

AMENDED THIS July 11, 2022 PURSUANT TO
MODIFIÉ CE July 11, 2022 CONFORMÉMENT À

RULE/LA RÈGLE 28.02 (_____)

THE ORDER OF Justice P. Perell
L'ORDONNANCE DU

DATED / FAIT LE July 5, 2021

REGISTRAR
SUPERIOR COURT OF JUSTICE

GRÉGIER
COUR SUPÉRIEURE DE JUSTICE

Court File No.: CV-17-570361-00CP

**ONTARIO
SUPERIOR COURT OF JUSTICE**

BETWEEN:

ARLENE MCDOWELL and THE ESTATE OF BRYAN MADRYGA,
BY HIS LITIGATION ADMINISTRATOR REBECCA SHAW

Plaintiffs

- and -

FORTRESS REAL CAPITAL INC., FORTRESS REAL DEVELOPMENTS INC., JAWAD RATHORE, VINCENZO PETROZZA, LAMB CALGARY INC., ORCHARD CALGARY INC., BUILDING & DEVELOPMENT MORTGAGES CANADA INC., ILDINA GALATI, FFM CAPITAL INC., ROSALIA SPADAFORA, FMP MORTGAGE INVESTMENTS INC., MICHAEL DARAMOLA, TONINO AMENDOLA, GRAHAM MCWATERS, DEREK SORRENTI, GRANT MORGAN, and SORRENTI LAW PROFESSIONAL CORPORATION

Defendants

Proceeding under the *Class Proceedings Act, 1992*, SO 1992, c 6

FRESH AS AMENDED STATEMENT OF CLAIM

TO THE DEFENDANT(S):

A LEGAL PROCEEDING HAS BEEN COMMENCED AGAINST YOU by the Plaintiff. The Claim made against you is set out in the following pages.

IF YOU WISH TO DEFEND THIS PROCEEDING, you or an Ontario lawyer acting for you must prepare a Statement of Defence in Form 18A prescribed by the *Rules of Civil Procedure*, serve it on the Plaintiff's lawyer or, where the Plaintiff does not have a lawyer, serve it on the Plaintiff, and file it, with proof of service in this court office, WITHIN TWENTY DAYS after this Statement of Claim is served on you, if you are served in Ontario.

If you are served in another province or territory of Canada or in the United States of America, the period for serving and filing your Statement of Defence is forty days. If you are served outside Canada and the United States of America, the period is sixty days.

Instead of serving and filing a Statement of Defence, you may serve and file a Notice of Intent to Defend in Form 18B prescribed by the *Rules of Civil Procedure*. This will entitle you to ten more days within which to serve and file your Statement of Defence.

IF YOU FAIL TO DEFEND THIS PROCEEDING, JUDGMENT MAY BE GIVEN AGAINST YOU IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU. IF YOU WISH TO DEFEND THIS PROCEEDING BUT ARE UNABLE TO PAY LEGAL FEES, LEGAL AID MAY BE AVAILABLE TO YOU BY CONTACTING A LOCAL LEGAL AID OFFICE.

Date February 24, 2017 Issued by "H. Tsakiris"
Local Registrar

Address of court office: Superior Court of Justice
330 University Avenue, 9th Floor
Toronto, ON M5G 1R7

TO: FORTRESS REAL CAPITAL INC.
25 Brodie Drive, Unit 8
Richmond Hill, ON L4B 3K7

AND TO: FORTRESS REAL DEVELOPMENTS INC.
25 Brodie Drive, Unit 8
Richmond Hill, ON L4B 3K7

AND TO: JAWAD RATHORE
25 Brodie Drive, Unit 8
Richmond Hill, ON L4B 3K7

AND TO: VINCENZO PETROZZA
25 Brodie Drive, Unit 8
Richmond Hill, ON L4B 3K7

AND TO: LAMB CALGARY INC.
3000, 700-9th Avenue S.W.
Calgary, AB T2P 3V4

AND TO: ORCHARD CALGARY INC.
25 Brodie Drive, Unit 8
Richmond Hill, ON L4B 3K7

AND TO: BUILDING & DEVELOPMENT MORTGAGES CANADA INC.
25 Brodie Drive, Unit 8
Richmond Hill, ON L4B 3K7

**AND TO: ESTATE OF ILDINA GALATI by its Trustee in Bankruptcy CROWE
SOBERMAN INC
25 Brodie Drive, Unit 8
Richmond Hill, ON L4B 3K7**

**AND TO: FFM CAPITAL INC.
4-81 Zenway Blvd.
Woodbridge, ON L4H 0S5**

**AND TO: ROSALIA SPADAFORA
4-81 Zenway Blvd.
Woodbridge, ON L4H 0S5**

**AND TO: FMP MORTGAGE INVESTMENTS INC.
930 The East Mall
Toronto, ON M9B 6J9**

**AND TO: MICHAEL DARAMOLA
c/o FMP Mortgage Investments Inc.
930 The East Mall
Toronto, ON M9B 6J9**

**AND TO: TONINO AMENDOLA
c/o FMP Mortgage Investments Inc.
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**AND TO: GRAHAM MCWATERS
c/o FMP Mortgage Investments Inc.
930 The East Mall
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**AND TO: DEREK SORRENTI
Sorrenti Law Professional Corporation
310-3300 Highway 7
Vaughan, ON L4K 4M3**

**AND TO: GRANT MORGAN
c/o SORRENTI LAW PROFESSIONAL CORPORATION
310-3300 Highway 7
Vaughan, ON L4K 4M3**

**AND TO: SORRENTI LAW PROFESSIONAL CORPORATION
310-3300 Highway 7
Vaughan, ON L4K 4M3**

CLAIM

1. The plaintiffs, Arlene McDowell (“McDowell”) and Rebecca Shaw (“Shaw”), Estate Administrator for the Estate (the “Estate”) of Bryan Madryga (“Madryga”), claim on their own behalf and on behalf of the proposed Class (together, the “Investors”):

(a) an order pursuant to the *Class Proceedings Act, 1992*, SO 1992, c 6 (the “CPA”), certifying this action as a class proceeding and appointing McDowell and Shaw as the Representative Plaintiffs;

(b) a declaration that Fortress Real Developments Inc. (“Fortress Developments”) holds in trust for the benefit of the plaintiffs and the Class its interest in an agreement with Lamb Calgary Inc. (“Lamb Calgary”) dated on or around January 23, 2014 and any amendments thereto or further agreements between the same parties with respect to a real estate development located at 602, 606, 610, 620, 624, 626 and 628 12th Avenue S.E., in Calgary, Alberta (the “Orchard Project”), and that Fortress Developments’ interest in the proceeds of sale of the Orchard Project, or, in the alternative, that any payments made to Fortress Developments by Lamb Calgary are impressed with a constructive trust in favour of the Plaintiffs and the Class;

(c) a declaration that Fortress Real Capital Inc. (“Fortress Capital”), Fortress Developments, Building and Development Mortgages Canada Inc. (“BDMC”), FFM Capital Inc. (“FFM”), FMP Mortgage Investments Inc. (“FMP”), Ildina Galati (“Galati”), Rosalia Spadafora (“Spadafora”), Michael Daramola (“Daramola”), Tonino Amendola (“Amendola”), Derek Sorrenti (“Sorrenti”), and Sorrenti Law Professional Corporation (“Sorrenti Law”) breached their respective fiduciary duties owed to McDowell, Madryga and the Class;

- (d) an order compelling disgorgement of all profits earned by those defendants who are found by the Court to be fiduciaries of the Investors;
- (e) an accounting and equitable tracing of all funds received from the Investors by Fortress Capital, Fortress Developments, Lamb Calgary, BDMC, FFM, FMP, Sorrenti, and Sorrenti Law;
- (f) in the alternative to subparagraph (b) above, rescission of all agreements between the Investors and the defendants with respect to the Investors' investments in a syndicated mortgage loan that Lamb Calgary granted to the Investors registered against title to the subject lands;
- (g) a declaration that the Investors are creditors of Fortress Capital, Fortress Developments, BDMC, FFM and FMP, and as such are complainants under s. 245 of the Ontario *Business Corporations Act*, RSO 1990, c B-16 (the "*OBCA*") or s. 238 of the Canada *Business Corporations Act*, RSC 1985, c C-44 (the "*CBCA*") as applicable;
- (h) a declaration that Fortress Capital, Fortress Developments, BDMC, FFM and FMP have acted in a matter that is oppressive, unfairly prejudicial to, and that unfairly disregarded the interests of the Investors as provided for under the provisions of s. 248 of the *OBCA* or s. 241 of the *CBCA* (as applicable), entitling the Investors to an order compensating the Investors for the total investment losses that they have suffered;
- (i) a declaration that the Investors are creditors of Lamb Calgary and as such are complainants under s. 239(b) of the *Business Corporations Act*, RSA 2000, c B-9 (the "*ABCA*");
- (j) a declaration that Lamb Calgary has acted in a manner that is oppressive, unfairly prejudicial to, and that unfairly disregarded the interests of the Investors as provided for

under the provisions of s. 242(2) and (3) of the *ABCA*, entitling the Investors to an order compensating the Investors for the total investment losses that they have suffered;

(k) damages, including aggravated damages, in the amount of \$25,000,000 or as otherwise assessed by the Court;

(l) exemplary and punitive damages in the amount of \$3,500,000;

(m) an order directing a reference or giving such other directions as may be necessary to determine issues not determined at the trial of the common issues;

(n) costs of this action on a substantial indemnity basis, plus the costs of providing notice of certification, notice of resolution of the common issues trial, and any other notices required to be provided to the Class, and costs of administering the plan of distribution of the recovery in this action, plus applicable taxes, pursuant to s. 26(9) of the *CPA*, on a full indemnity basis;

(o) pre-judgment and post-judgment interest at the rate of 8% interest per year, pursuant to the terms of the syndicated mortgage loan or as otherwise fixed by the Court;

(p) in the alternative to subparagraph (o), pre-judgment and post-judgment interest pursuant to ss. 128 and 129 of the *Courts of Justice Act*, RSO 1980, c 43, or such other rate as this Honourable Court deems just; and,

(q) such further and other relief as this Honourable Court deems just.

2. In this claim, the following definitions are used:

(a) “**Class**”, “**Class Members**” and “**Investors**” mean all persons in Canada who invested in a syndicated mortgage in respect of the Orchard Project registered against title as instrument number 141 112 373 to the lands located at 602, 606, 610, 620, 624, 626 and 628 12th Avenue S.E., in Calgary, Alberta, more fully described at Schedule “A” herein;

- (b) “**CUSPAP**” means the Canadian Uniform Standards of Professional Appraisal Practice which are the professional standards that appraisers must meet in performing a real property valuation as established by the Appraisal Institute of Canada (“**AACI**”);
- (c) “**FAAN**” means FAAN Mortgage Administrators Inc.;
- (d) “**Fortress Brokers**” means, jointly, FFM, FMP, and FDS Broker Services Inc.;
- (e) “**Fortress Defendants**” or “**Fortress**” means, jointly, Fortress Real Capital Inc. and Fortress Developments;
- (f) “**FSCO**” means the Financial Services Commission of Ontario, which regulated the financial services industry, including regulation and licensing of mortgage brokers, agents, brokerages and mortgage administrators with respect to dealing and trading in mortgages in Ontario, and which was replaced by FSRA in June 2019;
- (g) “**FSRA**” means the Financial Services Regulatory Authority of Ontario, a regulatory commission established under the *Financial Services Regulatory Authority of Ontario Act, 2016*, SO 2016, c 37, Sched 8 (the “*FSRA Act*”), replacing the Financial Services Commission of Ontario in June 2019;
- (h) “**MBLAA**” means the *Mortgage Brokerages Lenders and Administrators Act, 2006*, SO 2006, c 29;
- (i) “**Orchard Project**” or “**the subject lands**” refers to the real estate development project located at 602, 606, 610, 620, 624, 626 and 628 12th Avenue S.E., in Calgary, Alberta and the lands thereunder;
- (j) “**Petrozza**” means Vincenzo Petrozza, a founder, officer, director, and spokesperson of Fortress Capital, Fortress Developments, and Fortress Orchard 2014 Inc.;
- (k) “**Rathore**” means Jawad Rathore, a founder, officer, director, and spokesperson of Fortress Capital, Fortress Developments, and Fortress Orchard 2014 Inc.;
- (l) “**SML**” means the syndicated mortgage loan (a mortgage that secures a debt obligation in respect of which two or more persons are lenders) granted by McDowell and Madryga and the Class to Lamb Calgary and registered on title to the subject lands as instrument 141 112 373;
- (m) “**SML Agreement**” means the loan agreement between Centro Mortgage Inc. (renamed BDMC in or about January 2016), in trust, and Lamb Calgary dated January 23, 2014; and
- (n) “**Sorrenti Defendants**” means Sorrenti, Grant Morgan (“**Morgan**”) and Sorrenti Law.

NATURE OF THE ACTION

3. This action concerns a syndicated mortgage loan made by McDowell, Madryga, and the proposed Class Members that was registered against the lands underlying the Orchard Project as instrument 141 112 373. Investments in the SML were marketed and sold to the Class by Fortress, Rathore, Petrozza, BDMC, and other mortgage brokerage firms, including the Fortress Brokers and their agents, or referring parties acting as subagents to BDMC and/or the Fortress Brokers for which BDMC and/or the Fortress Brokers are liable in law.

4. The Orchard Project was intended to be a two-phase development project on an approximately 61,000 square foot site encompassing two high-rise condominium towers with residential units and commercial/retail space.

5. The SML went into default on or about April 30, 2016 when Lamb Calgary failed to pay to the Investors the quarterly interest payment due for the first quarter of 2016. Interest began and continues to accrue under the terms of the SML Agreement.

6. At the time of the default, the principal outstanding under the SML was \$14,204,145. By August 31, 2020 interest had accrued in the amount of \$4,406,442, based upon the information contained in FAAN's 19th Report dated August 15, 2020.

7. Subsequent to the default, the subject lands were listed for sale by Lamb Calgary. In June 2020, Lamb Calgary sold the subject lands for \$7 million. After payment of the mortgages in priority to the SML, outstanding property taxes, commissions, and other closing costs, approximately \$1.8 million remained. On September 22, 2020, FAAN obtained Court approval to discharge the SML and for distribution to the Class of 85% of the remaining proceeds on a *pari-passu* basis. It retained 15% as an administrative holdback.

8. This distribution paid to the Investors a small portion of the accrued interest arrears, only.

9. As detailed below, the defendants were negligent and made negligent misrepresentations about the value of the Orchard Project lands, and the nature and risks associated with investment in the SML, which induced the Investors to enter into the SML, to the detriment of the Investors.

10. Alternatively, the representations made by Fortress, its principals, BDMC, the Fortress Brokers and their agents were fraudulent in respect of the value of the subject lands, and the nature and risks associated with investment in the SML, and these fraudulent representations induced McDowell, Madryga and the Class to enter into the SML.

11. Further, the defendants other than the Sorrenti Defendants conspired to, and did, cause injury to the Investors.

12. The outstanding principal owing on the SML in respect of the Orchard Project is approximately \$14.2 million. Interest is also outstanding and continues to accrue.

13. The plaintiffs, therefore, claim, on behalf of McDowell, the Estate and the Class, damages equivalent to the total losses of capital that they have sustained, including interest at the rate of 8% per year, less the interest payment received following the sale of the property.

THE PARTIES

A. The Representative Plaintiffs

14. The plaintiff McDowell resides in the City of Toronto in the Province of Ontario.

15. The plaintiff Shaw is the Estate Administrator for the Estate of Bryan Madryga. She resides in the town of Whitchurch-Stouffville, Ontario. She was Madryga's wife. Madryga died on February 8, 2021.

16. McDowell and Madryga and the Class invested in the SML. There are a total of 340 Investors. This action is brought by McDowell and Shaw on behalf the following proposed Class:

All persons in Canada who invested in a syndicated mortgage in respect of the Orchard Project registered against title to lands located at 602, 606, 610, 620, 624, 626 and 628 12th Avenue S.E., in Calgary, Alberta, registered on title as 141 112 373.

B. The Fortress Defendants, the Fortress Brokers and BDMC

17. Fortress Developments is an Ontario corporation incorporated on July 9, 2012 that at all relevant times operated from an office in Richmond Hill, Ontario. It carried on the business of real estate development, and as a development consultant including assisting other developers in obtaining financing for their developments. Its officers and directors are Petrozza and Rathore (the “Fortress Principals”). Fortress Developments is controlled by, is an authorized agent for, and acted as the alter ego of the Fortress Principals in carrying out their fraud detailed herein.

18. Fortress Capital is a federal corporation incorporated in 2009, carrying on substantially the same business as Fortress Developments, and shared office space with it. Its sole director is Petrozza. Fortress Capital is controlled by, is an authorized agent for, and acted as the alter ego of the Fortress Principals in carrying out the fraud detailed herein.

19. Together, the Fortress Defendants facilitated providing development loans to real estate developers through syndicated mortgages sold to unsophisticated retail investors. The Fortress Defendants were incorporated by Rathore and Petrozza for the purpose of facilitating a fraud on the Investors, and as a channel for Rathore and Petrozza to obtain secret commissions from real estate developers, including Lamb Calgary.

20. FFM was a licensed mortgage brokerage firm that commenced carrying on business in 2013 using the trade name Fortress Financial Management. FFM was a mortgage brokerage

licensed and governed by the provisions of the *MBLAA*, from July 10, 2013 until December 4, 2018 when it made an assignment in bankruptcy. By order of the Bankruptcy Court dated March 15, 2021, the statutory stay of proceedings as against FFM in respect of this action was lifted.

21. On February 1, 2018, FSCO issued an Order that FFM pay an administrative penalty under s. 39 of the *MBLAA* of \$235,000.

22. Spadafora was the principal broker of FFM from January 28, 2014 until her license was revoked by FSCO under s. 19 of the *MBLAA* on February 1, 2018. This action is brought against Spadafora only with respect to the Class' claims relating to her negligence while acting as the principal broker of FFM during this time period.

23. FMP Mortgage Investments Inc. ("FMP") was a company incorporated under the laws of the Province of Ontario with an office in the City of Toronto. FMP is a mortgage brokerage licensed under and governed by the provisions of the *MBLAA*. FMP previously carried on business under the name Fortress Mortgage Professionals.

24. Michael Daramola ("Daramola") was the principal broker of FMP during the relevant times herein.

25. Tonino Amendola ("Amendola") was a director and officer of FMP.

26. Graham McWaters ("McWaters"), at the relevant times, was a registered mortgage agent in the Province of Ontario in the employ of or independently contracted by FMP.

27. BDMC is an Ontario corporation, which at all materials times operated from an office at the same location as Fortress in Richmond Hill. At all relevant times, BDMC was a licensed mortgage brokerage and a licensed mortgage administrator.

28. BDMC was the main mortgage broker that Fortress used to raise initial financing for real estate developers from the investing public through syndicated mortgage loans. The loan proceeds were intended to cover the “soft costs” of real estate developments in the early stages of development, including the Orchard Project. In many Fortress projects including the Orchard Project, BDMC also held the syndicated mortgage loans as a trustee for the syndicated investors and acted as the mortgage administrator in respect of the syndicated mortgage loans.

29. Until some time in 2013, BDMC acted as the mortgage broker for both Fortress and for the investors in Fortress syndicated mortgage loans. Thereafter, BDMC was typically not the broker of record for the investors, but it continued to perform many functions of the mortgage broker for the investors, including conducting project due diligence reviews and drafting written disclosures for the investors - including the statutorily mandated FSCO disclosure forms - and obtaining appraisals or opinions of value for the properties securing the syndicated mortgage loans, which were intended to be disclosed to the investors as part of the disclosure package. In carrying out these functions, BDMC was in a conflict of interest with respect to its duties to investors, its duties to the borrower, and its own financial interests.

30. On February 1, 2018, FSCO issued an order, on consent, revoking BDMC’s mortgage brokerage license pursuant to s. 19 of the *MBLAA*. BDMC was ordered to pay an administrative penalty of \$400,000 pursuant to s. 39 of the *MBLAA*. As part of the settlement, the license of Petrozza, who was a broker with BDMC, was revoked.

31. On April 20, 2018, the Ontario Superior Court of Justice appointed FAAN as Trustee of all of the assets, undertakings and properties of BDMC, including all of the assets in the possession of or under the control of BDMC, including lenders under any syndicated mortgage, and all real

property charges in favour of BDMC, until all assets under all syndicated mortgage loans have been realized and all property has been distributed to those entitled to it.

32. The Investors have been paid approximately \$1.53 million from the proceeds of sale of the subject property. FAAN continues to be the Trustee of BDMC's assets for the Orchard Project in respect of the small balance of the proceeds from the sale of lands remaining with FAAN.

33. At all material times, Galati resided in Vaughan, Ontario. She was a licensed mortgage broker and was the principal mortgage broker of BDMC. As BDMC's sole owner, and a director and officer of BDMC, BDMC was controlled by Galati.

34. On or about February 1, 2018, as part of BDMC's settlement with FSCO, Galati surrendered her broker license, and was required to cease all mortgage brokering activities effective February 5, 2018.

35. Galati died on September 26, 2020. On March 17, 2021, the Galati Estate made an assignment into bankruptcy. By order of the Bankruptcy Court dated September 13, 2021, the statutory stay of proceedings as against the Galati Estate in respect of this action was lifted.

36. The business of each of the Fortress Defendants, the Fortress Brokers, and BDMC is inextricably interwoven with that of the other and each is the agent of the other for the purposes of the marketing and brokering of syndicated mortgage loans and for the purposes of the misrepresentation and conspiracy claims described hereinafter.

C. Lamb Calgary

37. Lamb Calgary is a corporation incorporated under the laws of the Province of Alberta on January 20, 2014 for the purpose of developing the Orchard Project. Lamb Calgary was, at all material times, 50% owned by Fortress Orchard 2014 Inc., a company incorporated in Ontario and controlled by Rathore and Petrozza. Petrozza was a director of Lamb Calgary.

D. The Sorrenti Defendants

38. Sorrenti is a lawyer licensed to practice law in Ontario. He practices through his professional corporation, Sorrenti Law, from offices in Vaughan, Ontario. From time to time, Sorrenti Law employed other lawyers, including Morgan, who assisted Sorrenti and Sorrenti Law in providing the services set out herein with respect to the Class' investments in the SML. Sorrenti and Sorrenti Law are vicariously liable for the acts or omissions of their employees.

39. The Sorrenti Defendants provided ostensibly "independent" legal advice ("ILA") to the Investors about their proposed investments in the SML. The legal advice was not independent, and the Sorrenti Defendants breached the duty of care and fiduciary duty they owed to the Investors by providing negligent advice.

40. In many Fortress projects, although not the Orchard Project, Sorrenti also acted as bare trustee to hold investors' interests in their syndicated mortgages. In those projects, Sorrenti as trustee was replaced by FAAN by court order dated September 30, 2019. Sorrenti breached the duty of care and fiduciary duty he owed to investors in those projects.

41. Sorrenti Law was retained by the Investors to register a charge on title to the Orchard Project lands, to secure the SML debt. Sorrenti Law breached its contract and breached its fiduciary duty owed to the Investors by registering charge terms that were materially different from the terms

of the SML Agreement, and which caused the Investors to lose their priority as a secured lender insofar as the registered charge permitted construction financing to be registered in priority to the SML, thereby damaging the Investors.

42. In some projects, although not the Orchard Project, Sorrenti Law also acted as the mortgage administrator for the syndicated mortgages. He was replaced in this role by FAAN by court order dated September 30, 2019. Sorrenti Law was able to administer mortgages as part of a law practice, and without a licence, pursuant to an exemption in s. 5 (6) *MBLAA*, and ss. 3 – 5 of O. Reg. 407/07 thereunder.

MORTGAGE LAW IN ONTARIO

43. In Ontario, the mortgage brokerage industry is governed by the provisions of the *MBLAA* and its regulations. The *MBLAA* and its regulations set out standards of practice for mortgage brokerages, principal brokers, brokers, agents, mortgage administrators and brokerage officers and directors.

44. At the relevant times, the mortgage brokerage industry was regulated by FSCO and then FSRA, under the *Financial Services Commission of Ontario Act, 1997*, SO 1997, c 28, and the *FSRA Act*, respectively.

45. A license is required for anyone who:

- (a) solicits a person or entity to borrow or lend money on the security of real property;
- (b) negotiates or arranges a mortgage on behalf of another person or entity;
- (c) carries on the business of dealing and trading in mortgages;
- (d) solicits a person or entity to buy or sell mortgages;
- (e) buys or sells mortgages on behalf of another person or entity;

- (f) lends money on the security of real property; or
- (g) holds themselves out as lending money on the security of real property.

46. The *MBLAA* codifies much of the previous common law with respect to the duties of mortgage brokerages, principal brokers, brokers, agents, mortgage administrators and brokerage officers and directors. Its regulations set out high standards of practice for mortgage brokerages, principal brokers, brokers, agents, mortgage administrators and brokerage officers and directors.

47. At all times, Fortress and Rathore were acting as unlicensed mortgage brokers, and in breach of the statutory duties established under the *MBLAA*. At all times all the defendants knew or ought to have known that Fortress and Rathore were acting as unlicensed mortgage brokers but they turned a blind eye to this misconduct because it was profitable for them to do so.

48. FSCO requires that investors receive a copy of an appraisal of the investment property based on its “as is” value, if one has been prepared within the preceding 12 months. Appraisals are to be prepared in accordance with the CUSPAP standards established by the AACI. This requirement was known to the defendants but was ignored. Instead, the defendants other than Lamb Calgary provided advice to the Investors based on appraisals or opinions of value on an as-built basis which resulted in the Investors being duped into believing their investments were fully secured.

FORTRESS’ BUSINESS MODEL

49. The Fortress Defendants, BDMC, the Fortress Brokers and the Fortress Principals followed the same business model for each of the developments in which they raised capital for developers and builders through the vehicle of syndicated mortgages sold to individual retail investors, including with respect to the Orchard Project.

50. The Fortress Defendants acted as one corporate enterprise. Fortress Developments was primarily the entity that entered into development agreements with third-party developers/builders, while Fortress Capital was primarily responsible for raising investment capital through the syndicated mortgages, which would be used to fulfill Fortress Developments' obligations under the development agreements. Both companies acted in concert, shared office space, shared management and staff, and pooled their financial resources.

51. The business model followed by Fortress was that it would enter into development agreements with developers/builders whereby Fortress promised to provide real estate financing for the "soft costs" of the developments in return for 50% of the profits to be generated by the development. In some cases, the developer/builder would be a single purpose entity, sometimes incorporated wholly or partially by the Fortress Principals, in which case, the single purpose entity would be the borrower in respect of the syndicated mortgage loan.

52. Prior to the popularization of syndicated mortgage financing by Fortress and other companies, the financing for the soft costs of a development was usually obtained through "mezzanine" financing, which is typically only available to a developer at higher interest rates than that charged on mortgages for the acquisition of the development lands or for construction costs, both of which are registered in priority to mezzanine financing. Because of its subordinate position, mezzanine financing is risky and the interest rates are commonly as high as 30%, reflective of the degree of risk involved in the investment. The SML was equally risky.

53. Fortress' agreements with developers/builders called for advance payments to Fortress of "anticipated profits" at the time the financing was raised. This resulted in a substantial portion of investors' money (approximately 35%) being retained by Fortress years before any profits were

actually earned, if at all. It diverted the loan money away from the developer or builder, to Fortress, who in turn paid the unearned fees to Rathore and Petrozza as secret commissions contrary to s. 426(1)(a) of the *Criminal Code*.

54. Fortress used the funds that it retained to pay mortgage brokers' and agents' commissions at inflated rates as well as to pay the Sorrenti Defendants for the allegedly "independent" legal advice that they provided to investors (discussed further below). The rest it kept as its own profits. The fact that Fortress held back approximately 35% of the investors' funds to pay these Fortress-related fees and commissions was not disclosed, including to the Investors, and was intentionally withheld from the Investors.

55. BDMC or Sorrenti Law, as the mortgage administrators, also retained another 16% of investors' capital in an "interest reserve", which was used by the mortgage administrator to pay investors the interest payable under the syndicated mortgage loans over the first two years of the mortgage's term. Effectively, this was a return of capital, as the interest paid to the investors was actually part of the capital they invested. The result was that Investors who invested outside of registered plans paid taxes on ostensible income that was actually a return of capital.

56. Additionally, if the "interest reserve" was depleted, then the interest was paid to the investors from the investment funds of subsequent investors, effectively operating like a "Ponzi" scheme. The payment of interest from the capital advanced is contrary to s. 23 of the *MBLAA* Regulation 189/08, which states that a mortgage administrator shall not make a payment to a lender or investor in connection with the administration of a mortgage unless the payment is made from funds provided by the borrower.

57. The defendants knew, or ought to have known, that the structure of holding back part of the capital of the syndicated mortgage investment to pay future interest obligations on behalf of the borrower was a breach of s. 23 of the *MBLAA* Regulation 189/08, and that this information ought to have been disclosed to investors before they entered into the syndicated mortgage, but proper disclosure was not made to investors.

58. The result was that the developer or builder received no more than 50% of the funds raised from investors for use in the development of the project itself. This fact was not disclosed to the Investors, including McDowell, Madryga and the Class. It was intentionally withheld from the Investors, including McDowell, Madryga and the Class by Fortress, Rathore, Petrozza, BDMC, Galati, the Fortress Brokers, Daramola, Amendola, and McWaters, and was negligently withheld by the Sorrenti Defendants.

59. Fortress raised the capital to finance the developments predominantly from small and unsophisticated investors. Approximately 80 – 85% of the investors in Fortress syndicated mortgage loans held their investments in registered accounts such as registered retirement savings plans, registered education savings plans, or registered retirement income funds. The fact that the syndicated mortgage loans were allegedly eligible to be held in a registered account was a key representation and selling feature of the Fortress syndicated mortgage loans, including the SML.

60. Syndicated mortgage loans aggregate the small investors' loans, which are held in the name of a trustee. The trustee then lends the aggregate amount of the syndicated mortgage loan capital to the developer through a loan agreement executed by the trustee acting on behalf of the beneficiary investors, and the loan is secured by way of a mortgage registered on title to the project lands, often listing the names of all the investors as a schedule.

61. The Fortress syndicated mortgage loans were administered on behalf of the investors by either BDMC or by Sorrenti Law. In this case, BDMC was the administrator.

62. While Fortress actively marketed the syndicated mortgage loans to potential investors, including McDowell, Madryga and the Class, Fortress and Rathore could not directly sell the syndicated mortgage loans to investors because Fortress and Rathore were not licensed. Instead, Fortress, Rathore, Petrozza, BDMC and Galati arranged for BDMC to be their front, to sell the syndicated mortgage loans.

63. BDMC both solicited investors and sold the syndicated mortgage investments to investors. It acted as the agent for both the investor and for Fortress or the developer. By acting for both the investors and the lender on the sale of the syndicated mortgage loans, BDMC acted in an undisclosed conflict of interest.

64. In 2013, Fortress entered into agreements with the Fortress Brokers to have these mortgage brokers market the mortgage investments widely to members of the public, as well as to other mortgage brokers and agents who, in turn, would act as their agents to solicit investments in the Fortress syndicated mortgage loans from members of the public.

65. Despite the interposition of the Fortress Brokers as the selling brokers, BDMC continued to perform duties that were the responsibility of a selling mortgage brokerage, and continued to provide mortgage brokerage services to investors, including to those members of the Class who invested in the SML after the Fortress Brokers commenced carrying on business. BDMC continued to act in an undisclosed conflict of interest.

66. Although Fortress and Rathore were not a direct party to the sale of the syndicated mortgage loans to investors, they were actively involved in marketing the syndicated mortgage

loans. Fortress developed professional sales and marketing packages in respect of the developments in which it was involved, which were disseminated widely to its network of mortgage brokers and agents. The marketing packages were also circulated directly to members of the public, and Fortress held in-person sales events or “seminars” to promote investments in its syndicated mortgage loan products. Rathore usually spoke at these events to “sell” the syndicated mortgages.

67. Fortress prepared the marketing packages and held the marketing seminars to solicit and induce investors such as McDowell, Madryga and the Class to invest in the development projects through the syndicated mortgage loans. The marketing materials represented the real estate projects as large-scale developments with blue-chip, established, and reputable builders with decades of experience. The sales pitch did not disclose that even the established builders often used a single purpose corporation for each development to avoid liability if the development failed.

68. Particularly, and consistent with its marketing representations for all of the developments that it was financing, Fortress made the following representations (together, the “Core Misrepresentations”) to McDowell, Madryga and to the Class:

- (a) that syndicated mortgage loans, including the SML, were fully secured against the development property;
- (b) that syndicated mortgage loans, including the SML, provided a high (8%) rate of return, and the potential to obtain an even higher investment return through “profit participation” upon completion of the project “while still maintaining solid security and collateral on [the] principal investment”;

- (c) that syndicated mortgage loans, including the SML, were safe, low risk, and secure investments, including that Fortress “chooses projects that have minimal zoning risk and strong sales objectives to protect the investor from any sort of protracted delays”;
- (d) that syndicated mortgage loans, including the SML, were eligible to be held in registered accounts, which require that the loan to value ratio be less than 100%;
- (e) that the SML would pay interest at the rate of 8% per year, distributed quarterly, which would be income earned by the investor (and not a return of capital);
- (f) that syndicated mortgage loans, including the SML, were for a short term, of a few years, and at the end of the term, the principal would be repaid in full;
- (g) that the Investors would be repaid in full at the end of the term of the SML (when, in fact, the defendants knew construction of the Orchard Project might not be complete by the due date of the SML and that repayment to the Investors might not occur at that time. Any disclosure of this fact to the Investors was not adequate);
- (h) that interest would be paid to the Investors for the full term of the SML including any extensions beyond the original term. In fact, the SML provided that if Lamb Calgary extended the SML beyond its initial term and was not in default, interest thereafter would not be paid and would be capitalized until the principal of the loan was repaid when due. This fact

was not properly disclosed to the Investors and was not contractually agreed to by the Investors;

- (i) that, in the unlikely event of default of the syndicated mortgage, the trustee would be able to take immediate steps to act upon the Investors' security and would take such steps; and
- (j) that appraisals of the property were provided by AACI designated members to provide "hard, reliable valuations" used to assess the "loan to value" ratio of the syndicated mortgage loan.

69. The defendants knew that the Core Misrepresentations were made to potential investors, including McDowell, Madryga and the Class, to induce them to enter into the syndicated mortgage loans, including the SML. The defendants knew, or ought reasonably to have known that the representations were false, or they were reckless in respect of determining the veracity of the representations. The defendants knew, or ought reasonably to have known, that the investors relied upon the Core Misrepresentations in making their decisions to invest in the syndicated mortgage loans, including the SML.

70. The defendants intended that investors, including McDowell, Madryga and the Class, would rely upon the Core Misrepresentations when making their decisions to invest in the Fortress syndicated mortgage loans. The Investors reasonably relied upon the Core Misrepresentations set out in the marketing materials and provided to them at Fortress seminars and by representatives of Fortress including Rathore and Petrozza, BDMC, and the Fortress Brokers when the Investors decided to invest in the SML.

71. Fortress arranged for a trust company, Olympia Trust Company (“Olympia”), to act as the trustee to facilitate investors’ Fortress syndicated mortgage loan investments to be held in registered accounts. To the knowledge of Fortress, Rathore, Petrozza, BDMC, Galati, the Fortress Brokers, Spadafora, Daramola, Amendola, McWaters and the Sorrenti Defendants, Olympia was never licensed to act as a trust company in Ontario, but Olympia proceeded to carry on business in Ontario acting as trustee for the investments held in registered plans. No other trust companies or financial institutions licensed to do business in Ontario would permit registered account clients to invest in Fortress syndicated mortgages through their registered accounts. These facts were not disclosed to the Class until August 2017 when FSCO required that Olympia cease doing business in Ontario, and long after the Investors had made their SML investments.

72. The defendants knew that evidence was needed that the syndicated mortgage loans qualified to be held in registered accounts, which meant proof that the loan to property value ratio was less than 100%. Otherwise, the scheme would fail. However, these defendants did not obtain appraisals for the developments based on the required “as is” value of the properties. Instead, they obtained either appraisals or “opinions of value” based upon a hypothetical future value calculated as if the project was completed. The appraisals or opinions of value were not compliant with the obligations set down by FSCO and the *MBLAA*. The opinion of value prepared in respect of the Orchard Project was similarly deficient.

73. As part of Fortress’ marketing scheme, it conspired with Rathore, Petrozza, BDMC, Galati, the Fortress Brokers, Spadafora, Daramola, Amendola and McWaters to, and did, misrepresent to investors, including the Investors, that the valuations on the properties were compliant with FSCO’s requirements and compliant with CUSPAP, including that the current “as-is” value of the developments were sufficiently high so that the syndicated mortgage loans were eligible to be held

in registered accounts, and therefore that the loan to value ratio was less than 100% (the “Misrepresentation of Value”).

74. Fortress, Rathore, Petrozza, BDMC, Galati, the Fortress Brokers, Spadafora, Daramola, Amendola and McWaters made the Core Misrepresentations and Misrepresentation of Value to induce investors to invest in the Fortress syndicated mortgage loans. These defendants knew that investors, including the Investors, would rely upon these misrepresentations in making their decisions to invest in the Fortress syndicated mortgage loans. The Investors did, in fact, rely upon the Core Misrepresentations and Misrepresentations of Value of the Orchard Project made by these defendants in deciding to invest in the SML, including the decision to hold the investments in registered accounts.

75. Had Fortress, Rathore, Petrozza, BDMC, Galati, the Fortress Brokers, Spadafora, Daramola, Amendola and McWaters disclosed the true value of the development properties rather than grossly inflated values, none of the syndicated mortgage loans would have been registered-plan-eligible according to regulations set out by the Canada Revenue Agency. The Fortress syndicated mortgage lending scheme would never have succeeded, and the Investors would not have invested in the SML.

76. Fortress also intentionally omitted material information about the development projects it was financing in both the marketing materials and in the disclosure materials that it produced for the mortgage brokers to provide to the investors in the Fortress syndicated mortgage loans, including the terms of its agreements with the developers or builders whereby Fortress kept an up-front undisclosed profit of approximately 35% of the investment funds. This information was essential for investors to determine the risk involved in investing in the syndicated mortgage loans

and to know the true nature of the syndicated mortgage loan investments. The omissions were made intentionally to induce the Investors to invest in the SML and are part of the Core Misrepresentations.

77. In September 2020, FSRA found that Fortress had been dealing in syndicated mortgages without a brokerage licence and had violated s. 2(2) of the *MBLAA* twelve times. FSRA imposed a \$250,000 penalty against Fortress for its violations of the *MBLAA*.

THE ORCHARD PROJECT

78. On or about May 9, 2014, Lamb Calgary took title to the subject lands pursuant to purchase agreements entered into in October 2013. The purchase price was \$8.3 million. Lamb Calgary provided no equity for the purchase. This fact was never disclosed to the Investors. After closing, the two mortgages on title to the lands were:

- (a) a first mortgage in the amount of \$4,300,000 in favour of Harbour Mortgage Corp., registered in June 2014 (the “First Mortgage”); and
- (b) the SML in the amount of \$12,300,000.

79. The zoning for the Orchard Project was CC-X Centre City Mixed Use District Under Calgary Land Use By-Law IP2007. This zoning required amendment if the development was to be constructed as marketed. This was not disclosed to the Investors.

80. Prior to purchasing the Orchard Project lands, on or around January 23, 2014, Lamb Calgary entered into an agreement to borrow an amount of up to \$32,700,000 (the “Development Loan”) from Fortress Developments (the “Fortress Agreement”) for pre-construction (mezzanine-like) financing.

81. Key provisions of the Fortress Agreement were as follows:

- (a) the terms of the Fortress Agreement were confidential to the Fortress Principals;
- (b) the loan was divided into a secured portion and an unsecured portion. The secured portion was to be secured by a mortgage registered against the Orchard Project property (the SML);
- (c) Fortress Developments assigned its interest in the secured portion of the loan to BDMC. (A separate loan agreement between BDMC and Lamb Calgary was executed on January 23, 2014 and is discussed below);
- (d) Fortress was entitled to 50% of the profit of the Orchard Project as its consideration for entering into the Fortress Agreement (less certain adjusting amounts);
- (e) the term of the loan was four years from the date of its advance with an option for Lamb Calgary to extend the term for up to three more years under certain conditions. The relevant dates, once crystallized, were April 16, 2018 and April 16, 2021 respectively;
- (f) the Fortress Agreement allowed Fortress to retain 35% of all amounts raised from investors as an advance against anticipated profits or development consultant fees/costs, and for commissions and legal fees; and
- (g) in addition to the 35% of investors' money withheld by Fortress, a further amount from the funds raised from investors was to be set aside to pay investors their 8% interest per year. In other words, investors were to be paid "interest" from the capital they invested in the project.

82. The result of the Fortress Agreement was that Lamb Calgary received less than 50% of the SML proceeds for the actual development of the Orchard Project, and Fortress obtained a 50%

interest in the Orchard Project without investing any of its own capital. These material facts were not disclosed to McDowell, Madryga or the Class by any of the defendants.

83. By agreement dated January 23, 2014, Lamb Calgary entered into the SML Agreement with Centro Mortgage Inc. in Trust (later BDMC) with respect to the secured portion of the loan.

84. The firm of Legacy Global Mercantile Partners Ltd. (“Legacy”) was retained to provide an opinion of value (the “Opinion”) with respect to the Orchard Project lands. After the Orchard Project lands were under contract for purchase for \$8.3 million but before the transactions closed, on January 30, 2014, Kevin Ferguson and Jeff Cheong of Legacy delivered the Opinion. The Opinion was based upon the assumption of approval of the site plan for the Orchard Project, which included, at the time, two high-rise (18 and 42 storeys) condominium towers, totalling 480 units. The Opinion concluded that the subject lands had an approximate market value of \$26 - \$29 million, as built.

85. This valuation was based on the assumption that the Orchard Project had been successfully built; however, at the time the Opinion was provided, the Orchard Project property was not zoned to allow for the development that was to be marketed by Fortress, Lamb Calgary and BDMC. The valuation required the City of Calgary to approve a zoning change to allow Lamb Calgary to build the Orchard Project as contemplated.

86. As described above, the Opinion value was based on hypothetical and prospective events. This is contrary to the “current” or “as is” value that must be provided to investors in syndicated mortgages under the *MBLAA* and according to FSCO requirements. The Opinion was used to deceive the Investors regarding the risk they were taking and the ability to hold the SML in registered accounts and formed the basis of the Misrepresentation of Value for the Orchard Project.

87. After the Opinion was obtained, BDMC and the Fortress Brokers misrepresented the current market value of the land to be \$26 to 29 million in the disclosure documentation provided to the Investors.

88. In or about January 2014, Fortress began its marketing efforts for the Project.

89. On September 25, 2014, a company related to Lamb Calgary issued an Offering Memorandum whereby it set out its intention to sell bonds related to the Orchard Project for a total aggregate amount of \$32,700,000 (\$1,000 per bond). No claim with respect to the sale of these bonds is made in this action, and the purchasers of the bonds are not included in the proposed class.

90. Fortress, Rathore, Petrozza, BDMC, Galati, the Fortress Brokers, Daramola, Amendola and McWaters marketed and sold the SML for the Orchard Project to the Investors in a manner consistent with Fortress' usual business model, set out above. The marketing and sale of the SML was predominantly to unsophisticated retail investors, the vast majority of whom invested through registered plans, such as their retirement savings plans. The fact that the SML qualified to be held in a registered account was a key selling feature, emphasizing the security of the investment.

91. In making their investment decisions, McDowell, Madryga and the Class relied heavily upon Fortress' marketing materials, and the advice given to them by Fortress BDMC, its sales agents, or the other Fortress Brokers, all of which included the Core Misrepresentations and the Misrepresentation of Value.

92. Fortress arranged for Sorrenti (or members of Sorrenti Law) to provide the Investors with ILA, which was paid for by Fortress, on behalf of Lamb Calgary, from the proceeds of the SML. The advice provided to the Investors was the same in each instance: a pre-set speech was delivered

(often over the telephone) to the Investors, during which the Investors were assured that the SML was a low-risk, safe investment that qualified to be held in a registered account.

93. In providing the purported ILA, the Sorrenti Defendants repeated the Core Misrepresentations and Misrepresentation of Value. The Sorrenti Defendants' advice was not independent. The advice was misleading in material respects and did not meet the requisite standard of care of a reasonably informed, independent and competent solicitor. The Sorrenti Defendants provided a boilerplate promotion of the SML investments without providing a reasonable discussion of the risks associated with the SML investment, and without tailoring the advice to the Investors' individual circumstances, comprehension levels, or risk profiles.

94. Each of Fortress, Rathore, Petrozza, BDMC, Galati, the Fortress Brokers, Daramola, Amendola, McWaters and the Sorrenti Defendants falsely represented to the Investors that:

- (a) the investment was safe, and would be fully secured against the property, which was worth substantially more than the sum of the first mortgage and the total to be advanced under the SML;
- (b) the appraised "as is" value of the lands was \$26 to \$29 million based on the Opinion;
- (c) the investment would be for a defined term of four years;
- (d) there would be a "steady" annual fixed distribution of 8% paid quarterly;
- (e) there was a potential for additional profit sharing at the end of the term of the SML;
- (f) the investment would qualify to be held in a registered account;
- (g) the proceeds of the SML would be used to pay the purchase price for the Orchard Project lands, reasonable closing costs, reasonable hard or soft costs

prior to obtaining construction financing and for amounts required to make up for shortfalls in equity required by a subsequent construction lender; and

- (h) in the unlikely event of default of the SML, the trustee would be able to take immediate steps to act upon the Investors' security and would take such steps.

95. Fortress, Rathore, Petrozza, BDMC, the Fortress Brokers, Daramola, Amendola, McWaters and the Sorrenti Defendants made these misrepresentations to induce the Investors to enter into the SML. The Investors reasonably relied upon these misrepresentations when making their investments in the SML, and they reasonably relied upon the ILA that they received from the Sorrenti defendants to reassure them that investment in the SML was safe, secure, and appropriate based upon their investment objectives.

96. In marketing and selling the SML to Investors, Fortress was acting as an unlicensed mortgage brokerage. None of Fortress, Rathore, Petrozza, the Sorrenti Defendants, BDMC the Fortress Brokers, Daramola, Amendola or McWaters disclosed this fact to the Investors.

97. Fortress, Rathore, Petrozza, BDMC, the Fortress Brokers, Daramola, Amendola, McWaters and the Sorrenti Defendants failed to explain to the Investors that part of their own investments, and the investments of future Investors in the SML, would be used to pay the interest due to them under the SML – effectively that the structure for payment of the interest under the SML was tantamount to a “Ponzi” scheme.

98. Fortress, Rathore, Petrozza, BDMC, the Fortress Brokers, Daramola, Amendola, McWaters and the Sorrenti Defendants failed to disclose that Lamb Calgary had no revenue sources from which to pay the interest payments due under the SML and had no prospect of obtaining such a revenue source, since it did not even have zoning approval to proceed with the

development of the planned Orchard Project. Therefore, there was always a genuine risk that the Orchard Project would fail. It was the opposite of the safe, low-risk investment that it was represented to be.

99. Fortress, Rathore, Petrozza, BDMC, the Fortress Brokers, Daramola, Amendola, McWaters and the Sorrenti Defendants failed to disclose to the Investors what the real “as is” value of the subject property was (*i.e.* the then-current value of the land only, without consideration of the future planned development and construction). Nor did they disclose the true nature of the investment the Investors were making – which was in fact very risky mezzanine-like financing that would be subordinated to other mortgages to be registered on title to the Orchard Project lands.

100. Fortress, Rathore, Petrozza, BDMC, the Fortress Brokers, Daramola, Amendola, McWaters and the Sorrenti Defendants failed to disclose to the Investors that they would be required to “standstill” or “forbear” any defaults in payments due once a construction loan was put in place until the construction loan was retired. Any partial disclosure of this information was not sufficient and was not contractually agreed to by the Investors.

101. Fortress, Rathore, Petrozza, BDMC, the Fortress Brokers, Daramola, Amendola, McWaters and the Sorrenti Defendants failed to disclose to the Investors that the bonds which Fortress, BDMC and the Fortress Brokers intended to sell on behalf of Lamb Calgary’s related company were intended to rank *pari passu* with their interest in the Orchard Project lands, thereby diluting their security.

102. Fortress, Rathore, Petrozza, BDMC, the Fortress Brokers, Daramola, Amendola, McWaters and the Sorrenti Defendants failed to disclose to the Investors that:

- (a) funds set aside for interest payments would be held in a non-interest bearing account for Investors although the funds would be utilized by one or more of the defendants to earn income for themselves;
- (b) Olympia's payments of interest to the Investors that were held in Investors' registered plan accounts would not pay interest to the Investors and could not be utilized by the Investors to purchase investments such as securities although Olympia was able to utilize these funds to earn income for itself;
- (c) pursuant to the investment documents for the SML, in the event of default under the SML, Investors (not BDMC or Olympia) were the ones contractually obligated to collect all mortgage arrears and to institute legal actions with respect to same. Any partial disclosure of this information was not sufficient and was not contractually agreed to by Investors;
- (d) notwithstanding this term of the SML, BDMC (as mortgage administrator) would assume the responsibilities for collecting mortgage arrears; but would be unable to take any action due to the charge terms registered on title to the Orchard property; and
- (e) notwithstanding that Investors had the contractual obligation to collect mortgage arrears and institute legal proceedings in the event of default, as minority investors in the SML they would not be able to compel that enforcement steps be taken with respect to the SML to protect their legal rights.

103. The misrepresentations set out above, at paragraphs 944 and 966 through 1022 are the "Orchard Misrepresentations".

104. Had the true facts about the SML been disclosed to the Investors, rather than the Core Misrepresentations, the Misrepresentation of Value and the Orchard Misrepresentations, the Investors would not have invested in the SML.

105. The ILA provided by the Sorrenti Defendants included the Core Misrepresentations, the Misrepresentation of Value and the Orchard Misrepresentations and failed to disclose many material facts about the SML, including:

- (a) the SML was a high-risk investment;
- (b) the actual current “as is” market value of the subject lands;
- (c) the Opinion was not a current value appraisal, prepared in compliance with required standards;
- (d) the SML was not fully secured against the subject lands;
- (h) the fact that the true loan to value ratio for the SML was well in excess of 100%, *i.e.* the amount of the SML and other debt registered against the subject lands exceeded 100% of the as is value of the land, which meant that the SMLs were not registered-plan eligible pursuant to s. 204 of the *Income Tax Act* and s. 4900(1) of the *Income Tax Regulations*, CRC, c 945, because they were not “fully secured”;
- (i) holding the investment in a registered plan could have adverse tax consequences for the Investor;
- (j) no trust company registered to carry on business in Ontario was prepared to allow its registered account holders to hold the SML in their registered account;
- (k) Olympia was not authorized to carry on business in Ontario;

- (l) the fact that 16% of the capital advances would be used to pay the first two years of interest under the SMLs and future Investors' capital advances would fund the interest payments thereafter, which was a breach of the *MBLAA*. While some disclosure of this fact was made to the Investors, it was inadequate to properly alert them to the risk;
- (m) Lamb Calgary had no revenue sources from which to pay the interest payments due under the SML, and no prospect of obtaining such a revenue source, since it did not even have zoning approval to proceed with the development of the planned project. Therefore, there was a genuine risk that the Orchard Project would fail;
- (n) the fact that approximately 35% of the capital advances would be kept by Fortress as an unearned "profit participation" payment and that the mortgage brokers were paid a commission at a highly inflated rate;
- (o) the fact that Fortress was not a registered mortgage broker, but was receiving a substantial fee for facilitating the SML for Lamb Calgary;
- (p) the fact that there was no guarantee of the high rate of return set out in the SML, or any return at all;
- (q) the SML would rank below other mortgages in priority of repayment, the amount of those prior ranking mortgages, and the fact that the Investors were agreeing to subordinate their position to prior encumbrances substantially greater than even the inflated value set out in the Opinion;
- (r) zoning approvals were not yet in place for the proposed development upon which the Opinion's assumptions were based, and therefore the Opinion was

not a hard, reliable valuation of even the projected market value of the subject lands;

- (s) under the registered charge terms, Lamb Calgary would have the unilateral authority to further subordinate the priority of the SML when new financing was procured, thereby increasing the risks associated with the investment;
- (t) the bonds being sold by Lamb Calgary's related company would rank *pari passu* with their interest in the Orchard Project lands;
- (u) the SML Agreement contained postponement and standstill provisions which would limit the Investors' ability to enforce the SML in the event of default, and no advice was provided to the Investors as to what the terms of any such postponement and standstill would include or how that might affect the Investors' ability to enforce the SML if it went into default;
- (v) the registered charge terms of the SML varied from the terms disclosed to the Investors and purported to prevent the Investors from acting upon their security in the event of default or when it came due, unless certain secured lenders consented to such action;
- (w) while the SML would be registered on title to the property, this "security" did not guarantee repayment of the principal, as the value of the property as built might not be adequate to pay back the principal after repayment of higher-ranking lenders, and the land value was not adequate to secure the debt at the time that the SML was granted; and
- (x) there was no established retail market for resale of the SML, therefore it lacked liquidity.

106. The Sorrenti Defendants also failed to disclose that they were acting in a conflict of interest, because they were also acting for Fortress and BDMC, and they were paid by Fortress for the service of providing the ILA. Therefore, the Sorrenti Defendants had a financial interest in ensuring that the Investors completed the SML investment.

107. The Sorrenti Defendants also failed to disclose to the Investors that they were acting for both the Investors as lenders, and Lamb Calgary as borrower in registering the mortgage, all at the expense of the Investors and not Lamb Calgary, which was negligent and a breach of fiduciary duty, particularly in light of the undisclosed terms of the registered charge, which grossly favoured Lamb Calgary.

108. BDMC was incompetent and negligent in administering the SML mortgage. As mortgage administrator, BDMC owed a fiduciary duty to act only in the best interests of McDowell, Madryga and the Class, which it failed to meet, as it was acting in both its own self-interest and in the interests of Fortress and Lamb Calgary at the same time.

109. Despite Fortress and BDMC's representation that Fortress chose only projects with "minimal zoning risk", the Orchard Project had substantial zoning risk in that the required zoning to build the project as designed had not been obtained from the City of Calgary when the SML was being sold.

110. Despite all the defendants' assurances that the SML was a safe and secure investment, Lamb Calgary defaulted on paying the quarterly interest payments when due. The SML thereby went into default on or about April 30, 2016. No steps were taken by BDMC, the mortgage administrator and trustee to enforce the SML.

111. In failing to protect the interests of the Investors once the SML was in default, BDMC breached its statutory and fiduciary duties as mortgage administrator and trustee and breached the duty of care owed to the Investors. The Investors suffered damages as a result thereof.

112. BDMC never advised the Investors of their enforcement rights once the SML went into default. It was negligent in failing to do so.

113. The Investors (through FAAN) were unable to enforce the default under the SML because postponement and subordination agreements had been entered into with the construction lenders that prevented the Investors from taking any steps to enforce their rights until the construction lenders were paid in full or had consented to enforcement action. These postponement and subordination agreements were never properly disclosed to the Investors and entering into them exceeded the authority granted by the Investors to BDMC in the SML Agreements. As such, BDMC breached its contract with the Investors, acted in breach of trust and breach of fiduciary duty, and was negligent.

THE SML

114. As set out above, Lamb Calgary entered into the SML Agreement with Centro Mortgage Inc. in Trust for the Investors as the lender on January 23, 2014. Key terms of the SML Agreement were:

- (a) The SML would be registered against the subject property in the amount of up to \$32.7 million. This was, in fact, done and registered on May 9, 2014 in the original principal amount of \$12.3 million as Instrument 141 112 373 on the six parcels making up the Orchard Project;
- (b) The SML proceeds were to pay for Lamb Calgary's "purchase price on closing, other reasonable closing costs and reasonable hard or soft costs to be incurred

prior to construction financing and to pay for Project costs to make up for any shortfall in required equity ... prior to the first advance of the construction loan...”;

- (c) The term of the SML was four years, with an option for Lamb Calgary to extend the term for 12 months and, on certain conditions, to extend the maturity date further for an additional two years. These dates, once crystallized, became April 16, 2018, 2019 and 2021;
- (d) Interest was payable on the SML at 8% per annum, payable quarterly. In the event Lamb Calgary extended the SML Agreement beyond its initial term and if it was not in default, interest thereafter would not be paid and would be capitalized until the principal of the SML was repaid when due;
- (e) The Investors could earn, under certain circumstances, a project completion fee equal to 12% of the principal of the SML (subject to adjustments) to be paid not later than 30 days after substantial completion of the Orchard Project;
- (f) The SML would be registered against the Orchard Project property as security for the loan;
- (g) There were certain conditions precedent that had to be satisfied prior to the lender making each advance under the SML to Lamb Calgary;
- (h) Events of default under the SML Agreement included the failure to make any interest payments when due;
- (i) The SML could be subordinated to “Permitted Encumbrances”, i.e. the first-ranking construction financing which was not to exceed \$150 million plus a 10% contingency, if required. No other financial encumbrances were permitted to be registered in priority to the SML;

- (j) Lamb Calgary covenanted not to create any encumbrances on the subject lands other than the Permitted Encumbrances, and if it did so, this would be an event of default;
- (k) Lamb Calgary provided an indemnity, indemnifying the Lender from and against all costs and expenses imposed on the Lender arising from the lender being the Lender in respect of the Orchard Project; and
- (l) Lamb Calgary covenanted to “cooperate fully with the Lender with respect to any proceedings before any court, ...which may in any way materially and adversely affect the rights of the Lender hereunder or any rights obtained by it under any of the Loan Documents...”.

115. Subsections 17(a) to (e) of the SML Agreement follow the heading “Postponement and Subordination and Partial Discharge”. Subsection 17(a) provides a covenant “to postpone and subordinate the [SML Agreement] in favour of First-Ranking Construction Loan Security and to enter into such standstill agreements as shall be reasonable in the circumstances.”

116. No further particulars were provided with respect to the terms of any postponement and subordination agreement. The term “reasonable in the circumstances” was ambiguous, and must be interpreted against Lamb Calgary and in favour of the Investors. Any standstill terms that derogated from the Investors’ rights under the SML or which would impair their security were not reasonable under any circumstances.

117. A charge securing the SML was registered on title in the face amount of \$12.3 million, naming Centro and Olympia Trust jointly as the mortgagees. Olympia held title as bare trustee for those Investors holding their investments in their registered accounts, and Centro held title as bare trustee for the rest of the Investors. Although registered against the subject lands, the SML was

unsecured when granted, as the as-is value of the Orchard Project was less than the first ranking charges on title.

118. On December 17, 2014, the amount of the SML was increased to \$14.6 million, and registered on title to the subject lands.

119. The terms of the charge registered on title to secure the SML were materially inconsistent with the SML Agreement with respect to postponement, subordination and standstill terms. The registered charge terms allowed Lamb Calgary to put as much secured debt ahead of the Investors as it could obtain, the Investors could not object, and had no reasonable means to enforce a default under the SML. The Investors lost many of the fundamental rights included in the SML Agreement.

120. The terms of this charge were not disclosed to the Investors prior to the registration of the charge, and they did not agree to them. The terms were not “reasonable in the circumstances”. None of Fortress, BDMC, the Fortress Brokers, nor the Sorrenti Defendants reviewed the terms of the charge with the Investors prior to the Investors investing in the SML. This non-disclosure was a material omission, was not agreed to by the Investors, and renders the charge unenforceable, or, alternatively, Fortress, BDMC, the Fortress Brokers, and the Sorrenti Defendants are liable to the Investors for all damages arising from the registration of the charge on terms to which the Investors did not agree.

121. By permitting the registration of a charge on title that was materially inconsistent with the SML Agreement, Lamb Calgary failed to act honestly and in good faith in the performance of the SML Agreement, and breached its terms. The Investors have been damaged as a result thereof.

122. Insofar as BDMC (either as Trustee or Administrator) agreed to subordinate the security of the Investors to prior encumbrances in excess of any amounts agreed to in the SML Agreement, it has caused damage to the Investors and breached its contractual and fiduciary duty owed to the Investors.

FSRA AND RCMP INVESTIGATIONS

123. In or around December 2015, FSCO, which, at the time, had regulatory authority over the Ontario mortgage industry, commenced an investigation into Fortress, BDMC, and the Fortress Brokers arising from concerns about the conduct and administration of syndicated mortgage loans arranged by Fortress with the aid of Rathore, Petrozza, BDMC, Galati, the Fortress Brokers, Daramola, Amendola, McWaters and the Sorrenti Defendants.

124. In 2016, FSRA began issuing consumer communications to the investing public stating that it considers syndicated mortgage loan investments to be “high risk” investments that were often marketed to the investing public using techniques that belie the true risks of the mortgages. That was, in fact, the case with respect to the marketing and sale of Fortress’ syndicated mortgage loans including with respect to the Orchard Project.

125. The regulators’ investigation culminated in settlement agreements between FSRA and each of BDMC and the Fortress Brokers, executed on January 31, 2018, which, amongst other things resulted in orders that:

- (a) revoked the mortgage broker licenses for:
 - (i) BDMC;
 - (ii) Petrozza;
 - (iii) each of the principal brokers of the three Fortress Brokers.

- (b) required BDMC to pay administrative penalties of \$400,000; and

(c) required each of the Fortress Brokers to pay administrative penalties of \$235,000.

126. BDMC agreed that FAAN would assume the mortgage administration for all Fortress-related syndicated mortgages that BDMC had been administering. Additionally, Galati surrendered her license, thereby ceasing all mortgage brokering activities.

127. In or around March 2018, BDMC (through its newly-formed alter ego corporation Canadian Development Capital & Mortgage Services Inc., which was run by Galati's mother, Giuliana Galati) engaged in various acts in breach of the FSCO settlement, including acting to frustrate FAAN's ability to carry out its role as administrator of the syndicated mortgages.

128. To prevent further harm to investors that would have been caused by continued breaches and obstruction of FAAN's operations, on April 20, 2018, on the application of the Superintendent of Financial Services, FAAN was appointed as trustee, without security, of all the assets, undertakings and properties of BDMC. Since that date, FAAN has been the mortgage administrator with respect to BDMC-administered Fortress syndicated mortgage loans, including for the Orchard Project.

129. On September 9, 2020, FSRA entered into a settlement with Fortress Developments, pursuant to which it imposed administrative penalties against Fortress Developments in the amount of \$250,000 for 12 contraventions of s. 2(2) of the *MBLAA*, related to Fortress Developments providing services to borrowers for the purpose of financing property developments when it was not licensed to do so.

130. On April 13, 2018, the RCMP's Integrated Market Enforcement Team obtained a search warrant for the offices of Fortress, BDMC and the Fortress Brokers in connection with a fraud investigation into Fortress's syndicated mortgage businesses. In the search warrant, the

investigators asserted their belief that the key aspects of this fraud occurred from 2012 to 2017 and include:

- (a) investors were presented with inflated “as is” property values for the lands securing their syndicated mortgage loans, which misrepresented the true risk of the investments and their ineligibility for investment through a registered plan;
- (b) the actual loan to property value ratios in respect of the syndicated mortgage loans exceeded 100%;
- (c) the syndicated mortgages were promoted as being registered plan eligible, when they were not, and therefore investors who invested through registered plans could be subject to adverse taxation by the Canadian Revenue Agency; and
- (d) investment funds were used for purposes other than what was disclosed to investors. A portion of the investors’ funds was not directed to the development project and instead was retained by Fortress at the time of placement of the loan.

131. These allegations were true with respect to the Orchard Project and the SML. Fortress, Rathore and Petrozza were engaged in a fraudulent scheme. BDMC, Galati, the Fortress Brokers, Spadafora, Daramola, Amendola and McWaters were reckless or negligent with respect to their role in the scheme. The Sorrenti Defendants were grossly negligent with respect to their role in the scheme, if they were not complicit in the fraud.

132. On or about June 21, 2022, the RCMP laid criminal charges against Rathore and Petrozza. Both were charged with fraud contrary to section 380(1)(a) of the *Criminal Code* and with receiving secret commissions contrary to Section 426(1)(a) of the *Criminal Code*.

133. In sum, the actions of Fortress, Rathore, Petrozza, BDMC, Galati, the Fortress Brokers, Spadafora, Daramola, Amendola and McWaters in facilitating the SML exposed the Investors to

tremendous risk due to its financing structure, which included high professional fees, advance secret profit sharing, lack of proper appraisal, and automatic subordination of creditor priority. The real risks of the SML were intentionally not disclosed to Investors at the time they invested to induce them to invest so that Fortress, Rathore and Petrozza could take excessive fees and unearned profits, and so the other defendants would also profit at the expense of the Investors.

MCDOWELL'S INVESTMENT IN THE ORCHARD PROJECT

134. McDowell's investment in the SML is representative of the investments made by all of the Investors. The defendants engaged in the same misconduct with all the Investors as they engaged in with McDowell.

135. McDowell is a retiree who lives in the City of Toronto in the Province of Ontario. At the time of her investment in the SML, she was 59 years of age, and nearing retirement.

136. In order to improve the yield in her RRSP, McDowell wished to invest in mortgages offering higher rates of return.

137. In April 2012, McDowell met a mortgage agent named Marcel Greaux, with the brokerage firm of the Mortgage Alliance of Canada. Mortgage Alliance of Canada was a subagent of one of the Fortress Brokers, FFM. Greaux advised McDowell that he could assist her in finding mortgage investments for her RRSP.

138. All of the information conveyed by Greaux to McDowell about the Orchard Project and the SML was obtained from one or more of Fortress, Rathore, Petrozza, BDMC or FFM, and was conveyed in his capacity as an employee of FFM's subagent.

139. McDowell had previously invested in other Fortress projects. In doing so, Greaux had shown McDowell Fortress promotional material that emphasized the following factors:

- (a) an 8% annual rate of return;
- (b) a further success fee if the project was successful;
- (c) a two to four year loan;
- (d) McDowell would be on title to the property; and
- (e) the investment was safe and secure and qualified to be held in a registered account.

140. Greaux did not discuss any of the risks of the investment with McDowell. The Fortress promotional material did not set out any risks. No risks were brought to McDowell's attention.

141. In order to make her investment through her RRSP, Greaux advised McDowell to open a self-directed RRSP account with Olympia, which McDowell did.

142. In discussing the Fortress projects, Greaux made the Core Misrepresentations and Misrepresentations of Value to McDowell. In addition, misrepresentations particular to the individual projects were made to McDowell.

143. In order to invest, McDowell completed a document entitled Client Suitability Form. Mortgage brokerages must have investors complete this form to ensure that the investment being sold to the investor is suitable for him/her. The form contained details of McDowell's financial position and her desired investment risk profile.

144. McDowell wrote that her risk tolerance was medium (the second lowest category of four) and that her objective in making the investment was income (in contrast to other options such as

“aggressive” or “speculation”). She also indicated she “would rather accept a lower rate of return to reduce [her] risk”.

145. All of these instructions were ignored by Fortress, BDMC and FFM in selling McDowell her investments. There is no indication the Client Suitability Form and the information contained therein was ever reviewed by Fortress, BDMC or FFM.

146. Fortress, BDMC, FFM and the Sorrenti Defendants knew or ought to have known that this SML was inconsistent with McDowell’s risk profile, and that selling the investment to her was contrary to Fortress’, BDMC’s and FFM’s obligations under ss. 43 and 45 of the *MBLAA*, ss. 4, 12, 18, 24, 25, 26 and 27 of Regulation 188/08 and s. 10.1 of Regulation 189/08. Fortress, BDMC and FFM, nonetheless, sold her the SML. All these defendants failed to provide proper advice to McDowell in breach of their duties owed to her. In the result, McDowell has suffered a substantial loss of her investment, including interest at the rate of 8% per year.

147. By the spring of 2014, McDowell’s investments in the previous Fortress projects appeared to be performing well in that quarterly interest payments were being made. McDowell was introduced at this time to the Orchard Project.

148. Greaux repeated the Core Misrepresentations and the Misrepresentations of Value to McDowell. In addition, the Orchard Misrepresentations were made.

149. Among the documents provided to McDowell and the Investors was a FSCO-mandated document entitled Investor/Lender Disclosure Statement for Brokered Transactions (the “**Disclosure**”). This document had been prepared by BDMC and signed by Galati on BDMC’s behalf.

150. The Disclosure set out the obligations due to investors in syndicated mortgages, many of which were not met, including the following:

- (a) to disclose in writing whether the selling brokerage acted for the lender or borrower or both in the transaction. This was not done;
- (b) to disclose in writing the selling brokerage's relationship with "each party to the transaction". Investors were not advised that Fortress, BDMC and Lamb Calgary were related entities;
- (c) to disclose in writing material risks about the transaction that the investor should consider. Investors were never advised of the risks associated with the SML set out above in this Claim;
- (d) to disclose in writing actual or potential conflicts of interest that might arise from the transaction. Investors were not advised that Fortress, BDMC and Lamb Calgary were related entities or that BDMC was both the selling brokerage of the SML, the trustee of the SML and the administrator of the SML;
- (e) a caution in the Disclosure was provided for the investor to obtain ILA but the ILA provided to Investors was not independent;
- (f) the Disclosure stated the selling brokerage might receive additional earnings based on the development of the Project and indexed on a percentage of profit. In fact, by this date Fortress, BDMC and others had already received additional earnings paid by Lamb Calgary;
- (g) the Disclosure stated that the selling brokerage had complied with all requirements of the *MBLAA*. In fact, BDMC and the Fortress Brokerages had not complied with all requirements of the *MBLAA* as set out in this Claim;

- (h) the Disclosure stated that an appraisal had been done on the lands underlying the Project dated January 30, 2014 which arrived at an “as is” value of \$26 million - \$29 million. The Opinion was not an appraisal and the value of \$26 million - \$29 million was not a reasonable “as is” value for the Orchard Project lands. The “as is” value of the lands was no more than the purchase price Lamb Calgary paid to acquire the lands;
- (i) the Disclosure stated that the loan to value ratio of all encumbrances against the appraised “as is” value of the Project lands was 67%. A 67% loan to value ratio was incorrect as it was based on the Opinion value which was not the “as is” value. The true loan to value ratio at that time would have been substantially greater than 100% of the true value of the Project lands. A loan to value ratio in excess of 100% of the value of the investment made it ineligible as a registered plan investment;
- (j) to advise of the referral and brokerage fees to be paid by Lamb Calgary with respect to investments in the SML. The high amounts disclosed in the Disclosure varied from amounts disclosed in other SML documents. The disclosed amounts did not accurately set out all commissions being paid to the brokers and agents. Nor did this section of the document disclose the significant amounts retained by Fortress, Rathore and Petrozza as advance payments from Lamb Calgary;
- (k) to attach the following documents to the Disclosure:
 - i. copies of any existing mortgages;
 - ii. copies of appraisals carried out on the Orchard Project within the last 12 months;

- iii. a copy of an agreement of purchase and sale for the Project if the property was purchased in the previous 12 months; and
- iv. documentary evidence of Lamb Calgary's ability to meet the mortgage payments.

With the exception of the Opinion, these documents were not attached or provided to Investors;

- (l) to confirm that the selling brokerage had provided "all other information an investor of ordinary prudence would consider to be material to a decision whether to lend money on the security of the [Orchard Project], so that [in investor could] make an informed decision before [he/she committed] to invest". The selling brokerages omitted to provide significant material information to investors; and
- (m) to provide with the Disclosure a schedule of funds that had been advanced and would be advanced to Lamb Calgary. This was not done.

151. Upon satisfying herself that the Project had similar attributes to her other Fortress investments, in particular that it was safe and secure for retirement investing, McDowell decided to proceed with a \$75,000 investment in the SML.

152. Prior to investing, McDowell received ILA by telephone from Sorrenti that was paid for by Fortress. The telephone call with Sorrenti lasted approximately 20 minutes. It was similar to the ILA she had received from Sorrenti when she made her previous Fortress investments.

153. Sorrenti briefly described the documents she was signing and asked McDowell if she had any questions. Sorrenti did not review any of the significant risks of the investment with

McDowell. Sorrenti did not advise McDowell that the “advice” he was providing was not true ILA because Fortress was paying Sorrenti’s fees for the advice.

154. Sorrenti ignored his legal obligations under the *Rules of Professional Conduct* to disclose conflicts of interest, including that he was paid by Fortress to provide ILA to McDowell about the Fortress investment.

155. McDowell executed the SML documents on April 1, 2014.

156. Among the documents signed by McDowell was a document entitled Confirmation of Lender’s Interest. In the document, BDMC agreed as follows:

- (a) to provide investors with notice of any material default by Lamb Calgary; and
- (b) to enforce the SML on behalf of investors as would a “prudent lender”.

157. In investing in the SML, McDowell relied upon the misrepresentations made to her, both oral and in writing, including the Core Misrepresentations, the Misrepresentations of Value, the Orchard Misrepresentations, the Disclosure, the Confirmation of Lender’s Interest, and the purported ILA received from Sorrenti. Such reliance was reasonable.

158. Had the misrepresentations described above not been made to McDowell and had she received accurate information about the Orchard Project, she would not have invested in the SML.

MADRYGA INVESTS IN THE ORCHARD PROJECT

159. Madryga’s investment in the SML is representative of the investments made by all of the Investors. The defendants engaged in the same misconduct with all the Investors as they engaged in with Madryga.

160. At the time of his investment in the SML, Madryga was 42 years of age. He had a university degree in engineering and had pursued a variety of entrepreneurial careers since that time.

161. In 2010, Madryga started doing some real estate investing. He met McWaters (a mortgage agent with one of the Fortress Brokers, FMP) in the spring of 2012. McWaters introduced Madryga to syndicated mortgages.

162. In May 2012, McWaters invited Madryga to a Fortress seminar about syndicated mortgages and various investment opportunities. Rathore spoke at the seminar and made the Core Misrepresentations.

163. All of the information conveyed by McWaters to Madryga was obtained from one or more of Fortress, Rathore, Petrozza, BDMC and FMP.

164. Before and after the seminar, McWaters extolled the investment virtues of syndicated mortgages to Madryga. McWaters stressed the high rate of return paid by the investments and their low risk.

165. Madryga was impressed with the Fortress presentation he attended and with McWaters' representations about the company and syndicated mortgages in general.

166. McWaters provided Madryga with Fortress marketing material and the two engaged in an active email and personal discussion about Fortress investment opportunities.

167. At this time, Madryga completed a Client Suitability Form for FMP (and BDMC). It contained details of Madryga's financial position and his desired investment risk profile.

168. While Madryga indicated in his profile that he was prepared to accept some degree of risk, overall his profile indicated an investment in the SML was not suitable for him. Nor was it sufficiently secure for someone investing for retirement.

169. An investment in the SML was also not suitable for other investors who also completed Client Suitability Forms for FMP, and the Fortress Brokers, or BDMC.

170. There is no indication that the Client Suitability Form and the information contained therein was ever reviewed by Fortress or BDMC. The information in the Client Suitability Form was ignored by Fortress, BDMC and FMP in selling Madryga his investment.

171. Fortress, BDMC, FMP and the Sorrenti Defendants knew or ought to have known that this SML was inconsistent with Madryga's investment risk profile, and that selling the investment to him was contrary to Fortress', BDMC's and FMP's obligations under ss. 43 and 45 of the *MBLAA*, ss. 4, 12, 18, 24, 25, 26 and 27 of Regulation 188/08 and s. 10.1 of Regulation 189/08. Fortress, BDMC and FMP, nonetheless, sold him the SML. All these defendants failed to provide proper advice to Madryga in breach of their contractual and fiduciary duties owed to him. In the result, Madryga suffered a substantial loss of his investment, including interest at the rate of 8% per year.

172. In discussing the Fortress projects, McWaters made the Core Misrepresentations and Misrepresentation of Value to Madryga. In addition, misrepresentations particular to the individual projects, including the Orchard Project, were made to Madryga.

173. In reliance upon the misrepresentations made to him, both written and oral, and the ILA purportedly provided to him, Madryga proceeded with a Fortress investment through his RRSP. He would not have proceeded had he been advised of the true nature of the particular investments and Fortress syndicated mortgages.

174. By the spring of 2014, Madryga's investment in his other Fortress project appeared to be performing well in that quarterly interest payments were being made. Madryga was introduced at this time to the Orchard Project.

175. Upon satisfying himself that the Orchard Project was as safe and secure an investment as his current Fortress investment, Madryga decided to proceed with a \$28,000 investment in the SML.

176. Madryga received ILA from Morgan that was paid for by Fortress. It was similar in nature to the ILA purportedly given by Sorrenti to McDowell. None of the significant risks associated with the SML were discussed with Madryga. Nor was he told that that the "advice" he was receiving was not true ILA.

177. Morgan ignored his legal obligations under the *Rules of Professional Conduct* to disclose conflicts of interest, including that he was paid by Fortress to provide ILA to Madryga about the Fortress investment.

178. Madryga was given a Disclosure document similar to the one provided to McDowell.

179. Madryga signed the agreements for the SML on May 12, 2014.

180. In investing in the SML, Madryga relied upon the misrepresentations made to him, both oral and in writing, including the Core Misrepresentations, the Misrepresentations of Value, the Orchard Misrepresentations, the Disclosure, the Confirmation of Lenders Interest, and the purported ILA received from Morgan. Such reliance was reasonable.

SUBSEQUENT EVENTS

181. Sales of units in Phase 1 of the Orchard Project started in late 2014. Sales were slow due, at least in part, to the slowdown in the Alberta economy. Only 60% of the condominium units in Phase 1 had been sold to that time.

182. Construction was slated to start in the spring of 2015 but was delayed several times. It never began.

183. Construction financing was never secured, and eventually in or about November 2017, the pre-sale agreements were terminated, and the purchasers' deposits were returned to them.

184. Investors in the SML received interest payments for the quarter ended December 31, 2015. Thereafter, Lamb Calgary failed to make any interest payments. The failure to pay interest constituted an event of default under the SML Agreement.

185. BDMC took no steps to contact Investors about the default in payment of interest. Nor did it take any steps to demand repayment of the SML from Lamb Calgary or take any other enforcement steps on behalf of Investors, as it had agreed to do in the Confirmation of Lenders Interest.

186. At about the same time as they entered into the original agreement to solicit investments in the SML, Fortress and Lamb Calgary entered into another agreement whereby Fortress agreed to also solicit further investments in the Orchard Project through a hybrid syndicated mortgage loan/bond offering. This was not disclosed to the Investors.

187. On April 16, 2016, when the SML was already in, or about to go into default, Orchard Calgary and BDMC as the administrator entered into a second loan agreement with respect to the hybrid syndicated mortgage loan/bond offering (the "Hybrid Loan").

188. In December 2016, in connection with entering into the Hybrid Loan Agreement, BDMC as the administrator of both the SML and the Hybrid Loan, entered into an agreement with Orchard Calgary whereby it agreed, on behalf of the Investors that – notwithstanding the terms of the SML – the SML would rank *pari-passu* with the Hybrid Loan (the “Pari-Passu Agreement”), and that the Investors and the Hybrid Loan lenders would be entitled to share pro rata in the repayment of their respective loans.

189. BDMC did not seek instructions or directions from the Investors before executing the Pari-Passu Agreement. The Pari-Passu Agreement was contrary to the interests of the Investors, contrary to the terms of the SML Agreement, and materially and adversely impacted their security. BDMC was acting without authority, in breach of its contractual and fiduciary duties, and in a conflict of interest when it entered into the Pari-Passu Agreement.

190. No term of the agreement pursuant to which BDMC was appointed as mortgage administrator granted BDMC the right or authority to enter into the Pari-Passu Agreement.

191. The Plaintiffs and the Class have been damaged as a result of BDMC entering into the Pari-Passu Agreement, as they did not receive all the proceeds of sale to which they were entitled based upon their priority registered mortgage position when the subject lands were sold.

192. Subsequently, the Orchard Project lands were listed for sale by Lamb Calgary. In June 2020, Lamb Calgary sold the subject land for \$7 million. After payment of the mortgage in priority to the SML, property taxes, commissions, and other closing costs, approximately \$1.8 million remained for distribution to the Investors.

193. On September 22, 2020, FAAN obtained Court approval for distribution on a *pari passu* basis with the bondholders. FAAN retained an administrative holdback.

THE CAUSES OF ACTION

194. The plaintiffs assert the following claims against some or all of the defendants:

- (a) conspiracy;
- (b) oppression;
- (c) fraudulent misrepresentation/deceit;
- (d) negligent misrepresentation;
- (e) negligence;
- (f) breach of fiduciary duty; and
- (g) breach of contract.

A. CONSPIRACY

195. Fortress, Rathore, Petrozza, and Lamb Calgary conspired with each other with the intent to cause injury to the Investors. The particulars are set out in the facts above and summarized here.

196. Fortress, Rathore, Petrozza, and Lamb Calgary conspired together to obtain a grossly inflated “current value” valuation in the Opinion. These defendants used the Opinion as the valuation that they were required to disclose to the Investors, and to give the appearance that the subject lands had a much greater value than they were actually worth, and thereby to make it appear that the SML qualified as an investment that could be held in a registered account. These defendants also used the Opinion to assure the Investors that the SML was a low-risk investment, fully secured against the subject property, when they knew that it was not a low-risk or secured investment.

197. Fortress, Rathore, Petrozza, and Lamb Calgary conspired together to make the Core Misrepresentations, the Orchard Misrepresentations and the Misrepresentation of Value to the Investors, including omitting to disclose the material facts about the actual risks associated with

the SML, all as set out above. These defendants knew that they were misrepresenting the true state of affairs to the Investors. These defendants knew that McDowell, Madryga and the Class relied upon these misrepresentations and omissions of material fact in making their SML investment decisions, and they knew that the Investors would suffer losses with respect to their investments in the SML. These defendants made the misrepresentations with the intent to cause harm to McDowell, Madryga and the Class, and for their own personal gain, which is what transpired.

198. Further particulars of the conspiracy among Fortress, Rathore, Petrozza, and Lamb Calgary are:

- (a) Fortress arranged to have Olympia act as the trustee for Investors who wished to hold the SML in a registered account, when Olympia could not lawfully fulfill that role in Ontario, after Fortress found that no qualified trustee was prepared to act as such in respect of any Fortress syndicated mortgage loan;
- (b) Fortress, Rathore, Petrozza, and Lamb Calgary knew that Olympia could not legally act as a trustee in Ontario and that no qualified trustee would act;
- (c) Fortress, Rathore, Petrozza, and Lamb Calgary knew that the SML was not qualified to be held in a registered account, and acted in concert to misrepresent the loan to value ratio and the “as is” value of the Orchard Project lands to the Investors;
- (d) Fortress, Rathore, Petrozza, BDMC, Galati, Daramola, Amendola, McWaters and Lamb Calgary agreed not to disclose this fact to the Investors because it was integral to their marketing plan for the SML that it qualify as an investment in a registered account, and that, if the SML was not registered-account-qualified, then Fortress and BDMC would be unable to raise the funds that

Lamb Calgary required, and none of these defendants would profit from the investment; and

- (e) Fortress, Rathore, Petrozza, and Lamb Calgary agreed to keep the advance payment of profits agreement secret and not to disclose it to the Investors.

B. OPPRESSION

199. The actions of the Fortress Defendants, BDMC, Fortress Brokers and Lamb Calgary were oppressive, unfairly prejudicial and unfairly disregarded the interests of the Investors contrary to the provisions of the *OBCA*, *CBCA* and *ABCA* entitling McDowell, Madryga and the Class to damages.

200. The Fortress Defendants, Lamb Calgary and their directors, officers, and agents, committed the following breaches:

- (a) they created a retail investment scheme that placed undue risk on retail investors, while simultaneously representing the investments as low-risk;
- (b) they ignored the risk tolerance of the Class Members;
- (c) they induced the Investors to enter investment agreements with materially unfair terms and without any or adequate disclosure to enable the Investors to make prudent risk assessments;
- (d) the Fortress Defendants concealed the risks of the Orchard Project by hiring their own lawyer to provide the investors with legal advice that could not have been and was not independent;
- (e) the Fortress Defendants retained funds that they received from the Investors as advances and did not provide these funds to Lamb Calgary (or to the Investors) when it became clear that the Orchard Project would not earn a profit; and

- (f) all of these defendants promoted the investments for the purpose of their own financial gain, and in fact gained financially from the Investors' losses.

201. The investment scheme and these defendants' participation in its design and promotion were unfair, oppressive, and prejudicial to the Investors, including McDowell, Madryga and the Class.

202. An oppression remedy setting aside the Class Members' SML transactions or awarding compensation to the Investors would be fair, would vindicate the Investors' rights and comport with the parties' reasonable expectations, and would go no further than remedying the oppressive conduct.

C. FRAUDULENT MISREPRESENTATION/DECEIT

203. Fortress, Rathore, and Petrozza made fraudulent misrepresentations to McDowell, Madryga and the Class.

204. By soliciting investments in the SML, and acting as mortgage brokers for the Investors in respect of their SML investments, Fortress Rathore, and Petrozza were in a direct and proximate relationship with the Investors, and owed them the duty of care of a reasonably competent mortgage broker, which these defendants breached by making fraudulent misrepresentations about the SML investments.

205. These defendants knowingly made the Core Misrepresentations, the Orchard Misrepresentations, and the Misrepresentation of Value to the Investors as set out herein, which they knew the Investors would rely upon in making their investment decisions, and which included:

- (a) misrepresenting that the SML was a safe and secure investment, fully secured on the Orchard Project lands, and omitting to disclose the material risks associated with the development and the investment;
- (b) misrepresenting that the SML qualified as an investment that could be held in registered accounts and that the loan-to-value ratio of the Orchard Project lands was 67%;
- (c) misrepresenting that the then-current “as is” value of the Orchard Project lands was as set out in the Opinion, and intentionally concealing that the valuations in the Opinion were not prepared in compliance with FSCO mandated CUSPAP standards, and were not current value valuations;
- (d) omitting to tell the Investors that Lamb Calgary would receive no more than 50% of the funds raised in the SML and that Fortress would retain approximately 35% of the funds, including to pay Fortress for an unearned profit participation;
- (e) failing to properly disclose that 16% of the funds paid by the Investors would be used to fund an “interest reserve” and would be used to pay the first two years of interest payments due under the SML, and that the funds of future Investors in the SML would be used to pay the interest thereafter, and therefore the payment of interest under the SML was actually a return of capital, not profits, and was structured effectively as a Ponzi scheme, and in breach of s. 23 of Regulation 189/08 of the *MBLAA*;
- (f) failing to disclose that inordinately high brokerage commissions would be paid to various brokers, agents and referring parties, which was substantially higher

than typical commissions in the mortgage industry, and much greater than the brokerage fees which were disclosed to the Investors;

- (g) misrepresenting to Investors that they would receive ILA from the Sorrenti Defendants, when, in fact, Fortress retained the Sorrenti Defendants, and paid for this legal advice on behalf of the borrower, and the Sorrenti Defendants were in a position of conflict, given that they would earn income from the ILA paid from the proceeds of the SML;
- (h) misrepresenting that advances made under the SML would be based upon certain milestones to be achieved and confirmed by a cost consultant retained to work on the Orchard Project, when in fact the funds were immediately disbursed by BDMC;
- (i) misrepresenting that the SML would not be subordinated to any other mortgage, other than construction financing;
- (j) omitting to disclose to the Investors that Olympia was not authorized to carry on business in Ontario as trustee for the registered plan SML investments, and that no trust companies or financial institutions licensed to do business in Ontario would permit registered plan clients to invest in Fortress syndicated mortgages through registered accounts that they administered;
- (k) omitting to disclose material facts about Lamb Calgary's inability to meet project development milestones and, in fact, misrepresenting that zoning approvals had already been obtained for the Orchard Project lands;
- (l) misrepresenting that the SML would be repaid when it came due when these defendants knew or were reckless in failing to confirm that construction could

not be completed by the date that the SML came due, and still selling the SML to Class members after these facts were known;

- (m) failing to properly disclose that in the event Lamb Calgary extended the SML Agreement beyond its initial term and was not in default, interest thereafter would not be paid and would be capitalized until the principal of the Development Loan was repaid when due;
- (n) misrepresenting that Lamb Calgary had injected capital into the Orchard Project, when it was 100% debt financed; and
- (o) omitting to disclose that the SML would include a standstill agreement purporting to prevent the Investors from acting upon their security in the event of default or when they came due, unless construction lenders consented to such action.

206. In making their decision to invest in the SML, the Investors each relied on the fraudulent misrepresentations by Fortress, Rathore, and Petrozza to their detriment. McDowell, Madryga and the Class have suffered the loss of their capital and interest at the rate of 8% per year because of these defendants' fraudulent misrepresentations.

D. NEGLIGENT MISREPRESENTATION

207. In deciding to invest in the SML, McDowell, Madryga and the Class each relied to their detriment on the negligent misrepresentations made by Fortress, Rathore, Petrozza, BDMC, Galati, the Fortress Brokers, Spadafora, Daramola, Amendola, McWaters, the Sorrenti Defendants and Lamb Calgary. They have suffered a significant loss of their capital and interest at the rate of 8% per year as a result thereof.

a. The Mortgage Brokers

208. By soliciting investments in the SML, making representations upon which they knew the Investors would reasonably rely, and acting as mortgage brokers for the Investors in respect of their SML investments, Fortress, Rathore, Petrozza, BDMC, Galati, the Fortress Brokers, Spadafora, Daramola, Amendola and McWaters were in a direct and proximate relationship with McDowell, Madryga and the Class, and owed them the duty of care of a reasonably competent mortgage broker (and, in the case of Galati, Spadafora and Daramola, a reasonably competent principal broker of a mortgage broker), which these defendants breached by making the Core Misrepresentations, the Orchard Misrepresentations, and the Misrepresentation of Value negligently.

209. In the alternative to paragraphs 2036 above, if the representations set out in those paragraphs were not made to the Investors by Fortress, Rathore and Petrozza fraudulently, then they were made negligently by Fortress, Rathore and Petrozza, and they were made negligently by BDMC, Galati, the Fortress Brokers, Spadafora, Daramola, Amendola and McWaters.

210. These defendants knew, or ought reasonably to have known that these misrepresentations were untrue when they were made. These defendants knew, or ought reasonably to have known, that the Investors would reasonably rely upon the misrepresentations in making their decision to invest in the SML, and the Investors did so rely, to their detriment.

b. Sorrenti Defendants

211. The Sorrenti Defendants were in a direct and proximate relationship with the Investors in respect of each of the two roles that the Sorrenti Defendants held with respect to the Orchard Project, *i.e.* as solicitor providing legal advice and as lawyer representing the Investors in

completing and registering their investment in the SML. The Sorrenti Defendants were negligent in performing their duties in each such role.

212. The Sorrenti Defendants made the Core Misrepresentations, the Orchard Project Misrepresentations, and the Misrepresentation of Value to McDowell, Madryga and the Class negligently at the time they provided the ILA.

213. The Sorrenti Defendants knew, or ought reasonably to have known that these misrepresentations were untrue when they were made. These defendants knew, or ought reasonably to have known, that the Investors would reasonably rely upon the misrepresentations in making their decision to invest in the SML, and the Investors did so rely, to their detriment.

c. Lamb Calgary

214. Lamb Calgary was in a direct and proximate relationship with the Investors with respect to the Orchard Project and owed them the duty of care as a borrower soliciting funds for investment. Their duty included, among other things, the obligation not to enter into secret profit sharing agreements, not to misrepresent the nature of the investment and the as is value of the lands, and not to place a charge on the property that was materially different than the terms of the SML.

215. Fortress, Rathore, Petrozza, BDMC, Galati, the Fortress Brokers, Spadafora, Daramola, Amendola and McWaters acted as the agents for Lamb Calgary in making the misrepresentations to McDowell, Madryga and the Class about the SML investments in the Orchard Project. Lamb Calgary is liable for the injuries caused to the Investors as a result of the misrepresentations of its agents.

216. Lamb Calgary knew, or ought reasonably to have known that these misrepresentations were untrue when they were made by its agents. Lamb Calgary knew, or ought reasonably to have known that the Investors would reasonably rely upon the misrepresentations in making their decision to invest in the SMLs, and the Investors did so rely, to their detriment.

E. NEGLIGENCE

217. Each of the defendants was in a proximate relationship with McDowell, Madryga and the Class, giving rise to a duty of care.

218. Fortress, Rathore, Petrozza, BDMC, Galati, the Fortress Brokers, Spadafora, Daramola, Amendola and McWaters owed the Investors a duty of care based on the special relationships between them, as set out above in the sections addressing fraudulent and negligent misrepresentation.

219. The Sorrenti Defendants were in a direct and proximate relationship with McDowell, Madryga and the Class in respect of each of the two separate roles that they held with respect to the Orchard Project, *i.e.* as solicitor providing legal advice and as lawyer representing the Investors in completing and registering their investment in the SML. The Sorrenti Defendants were negligent in performing their duties in each such role, and as a result of their negligence, the Investors were injured.

220. Each of the defendants was in a proximate relationship with McDowell, Madryga and the Class such that they knew, or ought reasonably to have known that their acts or omissions in respect of their roles in the SML investments could cause injury to or damage to the Investors if they failed to take reasonable care. Their negligence did cause harm to the Investors, and was the proximate cause, or contributed to the investment losses that the Investors have suffered.

221. The particulars of these defendants' negligence is set out above, and includes the following.

a. Negligence of all Defendants

222. The defendants failed to disclose the actual as-is value of the Orchard Project lands to McDowell, Madryga and the Class at the time that they invested in the SML and failed to disclose the true risks involved in the investment.

223. The defendants knew, or ought to have known, that the actual as-is value of the subject lands rendered the SML ineligible for investment in registered plans, and they did not disclose this material fact to the Investors.

224. The defendants preferred their own interests and those of their co-defendants to those of the Class Members and failed to advise the Investors that they were making this preference.

b. Negligence of Fortress, Rathore, Petrozza, BDMC, Galati, the Fortress Brokers, Daramola, Amendola and McWaters

225. These defendants failed to ensure that the SML complied with all legal requirements and that proper disclosure of all material risks was made to the Investors.

226. These defendants created and disseminated the promotional materials which were inaccurate, false, deceptive, misleading, and failed to contain material information, and which were designed to convince the Class Members of the safety and high return of the SML investments, which these defendants knew or ought to have known was untrue, the particulars of which are set out above.

227. These defendants failed to provide McDowell, Madryga and the Class with truthful, clear and transparent information about the material facts, risks and fees payable related to the SML.

228. These defendants marketed the SML to the Investors in a manner that was inaccurate, false, deceptive, misleading, and which failed to contain material information, and which was designed to convince the Class Members of the safety and high return of the SML investment, which these defendants knew or ought to have known was untrue.

229. These defendants marketed the SML to the Investors as safe and secure investments when they knew the SML was a risky investment. These defendants knew and did not disclose that because there was no or insufficient security for the SML, it was not suitable for any retail investors.

230. Petrozza, BDMC and Galati worked intimately with Fortress, Petrozza and Rathore to market the SML and solicit investors for the SML when they knew that Fortress and Rathore were dealing in mortgages without a licence under the *MBLAA*.

231. Fortress and Rathore undertook the duties of a mortgage brokerage under the *MBLAA* when these defendants knew that neither Fortress entity nor Rathore was licensed as a mortgage brokerage/broker, and Petrozza, BDMC, Galati, the Fortress Brokers, Spadafora, Daramola, Amendola, and McWaters allowed Fortress and Rathore to fulfil mortgage broker functions, including selling investments in the SML, that ought to have been performed by them.

232. Fortress and Rathore introduced the Orchard Project investment to the Investors when only a licensed mortgage brokerage/broker was entitled to make such introductions and Petrozza, BDMC, Galati, the Fortress Brokers, Spadafora, Daramola, Amendola, and McWaters allowed Fortress and Rathore to do so.

233. These defendants failed to ensure that the investments in the SML were appropriate investments for each Investor based on the Investor's sophistication, investment objectives, and

risk profile, and in fact, they failed to fulfill any of the KYC functions required of a mortgage broker before placing the Investors into the SML.

234. These defendants withheld from the Investors the fact that approximately 35% of the principal amount advanced under the SML was used to pay for “development consultant fees”, all of which were paid to Fortress, Rathore and Petrozza and not to actual consultants with respect to the development of the Orchard Project.

235. These defendants withheld the fact that 50% of the development consultant fee would be paid to brokers, BDMC (in its capacity as borrower’s broker), Fortress, Rathore and Petrozza.

236. These defendants failed to fulfill the obligations of a mortgage brokerage (and, in the case of Galati, Spadafora and Daramola, the obligations of a principal broker of a brokerage) to ensure that the SML complied with all legal requirements and that complete and accurate disclosure of all material risks was made to the Investors. This included failing to provide Investors with all of the accurate and true information and documents required by FSCO to be produced, and as enumerated in the Disclosure.

237. These defendants failed to ensure that McDowell, Madryga and the Class obtained genuine ILA, and instead they arranged ILA for the Investors that was not truly independent, but which was designed to encourage the Investors to invest in the SML. The true nature of the ILA was withheld from the Investors.

238. These defendants withheld and/or concealed the potential and actual conflicts of interest among the entities involved in the SML, specifically the relationships between Fortress, BDMC, and the Sorrenti Defendants.

239. These defendants failed to disclose to McDowell, Madryga and the Class that Olympia was not authorized to carry on business in Ontario as trustee for the Fortress registered plan SML investments, and that no trust companies or financial institutions licensed to do business in Ontario would permit registered plan clients to invest in Fortress syndicated mortgages through registered accounts that they administered.

240. These defendants knew or ought to have known Lamb Calgary had not disclosed information which adversely affected or would be reasonably be seen as adversely affecting the Orchard Project lands or Lamb Calgary's ability to perform its obligations, as Lamb Calgary was obligated to do under the provisions of the SML Agreement (Articles 15 and 16).

241. These defendants failed to ensure that the SML was not subordinated to any other mortgage other than construction financing.

242. These defendants marketed and recommended the SML to the Investors when it was not an appropriate investment for any investor as it was neither safe nor secure and, in fact, was a fraudulent scam.

243. These defendants failed to warn or inaccurately explained that "construction financing" references in the SML documents included all the funds needed to complete the Project that were not financed by the SML, including further "mezzanine" debt.

244. Generally, these defendants failed to provide competent mortgage broker services to the Investors.

245. These defendants failed to ensure that BDMC and Olympia took appropriate steps to represent the Plaintiffs and other investors once Lamb Calgary went into default under the SML.

246. BDMC owed McDowell, Madryga and the Class a duty of care to act as a reasonably prudent trustee in fulfilling its role as the SML trustee, including compliance with the contractual provisions with respect to that role. BDMC also owed McDowell, Madryga and the Class a duty of care to act as a reasonably prudent mortgage administrator in performing that role with respect to the SML.

247. BDMC was negligent in performing its duties in each such role, as particularized above at **paragraphs 246**, as applicable, and below with respect to breach of fiduciary duties. The breaches of fiduciary duty were also acts of negligence by BDMC.

c. Negligence of the Sorrenti Defendants

248. The Sorrenti Defendants were in a direct and proximate relationship with McDowell, Madryga and the Class in respect of each of the two separate roles that they held with respect to the Orchard Project.

249. The Sorrenti Defendants owed McDowell, Madryga and the Class a duty of care to act as reasonably prudent real estate solicitors in providing them with ILA and in acting on their behalf in completing their investment in the SML.

250. The Sorrenti Defendants were negligent in performing their duties in each such role as particularized above in this Claim and also below with respect to breach of fiduciary duties. The breaches of fiduciary duties were also acts of negligence by the Sorrenti Defendants.

F. BREACH OF FIDUCIARY DUTY

251. McDowell, Madryga and the Class were in a fiduciary relationship of trust and confidence with BDMC, the Fortress Brokers and the Sorrenti Defendants. These defendants had the ability

to exercise discretion or power to affect the interests of the Investors, making them vulnerable to these defendants' actions. As such, these defendants were required to act honestly, in good faith, and strictly in the best interests of the Investors.

252. Fortress, BDMC, the Fortress Brokers and the Sorrenti Defendants owed fiduciary duties to McDowell, Madryga and the Class to:

- (a) act honestly, in good faith and in their best interests;
- (b) exercise the care, skill, diligence and judgment that a prudent investor would exercise in investing their funds (BDMC);
- (c) exercise the care, skill, diligence and judgment of a reasonable solicitor in providing ILA (the Sorrenti Defendants);
- (d) exercise the care, skill, diligence and judgment of a reasonable trustee and administrator (BDMC);
- (e) consider all relevant criteria about the Orchard Project before recommending an investment in the SML;
- (f) determine the true current value of the Orchard Project property, and advise the Investors accordingly;
- (g) ensure that documentation provided to them sufficiently established the current value of the Orchard Project property;
- (h) disseminate accurate and truthful information about the Orchard Project; and
- (i) warn Class Members, before creating and administering the trust, that the SML was high-risk, unsecured, and a grossly improvident bargain.

253. Fortress, BDMC, the Fortress Brokers and the Sorrenti Defendants all breached the fiduciary duties that they each owed to McDowell, Madryga and the Class, as particularized above

with respect to the allegations of negligent misrepresentation and negligence. These defendants acted in their own self-interest, to the detriment of the Investors in the SML. They failed to disclose material facts about the SML and omitted to disclose other material facts. Their negligence, negligent misrepresentations and breach of contract were also breaches of their fiduciary duties owed to the Investors.

254. With respect to BDMC's role as a trustee on behalf of SML Investors, BDMC breached its fiduciary duties in the following respects:

- (a) BDMC was in a conflict of interest as a result of the conflicting roles of a trustee for the Investors in addition to its role as the selling brokerage;
- (b) it acted as a co-trustee with Olympia when it knew that Olympia was carrying on business unlawfully in Ontario;
- (c) it knew the SML investment funds were not being used for "land acquisition costs and initial soft costs, and the costs incidental thereto" as represented, yet it took no steps to prevent such unauthorized use being made of the funds, and allowed the SML funds to be disbursed to the borrower, when the conditions to do so had not been met;
- (d) it failed to obtain the necessary information and ensure that the conditions precedent were met prior to making advances to Lamb Calgary;
- (e) BDMC failed to ensure the SML was only subordinated to other mortgages as agreed upon in the SML Agreement;
- (f) BDMC used a portion of the Investors' own funds, which were held in the Interest Reserve Account, to pay the interest owing on the SML, rather than

requiring the borrower to fund the Interest Reserve Account from its own sources;

- (g) BDMC failed to disclose to the Investors that the interest payments were actually a return of capital and not interest;
- (h) once the SML went into default, BMDC failed to take steps to enforce the Investors' security as it was obligated to do under the SML Agreement's terms; and
- (i) once the SML went into default, it failed to properly inform Investors of the default and obtain their instructions as to what steps should be taken to enforce their rights, and instead represented to them that they had no recourse.

255. Insofar as Fortress and Rathore were acting as unlicensed mortgage brokers, they, too, owed McDowell, Madryga and the Class all the duties of a mortgage broker at common law and under the *MBLAA*.

256. Fortress, the Fortress Brokers and Rathore breached their fiduciary duties, as particularized above, including:

- (a) they assumed the duties of a mortgage brokerage/broker under the *MBLAA* when it knew they were not licensed by FSCO as a mortgage brokerage/broker;
- (b) they introduced the Orchard Project investment to the Investors when only a licensed mortgage brokerage was entitled to make such introductions;
- (c) they failed to take the steps required of a mortgage brokerage/broker to ensure that the SML complied with all legal requirements and that proper disclosure of all material risks were made to the Investors;

- (d) they failed to ensure the investments in the SML were appropriate investments for each Investor based on the Investor's background and risk profile, and based upon client suitability forms accurately completed following a KYC interview with each Investor;
- (e) they marketed and recommended the SML as a safe and secure investment when they knew it was a risky investment not suitable for any Investors;
- (f) they made the misrepresentations particularized above in marketing and selling the SML investments to the Investors;
- (g) they failed to ensure the Investors obtained genuine ILA, and instead arranged for ILA that was not truly independent, as it was prepackaged and paid for by Fortress, and was delivered by the Sorrenti Defendants, who were in an undisclosed conflict of interest, and they did not warn the Investors of the risks associated with investment in the SML or the true nature of the Orchard Project;
- (h) they utilized the services of Olympia to hold the SML investments in the Investors' registered plan accounts, when they knew Olympia had been turned down for a license to carry on business by FSCO but had unlawfully decided to carry on business in Ontario as the trustee of Fortress syndicated mortgage loans;
- (i) they did not disclose to the Investors that no trust company or financial institution authorized to carry on business in Ontario was prepared to hold Fortress syndicated mortgage loans in registered accounts; and
- (j) they knew Lamb Calgary had not disclosed information which adversely affected or would be reasonably seen as adversely affecting the Orchard Project lands or Lamb Calgary's ability to perform its obligations, as Lamb Calgary

was obligated to do under the provisions of the SML Agreement, Article 15, but nevertheless continued to solicit Investors in the SML and induce them to enter into the SML while Lamb Calgary was in default under the SML Agreement.

257. McDowell, Madryga and the Class were entirely reliant on the skill and expertise of Fortress, Rathore, BDMC, the Fortress Brokers and the Sorrenti Defendants. The Investors were in a wholly vulnerable position relative to these defendants.

258. Fortress, BDMC, the Fortress Brokers and the Sorrenti Defendants breached their fiduciary duties owed to the McDowell, Madryga and the Class, resulting in the Investors sustaining the loss of their investments. The damages to be paid to the Investors as a result of the breach of fiduciary duty is the disgorgement of profits earned by these defendants.

G. BREACH OF CONTRACT

a. Lamb Calgary

259. McDowell, Madryga and the Class entered into the SML with Lamb Calgary. Lamb Calgary defaulted on the SML, and thereby breached its contract with the Investors.

260. For the duration of the SML, Lamb Calgary failed to notify McDowell, Madryga or the Class about any information adversely affecting the Orchard Project and Lamb Calgary's assets, liabilities, affairs, business, operations or conditions, financial or otherwise, or its ability to perform its obligations under the SML. It did not disclose that it paid funds from the SML to Fortress for "anticipated profits", when no profits had been earned by the Orchard Project, thereby diverting the funds from their intended use for the Project's development. These failures to disclose were all in breach of Article 15 of the SML Agreement.

261. Lamb Calgary's failure to disclose these facts to the SML Investors, and its intentional misrepresentations, were in breach of Lamb Calgary's duty to act honestly and in good faith with respect to its obligations under the SML.

262. Lamb Calgary's misrepresentations and omissions were a breach of contract that prevented the Investors from being able to take timely action to enforce their mortgage security, which enriched Lamb Calgary at the expense of the Investors.

263. Lamb Calgary paid Fortress "advances on profits" before any profits had been earned in respect of the Orchard Project, in breach of the purposes for which the SML funds were advanced by the Investors, which was bad faith performance of the SML Agreement, and caused damage to the Investors, as the funds advanced were not used for their stated and intended purpose.

264. Lamb Calgary had a positive duty to the Investors in performing its obligations under the SML Agreement to correct the misrepresentations of the other defendants, and it failed to do so, in breach of its duty of good faith and honest performance of the contract.

265. Accordingly, all principal and all interest accrued before and after default of the SML, and all costs of incurred by the Investors in enforcing their rights under the SML Agreement is now due and owing to the Investors by Lamb Calgary.

b. BDMC, Galati, the Fortress Brokers, Spadafora and Daramola

266. McDowell, Madryga and the Class signed a Memorandum of Understanding ("MOU") with BDMC and retained BDMC as their mortgage broker, or they signed a MOU with the Fortress Brokers for the same purpose. Where Class Members retained one of the Fortress Brokers, BDMC acted jointly with the Fortress Brokers in fulfilling the role of mortgage broker.

267. In the MOUs, the mortgage brokers set out their duties owed to McDowell, Madryga and the Class as including the following:

- (a) Suitability of the lender;
- (b) Know Your Client (KYC);
- (c) Documentation Completion;
- (d) Merits of the Project;
- (e) Risk Disclosure; and
- (f) Conflict of interest disclosure.

268. These defendants failed to meet their contractual and fiduciary obligations owed to McDowell, Madryga and the Class under the MOUs and as their mortgage brokers. As set out above in detail, they:

- (a) failed to make any effort to meet their KYC obligations with respect to any of the Investors;
- (b) failed to disclose the risks associated with the SML investments;
- (c) failed to ensure that an investment in the SML was an appropriate investment for each of the Investors based upon their investment objectives, sophistication, and risk tolerance;
- (d) failed to ensure that the valuation of the Orchard Project lands was a current value appraisal prepared in compliance with CUSPAP; and
- (e) failed to provide the Investors with a current value appraisal prepared in compliance with FSCO requirements and CUSPAP.

269. Pursuant to section 12 of the SML Agreement, BDMC was required to satisfy itself with respect to certain conditions precedent before making advances to Lamb Calgary, which it failed

to do. The conditions were not met, and the funds ought never to have been advanced to Lamb Calgary.

270. BDMC failed to fulfill its duties as trustee honestly and in good faith.

271. But for BDMC's breaches of contract in performing its role as trustee, none of the Investors' investment funds would have been advanced to Lamb Calgary, and they would have suffered no loss. Because of BDMC's breaches of contract in performing his role as trustee, the Investors lost most of their capital and interest at the rate of 8% per year.

272. BDMC also breached its contracts with the Investors by performing its duties as mortgage administrator negligently, including by failing to properly advise the Investors when Lamb Calgary failed to meet its contractual obligations and went into default under the terms of the SML Agreement, and by failing to take any steps to enforce the SML.

273. BDMC failed to fulfill its duties as mortgage administrator honestly and in good faith.

274. Had BDMC fulfilled its duties honestly and in good faith, and properly advised the Investors about their rights when the SML went into default, or taken action on behalf of the Investors to enforce the SML when it went into default, then the Investors would have recovered their capital investment and all accrued interest from Lamb Calgary, and would have suffered no loss. BDMC is therefore liable to the Investors for the whole of their investment losses arising from this breach of contract.

275. Galati, Spadafora and Daramola (as principal brokers of BDMC, FFM and FMP, respectively), had a statutory duty under the *MBLAA* and its regulations to ensure that BDMC and

the Fortress Brokers and their brokers and agents complied with the *MBLAA*'s provisions. They knew of these obligations but failed to meet them.

276. Galati, Spadafora and Daramola knew BDMC's and the Fortress Brokers' breaches of contract would cause harm to McDowell, Madryga and the Class. They did nothing to prevent those breaches from happening, contrary to their statutory obligations under the *MBLAA*. As principal brokers, they did nothing to develop policies for BDMC or the Fortress Brokers that would prevent those breaches from happening, contrary to their statutory obligations.

277. Had BDMC and the Fortress Brokers met their contractual obligations to the Investors, the Investors never would have invested in the SML, and would not have suffered any loss.

278. BDMC as trustee and mortgage administrator breached the express or implied terms of its contracts with the Investors by failing to take any steps to enforce the SML once it fell into default.

279. Because of BDMC, Galati, the Fortress Brokers, Spadafora and Daramola's breach of their contractual obligations to the Investors, the Investors have suffered the loss of a significant part of their capital and interest at the rate of 8% per year. BDMC, Galati, the Fortress Brokers, Spadafora and Daramola are therefore liable to McDowell, Madryga and the Class for the whole of their investment losses.

c. The Sorrenti Defendants

280. McDowell, Madryga and the Class retained the Sorrenti Defendants to provide them with competent ILA, and to act on their behalf on the closing of their SML investment transactions.

281. As set out above, the Sorrenti Defendants breached these retainers by failing to provide McDowell, Madryga and the Class with genuine ILA, because they were acting in a position of conflict.

282. The Sorrenti Defendants also breached these retainers by providing negligent ILA to the Investors, as particularized above. The advice was prepackaged and was identical for all Investors.

283. The Sorrenti Defendants breached their retainers by causing the registration of the charge on title to the subject property evidencing the SML that deviated from the terms of the SML Agreement.

284. Had the Sorrenti Defendants met their contractual obligations to the Investors, the Investors never would have invested in the SML, and would not have suffered any loss.

285. As a result of the Sorrenti Defendants' breaches of their contractual obligations to the Investors, the Investors have suffered the loss of their capital and interest at the rate of 8% per year. The Sorrenti Defendants are therefore liable to McDowell, Madryga and the Class for the whole of their investment losses.

RELEVANT LEGISLATION

286. The plaintiffs plead and relies upon the provisions of the following acts and the regulations passed thereunder:

- a) *Mortgage Brokerages, Lenders and Administrators Act*, 2006, SO 2006, c 29;
- b) *Financial Services Commission of Ontario Act, 1997*, SO 1997, c 28;
- c) *Loan and Trust Corporations Act*, RSO 1990, c L-25;
- d) *Business Corporations Act*, RSO 1990, c B-16;
- e) *Business Corporations Act*, RSA 2000, c B-9

- f) *Canada Business Corporations Act*, RSC 1985, c C-44;
- g) *Business Corporations Act*, RSA 2000, c B-9
- h) *Trustee Act*, RSO 1990, c T-23; and
- i) *Negligence Act*, RSO 1990, c N-1.

PLACE OF TRIAL

287. The plaintiffs propose that this action be tried at Toronto, Ontario.

DATE: February 24, 2017

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SCHEDULE "A"

LEGAL DESCRIPTION OF THE PROPERTY

Property Address & Legal Description:

602 12th Avenue SE Calgary, Alberta
Plan C, Block 76, Lots 43 and 44, City of Calgary
PIN: 031408897

606 12th Avenue SE Calgary, Alberta
Plan C, Block 76, Lots 41 and 42, City of Calgary
PIN: 101219120004

610 12th Avenue SE Calgary, Alberta
Plan C, Block 76, Lots 39 and 40, City of Calgary
PIN: 101219120003

620 12th Avenue SE Calgary, Alberta
Plan C, Block 76, Lots 32 to 38 inclusive, excepting thereout all mines and minerals out of Lots 35 and 36, City of Calgary
PIN: 101219120001

624 12th Avenue SE Calgary, Alberta
Plan C, Block 76, the westerly 10 feet throughout of Lot 30 and the whole of Lot 31, City of Calgary
PIN: 101219120

626 12th Avenue SE Calgary, Alberta
Plan C, Block 76, the westerly 21 feet throughout Lot 29 and that portion of Lot 30 which lies to the East of the westerly 10 feet throughout said Lot 30, City of Calgary
PIN: 101219120002

628 12th Avenue SE Calgary, Alberta
Plan C, Block 76, the westerly 6.5 feet of Lot 27, the whole Lot 28 and that portion of Lot 29 lying to the East of the westerly 21 feet of said Lot 29, City of Calgary
PIN: 101219120005

ARLENE MCDOWELL et al. -and- FORTRESS REAL CAPITAL INC. et al.
Plaintiffs Defendants

Court File No.: CV-17-570361-00CP

**ONTARIO
SUPERIOR COURT OF JUSTICE**

PROCEEDING COMMENCED AT TORONTO

FRESH AS AMENDED STATEMENT OF CLAIM

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