Court File No.: CV-13-1 0280-00CL

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. and EGLINTON CASTLE INC.

Respondents

- and -

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

Factum of Schonfeld Inc.

("Counter-Application" of the Respondents returnable March 15, 2016 re: various procedural relief and Manager's Motion returnable March 15, 2016 for an Order Striking Certain Portions of the Respondents' "Notice of Counter-Application")

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I. OVERVIEW

1. This is the factum of Schonfeld Inc., in its capacity as manager (the "**Manager**") of (i) certain companies listed in Schedule "B" to the Order of Justice Newbould dated November 5, 2013 (the "**November 5 Order**") (the "**Schedule B Companies**"), together with the real estate properties owned by the Schedule "B" Companies (the "**Schedule B Properties**"), as amended by Order of Justice Newbould dated January 16, 2014, and (ii) the properties listed at Schedule "C" to the Order of Justice Brown dated August 12, 2014 (the "**Schedule C Properties**", together with the Schedule "B" Properties, the "**Properties**").

2. The return of the Applicants' ("**Bernstein**") application is presently scheduled on March 15, 2015. On February 12, 2016, the Respondents (the "**Waltons**") served a document styled a "Notice of Counter-Application." Among other things, the Waltons seek an order directing a trial of an issue with respect to whether they committed fraud; damages against Bernstein relating to the institution of these proceedings and alleged improvident sale of the Schedule "B" Properties; and an award of damages against the Schedule "B" Properties.

3. In its 40th Report dated March 2, 2016 (the "**40th Report**"), the Manager makes the following recommendations:

(a) **The Manager recommends that the procedural relief sought by the Waltons be denied.** Based on the material filed to date, the trial that the Waltons ask this Court to order will add few, if any, new and relevant facts to the proceedings but will substantially increase the time and cost required to resolve the remaining dispute between Bernstein and the Waltons on the merits. The Manager has not previously taken a position on any procedural aspect of the dispute between Bernstein and the Waltons. However, the Manager has an interest in the timely

resolution of this dispute since completion of its own mandate and distribution to numerous stakeholders cannot occur until Bernstein's rights relating to the Waltons and the Schedule "C" Companies are clarified. The delay contemplated by the Waltons will have an adverse effect on stakeholders who cannot recover funds until there is a resolution between Bernstein and the Waltons on the merits;

(b) **The Manager recommends that the Waltons' application be struck to the extent it alleges that any of the Schedule "B" Property sales were improvident.** Although the legal and factual basis on which Bernstein is alleged to be liable to the Waltons is not clear, a central tenet underlying the Waltons' application seems to be their contention that, as a result of these proceedings, the Schedule "B" Properties and Schedule "C" Properties were sold "improvidently." The Manager's marketing process was transparent and each sale that the Waltons now impugn was specifically approved by the Court on notice to the Waltons. The sales were found to be fair and reasonable by this Honourable Court. The relevant orders were not appealed and the time to appeal has long passed. The Waltons cannot challenge the relevant sales in their application;

(c) **The Waltons' claim against the Schedule "B" Companies is doomed to fail and should be struck.** The claim against the Schedule "B" Companies that the Waltons attempt to advance in their application suffers from at least the following fundamental flaws:

(i) The Waltons have failed to plead facts that, if proven, would entitle them to damages from the Schedule "B" Companies;

(ii) It is the Waltons themselves who directed all of the transactions underlying the claim. In essence, the Waltons seem to be suggesting that they caused the Schedule "B" Companies to be enriched at the expense of

the Schedule "C" Companies and that (for some unspecified reason) these actions justify a payment by the Schedule "B" Companies to the Waltons;

(iii) In any event, contrary to the suggestion in the Waltons' application, the Schedule "C" Companies received a massive net benefit from the Schedule "B" Companies; and,

(iv) The Waltons' claim is out of time. All of the transactions underlying the Waltons' claim pre-date the Manager's appointment on November 5, 2013. The Waltons did not serve their claim until February 12, 2016, more than two years after the conduct alleged to give rise to liability ceased.

II. FACTS

A. The Status of the Manager's Mandate

4. All of the Schedule "B" Properties and Schedule "C" Properties have either been sold by the Manager or transferred to separate enforcement proceedings commenced by mortgagees. Almost all of the mortgagee enforcement procedures are also complete.

> 40th Report of the Manager dated March 2, 2016 (the "**40th Report**") at para. 8, Manager's Motion Record ("**MR**"), Tab 2, p. 13

5. The Manager has made equity distributions totalling $11,595,762 to the Applicants. It is presently holding the following amounts in respect of the Schedule "B" Companies:

Company	Amount
Ascalon Lands Ltd.	$36,096.75
Cityview Industrial Ltd.	$30,000.00
Dupont Developments Ltd.	$25,000.00
Lesliebrook Holdings	$225,000.00
Liberty Village Properties	$61,500.00
Manager	$2,750,000.00
Northern Dancer Lands Ltd.	$201,034.91
Royal Agincourt Corp.	$366,000.00
Royal Gate Holdings Ltd.	$424,224.49
Tisdale Mews Inc.	$498,000.00
Twin Dragons Corporation	$719,000.00
Weston Lands Ltd.	$55,000.00
Total	**$5,390,856.15**

40th Report at para. 9, MR, Tab 2, pp. 13-14

6. Apart from funds being held pending resolution of a number of disputes with stakeholders, the Manager expects these funds to be available for equity distributions. As the Manager has previously reported, the August 12 Order provided that equity in the Schedule "B" Companies is to be distributed in accordance with the relative financial contributions of Bernstein and the Waltons. Based on the Manager's review to date, the Manager expects that the vast majority of the funds available for equity distributions from the Schedule "B" Companies will be payable to Bernstein pursuant to the August 12 Order.

40th Report at para. 10, MR, Tab 2, p. 14

7. The Manager is also holding proceeds from the sale of Schedule "C" Properties in the aggregate amount of $4,654,310.17. These funds are summarized in the table below:

Company	Amount
44 Park Lane Circle, Toronto, Ontario	$50,000.00
6195 Cedar Street Ltd. (2 Kelvin Avenue, Toronto, Ontario)	$21,365.17
1780355 Ontario Inc. (346 Jarvis Street, Suites A and B, Toronto, Ontario)	$317,351.48
Atala Investments Inc. (30 Hazelton Avenue, Toronto, Ontario)	$175,646.62
Bible Hill Holdings Ltd. (0 Luttrell Ave., Toronto, Ontario)	$54,076.45
Cecil Lighthouse Ltd. (24 Cecil Street, Toronto, Ontario)	$830,482.67
Emerson Developments Ltd. (260 Emerson Ave., Toronto, Ontario)	$200,533.77
Prince Edward Properties Ltd. (324 Prince Edward Drive, Toronto, Ontario)	$640,812.73
St. Clarens Holdings Ltd. (777 St. Clarens Avenue, Toronto, Ontario)	$464,195.89
The Old Apothecary Building Inc. (66 Gerrard Street East, Toronto, Ontario)	$98,301.79
United Empire Lands Ltd. (3270 American Drive, Mississauga, Ontario)	$1,801,543.60
Total	**$4,654,310.17**

40th Report at para. 11, MR, Tab 2, pp. 14-15

8. The majority of these funds cannot be distributed until Bernstein's claims against the Waltons are determined. Until such a determination is made, a variety of stakeholders will be unable to know what (if any) recovery they will receive. This issue can be illustrated by an examination of Prince Edward Properties Ltd. ("**Prince Edward Properties**").

40th Report at para. 12, MR, Tab 2, p. 15

9. Prince Edward Properties is the former owner of the Schedule "C" Property located at 324 Prince Edward Drive, Toronto, Ontario (the "**Prince Edward Property**"). Companies owned by Christine and Michael DeJong (the "**DeJongs**") owned shares in Prince Edward Properties and advanced a shareholder loan in the amount of $816,019. The Manager conducted a claims process in respect of the Prince Edward Property and accepted the DeJongs' claim in respect of their shareholder loan to Prince Edward Properties. However, the amount owed by Prince Edward Properties to the DeJongs cannot be paid until the Applicants' claim for either a judgment against Prince Edward Properties or a declaration that the Prince Edward Property is subject to a constructive trust in their favour is determined because it is possible that the Applicants will rank *pari passu* with the DeJongs (if a judgment against Prince Edward is awarded) or ahead of the DeJongs (if the Prince Edward Property is subject to a constructive trust).

40th Report at para. 13, MR, Tab 2, pp. 15-16

B. The Manager opposes the Waltons' request for a trial

10. In her affidavit, Ms. Walton asserts that the Waltons have raised "triable issues" with respect to "the work completed in relation to the development of the joint-portfolio properties

and the transfer of monies to the Schedule "C" Properties." The Manager has reviewed the affidavits filed in support of the Waltons' application and is of the view that these affidavits do not add, in any meaningful way, to the investigation into how funds transferred by the Waltons from the Schedule "B" Companies were used or what work the Rose & Thistle Group ("**Rose & Thistle**") performed on the Schedule "B" Companies.

40th Report at para. 21, MR, Tab 2, p. 18

11. On October 21, 2013, the Inspector reported in its First Interim Report (which is attached as Appendix "A" to the 40th Report) that:

(a) the Waltons had made a net transfer to themselves, Rose & Thistle and the Schedule "C" Companies of approximately $24 million;

(b) the Waltons had asserted that these transfers were payment for construction and development work relating to the Schedule "B" Companies; and

(c) the Waltons had not provided documentation to substantiate the construction and development costs that they claimed to have incurred.

40th Report at para. 22, MR, Tab 2, p. 18

12. This situation has, in some important respects, not changed since October 2013. In her recent affidavit, Ms. Walton continues to assert that the Waltons were entitled to take money as payment for construction and development services. However, the Waltons remain unwilling or unable to provide documentary evidence of what was done and how Bernstein's investments were used as is required by the Order of Justice Newbould dated October 25, 2013.

40th Report at para. 23, MR, Tab 2, pp. 18-19

13. In another important respect the situation has changed very dramatically since October 2013. Specific findings of fact were made in the November 5 Endorsement and the August 12 Reasons and these findings have been upheld by the Court of Appeal. In particular, the Waltons' entitlement to take money to pay for the services allegedly provided by Rose & Thistle was a central issue at the hearing before Justice Brown on July 16-18, 2014 (the "**July 2014 Hearing**"). Justice Brown considered the evidence before him and concluded that only $1 million of the $30.6 million worth of invoices issued by the Waltons had been substantiated:

> [87] Rose & Thistle no doubt provided some construction and maintenance work for the Schedule B Companies, but the Waltons bore the burden of establishing the validity and accuracy of the invoices which Rose & Thistle rendered for those services. Not only have they failed to do so, but one can only conclude from the refusal of the Waltons over the past nine months to provide back-up for the Rose & Thistle invoices – both to the Inspector and to their own cost consultants - that back-up for the full amounts of those invoices simply does not exist.
>
> [88] I therefore accept the view of the Inspector expressed in its Fifth Report, and I find that the Respondents have not produced the documentation needed to perform a detailed reconciliation of the alleged construction and maintenance expenses to the cash transfers to determine whether those transfers related to construction and maintenance work that Rose & Thistle actually performed for Schedule B Companies.
>
> [89] I make a similar finding in respect of the management fees charged by Rose & Thistle. Those fees were charged as a percentage of the construction costs incurred. Without an accounting of the accuracy of the construction costs actually incurred, an assessment of the reasonableness of the management fees is not possible. However, I will accept the reconciliation of management fees in the amount of $1 million reached by the Inspector with the Respondents for revenue-producing properties as reported in the Inspector's Third Report.
>
> [90] Taken together, those two findings mean that of the $30.6 million in invoices rendered by Rose & Thistle to the Schedule B

> Companies, the Respondents have established the validity and reasonableness of only $1 million of them – i.e the reconciliation relating to management fees for revenue-producing properties. The Respondents have failed to prove, on the balance of probabilities, that the remaining invoices covered work or services actually performed by Rose & Thistle for Schedule B Companies, notwithstanding that the information needed to do so remained in the possession and control of the Respondents.
>
> 40th Report at para. 24, MR, Tab 2, pp. 19-20

14. In support of their motion and application now returnable March 15, 2016, the Waltons have tendered affidavits from Ms. Walton and various former employees of Rose & Thistle describing work allegedly performed on the various properties. Before the July 2014 Hearing, Ms. Walton and other former employees of Rose & Thistle also swore affidavits containing similar descriptions. Justice Brown made the following finding with respect to these descriptions:

> [84] In her June 21, 2014 affidavit, Ms. Walton commented on each of the reports prepared by the cost consultants and she gave general descriptions of the work performed on each property. Notwithstanding that Ms. Walton spent extensive time in her affidavit dealing with each property, she did not append to her affidavit the back-up documentation to support the amounts charged by Rose & Thistle to each project which the Inspector had been requesting since last October.
>
> 40th Report at para. 25, MR, Tab 2, p. 20

15. In the result, Justice Brown dismissed the Waltons' request for a trial to determine what work had been performed by the Waltons in exchange for the funds they took from the Schedule "B" Companies:

> [225] I have found that of the $23.6 million in net transfers from Schedule B Companies to Rose & Thistle identified by the

> Inspector, the Respondents had only justified a reduction of $1 million in that number by reason of management fees billed. It follows that I dismiss Ms. Walton's audacious – but forensically unsupported – request for a trial of an issue of the amount of money the Schedule B Companies owed to Rose & Thistle. While in sports the best defence sometimes might be a good offence, that strategy does not work when parties who are subject to a court accounting order fail to comply with it. Ms. Walton seems to fail to appreciate the gravity of the situation in which she and her husband find themselves.
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> 40th Report at para. 26, MR, Tab 2, p. 20

16. A review of all of the various factual contentions made by the Waltons in their material is beyond the scope of this factum, but the examples below illustrate the Manager's concerns.

(i) Fraud findings have already been made against the Waltons

17. A primary basis on which the Waltons seek the trial of an issue is their contention that a finding of fraud requires consideration of *viva voce* evidence. In support of this position, Ms. Walton deposed at paragraph 13 of her affidavit sworn February 12, 2016 that:

> Justice Brown, in his August 12, 2014 order, did not make any orders in fraud against my husband and myself, nor did the Court of Appeal for Ontario make such orders against us.
>
> 40th Report at para. 29, MR, Tab 2, p. 21

18. It is not clear what Ms. Walton means by "orders in fraud." However, Justice Brown made four findings of fraud against the Waltons at paragraphs 145, 204, 207 and 264 of the August 12 Reasons. The Court of Appeal held that the constructive trusts imposed awarded in the August 12 Order were "based on the conduct of the Waltons…namely, their fraud" and upheld these findings.

40th Report at para. 30, MR, Tab 2, p. 21

August 12 Reasons, being Exhibit "C" to the 40th Report, MR, Tab 2C, p. 74

(ii) Deposits from the Rose & Thistle Account

19. In her affidavit sworn June 26, 2014, Ms. Walton asserted (for the first time) that Rose & Thistle had paid deposits totalling $6.657 million towards the purchase of the Schedule "B" Properties. These deposits were alleged to be a partial justification for the net transfer of $23 million from the Schedule "B" Companies to the Waltons and the Schedule "B" Companies. The Inspector responded to this assertion at paragraphs 60-62 of the Supplemental Report to the Fifth Interim Report of the Inspector, which is attached as Appendix "B" to the 40th Report. In the August 12 Reasons, Justice Brown rejected, in no uncertain terms, the Waltons' allegation that some of the transfers from the Schedule "B" Companies were justified by the deposits:

> In sum, I do not accept Ms. Walton's submission that deposits of $6.657 million should be recognized to reduce the net transfer amount due from Rose & Thistle to the Schedule B Companies as found by the Inspector.
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> 40th Report at para. 31, MR, Tab 2, p. 22
>
> Supplemental Report to the Fifth Interim Report of the Inspector, being Exhibit "F" to the 40th Report, MR, Tab 2F, p. 210
>
> August 12 Reasons, being Exhibit "C" to the 40th Report, MR, Tab 2C, 74

20. The Respondents now assert that they should be entitled to account for amounts transferred from the Schedule "B" Companies by calling "oral evidence from their former staff…" The Respondents have tendered the affidavit of Mario Bucci, the former Chief Financial Officer of Rose & Thistle, in an apparent attempt to identify evidence that they could potentially tender at the trial that they seek. In his affidavit, Mr. Bucci asserts:

> I know that Rose and Thistle paid at least $6,807,435 in deposits for properties directly from Rose and Thistle and Walton Advocates.
>
> 40th Report at para. 32, MR, Tab 2, p. 22

21. Mr. Bucci does not reference Ms. Walton's past evidence or its rejection by Justice Brown. Moreover, Mr. Bucci states that documents supporting his "knowledge" about the deposits are attached as Exhibit "F" to his affidavit but no such documentation is included in the affidavit served on the Manager.

> 40th Report at para. 33, MR, Tab 2, p. 22

22. Other aspects of Mr. Bucci's evidence (whether it is tendered to explain the Respondents' use of funds or as a preview of oral evidence Mr. Bucci might give at a trial) are also problematic. Mr. Bucci deposes that Rose & Thistle provided personnel to work on the Schedule "B" Properties resulting in costs of approximately $20,389,179. Mr. Bucci claims that this figure is based on "time sheets and vendor invoices and the expenses incurred to the specific property whenever these expenses were incurred in Rose and Thistle for intercompany billing at a later date within the fiscal year they pertained." Mr. Bucci does not append the time sheets and vendor invoices, nor does he explain what has happened to them or why they have not been provided in response to the Inspector's requests dating back to October 2013.

> 40th Report at para. 34, MR, Tab 2, p. 23

23. The source of Mr. Bucci's information is also unclear. However, as described in the Second Interim Report of the Inspector, Mr. Bucci previously advised that he did not even have access to construction files:

> On October 30, 2013, Mr. Schonfeld e-mailed Mr. Bucci to request access to the construction budgets in an "as is" condition. Mr. Bucci advised that he did not have access to construction files but had passed the request on to Ms. Liu. [Emphasis added]
>
> 40th Report at para. 35, MR, Tab 2, p. 23

24. In summary, Mr. Bucci's evidence relating to the deposits and construction costs does not add in any meaningful way to an understanding of what happened to funds invested by Bernstein or provide any reason to believe that providing Mr. Bucci with an opportunity to give *vica voce* evidence would do so.

> 40th Report at para. 36, MR, Tab 2, p. 23

(iii) 78 Tisdale and 875 Queen

25. Another example of the Waltons' attempt to use the proposed "trial of an issue" to re-litigate matters that have already been determined relates to funds taken from the Schedule "B" Companies that own 78 Tisdale Avenue (the "**Tisdale Property**") and 875 Queen (the "**Queen Property**"). Unlike most of the Schedule "B" Properties, the Tisdale Property and the Queen Property were purchased by the Waltons without Bernstein. Bernstein invested in these properties later and the funds that he invested were diverted by the Waltons for various purposes, including the purchase of their home at 44 Park Lane Circle. The Waltons subsequently issued invoices purporting to show that management and construction services were provided in exchange for these amounts. In these proceedings, Ms. Walton asserted that she was entitled to treat the funds invested by Bernstein as a return of equity built up in these properties before Bernstein invested.

> 40th Report at para. 37, MR, Tab 2, pp. 23-24

26. The transfers relating to the Tisdale Property and the Queen Property were the subject of considerable evidence and argument at the July 2014 Hearing before Justice Brown. Having considered that evidence, Justice Brown concluded with respect to the Tisdale Property that:

> [207] Further…the Waltons did not inform Dr. Bernstein that they intended to treat some of his equity injection as a return of capital to them. By failing to so inform Dr. Bernstein, at a time when they represented to Dr. Bernstein that no capital would be withdrawn until the substantial completion of the project, the Waltons deceived and defrauded Dr. Bernstein.
>
> 40th Report at para. 38, MR, Tab 2, p. 24

27. Justice Brown made a similar finding with respect to the Queen Property:

> [145] Based upon Norma Walton's June 21, 2014 evidence, I can only conclude that when Norma and Ron Walton signed the June 25, 2012 agreement with Dr. Bernstein for the 875/887 Queen Street East project, they fully intended to use the funds advanced by Dr. Bernstein to fund, in part, their own acquisition that day of their 44 Park Lane Circle personal residence. They did not disclose to Dr. Bernstein their intended use of his funds. To the contrary, in the agreement they signed with him on June 25, 2012, they led Dr. Bernstein to believe that the funds he advanced would be used solely for the project at 875/887 Queen Street East and that neither he nor his co-venturers, Norma and Ron Walton, would be able to withdraw their capital from that project until it had been sold. By signing the agreement with Dr. Bernstein on June 25, 2012, and then proceeding immediately to appropriate the funds he advanced to their own use later that day to acquire their mansion at 44 Park Lane Circle, Norma and Ron Walton deceived Dr. Bernstein and unlawfully misappropriated Dr. Bernstein's funds to their own personal use. In short, the Waltons defrauded Dr. Bernstein.
>
> 40th Report at para. 39, MR, Tab 2, pp. 24-25

28. In her February 12 Affidavit, Ms. Walton asserts that James Merryweather of the Manager instructed her with respect to how to account for the foregoing transactions. This is not

correct. In its Third Interim Report, the Inspector reported that the Waltons had issued huge, unsubstantiated invoices purporting to show construction and management services performed by Rose & Thistle in respect of the Tisdale Property and the Queen Property. When these invoices were questioned, the Waltons advised that the invoices reflected the increase in value of the real estate between when they acquired the properties and when Dr. Bernstein invested in the Schedule "B" Companies that owned them. The Waltons then reversed the relevant invoices. The Waltons' external accountant advised them with respect to how these transactions should be recorded after the invoices were reversed, not Mr. Merryweather.

40th Report at para. 40, MR, Tab 2, p. 25

29. In any event, Ms. Walton's assertion does nothing to support her application. Justice Brown found that the Waltons defrauded Bernstein by taking funds that they were not entitled to take. How these transactions were recorded on the books and records of the relevant company years later is of secondary importance.

40th Report at para. 41, MR, Tab 2, p. 25

C. Collateral Attack on the Manager's Conduct

30. The Waltons have made various claims for relief against Dr. Bernstein and the Schedule "B" Companies. All of these claims are based on the assertion that these proceedings – and not the Waltons' conduct – are the cause of the losses suffered in respect of the Schedule "B" Companies and the Schedule "C" Properties. Their allegations are essentially summed up in paragraphs (ix) and (x) of the Waltons' Notice of Application:

> Given that the real properties in control of the Court were improvidently liquidated, Bernstein's negligent and reckless course of action in obtaining the appointment of a Manager/Receiver fundamentally reduced the value of the joint-portfolio and the personal assets of the Waltons. [emphasis added]
>
> 40th Report at para. 42, MR, Tab 2, pp. 25-26

31. The Manager has sold a total of 22 Schedule "B" Properties and six Schedule "C" Properties in these proceedings. Every one of these sales was approved by the Court on notice to the Waltons. Each property has been subject to a transparent marketing process that was reported to all stakeholders and the Court. The Waltons did not oppose most of the sales completed by the Manager. The Waltons' sole attempt to change the Manager's marketing strategy was rejected by this Court in January 2014. The Waltons' sole attempt to oppose a specific sale was rejected by this Court in June 2014. Neither decision was appealed. The Waltons' allegation that properties were sold improvidently is a collateral attack on literally dozens of orders made by this Court on notice to them. It should not be countenanced.

> 40th Report at para. 43, MR, Tab 2, p. 26

32. In January 2014, Ms. Walton sought to effectively stay these proceedings so that she could negotiate "offers" to purchase most or all of the Schedule "B" Properties. These "offers" are referenced in the Waltons' Notice of Application. However, these purported offers were dealt with by this Court in January 2014. Ms. Walton's attempt to force the Manager to pursue the so-called offers was dismissed and that dismissal was not appealed. The Manager expressed serious concerns about the validity of these offers and the process by which they were obtained. Among other things, the three funds alleged to have been interested in purchasing the portfolio all submitted identical, non-binding letters of intent for the same purchase price. The so-called

"offers" would have effectively granted a potential purchaser a free and exclusive due diligence period, since they imposed no obligation at all on the prospective purchasers. It was not clear what (if any) information these purchasers had about the Schedule "B" Properties or how serious any of them were about purchasing the Schedule "B" Properties.

40th Report at para. 44, MR, Tab 2, p. 26

33. These concerns were expressed in the Manager's First Report and were accepted by the Court. In His Honour's Endorsement dated January 6, 2014, Justice Newbould wrote that he had "serious concern with the steps that Ms. Walton has taken regarding the marketing of the properties."

40th Report at para. 45, MR, Tab 2, p. 27

34. In the result, none of the prospective portfolio purchasers who submitted non-binding letters of intent to Ms. Walton even contacted the Manager about a potential portfolio purchase. In the Manager's view, there is no reason to believe that the negotiations proposed by Ms. Walton (had they been permitted) would have resulted in a favourable sale, or any sale, of the Schedule "B" Properties.

40th Report at para. 46, MR, Tab 2, p. 27

35. Apart from the January 6, 2014 motion, the Waltons only opposed one other sale completed by the Manager. Ms. Walton opposed the Manager's motion for an approval and vesting order with respect to the Schedule "B" Property at 450 Pape Avenue. Ms. Walton took the position that the sale price obtained by the Manager was not sufficient and solicited what she considered to be a superior offer from a third party. She asked the Court to dismiss the

Manager's motion for approval of its sale and direct the Manager to attempt to complete the sale to the third party. By Endorsement dated May 6, 2014, Justice Brown rejected these submissions, found that Ms. Walton had acted wrongfully in soliciting an offer, expressed serious concerns about the effect of Ms. Walton's conduct on the integrity of the sales process and approved the Manager's proposed sale.

> 40th Report at para. 47, MR, Tab 2, p. 27

D. The Need for Appointment of the Manager

36. The Waltons also appear to assert that the appointment of the Manager was itself a wrongful act. According to the Waltons, there was no need for the Manager's involvement, and if Ms. Walton had just been left alone to manage the properties, the Schedule "B" Properties would have been sold for much higher prices. The need for the Manager's appointment has been canvassed extensively in the November 5 Endorsement and August 12 Reasons and was summarized as follows by Justice Newbould in the endorsement dated February 9, 2015 dismissing a motion that challenged the priority of the Manager's charge on the basis that, *inter alia*, the Manager's appointment was not necessary:

> [25] Moreover, the receiver was necessary to preserve and realize the property of all of the schedule B corporations … for the benefit of all interested parties, including secured creditors. All of the properties were in chaos at the time the Manager was appointed and the subject of wrongful conduct, including co-mingling of funds, a lack of records and unauthorized use of funds. If the Waltons had been left unchecked, the adverse effects would undoubtedly have been worse.

> 40th Report at para. 49, MR, Tab 2, p. 28

37. In affirming Justice Newbould's November 5 Order appointing the Manager, a unanimous panel of the Court of Appeal, in its Endorsement dated May 21, 2014, which is attached as Appendix "C" to the 40th Report, concluded:

> [13] … The remedy ordered by the application judge, while undoubtedly one that should not be easily granted, was, in our view, fully justified in these circumstances.
>
> 40th Report at para. 50, MR, Tab 2, pp. 28-29

38. In support of the Waltons' claim that it is these proceedings and not their own management that caused the losses suffered by Bernstein and others in relation to the Schedule "B" Companies, the Waltons assert that mortgages registered against the Schedule "B" Properties were current but that appointment of the Manager constituted an event of default under most or all of these mortgages. Contrary to this assertion, many of the Schedule "B" Properties were already in default when the Manager was appointed because they had failed to pay property taxes or permitted the registration of construction liens against the relevant property. More generally, the Waltons' assertion ignores the precarious financial position of the Schedule "B" Companies when the Manager was appointed. As is discussed in detail in the Fifth Report of the Inspector, the Waltons relied on equity contributions from Bernstein to fund the cash flow needs of both the Schedule "B" Companies and the Schedule "C" Companies. Without such funding, the Schedule "B" Companies would have been unable to fund their obligations whether or not the Manager was appointed.

> 40th Report at para. 51, MR, Tab 2, p. 29

E. No relief is available against the Schedule "B" Companies

39. The Waltons have commenced an application seeking damages from the Schedule "B" Companies. Pursuant to the November 5 Order, the Manager is authorized and empowered to respond to claims against the Schedule "B" Companies. In the Manager's view, the Waltons' claim against the Schedule "B" Companies has no basis in fact or law. Accordingly, the Manager has brought the within motion to strike the Notice of Counter-Application to the extent that it asserts claims against the Schedule "B" Companies.

> 40th Report at para. 52, MR, Tab 2, p. 29

III. LAW AND ARGUMENT

A. The Manager Opposes the Respondents' Request for Trial

40. As described above, the Waltons' request for a trial is an attempt to relitigate matters that have already been decided in these proceedings. Such an attempt constitutes an abuse of process and should be denied by this Court. As stated by the Supreme Court of Canada:

> The doctrine of abuse of process engages the inherent power of the court to prevent the misuse of its procedure, in a way that would be manifestly unfair to a party to the litigation before it… One circumstance in which abuse of process has been applied is where the litigation before the court is found to be in essence an attempt to relitigate a claim which the court has already determined.
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> *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63 at para. 37 quoting *House of Spring Gardens Ltd. v.* Waite, [1990] 3 W.L.R. 347 at p. 358 (C.A.); Manager's Book of Authorities ("**BOA**"), Tab A

41. In the Manager's view, the proposed trial will significantly lengthen these proceedings. Moreover, the Manager has, since its appointment as Inspector in October 2013, asked the Waltons and their former employees for information and documentation relating to how funds

invested by Bernstein were used. The Waltons have consistently maintained that Bernstein's funds were used to pay legitimate expenses incurred by the Schedule "B" Companies but have been unable to provide the documents required to substantiate this assertion. The Waltons' most recent evidence is similar in kind and quality to what has previously been provided to the Inspector and the Court. The Waltons have not identified what different or better evidence would be presented if the matter were to proceed to trial.

B. Portions of the Waltons' Notice of Counter-Application should be struck

42. The Manager respectfully submits that the Waltons' newly launched "Counter-Application" is deeply flawed and that parts of the Waltons' claim should be struck. The impugned paragraphs are highlighted in yellow on the copy of the Waltons' application attached as Appendix "A".

43. Rules 25.11 and 38.12 provide that the Court may strike out or expunge all or part of any document filed on an application, with or without leave to amend, on the ground that the document,

(a) may prejudice or delay the fair hearing of the application;

(b) is scandalous, frivolous or vexatious; or

(c) is an abuse of process of the court.

Rules 25.11 and 38.12, *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194

Frank v. Legate, 2015 ONCA 631 at para. 37, BOA, Tab B

44. Rule 25.11 authorizes the Court to strike a document, or any portion thereof, where any one of the above-listed criteria is met. As described below, portions of the Respondents' Counter-Application meet *all three* requirements.

> Rules 25.11, *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194

45. The Supreme Court of Canada affirmed the importance of motions to strike out claims that have no chance of success in *R v. Imperial Tobacco Canada Ltd.*, [2011] 3 SCR 45:

> [19] The power to strike out claims that have no reasonable prospect of success is a valuable housekeeping measure essential to effective and fair litigation. It unclutters the proceedings, weeding out the hopeless claims and ensuring that those that have some chance of success go on to trial.
>
> [20] This promotes two goods — efficiency in the conduct of the litigation and correct results. Striking out claims that have no reasonable prospect of success promotes litigation efficiency, reducing time and cost. The litigants can focus on serious claims, without devoting days and sometimes weeks of evidence and argument to claims that are in any event hopeless. The same applies to judges and juries, whose attention is focused where it should be — on claims that have a reasonable chance of success. The efficiency gained by weeding out unmeritorious claims in turn contributes to better justice. The more the evidence and arguments are trained on the real issues, the more likely it is that the trial process will successfully come to grips with the parties' respective positions on those issues and the merits of the case.
>
> *R. v. Imperial Tobacco Canada Ltd.*, [2011] 3 S.C.R. 45 at paras. 19-20, BOA, Tab C

46. As is described below, the Waltons' claim cannot succeed to the extent it alleges that the Schedule "B" Properties were sold improvidently or that the Waltons are owed damages by the Schedule "B" Properties. It follows that these allegations should be struck, without leave to amend.

(i) The allegation that the Schedule "B" Properties were sold improvidently is an abuse of process and should be struck

47. As noted above, every aspect of the marketing and sale of the Properties by the Manager was disclosed to the Court and the Waltons. If, as the Waltons now allege, the Manager's actions resulted in "precipitous devaluation of the properties," they could have – and should have – sought directions from the Court. They did not. To the extent issues were raised, they were dismissed and no appeal was brought. The time to object to the Manager's sales process passed long ago.

> Notice of Counter-Application of the Respondents at para. (xi.), Application Record of the Respondents, Tab 1, p. 12

48. Attacking the court-approved sales process long after the fact is an abuse of process. The Waltons' application asserts that the sale of the Schedule "B" Properties by the Manager was not fair and reasonable. But this Court has already held that the *very same* sales *were* fair and reasonable. The Waltons' claim is a collateral attack on literally dozens of orders of this Court. Where, as here, a decision of the court is attacked in proceedings other than those whose specific object is the reversal of such decision, the attack must fail.

> See, for example, discussion in *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63 at para. 33, BOA, Tab A

(ii) The Waltons' Claim against the Schedule "B" Companies is Frivolous and Should be Struck

49. The essence of the Waltons' claim is that they, the Waltons, caused the Schedule "C" Companies to transfer monies to the Schedule "B" Companies and that, as a result, the Schedule "B" Companies are liable to them. This claim is not supported by either evidence or even allegations that could give rise to liability if proven.

50. The Waltons assert in their Notice of Counter-Application (although no reference to this issue is to be found in the Waltons' evidence) that the net contribution of certain Schedule "C" Companies to Rose & Thistle "likely benefitted" the Schedule "B" Properties. The first flaw in the Waltons' claim is that there is no evidence that the funds identified in the Waltons' Notice of Application flowed into any of the Schedule "B" Companies. On an aggregate basis, the Schedule "B" Companies made a massive net contribution to the Schedule "C" Companies. The identified funds could have been used to benefit other Schedule "C" Companies or the Waltons themselves.

40th Report at para. 53, MR, Tab 2, p. 30

51. The only apparent basis for the allegation that there were funds transferred by the Waltons from the Schedule "C" Companies to the Schedule "B" Companies is that the Inspector has not traced how funds invested by the Schedule "C" Investors were used. However, the Court of Appeal, in dismissing the DeJongs' appeal of the August 12 Order, specifically held that the Manager has no obligation to trace funds invested by the Schedule "C" Investors:

> [14] The DeJong appellants' complaint about the motions judge's failure to give directions on their tracing rights is related to the work of the Inspector. They contend that the Inspector was obliged to do a full tracing of all monies, as opposed to focusing on tracing the Bernstein applicants' funds.
>
> [15] The Bernstein applicants are paying for the Inspector. He is tracing their funds. Of course, in fulfilling his obligations, the Inspector must be mindful that he was appointed by the court. However, those obligations do not require the Inspector to trace the monies of all parties into and out of the various companies and properties. As the motions judge indicated, the DeJong appellants can assert their rights in the claims process. It is up to them to take such steps as are necessary to assert their rights in that process.

August 12 Order, being Exhibit "D" to the 40th Report, MR, Tab 2D, p. 174

52. Even if there was some basis for the assertion that the Inspector should trace funds invested by the Schedule "C" Investors, that assertion could not possibly lie in the Waltons' mouths. The Waltons directed each and every transaction that they say the Inspector should trace. Having solicited investments from the Schedule "C" Investors (and in the absence of any evidence that the Waltons were authorized to transfer funds invested to other companies) the Waltons now say that the *Inspector* has an obligation to identify how *they* used funds invested by the Schedule "C" Investors. It is the Waltons themselves that should have this knowledge.

53. Three further observations are warranted with respect to the tracing that the Waltons say the Inspector should have conducted:

(a) In January 2015, the Schedule "C" Investors brought a motion to compel the Inspector to trace how the funds they invested were used. The difficulty with this motion was – and is – that funding to conduct such a tracing was not available. The Schedule "C" Investors' motion was adjourned and the Schedule "C" Investors have taken no further steps to obtain such a tracing since January 2015;

(b) The Inspector compiled a master spreadsheet containing all of the transactional information underlying its tracing. This spreadsheet was provided to the Respondents in advance of the July 2014 Hearing and to the Schedule "C" Investors in January 2015. There is nothing to prevent either the Waltons or the Schedule "C" Investors from conducting the tracing that the Waltons say the Manager should conduct;

(c) The Waltons also complain that the Inspector's tracing analysis was conducted by the CFO of Bernstein's companies, Jim Reitan, for Dr. Bernstein's benefit. This allegation is baseless. Justice Brown specifically held that the Inspector's reports

> were reliable and rejected the Waltons' challenge to them. Nor did Mr. Reitan "conduct" the Inspector's analysis. That analysis was conducted by the Inspector with the assistance of Duff & Phelps. Mr. Reitan assisted the analysis, which the Order of this Court dated October 4, 2013 specifically authorized him to do. The Court's October 4, 2013 Order is attached as Appendix "H" to the 40th Report.

54. The Waltons also claim damages for unjust enrichment based on work allegedly performed and monies allegedly paid by Rose & Thistle on behalf of the Schedule "B" Properties. This is the same claim that Justice Brown described as "audacious, but forensically unsupported" and dismissed. This aspect of the Waltons' claim is a collateral attack on the August 12 Order and must fail on that basis.

55. In addition, the Waltons' claim against the Schedule "B" Companies is statute barred by the *Limitations Act* due to the expiry of Ontario's basic two-year limitation period. Even if the Waltons had completed the alleged transactions on which their claim is based, such transactions would have been completed before the appointment of the Manager on November 5, 2013 – more than two years before the Respondents served their Notice of Counter-Application.

> *Limitations Act, 2002*, S.O. 2002, c. 24, Sched. B, s. 4

56. The November 5 Order, while staying proceedings against the Schedule "B" Companies generally, did not prevent the Waltons from bringing their claims within the limitation period. In fact, the November 5 Order specifically authorizes claims as between the Applicants and the Respondents:

> Notwithstanding any other provision in this Order, the parties shall not be precluded from taking any steps or from commencing or

> continuing any proceedings in Ontario Superior Court of Justice, Court File No. CV-13-10280-00CL.
>
> November 5 Order at para. 12, being Exhibit "B" to the 40th Report, MR, Tab 2B, p. 62

57. The final, and perhaps most significant, flaw in the Waltons' claim against the Schedule "B" Companies is that the Waltons seek relief based on the alleged misuse of funds belonging to the Schedule "C" Companies, but the Waltons—and only the Waltons—controlled how these funds were used. The Schedule "B" Companies can only have liability for receipt of funds if the funds were wrongfully obtained. But if any misappropriation from the Schedule "C" Companies occurred, the Waltons are entirely to blame. The Waltons cannot seek compensation for losses allegedly caused by their own wrongdoing.

IV. CONCLUSION

58. For the foregoing reasons, the Manager respectfully requests an Order dismissing the Waltons' request for a trial; striking the Waltons' Notice of Counter-Application to the extent it alleges that the Schedule "B" Properties were sold improvidently; and, striking the Waltons' claim for damages against the Schedule "B" Properties.

All of which is respectfully submitted this 9th day of March, 2016.

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 Luttrell 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 Ltd.
5. Liberty Village Lands Inc.
6. Riverdale Mansion Ltd.
7. Royal Agincourt Corp.
8. Hidden Gem Development Inc.
9. Ascalon Lands Ltd.
10. Luttrell 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 Development Ltd.
31. Eddystone Place Inc.
32. Richmond Row Holdings Ltd.

33. El-Ad (1500 Don Mills) Limited
34. 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

SCHEDULE "D"

RELEVANT CASE LAW

1. *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63
2. *Frank v. Legate*, 2015 ONCA 631
3. *R v. Imperial Tobacco Canada Ltd.*, [2011] 3 SCR 45

6549441

SCHEDULE "E"

TEXT OF RELEVANT STATUTES

***Rules of Civil Procedure*, R.R.O. 1990, Reg. 194**

25.11 The court may strike out or expunge all or part of a pleading or other document, with or without leave to amend, on the ground that the pleading or other document,

(a) may prejudice or delay the fair trial of the action;

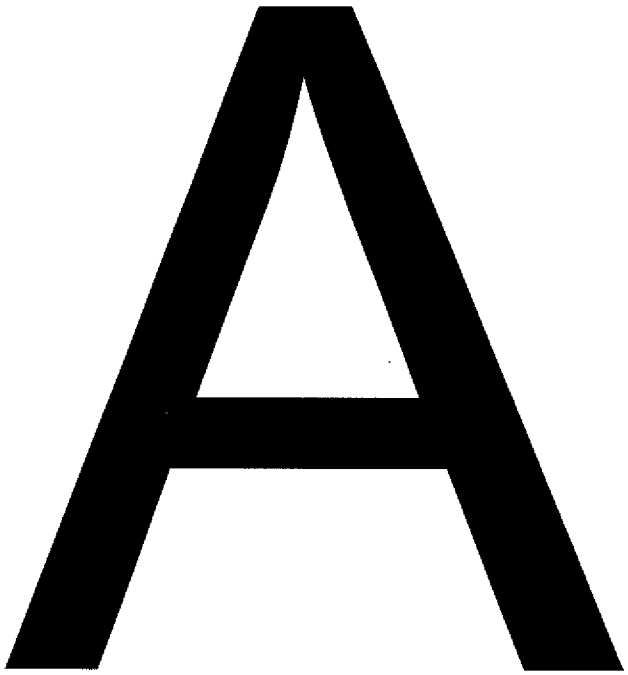
(b) is scandalous, frivolous or vexatious; or

(c) is an abuse of the process of the court.

38.12 Rule 25.11 applies, with necessary modifications, with respect to any document filed on an application.

***Limitations Act, 2002*, S.O. 2002, c. 24, Sched. B**

4. Unless this Act provides otherwise, a proceeding shall not be commenced in respect of a claim after the second anniversary of the day on which the claim was discovered.



Appendix "A"

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. and EGLINTON CASTLE INC.

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

A N D B E T W E E N:

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

Applicants by Counterapplication

and

DBDC SPADINA LTD.,

and THOSE CORPORATIONS LISTED ON SCHEDULE A HERETO., and DR. STANLEY BERNSTEIN

Respondents by Counterapplication

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

NOTICE OF COUNTERAPPLICATION

TO THE RESPONDENTS BY COUNTERAPPLICATION:

A LEGAL PROCEEDING HAS BEEN COMMENCED by the Applicants by Counterapplication. The claim made by the Applicants by Counterapplication appears on the following page.

THIS APPLICATION will come on for a hearing on the 15th day of March, 2016, at 10:00 a.m., before a judge presiding over the Commercial List at 330 University Avenue, 7th Floor, Toronto, ON, M5G 1R7.

IF YOU WISH TO OPPOSE THIS APPLICATION, to receive notice of any step in the application or to be served with any documents in the application, you or an Ontario lawyer acting for you must forthwith prepare a notice of appearance in Form 38A prescribed by the *Rules of Civil Procedure*, serve it on the Applicants' lawyer or, where the Applicants do not have a lawyer, serve it on the Applicants, and file it, with proof of service, in this court office, and you or your lawyer must appear at the hearing.

IF YOU WISH TO PRESENT AFFIDAVIT OR OTHER DOCUMENTARY EVIDENCE TO THE COURT OR TO EXAMINE OR CROSS-EXAMINE WITNESSES ON THE APPLICATION, you or your lawyer must, in addition to serving your notice of appearance, serve a copy of the evidence on the Applicants' lawyer or, where the Applicants do not have a lawyer, serve it on the Applicants, and file it, with proof of service, in the court office where the application is to be heard as soon as possible, but at least four days before the hearing.

IF YOU FAIL TO APPEAR AT THE HEARING, JUDGMENT MAY BE GIVEN IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU. IF YOU WISH TO OPPOSE THIS APPLICATION BUT ARE UNABLE TO PAY LEGAL FEES, LEGAL AID MAY BE AVAILABLE TO YOU BY CONTACTING A LOCAL LEGAL AID OFFICE.

Date _____ Issued by _____

Local Registrar

Address of court office: 330 University Avenue, 7th Floor
Toronto, ON M5G 1R7

APPLICATION

1. The Respondents (Applicants by Counterapplication), Norma Walton, Ronauld Walton, The Rose & Thistle Group Ltd. and Eglinton Castle Inc., make an application against the Applicants (Respondents by Counterapplication) for:

(i.) An Order requiring that the action commenced under Court File Number CV-15-11147-00CL, known as *Trez Capital Limited Partnership et al. v. Dr. Stanley Bernstein et al.* (hereinafter referred to as "the Trez Capital action"), be combined with the herein application;

(ii.) An Order dismissing the Applicants' (Respondents by Counterapplication) request to amend their Application;

(iii.) An Order dismissing the Applicants' request to add new parties to the Application;

(iv.) An Order requiring that the Trez Capital action and the within Application be set down for a trial, with appropriate directions;

(v.) In the alternative to paragraph (iv) above, an Order requiring that the Applicants' request for damages be transferred to a reference to be conducted, to determine the appropriate level of damages;

(vi.) An Order dismissing the Applicants' request for a finding of fraud as it relates to any aspect or any portion of the quantum of the damage award requested;

(vii.) An Order or a Judgment against the Respondents in the Counterapplication for unjust enrichment, in the amount of $27,000,000.00;

(viii.) An Order or Judgment against the Respondents in the Counterapplication for damages, as per the Statement of Defence and Crossclaim of the Defendants Norma Walton and Ronauld Walton in the Trez Capital action, in the amount of $52,000,000.00 for the relief set out in paragraph 44(a) of the Cross Claim in the Trez Capital matter and for breach of contract;

(ix.) A declaration that the Respondents in the Counterapplication owe, to the Schedule "C" property investors, the sum of $14,000,000.00;

(x.) A declaration that the Schedule "B" companies and the Respondents in the Counterapplication are jointly and severally liable to pay to the following companies the amounts indicated as follows:

i. $520,850 to Prince Edward Properties Ltd.;

ii. $134,900 to Cinderella Productions Ltd.; and

iii. 1,052,895 to Front Church Properties Ltd.;

(xi.) A declaration that the Schedule "B" companies and the Respondents in the Counterapplication are jointly and severally liable to pay to the Respondents or the following Respondent companies the following amounts:

i. $234,727 to Richmond East Properties Ltd.;

ii. $132,975 to Hazelton Property Management Ltd.;

iii. $2,906,430 to the Respondents related to Tisdale Properties Ltd.;

iv. $216,308 to the Respondents related to 19 Tennis Crescent; and

v. $145,432 to the Respondents related to 110 Lombard;

(xii.) prejudgment interest in accordance with section 128 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, as amended;

(xiii.) postjudgment interest in accordance with section 129 of the *Courts of Justice Act*;

(xiv.) the costs of this proceeding; and

(xv.) Such further and other relief as this Honourable Court may deem just.

2. The grounds for the application are:

a. Consolidation Request

(i.) In paragraph 291 of Justice Brown's August 12th, 2014 decision, His Honour directed that, "All proceedings as between Dr. Bernstein and the Waltons, and their respective companies, as well as any litigation involving Schedule B Companies/Properties and Schedule C Companies/Properties, should be managed together by one judge on the Commercial List. I direct that steps be taken to transfer any other such kind of proceeding to the Commercial List."

(ii.) The action commenced under Court File No. CV-15-11147-00CL, known as *Trez Capital Limited Partnership et al. v. Dr. Stanley Bernstein et al.*, relates to proceedings between Dr. Bernstein and the Waltons and a number of the Schedule "B" properties.

b. Amendment and Addition of New Parties

(i.) The Applicants have proposed to amend their application multiple times throughout this proceeding and are once again requesting to amend the application to add claims that are more properly brought in the form of an action.

(ii.) The Applicants have elected not to bring a separate motion seeking to amend their Application prior to moving for judgment, contrary to the Rules of Civil Procedure. Rather the Applicants are purporting to request the amendment be granted concurrent with moving for judgment.

(iii.) The Applicants are further proposing to add, as parties to this Application, Respondents who have not previously been parties. Again, contrary to the Rules of Civil Procedure, they are seeking to add those parties on the same day they request judgment against them.

c. Trial to be Ordered and the Fraud Claim

(i.) Whether a basis for a global determination of fraud can be demonstrated is a triable issue. No fraud judgment should issue without the Respondents having an opportunity to adduce viva voce evidence to the Court on that issue and the component issues and to call witnesses on their behalf, pursuant to Rule 38.10 of the *Rules of Civil Procedure*, R.R.O. 1990, Regulation 194, as amended.

(ii.) The Respondents have put, in issue, a multiplicity of facts, which go to showing that no fraud has been committed, most particularly in relation to work done for jointly held properties and funds transferred to Schedule "C" properties.

(iii.) Justice Brown, in this August 12th, 2014 orders, did not make any orders against the Respondents in fraud, nor did the Court of Appeal for Ontario make any such orders against the Respondents in fraud.

(iv.) Damage claims—most particularly with regard to the within matters—are not properly brought in the context of an application, particularly when facts upon which the claim rests are contested and there is no agreement or clarity as to the quantum of damages that are exigible.

(v.) There is extreme complexity to the damage claims and factual disagreement that make a proper determination of damages beyond the scope of the adjudicative process in the application and necessitate a reference pursuant to Rule 54.02;

d. Unjust Enrichment

(i.) The Respondents claim damages for unjust enrichment, relating to work done and monies paid by The Rose and Thistle Group Ltd. ("Rose and Thistle") for the benefit of the Schedule "B" properties. Thus far Rose and Thistle has received no credit for that work.

(ii.) As a direct result of Rose and Thistle's work, the Schedule "B" properties increased in value and were ultimately appraised for much more than their original purchase price. The Applicants benefitted from this increase in value and there is no juristic reason not to compensate Rose and Thistle.

(iii.) Rose and Thistle's work created an increase in value of the Schedule B properties of approximately $27,000,000.

e. Damages

(i.) The Applicants intentionally and recklessly caused the destruction in value of the Schedule "B" property portfolio and the Schedule "C" property portfolio by petitioning both into receivership, without notice to the secured creditors as it related to the Schedule "B" properties.

(ii.) The Respondents sustained damages as a result of the Applicants' pursuit of litigation, as opposed to pursuing mediation and arbitration as a more economical, private and sensible means to resolve any concerns, particularly in light of the nature of the joint investments and the 31 contracts signed between the parties.

(iii.) The appointment of a Receiver in the circumstances of the matter had the net effect of removing any flexibility or control by the parties over their own property.

(iv.) The appointment of a Receiver lacked commercial sense and its detrimental impact was foreseeable ab initio.

(v.) As a direct result of the Applicants' reckless and unreasonable pursuit of the appointment of the Receiver over the joint-portfolio assets, including the properties, all of the mortgages on the joint-portfolio properties were put into automatic default, notwithstanding the fact that all monthly payments were current. The default severely limited the ability to sell the properties in a commercially reasonable manner.

(vi.) Furthermore, if notice of the litigation had been provided to the secured creditors by the Applicants, the secured creditors could have made the Court aware that a

receivership or management order would automatically put the mortgages into default, thus triggering the lenders' rights to power of sale on all of the properties. This may have given the Applicants pause to reconsider the disastrous effects that public litigation would have on the value of the joint-portfolio.

(vii.) A further consequence of the litigation was that the Applicants had originally sought oppression remedies with respect to only six of the joint-portfolio properties. However, the Court appointed a Manager/Receiver over the entirety of the joint-portfolio, inclusive of those in relation to which no particular allegations of oppression had been made by the Applicants.

(viii.) The course of action pursued by the Applicants, in this respect, gave rise to instability in the business of the Respondents, exposed the Respondents to personal liability for mortgages totalling in excess of $200 million, by virtue of the Waltons' personal guarantees with respect thereto, as well as led to the commencement of a number of litigious proceedings by secured creditors.

(ix.) Furthermore, the appointment of the Manager/Receiver over the joint-portfolio properties substantially diminished the value of the properties, both by the reduced value of properties that are sold via receivership or power of sale, and additionally due to the greatly increased costs associated with the litigation and third-party management of the properties. These costs have totaled many millions of dollars.

(x.) Given that the real properties in control of the Court were improvidently liquidated, Bernstein's negligent and reckless course of action in obtaining the appointment of

a Manager/Receiver fundamentally reduced the value of the joint-portfolio and the personal assets of the Waltons.

(xi.) The marketing of the joint-portfolio properties, by the court-appointed Manager/Receiver, not only resulted in the precipitous devaluation of the properties, but additionally left a sizeable shortfall in available funds for distribution to creditors.

(xii.) Immediately upon the receivership Order being made, the Receiver declared that it would not entertain any offers to purchase until it had conducted a comprehensive valuation of the portfolio, despite the Respondents providing to the Receiver all of the appraisal reports. As such, the Receiver chose not to negotiate over many favourable offers to purchase the properties and, ultimately, sold those properties for far less than those offers initially received.

(xiii.) The Respondents attracted three big funds who were interested in purchasing the entire portfolio or, alternatively, enough of the portfolio to pay off the entirety of the mortgage debt. On receiving those offers, the Receiver and the Applicants sought a court order excluding the Respondents from the sales process. Due to the Respondents being excluded from discussions with respect to the disposition of the joint-portfolio properties, their in-depth knowledge of the portfolio and lucrative business connections were compromised. The value of the portfolio was reduced significantly as a result.

(xiv.) Furthermore, in an Order dated November 5th, 2013, Justice Newbould clearly bestowed upon the receiver manager unlimited discretion in dealing with the

properties, which by implication includes developing the properties and realizing their full potential value, which was not done. Instead the properties were liquidated.

(xv.) Bernstein failed to act in good faith, in the performance of his contractual duties to the companies governing the joint-portfolio properties and to his partners, in changing his approach to the way the partnership's business was carried out, in refusing to mediate and arbitrate the dispute and in engaging the Respondents in costly and needless litigation.

f. Schedule C Investors' Loss

(i.) On the same basis as e. above, Dr. Bernstein's actions in petitioning the Schedule C portfolio into Receivership caused the same sort of losses to the Schedule C equity value, to the detriment of the Schedule C investors.

(ii.) Dr. Bernstein's actions in petitioning the Schedule C properties into receivership caused the Schedule C investors to lose their $14 million investment in that portfolio.

g. Respondent and Respondent Company Entitlement

(i.) Pursuant to the Inspector's Tracing Analysis, eight of the Respondent companies provided to Rose and Thistle net monies. Those monies likely benefitted the Schedule B properties to the detriment of the Schedule C properties.

(ii.) Specifically:

i. Prince Edward Properties provided to Rose and Thistle the net sum of $520,850 to its specific detriment;

ii. Cinderella Productions Ltd. provided to Rose and Thistle the net sum of $134,900 to its specific detriment;

iii. Front Church Properties Ltd. provided to Rose and Thistle the net sum of $1,052,895 to its specific detriment.

vi. Richmond East Properties Ltd. provided to Rose and Thistle the net sum of $234,727 to its specific detriment;

vii. Hazelton Property Management Ltd. provided to Rose and Thistle the net sum of $132,975 to its specific detriment;

viii. Tisdale Properties Ltd. before Dr. Bernstein became a joint owner provided to Rose and Thistle the net sum of $2,906,430 to its specific detriment;

ix. 19 Tennis Crescent provided to Rose and Thistle the net sum of $216,308 to its specific detriment; and

i. 110 Lombard provided to Rose and Thistle the net sum of $145,432 to its specific detriment.

(iii.) The Schedule B properties likely benefitted from the monies that flowed from the above properties through Rose and Thistle into the Schedule B properties. The Inspector has refused to provide a tracing analysis showing the flows from Schedule C through Rose and Thistle into Schedule B to more accurately identify

where those funds went, despite requests being made by the Schedule C investors and the Respondents. Hence the only tracing before the Court is for the benefit of the Applicants conducted by the Applicants' CFO.

(iv.) Any damages claim by Dr. Bernstein using the Inspector's Tracing Analysis must be tied to the above claims that are owed by him back to the Schedule C Properties.

(v.) In contrast to Dr. Bernstein's claim for damages related to the Inspector's Tracing Analysis wherein he was either paid back for the monies that were transferred or received significant value from Rose and Thistle for those monies, none of the above monies were repaid to the Schedule "C" properties or to the Respondent companies.

(vi.) Such further and other grounds as counsel may advise.

3. The following documentary evidence will be used at the hearing of the application:

(i.) Affidavit of Norma J. Walton, Sworn on the 12th day of February, 2016;

(ii.) The Amended Statement of Claim of the Plaintiffs in the matter of *Trez Capital Limited Partnership et al. v. Dr. Stanley Bernstein et al.*, under Court File No. CV-15-11147-00CL;

(iii.) The Statement of Defence and Crossclaim of the Defendants Dr. Stanley Bernstein, DBDC West Mall Holdings Inc., 2272551 Ontario Limited and DBDC Global Mills Ltd., in the matter of *Trez Capital Limited Partnership et al. v. Dr. Stanley Bernstein et al.*, under Court File No. CV-15-11147-00CL;

(iv.) The Statement of Defence and Crossclaim of the Defendants Norma Walton and Ronauld Walton, in the matter of *Trez Capital Limited Partnership et al. v. Dr. Stanley Bernstein et al.*, under Court File No. CV-15-11147-00CL;

(v.) The Statement of Defence of the Defendants Norma Walton and Ronauld Walton to the Crossclaim of the Defendants Dr. Stanley Bernstein, DBDC West Mall Holdings Inc., 2272551 Ontario Limited and DBDC Global Mills Ltd., in the matter of *Trez Capital Limited Partnership et al. v. Dr. Stanley Bernstein et al.*, under Court File No. CV-15-11147-00CL;

(vi.) The Respondent's Motion Record (7 Volumes) dated September 21, 2015, filed;

(vii.) The Respondent's Motion Record (multiple volumes) dated July 3, 2014, filed;

(viii.) The Respondent's Motion Record (multiple volumes) dated June 25, 2014, filed;

(ix.) The Respondent's Motion Record (multiple volumes) dated November 2013, filed;

(x.) The Respondent's Motion Record (multiple volumes) dated October 2013, filed;

(xi.) All previous affidavits sworn by Norma Walton and filed by her, or on her behalf, in this matter; and

(xii.) Such further and other evidence as counsel may advise and this Honourable Court may permit.

12th February 2016

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TO: THE SERVICE LIST

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)

NOTICE OF COUNTERAPPLICATION

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DBDC SPADINA LTD., et al Applicants	NORMA WALTON, et al Respondents	Court File No. CV-13-10280-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
Commercial List

Proceeding commenced at Toronto

Factum of Schonfeld Inc.
("Counter-Application" of the Respondents returnable March 15, 2016 re: various procedural relief and Manager's Motion returnable March 15, 2016 for an Order Striking Certain Portions of the Respondents' "Notice of Counter-Application")

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File No. 14.0074