67, MR, Tab 2, p. 32

28. That analysis could, however, affect the Waltons' creditors. If the Waltons are entitled to shares in the Schedule "B" Companies then such shares (and any associated right to receive equity distributions) could conceivably be available to pay creditors other than Bernstein. The Manager is aware of several contingent creditors of the Waltons but, as described below, only one such creditor has obtained judgment against the Waltons.

50th Report at para. 68, MR, Tab 2, p. 32

E. The Waltons' creditors

29. The Manager has no mandate relating to the Waltons personally. Ira Smith Trustee & Receiver Inc. ("**Ira Smith**") was appointed receiver over the Waltons' personal assets by Order dated September 5, 2014. Ira Smith did not realize any amounts for distribution to the Waltons' creditors. Because of this, it did not conduct a claims process to identify such creditors. Ira Smith was discharged by Order of Justice Newbould dated November 12, 2015.

50th Report at para. 69, MR, Tab 2, p. 33

30. To the knowledge of the Manager, the Waltons' debts and alleged debts include:

- (a) The Applicants' judgment, which is described above;
- (b) Potential liability to investors in the various Schedule "C" Properties (the "**Schedule "C" Investors**"). In affidavits previously sworn in this proceeding, Ms. Walton has deposed that the Waltons are personally liable to repay \$14 million to the Schedule "C" Investors;
- (c) A claim by Trez Capital Limited Partnership ("**Trez**") in the amount of \$14.3 million for fraudulent misrepresentation and \$1 million in punitive damages;
- (d) Potential claims from other mortgagees who hold personal guarantees from the Waltons and were not paid in full;

- (e) The Canada Revenue Agency, which had registered a lien against the Waltons' home for unpaid income taxes;
- (f) A claim by the Bank of Nova Scotia ("BNS"), relating to the Waltons' guarantee of loans advanced to one of their companies, Urban Amish Interiors. By Judgment dated July 22, 2016 (the "BNS Judgment"), the Waltons were ordered to pay \$98,562.76 to BNS.

50th Report at para. 70, MR, Tab 2, p. 33

31. In their motion material and factum, the Respondents seek to preserve funds for the benefit of only two creditors: Trez and the Schedule C Investors. Trez initially indicated that it would participate in this motion and oppose the distribution of funds to the Applicants, but subsequently withdrew its opposition. The Schedule C Investors have not participated in this aspect of the motion.

32. It is possible that BNS has a claim to any distributions owed to the Waltons in connection with the Schedule "B" Companies. However, such a claim would rank *pari passu* with Bernstein's much larger claim. On this basis, BNS would be entitled to 0.1% of amounts that would otherwise be owed to the Waltons. The balance of such funds would be paid to Bernstein. BNS has been served with this motion, but has not taken a position.

50th Report at para. 73, MR, Tab 2, p. 34

F. Twin Dragons

33. The Manager has not previously analyzed Twin Dragons' accounting records to determine what (if any) equity contributions were made by the Waltons.

50th Report at para. 83, MR, Tab 2, p. 36

34. According to the Property Investment Profile, Bernstein made an equity contribution of \$1,085,894 and the Waltons made a Recorded Contribution of \$350,000. Based on these contributions, the Applicants are entitled to at least 75.6% of the funds available for distribution.

50th Report at para. 84, MR, Tab 2, p. 36

35. Based on the Manager's review and analysis, the \$350,000 Recorded Contribution appears to relate to funds solicited from third party investors (the "**TD Investors**") by the Waltons and then recorded in Twin Dragons' books and records as a Walton equity contribution.

36. Ms. Walton represented to Dr. Bernstein that these investments were subsequently "moved" to Rose & Thistle, but it is not clear whether the TD Investors consented to this. The facts relevant to this issue are summarized below.

50th Report at para. 85, MR, Tab 2, p. 36

37. The Agreement relating to Twin Dragons was executed on September 24, 2010. The Agreement prohibits, among other things, any shares being issued to third parties. Both before and after the TD Agreement was executed, the Waltons appear to have solicited investments from third parties. These investments are summarized below:

- (a) On September 1, Gideon and Irene Levytam deposited \$50,000 into Twin Dragons' bank account. The same day, this amount was transferred to the Waltons' personal account;
- (b) On September 30, 2010, Ange Boudle deposited \$50,000 into Twin Dragons' bank account. These funds were transferred to the Rose & Thistle Account later the same day.
- (c) On October 22, 2010, Teresa and Joe Memme deposited \$100,000 into Twin Dragons' bank account. These amounts were transferred to the Rose & Thistle Account on October 27 and 28, 2010.
- (d) On October 29, 2010, Duncan Coopland deposited \$150,000 into Twin Dragons' bank account. These amounts were transferred to the Rose & Thistle Account later the same day.

50th Report at para. 86, MR, Tab 2, pp. 36-37

Twin Dragons Agreement dated September 24, 2010, MR, Tab 2.X, p. 509

38. These contributions were recorded in a receivable account set up to recognize equity that had not yet been funded. The effect of these entries was to make it appear as if the Waltons had contributed \$350,000 in equity to Twin Dragons.

50th Report at para. 87, MR, Tab 2, p. 37

General Ledger, MR, Tab 2.Y, p. 549

39. There is also some evidence that Ange Boudle, one of the Twin Dragons investors, was paid \$75,000 on account of his \$50,000 investment. This payment is recorded in a general ledger set up to record return of capital.

50th Report at para. 88, MR, Tab 2, p. 37

Return of Capital General Ledger, MR, Tab 2.Z, p. 550

40. On June 7, 2013, Jim Reitan (Bernstein's Director of Accounting and Finance) wrote to Ms. Walton to raise a number of concerns relating to the management of the Schedule "B" Properties. One of the issues raised by Mr. Reitan was that the TD Investors appeared to own shares in Twin Dragons. In response, Ms. Walton denied the existence of any outside investors in a letter dated June 13, 2013:

we do not have outside investors in the properties we jointly own with Dr. Bernstein. As Mario explained, before Dr. Bernstein became a 50% owner of [Twin Dragons...] we have attracted investment from third parties. The moment he became an investors, we shifted all of those responsibilities over to the Rose & Thistle Group Ltd. and that is where they remain.

50th Report at para. 89, MR, Tab 2, p. 37

Letter from J. Reitan dated June 7, 2013, MR, Tab 2.AA, p. 551

Fifth Report of the Inspector, Schonfeld Inc., para. 37, Exhibit "3" to the Affidavit of Lester Tong sworn October 20, 2016, Applicants' Motion Record, Tab A(3), p. 11.

41. In light of the foregoing, the rights (if any) of the TD Investors to participate in an equity distribution is unclear. This is why the Manager proposed holding 25% of the amount available for distribution from Twin Dragons pending a determination of this issue. However, the Applicants, the Respondents and one of the TD Investors, Duncan Coopland, seek to have the TD Investors' entitlement determined on this motion. The Manager does not object to this approach.

50th Report at para. 90, MR, Tab 2, p. 38

III. CONCLUSION

42. For the foregoing reasons, the Manager respectfully requests the relief set out in its Notice of Motion.

All of which is respectfully submitted this 1st day of March, 2018.

Handwritten signature in blue ink: "Goodmans LLP per [signature]". The signature is written in a cursive style. Below the signature is a horizontal line.

Goodmans LLP

SCHEDULE “A” COMPANIES

1. Dr. Bernstein Diet Clinics Ltd.
2. 2272551 Ontario Limited
3. DBDC Investments Atlantic Ltd.
4. DBDC Investments Pape Ltd.
5. DBDC Investments Highway 7 Ltd.
6. DBDC Investments Trent Ltd.
7. DBDC Investments St. Clair Ltd.
8. DBDC Investments Tisdale Ltd.
9. DBDC Investments Leslie Ltd.
10. DBDC Investments Lesliebrook Ltd.
11. DBDC Fraser Properties Ltd.
12. DBDC Fraser Lands Ltd.
13. DBDC Queen’s Corner Ltd.
14. DBDC Queen’s Plate Holdings Inc.
15. DBDC Dupont Developments Ltd.
16. DBDC Red Door Developments Inc.
17. DBDC Red Door Lands Inc.
18. DBDC Global Mills Ltd.
19. DBDC Donalda Developments Ltd.
20. DBDC Salmon River Properties Ltd.
21. DBDC Cityview Lands Ltd.
22. DBDC Weston Lands Ltd.
23. DBDC Double Rose Developments Ltd.
24. DBDC Skyway Holdings Ltd.
25. DBDC West Mall Holdings Ltd.
26. DBDC Royal Gate Holdings Ltd.
27. DBDC Dewhurst Developments Ltd.
28. DBDC Eddystone Place Ltd.
29. DBDC Richmond Row Holdings Ltd.

SCHEDULE “B” COMPANIES

1. Twin Dragons Corporation
2. Bannockburn Lands Inc. / Skyline – 1185 Eglinton Avenue Inc.
3. Wynford Professional Centre Ltd.
4. Liberty Village Properties Inc.
5. Liberty Village Lands Inc.
6. Riverdale Mansion Ltd.
7. Royal Agincourt Corp.
8. Hidden Gem Development Inc.
9. Ascalon Lands Ltd.
10. Tisdale Mews Inc.
11. Lesliebrook Holdings Ltd.
12. Lesliebrook Lands Ltd.
13. Fraser Properties Corp.
14. Fraser Lands Ltd.
15. Queen’s Corner Corp.
16. Northern Dancer Lands Ltd.
17. Dupont Developments Ltd.
18. Red Door Developments Inc. and Red Door Lands Ltd.
19. Global Mills Inc.
20. Donalda Developments Ltd.
21. Salmon River Properties Ltd.
22. Cityview Industrial Ltd.
23. Weston Lands Ltd.
24. Double Rose Developments Ltd.
25. Skyway Holdings Ltd.
26. West Mall Holdings Ltd.
27. Royal Gate Holdings Ltd.
28. Dewhurst Development Ltd.
29. Eddystone Place Inc.
30. Richmond Row Holdings Ltd.
31. El-Ad Limited
32. 165 Bathurst Inc.

SCHEDULE “C” PROPERTIES

1. 3270 American Drive, Mississauga, Ontario
2. 0 Luttrell Ave., Toronto, Ontario
3. 2 Kelvin Avenue, Toronto, Ontario
4. 346 Jarvis Street, Suites A, B, C, E and F, Toronto, Ontario
5. 1 William Morgan Drive, Toronto, Ontario
6. 324 Prince Edward Drive, Toronto, Ontario
7. 24 Cecil Street, Toronto, Ontario
8. 30 and 30A Hazelton Avenue, Toronto, Ontario
9. 777 St. Clarens Avenue, Toronto, Ontario
10. 252 Carlton Street and 478 Parliament Street, Toronto, Ontario
11. 66 Gerrard Street East, Toronto, Ontario
12. 2454 Bayview Avenue, Toronto, Ontario
13. 319-321 Carlaw, Toronto, Ontario
14. 260 Emerson Ave., Toronto, Ontario
15. 44 Park Lane Circle, Toronto, Ontario
16. 19 Tennis Crescent, Toronto, Ontario
17. 646 Broadview, Toronto, Ontario

DBDC SPADINA LTD., et al.
Applicants

NORMA WALTON, et al.
Respondents

Court File No. CV-13-10280-00CL

**ONTARIO
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Commercial List**

Proceeding commenced at Toronto

Supplementary Factum of Schonfeld Inc.
(Motion Returnable March 2, 2018)

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