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

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., EGLINTON CASTLE INC., and THOSE CORPORATIONS LISTED ON SCHEDULE C HERETO

Respondents

and

THOSE CORPORATIONS LISTED ON SCHEDULE B HERETO, TO BE BOUND BY THE RESULT AND THE REAL PROPERTY LISTED ON SCHEDULE C HERETO, TO BE BOUND BY THE RESULT

and

SUCH OTHER RESPONDENTS FROM TIME TO TIME AS ARE ON NOTICE OF THESE PROCEEDINGS AND ARE NECESSARY TO EFFECT THE RELIEF SOUGHT

FACTUM OF THE RESPONDENTS
(Returnable on June 3rd, 2016)

April 29th, 2016

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TO: THE SERVICE LIST

PART I – OVERVIEW

1. The Waltons seek a trial of the issue as to whether or not a fraud has been committed. Since the amendment of the Applicants' materials seeking such a finding, and the filing of the counterapplication materials by the Waltons, the Toronto Police Service has laid theft and fraud charges against both of the Waltons.

2. It would be grossly unjust and unfair, to the Waltons, if there were a finding of fraud in these civil proceedings, on the basis of affidavit evidence, etc., in the context of an application. A finding of that nature could cause serious prejudice and unfairness in the criminal matter—especially having regard to the potential to prejudice a potential jury. Certainly, it would be very difficult for a potential juror to sufficiently appreciate the impact of a finding of fraud, in the context of an application, and be an unbiased juror in a criminal prosecution.

3. On the contrary, a trial of the issue of fraud, in the course of the civil process, being on the balance of probabilities, would be a fair way to dispose of the civil matter, in light of the ability of a judge to explain to a jury the difference in the standard of proof in civil and criminal matters. Undoubtedly, this matter has, and will, generate a great deal of publicity.

4. Additionally, the fact that the civil matter has been ongoing, despite the fact that the police commenced an investigation sometime in the early summer of 2015, requires that procedural fairness be provided to the Waltons, in a situation where a staying of the civil

matter is a potential remedy. The law is clear that ongoing civil matters can be stayed where manifest prejudice would impact ongoing criminal proceedings. In this case, because of the multiplicity of issues and interests affected, the Waltons take the position that it would only be appropriate to seek a stay if the Court were to decline to grant a trial of the issue as to whether or not a fraud was committed.

5. The fact that the affidavits filed in the civil matter can be used against the Waltons, in the criminal matter, violates their right to remain silent. This is one specific reason why, in the overwhelming majority of cases, criminal charges are laid before civil proceedings are pursued. In fact, it is the position of the Waltons that there is no overarching public interest in pursuing the charges, in light of a multiplicity of factors that would have been apparent to the police at the time that they had initiated their investigation.

6. Furthermore, at the point of the writing of this factum, it appears that the court-appointed Manager has co-operated with the police investigation, without disclosing the fact of that involvement to the Court. At the very least, the disclosure of this fact, to the Court, could easily have been made, on an appropriate basis and so as not to impair the integrity of the police investigation.

7. Additionally, the potential reporting of this matter, to the police, was an issue at the cross-examination of Dr. Bernstein, when counsel to the Applicants responded to a question in this regard. In light of the fact that Ms. Walton was told that the matter had not been reported to the police by counsel, and that position changed subsequent to the conclusion

of the cross-examination, the Court must consider whether it is fundamentally fair that the Manager, a court-appointed official, and the Applicants were aware of the police involvement, which, presumably, was spirited by Dr. Bernstein, and the Waltons were not privy to the process. This is especially so, in light of the fact that the Waltons had made this an issue in the cross-examination of Dr. Bernstein early on.

8. The continuation of the civil matter may have been approached differently by the Waltons, if, in fact, they were made aware of the criminal investigation while they were actively involved in the civil matter. At the very least, the change in circumstances, in the form of knowledge of the police investigation, may very well have impacted upon the multiplicity of decisions made in the course of the civil matter.

9. The Waltons take the further position that a trial of the issue of breach of duty of good faith, owed by Dr. Stanley Bernstein, and the allegations contained in the counterapplication, is an absolute necessity, in the context of this matter, especially with respect to damages, due to the intentional and wanton destruction of the value of the portfolio, despite viable and commercially sensible options, including mediation, rather than public litigation.

PART II — SUMMARY OF THE FACTS

The Waltons make no claim to the monies in trust with Schonfeld Associates Inc.

10. There is approximately $4.5 million remaining in trust from the sale of Schedule C properties and $5.5 million remaining in trust from the sale of Schedule B properties. In addition, Dr. Bernstein has been paid out approximately $11 million from Schedule B and C properties and has been transferred Schedule B companies that contain significant tax losses.

11. The Waltons make no claim to any of the money in trust with Schonfeld Associates Inc. and are content that the Court distribute that money in accordance with the claims advanced by Dr. Bernstein and by all of the Schedule C Investors.

12. The Waltons support the DeJongs' claim for payment to them of the monies in trust related to Emerson/St. Clarens, Prince Edward and American Drive.

13. The Waltons support the Condos' claim for payment to them of the monies invested related to Cecil Street.

14. The Waltons support the Levytams' claim for payment to them of the monies invested by them related to various properties.

15. Attached as Schedule "A" to this Factum is a list of the Schedule C Investors with their corresponding investments in the various properties to assist Justice Newbould in determining a fair distribution of funds.

The necessity of a trial

16. The laying of criminal charges, in this matter, comes nearly two years after the commencement of these civil proceedings. As such, the criminal charges against the Waltons postdate the securing of all of the subject properties by the Manager/Receiver, as well as the amendment of the Applicants' pleadings to claim fraud.

17. The trial of the issues is of seminal necessity, for the purpose of determining the appropriate level of damages, if any, to award the Applicants, in light of Justice Brown's essential finding that documentation provided did not support an award of a specific amount of money.

18. In that context, a trial is necessary, being that the Inspector/Manager has not given the Waltons any credit for any maintenance, development, renovation or construction work that was done on the properties, even though it has been acknowledged that the relevant work was, in fact, completed.

19. Furthermore, there was no meaningful analysis of the cost consulting reports; the Inspector/Manager additionally refused to appreciate the sworn evidence of particular individuals—namely, Yvonne Liu, Carlos Carreiro, Steve Williams, Mario Bucci and Mark Goldberg—with respect to the value of the work which had been completed, and insisted on documentary proof to support the work which Ms. Walton indicated, from the commencement of the matter, did not exist.

20. In addition, the Inspector/Manage used the lack of paperwork to justify its refusal to provide to Rose and Thistle any credit for the work which had evidently been completed, with a value of approximately $25 million, as a result of which work the properties sustained a marked increase in value, in the amount of almost double that amount.

Dr. Bernstein is a professional litigant, having almost 40 years of history with the court, penal and disciplinary system

21. Bernstein has a history with the police, with the Discipline Committee of the College of Physicians and Surgeons, and with litigation, having initiated numerous lawsuits in his lifetime, with at least ten suits being initiated by him in the past decade. Two of them are relevant to these proceedings.

22. In 2009 Bernstein sued Dr. Pat Poon, a Canadian weight-loss doctor who operates four weight loss clinics in the Greater Toronto Area. Bernstein alleged defamation. After a six year lawsuit the Judge awarded Bernstein $10,000 in damages and no costs. Bernstein is appealing. The judge said the "trial was more about ego than injury" and opined that these two doctors had wasted the court's time and the public's money.

23. In 2013 Bernstein sued Blake, Cassels & Graydon LLP, Gary T. Daniel and Andre Perey for $3.2 million concerning their representation of him in the Slimband litigation. He

claimed they owed him money because they did not name as a Plaintiff in that action Post Road Health and Diet Inc. and only named Dr. Bernstein personally.

a. In that Statement of Claim, Bernstein in paragraph 46 pleads "The negative publicity from the Slimband Action, coupled with a settlement **without a public vindication of Dr. Bernstein,** resulted in adverse inferences about the Plaintiff's goodwill, reputation and credibility. As a result, the Plaintiffs were subject to several disparaging remarks and rumours in the professional medical community and throughout the greater Toronto area.

b. In paragraph 10 it is indicated that this law firm has been on retainer with Dr. Bernstein for over 10 years and that it had commenced **several actions on behalf of Post Road Health and Diet Inc.** in which damages were claimed.

24. These two lawsuits are relevant for the following reasons:

a. In the Poon matter, Bernstein was found to have wasted the court's time and resources for ulterior motives, similar to this case. He has utilized the civil courts and their vast resources to obtain biased rulings against the Waltons using the Inspector/Receiver he had on his payroll; and

b. Similar to the lawsuit he brought against his own lawyers, Bernstein in this case is seeking full public vindication and as such he refused any reasonable settlement

offers brought by any of the various parties who made them and instead has doggedly pursued findings to the detriment of the Waltons.

Dr. Bernstein's desire for vengeance and vindication in this matter caused his losses

25. In keeping with his pleading quoted above wherein Dr. Bernstein stated that he wanted **public vindication**, Bernstein told Norma Walton ("Walton") by phone that he did not care how much money he lost in this matter as long as she was bankrupt and in jail for what she did to him.

26. Bernstein rejected a settlement offer from the Waltons that would have paid him $78.5 million back in equity plus a profit of $31.5 million. Bernstein rejected offers from various other groups, at least three of which Walton is aware, that would have seen him exit the property portfolio whole with a profit.

27. As a result of permitting his emotional compulsions to take precedence over rational thought and consideration, the courses of action pursued by Bernstein have resulted in the following:

    a. They have driven Bernstein's litigation in this matter;

    b. They have caused Bernstein to act recklessly and without regard to his fiduciary duties to the jointly owned companies;

c. They have caused Bernstein to trample on the rights of innocent third parties who held equity in the portfolio;

d. They have driven Bernstein to litigate instead of mediating and arbitrating in accordance with the contracts and both parties' intentions;

e. They have caused Bernstein to recklessly pursue a receivership in the face of clear evidence that a receivership would decimate the portfolio value;

f. They have made Bernstein reckless in insisting the receivership application proceed without notice to secured creditors;

g. They have caused the tragic and unnecessary loss in equity value in the joint portfolio; and

h. They have caused personal guarantees to be triggered due to the significantly depressed prices that the portfolio sold for.

28. Anyone with even a passing knowledge of real estate and particularly commercial real estate knows that receiverships and powers of sale destroy value. Bernstein had 50 years of business experience, much of it in the real estate field, when he triggered the receivership

that in turn triggered the rights of lenders to power of sale properties. He of anyone knew that his chosen course of action would cause significant losses.

29. Bernstein was content with that bargain so long as Walton was destroyed and he thus secured his public vindication and vengeance.

30. In Walton's October 31, 2013 Affidavit she predicted that if Bernstein was permitted to petition the portfolio into receivership, significant losses would occur to both parties' equity investments and Walton and her husband would be called upon to make good on personal guarantees because the receivership process would result in losses to lenders.

31. What Walton predicted in October 2013 has come to pass. Walton was not prescient. Anyone looking at the situation at that time would have foreseen huge losses if the receivership was pursued and would have questioned Bernstein's motivations.

Walton did not cause Bernstein's damages

32. Independent companies met with Bernstein to offer to buy him out, to buy the Waltons out, to buy the whole portfolio, to structure whatever type of transaction he wished to see him get out his equity with profits. He refused all of them.

33. No sane person would petition his own portfolio into receivership without notice to the secured creditors unless he was wantonly reckless about destruction of value and unless he was motivated by other factors.

34. Walton is not responsible for Bernstein's decision to employ a "scorched earth" approach to this dispute and to litigate.

35. Walton is not liable to Bernstein for the loss he has suffered as a result of his decision to litigate this matter.

36. It was Bernstein's decision to petition the joint portfolio and all jointly owned properties into receivership without notice to the parties' secured creditors. As a result, more than half of the properties owned by the Waltons were sold via power of sale.

Dr. Bernstein intentionally destroyed Walton equity and Schedule C Investor equity

37. In Bernstein's quest for retribution against Walton, he recklessly destroyed the equity value in both the Schedule B portfolio of properties and the Schedule C portfolio of properties.

Walton is entitled to defend against Bernstein's fraud allegation

38. For the first time in November of 2015 Bernstein claimed a damages order with a fraud finding attached to it that would survive bankruptcy.

39. Walton is entitled to an opportunity to explain to the Court, through her own testimony and through the testimony of her former employees and business colleagues that all money transferred from Schedule B properties to Rose and Thistle Group Ltd. was justified and was for work done. The work done by Rose and Thistle has already been acknowledged by Mr. Justice Brown (as he then was) and Schonfeld. Schonfeld refused to quantify the value of that work and the corresponding increase in value in the properties that occurred as a result, hence that information will need to come from Walton, the third party appraisal reports, and the witnesses that have sworn affidavits supporting the value of the work completed by Rose and Thistle.

40. Walton has provided appraisal reports to show that the properties under Rose and Thistle's management dramatically increased in value as a result of the work done. That work done entitles Rose and Thistle to have been paid money from the Schedule B properties.

41. Walton has provided pro formas, all showing that Rose and Thistle would be doing work on every property to further the development plan for that property, and all showing that Rose and Thistle's work was apparent and budgeted for from the beginning. Bernstein has given evidence confirming that he knew Rose and Thistle would be doing work on the properties and being paid for that work.

42. There was never any fraudulent intent on behalf of Walton in transferring monies. All monies were transferred to compensate for deposits paid and work done by Rose and Thistle.

43. Walton has provided new evidence as follows:

    a. Mark Goldberg, former COO of Rose and Thistle, has sworn a detailed affidavit showing the value of the equity in the portfolio prior to litigation, detailing the work done by Rose and Thistle staff, and showing the increase in value achieved due to Rose and Thistle's management of those properties.

    b. Mario Bucci, former CFO of Rose and Thistle, has sworn a detailed affidavit showing the amount of money invested in the Schedule B properties, the monies paid by Rose and Thistle in deposits, and the people employed by Rose and Thistle to do this work and cause this increase in property value.

    c. Steve Williams, former VP Planning, has sworn a detailed affidavit showing the amount of work done by Rose and Thistle to these properties which resulted in the properties increasing in value from date of purchase to date of valuation.

    d. Norma Walton has sworn two detailed affidavits attaching all third party appraisal reports showing the increase in value that Rose and Thistle was able to achieve with

the properties and explaining where the monies went that were transferred and the work done to justify the payments made.

PART III — THE ISSUES AND THE LAW

The basis for a finding of fraud has not been established in this case

44. A finding of fraud requires the following basic elements:

    a. Misrepresentation of a material fact;

    b. Knowledge on the part of the person misrepresenting that they were misrepresenting a fact;

    c. Making the misrepresentation purposefully with the intent of fooling the victim;

    d. The victim believed the misrepresentation and relied upon it; and

    e. The victim suffered damages as a result of the misrepresentation.

45. A civil fraud case requires the need to prove that the person committing fraud materially misrepresented the fact, that the fact was false and they knew that it was false, that they did so with the intention of getting the victim to act on the misrepresentation and that the victim

acted reasonably in believing the misrepresentation and that the victim suffered a damage as a result of the misrepresentation.

46. In order to sustain an action in deceit there must be proof of fraud and nothing short of that will suffice. Secondly, fraud is proved when it is shown that a false representation has been made (1) knowingly, or (2) without belief in its truth or (3) recklessly, careless whether it be true or false…Thirdly, if fraud be proved, the motive of the person guilty of it is immaterial. It matters not that there was no intention to cheat or injure the person to whom the statement was made. (Reference: 1889 case Derry v. Peek)

47. The false statement must actually induce the person to act upon it. (Parna v. G. & S. Properties Ltd., 1971) "But for the tortious conduct of the defendant, the plaintiff would not have sustained the injury complained of." (Snell v. Farrell)

48. Four elements of the tort of civil fraud:

    a. A false representation made by the defendant;
    b. Some level of knowledge of the falsehood of the representation on the part of the defendant whether through knowledge or recklessness;
    c. The false representation caused the plaintiff to act; and
    d. The plaintiff's actions resulted in a loss.

49. Summary judgment is not appropriate where there is a genuine issue requiring a trial. The motion judge should ask whether the matter can be resolved in a fair and just manner on a summary judgment motion. This will be the case when the process:

    a. Allows the judge to make the necessary findings of fact;
    b. Allows the judge to apply the law to the facts; and
    c. Is a proportionate, more expeditious and less expensive means to achieve a just result.

50. Hryniak v. Bruno Appliances: Hyrniak was aware of the falseness of the representations and exercised full dominion and control over Bruno Appliances' funds but this finding would support liability in conversion but is not sufficient to establish fraud.

51. Walton did not defraud Bernstein or any of her investors. Walton acted in accordance with the contracts between the Waltons and the investors including Bernstein whereby Walton's equity was to be provided as needed after the initial funds from them had been exhausted.

52. Walton pooled monies for the benefit of the joint portfolio. Although Walton was behind in her accounting, she never defrauded any of her investors including Bernstein. At the time that Walton was running the portfolio, all mortgage payments were current and the properties were being developed or had been developed. Some were in pay and others were tracking to be in pay. The portfolio was profitable and every investor's equity was secured by a robust and valuable portfolio.

53. Bernstein ceded all control of the portfolio to Walton, as a result of his complete satisfaction with his consequent ability to operate his business, vacation in Florida during the winter season, enjoy leisurely time at his cottage and travel to various locales, whilst simultaneously receiving regular updates from Walton, in addition to approximately $4,000,000 in annual interest and equity repayment distributions from his investment in the joint portfolio. In this regard, Bernstein was pleased to continue to provide additional funds as required by the portfolio, having regard to the substantial benefits which he had reaped from the same.

54. Bernstein was intent on building a $1 billion portfolio with Walton; with such an objective in mind, he provided the requisite funding to enable Walton to locate, finance, develop and reposition the properties, so that they were either sold for a profit or put into pay to provide a return of debt and equity. Bernstein confirmed his complete ceding of control to Walton in his cross examination. He was never interested in enforcing the contracts between the parties, nor was he concerned with the manner in which Walton exercised her duties, so long as he received his annual distributions and the properties were being developed in accordance with the development plans for each of them.

55. Walton never misrepresented any facts to Bernstein. Bernstein never relied upon any misrepresentation. And no misrepresentation caused Bernstein's losses.

There has been no order against Walton in fraud

56. Both Bernstein and the Manager claim that Brown found Walton acting in a manner to defraud Bernstein.

57. Brown only makes reference to the term "fraud" in his Endorsement specifically as it relates to two transactions, one regarding Tisdale and the other regarding Queen Street East. There was no general finding that Walton defrauded Bernstein.

58. The Court of Appeal confirms Brown's decisions and their comments relate solely to the constructive trusts portion of the order, which is the only part of the order that was appealed. Their comments mirror Brown's in that the only time fraud was mentioned in Brown's decision was in a reference relating to Tisdale and Queen Street East.

59. Walton is confident that once she is given the opportunity at a trial to explain the Tisdale and Queen Street East transactions any notion of fraud will be eliminated.

60. Walton relied upon the Manager's employee in structuring those transactions as she did. The transactions were justified and once explained, show no fraud occurred.

61. Nowhere else in Brown's decision does the issue of fraud arise.

62. The only instance where Justice Brown found fraud related to the properties called Tisdale and Queen Street East. James Merryweather worked with Mario Bucci and Norma Walton

to account for those two properties. It was Mr. Merryweather's suggestion that they be reported as they were to reflect the reality that Dr. Bernstein bought into those projects after the Waltons had dramatically increased their value and not from the beginning.

63. If Ms. Walton is able to explain that process to the Court, she is confident that the Court will understand there was no fraud related to those transactions.

64. There has been no other reference to fraud by Justice Brown in his 104 page decision from August 2014.

Ms. Walton kept Dr. Bernstein fully apprised of the development of the portfolio

65. Bernstein had little interest in the day to day workings of the joint property portfolio. He rarely if ever came to Walton's office and never asked for any documents related to the joint portfolio. He offered to provide money whenever Ms. Walton requested it, and was generally agreeable to anything that Ms. Walton proposed.

66. Throughout the partnership Walton met with Bernstein, on average, twice per month always at his offices and she regularly provided him with updates regarding the progress of various joint-portfolio developments. Over the course of the three-year investing relationship, she sent Bernstein hundreds of pages of e-mails, to which he responded. In this regard, Dr. Bernstein was kept fully apprised of all matters relating to the development

of the joint-portfolio properties, including, as per his implied consent, verbal updates, as opposed to written reports.

The Joint Property Portfolio was performing well and according to plan

67. Bernstein earned profits from the joint-portfolio venture in three distinct ways:

    a. Receiving premium interest rates on monies advanced in the form of mortgages, being a registered charge against the property and, thus, a secured investment (namely, an 8% annual interest rate on a first mortgage, in addition to a 2% placement fee, and an 11% annual interest rate on a second mortgage, in addition to a 2% placement fee);

    b. The contribution of shareholder loans, pursuant to the provisions of the relevant contractual agreements, to be repaid prior to the distribution of any profits earned upon the completion of the project; and

    c. The receipt of 50% of the profits earned as a result of the completion of each project.

68. At the time Bernstein started litigation, he was receiving approximately $4 million a year in annual interest and equity distributions from the joint portfolio.

Don Mills Mortgage Financings

69. Ms. Walton had a colour of right to facilitate the placement of two mortgages on the Don Mills properties, located at 1450 and 1500 Don Mills Road, in the total amount of $6,000,000.00. At the time, the portfolio required a capital infusion; the mortgages were the chosen option instead of requiring a capital call from the partners or from Bernstein alone, as had been the practice in the past.

70. In addition to Bernstein's consent to Ms. Walton taking responsibility for strategic decisions associated with operating the joint-portfolio properties, the Waltons possessed equity in the Don Mills property, similar to the other properties constituting the joint-portfolio. As such, in obtaining mortgages against the Don Mills properties, they were borrowing against their own equity in the properties.

71. Ms. Walton used the vast majority of the monies derived from the Don Mills mortgages in an easily traceable manner, in order to address the immediate cash-flow requirements of the portfolio. Bernstein was advised of the mortgages in and around September 2013, before he commenced litigious proceedings.

72. Subsequent to fulfilling the joint-portfolio's immediate cash-flow needs, Ms. Walton utilised the Waltons' equity portion of the Don Mills mortgages, in the amount of approximately $2.5 million, to fund development expenses within the Walton portfolio. Shortly thereafter, when Bernstein expressed his disapproval of the mortgage

arrangements, Ms. Walton refinanced the Hazelton properties and repaid to the Don Mills properties the sum of approximately $800,000.

73. Between October 17th, 2013, and December 15th, 2013, Ms. Walton personally funded the joint-portfolio, using approximately $880,000.00 of her own assets, in an effort to ensure that all mortgage payments remained current.

Dr. Bernstein was repaid most of the $22.6 million he now complains about

74. The following sums were advanced by Bernstein to the Schedule B properties and to The Rose and Thistle Group Ltd. as construction loans to compensate for the renovation and rebuilding of the properties:

    a. 241 Spadina, $2.8 million;
    b. 32 Atlantic, $4.5 million;
    c. 18 Wynford, $2.8 million; and
    d. 1185 Eglinton East, $1.5 million.

75. Bernstein has been fully repaid for all of the above monies from the refinancing of those four properties prior to any litigation. That $11.6 million should not form any part of the $22.6 million claim and should be deducted from it as having been fully repaid.

76. In addition, Rose and Thistle paid directly $6 million of deposits to purchase Schedule B properties. That money should be deducted from the $22.6 million.

77. That leaves $4 million to be accounted for, which can be easily explained by Rose and Thistle.

74. Dr. Bernstein is claiming damages of $22.6 million against the Waltons' Schedule "C" companies and properties. The basis for his claim is that his money went into the Schedule "B" properties and was then paid to Rose and Thistle and then was paid from Rose and Thistle into the Schedule "C" properties.

75. In fact, Dr. Bernstein was repaid, or received value, for the entirety of the sum of $22.6 million, which he claims in damages, as demonstrated below:

a) 32 Atlantic:

i. On August 29th, 2011, this property was purchased by Bernstein and the Waltons for $7 million, as referenced in the relevant parcel register, attached as Exhibit 32 to the Affidavit of Jim Reitan, sworn on June 26th, 2014.

ii. Between August 29th, 2011 and August 1st, 2012, Dr. Bernstein advanced to the 32 Atlantic property the sum of $4.5 million as a construction mortgage, as it is indicated in the relevant pro forma attached as Exhibit "A" to the Affidavit of Norma Walton, sworn on October 3rd, 2013 (Tab 7, Exhibit "B," of Responding Motion Record dated September 21st, 2015).

iii. 32 Atlantic paid to Rose and Thistle the sum of $4.5 million, because Rose and Thistle was the general contractor on the project and completed the work to renovate

it, as set out in the Affidavits of Yvonne Liu, Carlos Carreiro, Mark Goldberg and Steven Williams, previously filed in this matter. In this regard, the relevant Intrepid Cost Consulting Report, attached as Exhibit "H" to the Affidavit of Norma Walton, sworn on June 26th, 2014 (Tab 9 of Responding Motion Record dated September 21st, 2015), encloses before-and-after photos which demonstrate the work completed by Rose and Thistle.

iv. Dr. Bernstein is including the sum of $4.5 million as part of his $22.6 million damages claim, as referenced in the Inspector's Tracing Analysis, attached as Appendix "F" to the Fourth Interim Report of the Inspector.

v. On August 1st, 2012, the tenants moved into the property, as referenced in the relevant lease previously filed with the Court. Due to the work completed by Rose and Thistle, and their attraction of the tenant, Cossette Media, the property was appraised at a value of $19.5 million as at July 17th, 2012, almost exactly one year after purchasing the property for $7 million, as referenced in the relevant appraisal report. This, therefore, constitutes a $12.5 million increase in value due to the work completed by Rose and Thistle.

vi. A new mortgage was arranged and closed on August 28th, 2012, as referenced in the relevant parcel register, attached as Exhibit 32 to the Affidavit of Jim Reitan, sworn on June 26th, 2014, which new mortgage paid back, in full, Dr. Bernstein's $4.5

million construction mortgage and his $6.8 million acquisition mortgage, on August 29th, 2012.

vii. Nonetheless, despite Dr. Bernstein being fully repaid the $4.5 million sum on August 29th, 2012, he is now trying to claim that sum as part of his entitlement to the Schedule "C" properties.

b) 241 Spadina Avenue:

i. On October 18th, 2010, this property was purchased by Bernstein and the Waltons for $4.5 million, as referenced in the relevant parcel register attached as Exhibit 29 to the Affidavit of Jim Reitan, sworn on June 26th, 2014.

ii. Between October 18th, 2010 and April 24th, 2012, Dr. Bernstein advanced to the 241 Spadina property the sum of $2.7 million as a construction mortgage, as well as a further sum of $400,000.00 as a tenant improvement allowance, for a total of $3.1 million, as referenced in the pro forma attached as Exhibit "A" to the Affidavit of Norma Walton, sworn on October 3rd, 2013 (Tab 7, Exhibit "B," of Responding Motion Record dated September 21st, 2015).

iii. 241 Spadina Avenue paid, to Rose and Thistle, the full amount of the $2.7 million sum, because Rose and Thistle was the Project Manager of the project and completed much of the work required to renovate the property, as set out in the Affidavits of

Yvonne Liu, Carlos Carreiro, Mark Goldberg and Steven Williams, previously filed in this matter. Please also reference, in this regard, the relevant Intrepid Cost Consulting Report, attached as Exhibit "H" to the Affidavit of Norma Walton, sworn on June 26th, 2014 (Tab 9 of Responding Motion Record dated September 21st, 2015), which includes before-and-after photos demonstrating the work completed by Rose and Thistle.

iv. Dr. Bernstein has included that sum of $3.1 million as a portion of his $22.6 million damages claim, as referenced in the Inspector's Tracing Analysis, attached as Appendix "F" to the Fourth Interim Report of the Inspector.

v. The tenants moved into the property between 2011 and 2013, as referenced in the relevant rent roll.

vi. Due to the work completed by Rose and Thistle, and their attraction of the tenants, the property was appraised at approximately $12 million as at December 12th, 2012, approximately two years after purchasing the property for $4.5 million, as referenced in the relevant appraisal report. This, therefore, constitutes an estimated $7.5 million increase in value due to the work completed by Rose and Thistle.

vii. A new mortgage was arranged and closed on May 18th, 2012, which new mortgage paid back, in full, Dr. Bernstein's construction mortgage in the amount of $3.1 million and his acquisition mortgage in the amount of $3.6 million, as per the parcel

register attached as Exhibit 29 to the Affidavit of Jim Reitan, sworn on June 26th, 2014. Nonetheless, despite being fully repaid the sum of $3.1 million on April 24th, 2012, Dr. Bernstein presently seeks to claim that sum as part of his entitlement to the Schedule "C" properties.

c) 1185 Eglinton Avenue East:

i. On December 17th, 2010, this property was purchased by Bernstein and the Waltons for $8.5 million, as referenced in the relevant parcel register, attached as Exhibit 30 to the Affidavit of Jim Reitan, sworn on June 26th, 2014.

ii. Prior to purchase, through to December 10th, 2012, Dr. Bernstein advanced to the 1185 Eglinton Avenue property the sum of $1.4 million as a development and demolition mortgage, as it is indicated in the pro forma attached as Exhibit "A" to the Affidavit of Norma Walton, sworn on October 3rd, 2013 (Tab 7, Exhibit "B," of Responding Motion Record dated September 21st, 2015).

iii. 1185 Eglinton Avenue paid to Rose and Thistle that sum of $1.4 million because Rose and Thistle was the Project Manager for the demolition of the existing 13-storey building, which had been torn down. Rose and Thistle was additionally responsible for obtaining the development approvals to turn the property into a high-rise residential development site, as set out in the Affidavits of Yvonne Liu, Carlos Carreiro, Mark Goldberg and Steven Williams, previously filed in this matter. Note

that the development approval work commenced in August, 2012, four months before the purchase closed. In this regard, enclosed in the BTY Group Cost Consulting Report, attached as Exhibit "K" to the Affidavit of Norma Walton, sworn on June 26th, 2014 (Tab 9 of Responding Motion Record dated September 21st, 2015), are before-and-after photos which demonstrate the work completed by Rose and Thistle.

iv. Dr. Bernstein is including the $1.4 million sum as part of his $22.6 million damages claim, as referenced in the Inspector's Tracing Analysis, attached as Appendix "F" to the Fourth Interim Report of the Inspector.

v. The demolition and development approval was completed by December 10th, 2012.

vi. Due to the work completed by Rose and Thistle, almost exactly two years after purchasing the property for $8.5 million, the property was appraised at $19.4 million, as at December 6th, 2012, being an approximate $11 million increase in value due to the work completed by Rose and Thistle, as referenced in the relevant appraisal report.

vii. A new mortgage was arranged and closed on December 10th, 2012, which new mortgage paid back, in full, Dr. Bernstein's funds in the amount of $1.4 million, as a construction mortgage, and $6.8 million as an acquisition mortgage, as per the parcel register attached as Exhibit 30 to the Affidavit of Jim Reitan, sworn on June 26th, 2014.

viii. Hence, Dr. Bernstein was fully repaid the $1.4 million on December 10th, 2012, although he is now trying to claim that sum as part of his entitlement to the Schedule "C" properties.

d) 18 Wynford Drive:

i. On February 7th, 2011, this property was purchased by Bernstein and the Waltons for $8.5 million, as referenced in the relevant parcel register, attached as Exhibit 31 to the Affidavit of Jim Reitan, sworn on June 26th, 2014.

ii. Between February 7th, 2011 and March 7th, 2013, Dr. Bernstein advanced to the 18 Wynford property the sum of $2.8 million as a construction mortgage, as referenced in the relevant pro forma attached as Exhibit "A" to the Affidavit of Norma Walton, sworn on October 3rd, 2013 (Tab 7, Exhibit "B," of Responding Motion Record dated September 21st, 2015).

iii. 18 Wynford paid to Rose and Thistle that sum of $2.8 million because Rose and Thistle was the General Contractor on the project and completed the work to renovate it, as set out in the Affidavits of Yvonne Liu, Carlos Carreiro, Mark Goldberg and Steven Williams, previously filed in this matter, and as it is indicated in the Intrepid Cost Consulting Report attached as Exhibit "J" to the Affidavit of Norma Walton, sworn on June 26th, 2014 (Tab 9 of Responding Motion Record dated September 21st,

2015), which report includes before-and-after photos demonstrating the work completed by Rose and Thistle.

iv. Dr. Bernstein is including that $2.8 million sum as part of his $22.6 million damages claim, as referenced in the Inspector's Tracing Analysis, attached as Appendix "F" to the Fourth Interim Report of the Inspector.

v. A number of tenants moved in between February 7th, 2011 and March 7th, 2013, as referenced in the relevant rent roll.

vi. Due to the work completed by Rose and Thistle, their improvement of the building, and their attraction of the tenants, the property was appraised at $14.5 million as at January 21st, 2013, almost exactly two years after purchasing the property for $8.5 million, being a $6 million increase in value due to the work completed by Rose and Thistle, as referenced in the relevant appraisal report.

vii. A new mortgage was arranged and closed on March 7th, 2013, which new mortgage paid back, in full, Dr. Bernstein's $2.8 million, as per the parcel register attached as Exhibit 31 to the Affidavit of Jim Reitan, sworn on June 26th, 2014.

viii. Hence, Dr. Bernstein was fully repaid the sum of $2.8 million on March 7th, 2013, albeit he is now trying to claim that amount as part of his entitlement to the Schedule "C" properties.

e) 78 Tisdale Avenue:

i. On March 26th, 2010, this property was purchased by the Waltons for $1.4 million, as referenced in the relevant parcel register, attached as Exhibit 38 to the Affidavit of Jim Reitan, sworn on June 26th, 2014.

ii. Between March 26th, 2010 and November 15th, 2010, the Waltons were in the process of development approving the property to permit multiple townhouses. On November 15th, 2010, Dr. Bernstein advanced mortgage monies to replace the existing lender; he was not an owner at that time. The Waltons continued the development approval process and began generating interest from prospective purchasers of the property, so as to permit those purchasers to build the townhouses.

iii. On December 27th, 2011, Dr. Bernstein agreed to buy in to the project, at a price of $6,703,000.00 for the property, given the work completed by Rose and Thistle to date and the two third-party offers generated by the Tisdale property at that time. This constituted an increase in property value of approximately $5,303,000.00, over the course of the 20-month period since purchase. The relevant pro forma is attached as Exhibit "A" to the Affidavit of Norma Walton, sworn on October 3rd, 2013 (Tab 7, Exhibit "B," of Responding Motion Record dated September 21st, 2015). The two offers used to calculate fair market value are attached hereto as Exhibit "C."

iv. Justice Brown has characterized Dr. Bernstein buying into Tisdale as improper on the part of the Waltons. James Merryweather from Schonfeld Inc. sat with Mario Bucci and Norma Walton, in an effort to determine how to best demonstrate that Dr. Bernstein was buying in at a higher price than the existing cost base, as of December 27, 2011. It was on Mr. Merryweather's recommendation that the Waltons had their accountant write up the value of the company to the $6,708,000.00 amount, to reflect that Dr. Bernstein was buying in at a higher value.

v. Despite this involvement of Mr. Merryweather, an employee of Schonfeld, the Inspector's Report describing this accounting transaction made it seem that the Waltons were doing something wrong, when, in fact, they had simply followed Mr. Merryweather's advice as to how to demonstrate that Dr. Bernstein bought in at a higher value than the Waltons' cost base.

vi. After Dr. Bernstein bought in, the Waltons continued to progress with the property and they refinanced the property on June 27th, 2013, with a third-party lender, and Dr. Bernstein was repaid his mortgage, which was discharged.

vii. 78 Tisdale paid monies to Rose and Thistle because the Waltons were entitled to the increase in value from the date of purchase to the date of Dr. Bernstein's buy-in.

viii. Dr. Bernstein is including that sum of $1.4 million, as it relates to Tisdale, as part of his $22.6 million damages claim, as referenced in the Inspector's Tracing Analysis, attached as Appendix "F" to the Fourth Interim Report of the Inspector.

ix. In fact, the new mortgage paid to Dr. Bernstein all monies that were advanced on the Tisdale property, as it is indicated in the parcel register attached as Exhibit 38 to the Affidavit of Jim Reitan, sworn on June 26th, 2014, confirming that the mortgage closed and confirming that Dr. Bernstein's mortgage was discharged.

x. Thus, Dr. Bernstein was fully repaid the $1.4 million amount on June 27th, 2013. Yet, he is now attempting to claim this amount as part of his entitlement to the Schedule "C" properties.

f) 875 Queen Street East

i. Justice Brown has characterized Dr. Bernstein buying into Queen Street as improper on the part of the Waltons. James Merryweather from Schonfeld Inc. sat with Mario Bucci and Norma Walton, in an effort to determine how to best demonstrate that Dr. Bernstein was buying in at a higher price than the existing cost base. It was on Mr. Merryweather's recommendation that the Waltons had their accountant write up the value of the company to the increased amount, to reflect that Dr. Bernstein was buying in at a higher value.

ii. Despite this involvement of Mr. Merryweather, an employee of Schonfeld, the Inspector's Report describing this accounting transaction made it seem that the Waltons were doing something wrong, when, in fact, they had simply followed Mr. Merryweather's advice as to how to demonstrate that Dr. Bernstein bought in at a higher value than the Waltons' cost base.

g) 1500 Don Mills Road:

i. Dr. Bernstein, at his request of the Court, is now the sole owner of Donalda Developments Inc., pursuant to an order of the Court. His CFO, Jim Reitan, has confirmed under oath that Dr. Bernstein took over ownership of that company with the objective of utilizing the tax losses contained in the company for his own purposes. The tax losses are estimated at approximately $5 million.

ii. Dr. Bernstein is including, as part of his $22.6 million damages claim, the sum of $1,027,960.00 from 1500 Don Mills Road, yet he is now the sole owner of that entity. He is in line to receive the benefit of the tax losses in the sum of approximately $5 million. Those tax losses will likely exceed the $1,027,960.00 amount which he presently claims in damages, when applied against capital gains or income.

iii. Also, Rose and Thistle performed work at 1500 Don Mills Road, justifying the sum paid to it, as it is indicated in the cost consulting report of BTY, confirming the value

of this work, as attached as Exhibit "T" to the Affidavit of Norma Walton, sworn on June 26th, 2014 (Tab 9 of Responding Motion Record dated September 21st, 2015).

iv. Hence, it seems, Dr. Bernstein is trying to obtain double recovery of the amount of $1,027,960.00.

h) 65 Heward Avenue:

i. Dr. Bernstein is now the mortgagee on this property. He is presently claiming damages as against this property, in the amount of $2,076,000.00.

ii. Rose and Thistle performed environmental remediation and general contracting work at this property, which justified the payment of $2,076,000.00, as set out in the Affidavits of Yvonne Liu, Carlos Carreiro, Mark Goldberg and Steven Williams, previously filed in this matter, and as it is demonstrated by the pro forma attached as Exhibit "A" to the Affidavit of Norma Walton, sworn on October 3rd, 2013 (Tab 7, Exhibit "B," of Responding Motion Record dated September 21st, 2015), as well as the BTY cost consulting report attached as Exhibit "O" to the Affidavit of Norma Walton, sworn on June 26th, 2014 (Tab 9 of Responding Motion Record dated September 21st, 2015).

i) 3765 St. Clair Avenue East:

i. Dr. Bernstein is claiming damages as against 3765 St. Clair Avenue East, in the amount of $425,309.00.

ii. Rose and Thistle development approved this property for townhouses, thus increasing the value from $1.6 million, on December 26th, 2011, to $3.5 million in 2014, such development approval justifying the $425,309.00 which Rose and Thistle was paid and which Rose and Thistle told Dr. Bernstein it would cost, pursuant to the pro forma attached as Exhibit "A" to the Affidavit of Norma Walton, sworn on October 3rd, 2013 (Tab 7, Exhibit "B," of Responding Motion Record dated September 21st, 2015).

iii. Dr. Bernstein benefitted from the increase in value of St. Clair and, thus, should not also be entitled to benefit from a windfall of $425,309.00. Otherwise, he will have been unjustly enriched.

Numerous people have sworn evidence to support the work done by Rose and Thistle

76. The following people have provided sworn evidence, none of which has been cross-examined on by Bernstein, to support the significant work done by Rose and Thistle on the Schedule B properties:

a. Yvonne Liu;
b. Carlos Carreiro;
c. Mark Goldberg;

d. Steve Williams;

e. Mario Bucci; and

f. Norma Walton

77. Bernstein chooses to ignore that evidence and does not want the court to consider it. It would be severely unfair if the court were to find that the $22.6 million was not justified without hearing from the above witnesses who confirm that the work was done.

78. Schonfeld has had no interest in trying to quantify the value of the work done by Rose and Thistle because that would be contrary to his mandate from Bernstein to try to show the Waltons acted in a criminal manner.

79. The work that was paid for with the $22.6 million supported an increase in value of the appraised value of the properties in the amount of $45 million. That increase in value must be acknowledged in any discussion about the $22.6 million.

Authorization and Approval of Bernstein to run the portfolio as Walton saw fit

80. Norma Walton and Ronauld Walton, ("the Waltons") were entitled to transfer funds from Schedule B companies that they jointly owned with Dr. Stanley Bernstein ("Bernstein") to their company, the Rose and Thistle Group Limited ("Rose and Thistle"). Transfers to Rose and Thistle are justified as payment for services rendered to the Schedule B companies. Walton's delayed equity investment and the loss in value of the Schedule B properties upon appointment of a receiver could reasonably have been expected.

81. For each Schedule B property, the parties agreed that Bernstein would provide his equity investment at the beginning of each project, and Walton would provide her equity investment at a later date as required.

82. Rose and Thistle performed construction and development services that increased the market value of the Schedule B properties. Bernstein recognized this increase in value and he invested in over 30 properties with Walton, again, keeping her equity investment open ended.

83. The rapid growth of the portfolio outpaced the ability of Rose and Thistle to provide a proper accounting as agreed upon.

84. Bernstein questioned the accounting and whether Walton was making her equity investments. Around September 2013 he began litigation that resulted in the appointment of a receiver.

85. The receivership reduced the market value of the properties and, as a result, the Appellants were not able to fully recover on their investments.

86. The respondents request the trial of the issues to assist in their accounting of the Bernstein investment.

PART III — THE ISSUES AND THE LAW

87. This application raises the following additional issues:

    I. Do the Respondents have a juristic reason to deny recovery of the Applicants?

    II. Did the Respondents make fraudulent misrepresentations to the Applicants?

    III. Did the Respondents have knowing assistance?

    IV. What is the quantum of damages?

I. Do the Respondents have a juristic reason to deny recovery of the Applicants?

88. A finding of unjust enrichment requires the deprivation of the Applicants and a corresponding benefit to the Respondents. On August 12, 2014 Justice Brown found that the Applicants had established a *prima facie* case of unjust enrichment. As such, the defendant must establish whether a juristic reason exists to deny recovery and allow retention of the benefit.

89. This stage of the analysis thus provides for a residual defence in which courts can look to all of the circumstances of the transaction. To assess Walton's retention of possible benefits earned, the courts must consider the reasonable expectation of the parties, and public policy considerations.

Reasonable Expectation of the Parties

90. The reasonable expectations of Bernstein and Walton were established in a number of ways:

a. Before investing in each project, Bernstein was provided with a pro forma that was completely transparent on the face of it;

b. Before investing in each project, Dr. Bernstein had an opportunity to evaluate and analyse the project and visit the property and ask any questions he wanted related to the opportunity;

c. DBDC Spadina is a sophisticated entity with resources necessary to evaluate the project and the related risk;

d. Bernstein employed Jim Reitan as his full-time Director of Accounting and Finance for the entire time that he and Walton were investing in joint real estate projects. Nonetheless, Bernstein did not involve Mr. Reitan until late 2012 and Mr. Reitan did not meet Mario Bucci until February 28, 2013 and Norma Walton until March 2013;

e. The contracts clearly indicate that Bernstein would invest funds by a certain date while the Waltons would invest “in a timely manner as required as the Project is completed”;

f. Bernstein was welcome to visit the properties and had a key for a number of the properties;

g. Bernstein was aware that on every project, Rose and Thistle was going to add value to the property, manage the property, and do whatever work was required to realize the project plan for the property;

h. Bernstein was aware that in exchange for the maintenance of the properties and development of the project, Rose and Thistle was entitled to payment;

i. In all but two projects, Bernstein bought in at Walton's cost;

91. In exchange for Bernstein's relatively high initial equity investments he received 50% shares and a shareholder loan back to him for funds provided. Bernstein was aware his investment was not guaranteed and had inherent risk.

First Cross-examination of Dr. Bernstein, lines 620-628

92. The Applicants could reasonably have expected that Rose and Thistle did not have the initial funds to correspond with the Applicant's investment. The contracts clearly state that Walton would provide equity in a timely manner as required. This term strongly suggests that Walton did not have the investment funds and would not have the investment funds until a later date.

93. Given their resources, one would expect the Applicants had legal and financial advice before agreeing to the contracts. Yet, with no established timeline for Walton to provide the corresponding equity investment, Bernstein invested in 31 properties.

94. Between September 2010 through to June 2013, neither party followed the contract terms. Specifically:

a. Bernstein did not request and Walton did not provide bank statements or cancelled cheques despite that being a monthly obligation pursuant to the contracts;

b. Although Bernstein knew Walton was writing cheques and making transfers for more than $50,000 contrary to some of the contracts he did not complain or request that he approve those payments;

c. Bernstein did not become a director of most of the companies despite his positive obligation to be one, and ultimately he was only a director for five of the 31 companies;

d. Bernstein never objected to any decision made by Walton regarding the joint portfolio until after the litigation began;

e. Bernstein did not enforce his contractual rights to detailed reports as he was wholly satisfied with the reporting that was taking place;

f. Bernstein acquiesced to Walton managing the portfolio in Walton's sole discretion.

95. Despite these contractual breaches, Bernstein appeared satisfied with the arrangement as he continued to make joint investments with Walton up until June 20, 2013. Rather than insist on more detailed reporting, Bernstein encouraged Walton to find new investment properties.

96. As the portfolio grew Rose and Thistle struggled to maintain full accounting records.

97. The inevitable resulting conflict led Bernstein to pursue litigation and the appointment of a receiver.

98. The Applicants could reasonably have expected that the appointment of the receiver would affect the selling price of the properties.

99. Walton informed Bernstein that the appointment of a receiver would cause a default on the existing mortgages. Rather, than appoint a receiver Walton suggested that Bernstein take control of the 33 bank account relating to Schedule B properties.

Mutual Benefit

100. Bernstein and Walton derived a mutual benefit from their arrangement. Bernstein provided the majority of investment funds and Walton, through Rose and Thistle, managed the portfolio. The arrangement benefited both sides and resulted in a number of successful projects.

101. In October 2014, Bernstein and Walton purchased 241 Spadina. At the time, the five storey building needed a complete renovation. The contract and pro forma set out the plans to purchase, renovate, lease, refinance, and distribute equity. It was a successful project that Rose and Thistle completed early and Bernstein received equity distribution for over six months.

Applicant's Motion Record

102. According to Mario Bucci, chief financial officer of Rose and Thistle, the total purchase price and improvements to 241 Spadina, including work performed by Rose and Thistle and third party vendors total $9.47 million. As a result of work performed, the market value increased from $4.7 million to its selling price of $12 million.

Affidavit of Mario Bucci, Tab C

Affidavit of Mark Goldberg, Tab B

103. In December 2010, Bernstein and Walton purchased 1185 Eglinton Avenue East, a 10 storey-building on 2.84 acres of land. The pro forma included in the contract refers to demolition of the property so that it would be development approved for high rise condominiums and sold to a developer. Rose and Thistle demolished the building, and rezoned to high rise residential.

104. Based on Mr. Bucci's calculations, $10.6 million was spent to purchase and improve the property. As a result, the property increased in value from $8.6 million to $18 million and based on this increase Atrium Mortgages provided additional financing of $12 million.

Affidavit of Mario Bucci, Tab C

Affidavit of Mark Goldberg, Tab B

105. In February 2011, Bernstein and Walton purchased the majority of commercial condominium units at 18 Wynford Drive, a 7 storey building on 1.5 acres of land. The pro forma included with the contract outlined plans to bring each unit purchased to building standards and renovated to accommodate the needs of a tenant or purchaser. Rose and Thistle executed the plan and Bernstein's mortgage and equity were repaid in full. Bernstein received a profit of approximately $140,000.

106. Mr. Bucci states $10 million was spent to purchase and renovate 18 Wynford resulting in an increase in value from $8.8 million to $14.5 million. As a result, Trez Capital provided additional financing of $9.8 million.

Affidavit of Mario Bucci, Tab C

Affidavit of Mark Goldberg, Tab B

107. In August 2011, Bernstein and Walton purchased 32 Atlantic, a 65,000 square foot industrial/commercial facility built in the early 1900s that was in need of a full renovation. The pro forma outline Rose and Thistle plans to purchase, renovate, leas, refinance, and provide equity to Bernstein and Walton on their remaining equity investment. Rose and Thistle executed the plan a year early and Bernstein received equity payments for over one year.

108. Mr. Bucci states $5.5 million was spent to purchase and renovate 32 Atlantic resulting in an increase in value from $7.2 million to its selling price of $18.5 million.

Affidavit of Mario Bucci, Tab C

Affidavit of Mark Goldberg, Tab B

109. The cost consultation of Intrepid Quantity Surveying substantiates 89% of the overall invoices for hard costs for this project, or $3 million.

Respondents' Motion Record, Intrepid Quantity Surveying Report p. 1492

110. Bernstein and Walton went on to purchase many more properties. These projects had two to four year timelines and were in various stages of development at the time of the Receivership appointment. Each property was purchased once Bernstein was given an opportunity to review the corresponding contract and pro forma before making a decision to invest. Like the projects that came before, these were on their way to a successful completion.

111. These properties, while in various stages of development also had significant increases in value. For example, at 30 Fraser Avenue Mr. Bucci states $19,484.87 was spent on improvements. The market value increased from $2.5 million to $4.5 million.

112. To improved overall cash flow throughout the portfolio, Walton transferred funds to the Roe and Thistle clearing account. Had the contract been strictly adhered to, each company would have been restricted to its specified investment funds and, inevitably, some companies would have underperformed.

Public Policy

113. Public policy considerations provide a juristic reason to deny the Applicant's recovery. Paragraph 111(1)(a) of the *Income Tax Act* permits the Applicant to deduct non-capital losses, defined in subsection 111(8), over a 23-year period (the three taxation years before the loss was incurred and the 20 subsequent taxation years). The deduction of these non-capital losses reduces the Applicant's corporate tax that would otherwise be payable.

114. The examination of James Reitan, of October 19, 2015 suggests the Applicants have organized their affairs in line with loss provisions of the *Income Tax Act*. DBDC Spadina has been amalgamated with DBDC Donalda. The rationale for this amalgamation appears to be that DBDC Donalda can reduce corporate tax by using losses incurred by DBDC Spadina. The Inspector identified $25,680,852 in net transfers that were directed from Rose and Thistle to Schedule C Companies. Third parties have invested $14,16,536.00 in the Schedule C companies.

III. Did the Respondents make fraudulent misrepresentations to the Applicants?

115. The Appellant's assert that the Respondents are liable for fraudulent misrepresentation. However, fraudulent misrepresentation does not occur where there is no active concealment of material fact, conduct preventing the discovery of the true state of affairs, or discouraging the ascertainment of the true state of affairs.

Fridman, The Law of Contract, 6th Ed. (Carswell, 2011) at page 289

116. Walton's updates, while less than complete, provided ample information for Bernstein to assess his options. Walton sent emails updates of specific properties that include terms of refinancing, mortgage discharges, potential tenants, cash flow, offers to purchase, potential transfer of funds between companies, construction advances, properties taxes, utilities and so on.

117. Rather than demand full monthly particulars of the investments, Bernstein remained content to receive updates by email and telephone. Bernstein appeared satisfied with the reporting and at times applauded the quality of the reports.

118. When Bernstein requested additional information that Walton could provide given Rose and Thistle's limited accounting records, she provided them. For example, Bernstein's accountant, Lawrence Zeifman, made enquiries for information of Walton in 2012 for financial statements which were provided to him in September 2012.

119. It was not until James Reitan's June 2013 requests for detailed information of the investments did Bernstein demand these particulars. According to Justice Brown, in doing so, Bernstein is prevented from relying on the Respondents' failure to provide monthly reports in the early part of their relationship as an event of default under the agreements.

DBDC Spadina v. Walton, Justice Brown's Reasons for Decision, page 61, para. 178

IV. Did the Respondents have knowing assistance?

120. The Applicants seek damages in the amount of $22.6 million against all of the Schedule C companies on the basis of knowing assistance. The Inspector found that $25 million in net transfers went to Schedule C properties, yet could not provide a direct tracing to all of the Schedule C properties.

121. The constituent elements of the tort of knowing assistance in breach of fiduciary duty are the existence of a fiduciary duty; the fiduciary breached that duty fraudulently and dishonestly; the stranger to the fiduciary relationship must have had actual knowledge of both the fiduciary relationship and the fiduciary's fraudulent and dishonest conduct; and the stranger must have participated in or assisted the fiduciary's fraudulent and dishonest conduct.

Air Canada v. M & L Travel Ltd., [1993] 3 S.C.R.

122. In his August 12 2014 decision, Justice Brown found the Respondents breached fiduciary duties owed to investors by co-mingling investment funds and appropriating some of the funds to their own benefit.

DBDC Spadina v. Walton para. 264

123. The respondents did not breach their duties fraudulently or dishonestly. Bernstein was aware that Walton's reports were not as complete as had been contemplated in the contracts, yet he was content to receive these informal updates.

124. The contracts expressly stated that Walton's equity investment would come at a later date and Bernstein could reasonably have expected that Walton did not have her share of the equity investments for each property.

125. Further, the Inspector's direct tracing of Applicant funds to Schedule C was limited to specific properties. These properties include:

a) 14 College Street;

b) 3270 American Drive

c) 3454 Bayview

d) 2454 Bayview

e) 44 Park Lane Circle

f) 2 Kelvin Street

g) 0 Trent

h) 26 Gerrard Street

126. To allow collection from the remaining Schedule C Companies, the court would need to make the inference that Bernstein funds did in fact flow to other Schedule C companies. There are a number of issues with this broad inference.

127. From August 2008 through to September 2010, Walton borrowed mortgage funds from Bernstein for the following properties:

a) 648 Broadview Avenue;

b) 646 Broadview Avenue;

c) 252 Carlton;

d) 66 Gerrard Street East;

e) 86 Parliament;

f) 65 Front Street East;

g) 19 Tennis Crescent; and

h) 30 and 30A Hazelton Avenue

128. All of the above mortgage payments were made and all mortgages have since been repaid with interest.

Cross-examination of Dr. Bernstein, lines 87-90

129. It is unclear why the Schedule C companies would need additional Bernstein funds. Third parties invested from $7 million to $14 million into the properties. Many of the properties were cash flow positive and had no need for additional funding.

130. The Inspector's tracing into Schedule C properties does not reflect the overall history of transactions in and out of Rose and Thistle. If funds were transferred from Bernstein to the Schedule C companies, an assertion which the Appellants expressly deny, there is potential that Appellant funds were transferred into Schedule C companies and these funds ultimately found their way back into the Schedule B company from which they originated.

131. In order to determine the standing of Schedule B companies in comparison to Schedule C, an analysis of net transfers from Schedule C to the Rose and Thistle account and from the Rose and Thistle account to Schedule B is necessary.

132. Likewise, further analysis is required to determine the net funds that were added to the Rose and Thistle outside of the transfers between Schedule B and Schedule C properties.

133. The Schedule C purchasers had no knowledge that funds were comingled in the Rose and Thistle clearing account. The Schedule C purchasers were bona fide purchasers for value. As such they could not participate or assist in the fiduciary conduct.

134. To permit Bernstein to collect from Schedule C companies without a direct tracing is to permit Bernstein to collect a windfall. Bernstein is to be made whole, but nothing more.

Quantum of Damages

135. Justice Brown acknowledged in his reasons that the Appellants were contractually entitled to be paid for services rendered to the Schedule B properties. Further, the Inspector acknowledged in the Supplement of his Fifth Report that the Applicants did construction work for which they claim compensation. As of this date, no decision has established the amount the respondents are entitled to for their services.

DBDC Spadina v. Walton. Brown para. 7

136. Walton claims the sum of $2,580,292 in property maintenance fees on the basis that Rose and Thistle had to provide personnel to operate the properties. Schnofeld has confirmed this reality as has Bernstein.

Cross-examination of Dr. Bernstein, 1715-1717

	Property / Address	**Company Name**	**Management Fee**	**Maintenance Fee**
1	3765 St. Clair East	Ascalon Lands Ltd.	0	55,000
2	1185 Eglinton Avenue	Bannockburn Lands Inc.	119	57,500
3	1, 9-11 Cityview	Cityview Industrial Ltd.	14,470	50,750
4	14 Dewhurst Blvd.	Dewhurst Developments	4,667	16,000
5	1500 Don Mills	Donalda Developments	234,608	300,000
6	65 Heward	Double Rose Developments	80,248	171,875
7	1485 Dupont Store	Dupont Developments Ltd.	11,163	184,375
8	153 Eddystone Ave.	Eddystone Place Inc.	0	16,000
9	30 Fraser Ave.	Fraser Lands Ltd.	10,030	29,250
10	7 and 15 Fraser Ave.	Fraser Properties Corp.	73,674	156,000
11	1450 Don Mills	Global Mills Inc.	162,637	0
12	14 Trent	Hidden Gem Developments	7,853	70,000
13	1131A Leslie St.	Lesliebrook Holdings	57,370	161,500
14	1131 Leslie St.	Lesliebrook Lands Ltd.	0	46,250
15	33 & 47 Jefferson	Liberty Village Lands Inc.	0	24,000
16	30 & 32 Atlantic Ave.	Liberty Village Properties	74,315	160,000
17	146 Queen’s Plate Drive	Northern Dancer Lands	279	24,000
18	1003 Queen Street East	Queen Corner Corp.	0	24,000
19	875 Queen Street East	Red Door Developments	9,067	59,500
20	875 Queen Street West	Red Door Lands Ltd.	4,909	17,000
21	620-624 Richmond	Richmond Row Holdings	0	37,500
22	450 Pape Ave	Riverdale Mansion	0	66,667
23	5770 & 5780 Highway 7	Royal Agincourt Holdings	118,516	235,000

24	1 Royal Gate Blvd.	Royal Gate Holdings Ltd.	70,382	63,750
25	0 Trent Ave.	Salmon River Properties Ltd.	0	30,000
26	30-34 Meridian Rd.	Skyway Holdings	73,821	231,000
27	78 Tisdale Mews	Tisdale Mews Inc.	3,050	66,000
28	241 Spadina Ave.	Twin Dragon Corp.	50,149	139,000\
29	295 Westmall Holdings	Westmall Holdings	73,821	231,000
30	355 Weston	Weston Lands Ltd.	0	51,625
31	18 Wynford Drive	Wynford Professional Ctr.	110,164	0
			1,1853,013	2,580,292

137. Rose and Thistle had personnel whose employment related to this ongoing maintenance. The maintenance is not included as part of the improvement costs as outlined by Bucci.

Affidavit of Mark Goldberg, Tab A

138. In addition, Walton claims the sum of $8,500,853 in construction work done by Rose and Thistle on the Schedule B properties Spadina, Eglinton ,Wynford, and Atlantic. All such work was confirmed by Bernstein at the time he was funding the work, and all such work was confirmed completed by Dr. Bernstein.

139. The 8.5 million in construction costs is accounted for through multiple affidavits, photographs, invoices, and consulting reports. The funds spent to develop these properties increased their market value…

140. Walton claims severance approval fees of $1,087,500

141. Walton claims $2,345,629.04 for project management fees due to Rose and Thistle.

ALL OF WHICH IS RESPECTFULLY SUBMITTED BY:

April 29th, 2016

Howard C. Cohen

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Lawyers for the Respondents Norma Walton, Ronauld Walton, The Rose & Thistle Group Ltd. and Eglinton Castle Inc.

SCHEDULE "A" COMPANIES

1. Dr. Bernstein Diet Clinics Ltd.
2. 2272551 Ontario Limited
3. DBDC Investments Atlantic Ltd.
4. DBDC Investment 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 Inc.
14. DBDC Queen's Plate Holdings Inc.
15. DBDC Dupont Developments Inc.
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 Industrial 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. Royal Gate Nominee Inc.
29. Royal Gate (Land) Nominee Inc.
30. Dewhurst Developments Ltd.

31. Eddystone Place Inc.
32. Richmond Row Holdings Ltd.
33. El-Ad (1500 Don Mills) Limited
34. 165 Bathurst Inc.

SCHEDULE "C" PROPERTIES
(MUNICIPAL ADDRESSES)

1. 3270 American Drive, Mississauga, Ontario
2. 2 Kelvin Avenue, Toronto, Ontario
3. 346 Jarvis Street, Suites A, B, E and F, Toronto, Ontario
4. 1 William Morgan Drive
5. 324 Prince Edward Drive, Toronto, Ontario
6. 24 Cecil Street, Toronto, Ontario
7. 30 and 30A Hazelton Avenue, Toronto, Ontario
8. 777 St. Clarens Avenue, Toronto, Ontario
9. 66 Gerrard Street East, Toronto, Ontario
10. 14 College Street, Toronto, Ontario
11. 26 Gerrard Street East, Toronto, Ontario
12. 2454 Bayview Avenue, Toronto, Ontario
13. 319 – 321 Carlaw, Toronto, Ontario
14. 0 Lutrell Avenue, Toronto, Ontario
15. 260 Emerson, Toronto, Ontario
16. 44 Park Lane Circle

DBDC SPADINA LTD. et al. Applicants	-and-	NORMA WALTON et al. Respondents
NORMA WALTON et al. Applicants by Counterapplication	-and-	DBDC SPADINA LTD. et al. Respondents by Counterapplication

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

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

(Proceeding Commenced at Toronto)

FACTUM OF THE RESPONDENTS
(Returnable on June 3rd, 2016)

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