

AMENDED THIS  
MODIFIÉ CE

July 17/19

PURSUANT TO  
CONFORMÉMENT A

RULE/LA RÈGLE 20.02

THE ORDER OF  
L'ORDONNANCE DU

DATED / FAIT LE

S. Perrell  
July 26/17

Court File No.: CV-16-561293-00CP

REGISTRAR  
SUPERIOR COURT OF JUSTICE  
BREFFIER  
COURT SUPÉRIEURE DE JUSTICE

ONTARIO

SUPERIOR COURT OF JUSTICE

IN THE MATTER OF a Proceeding under the *Class Proceedings Act, 1992*,  
S.O. 1992, C. 6

BETWEEN:

DAVID MARTINO

Plaintiff

- and -

FORTRESS REAL CAPITAL INC., FORTRESS REAL DEVELOPMENTS INC., ADI  
DEVELOPMENTS (LINK) INC., ADI DEVELOPMENT GROUP INC., BUILDING &  
DEVELOPMENT MORTGAGES CANADA INC., ILDINA GALATI, FFM CAPITAL  
INC., ROSALIA SPADAFORA, SAUL PERLOV, DEREK SORRENTI, SORRENTI  
LAW PROFESSIONAL CORPORATION and OLYMPIA TRUST COMPANY

Defendants

**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 lawyer or, where the Plaintiff do 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.

REQUEST TO REDEEM

Whether or not you serve and file a statement of defence, you may request the right to redeem the mortgaged property by serving a request to redeem (Form 64A) on the Plaintiff and filing it in this court office within the time for serving and filing your statement of defence or at any time before being noted in default. If you do so, you will be entitled to seven days' notice of the taking of the account of the amount due to the Plaintiff, and to 60 days from the taking of the account within which to redeem the mortgaged property.

If you hold a lien, charge or encumbrance on the mortgaged property subsequent to the mortgage in question, you may file a request to redeem, which must contain particulars of your claim verified by an affidavit, and you will be entitled to redeem only if your claim is not disputed or, if disputed, is proved on a reference.

REQUEST FOR SALE

If you do not serve and file a statement of defence, you may request a sale of the mortgaged property by serving a request for sale (Form 64F) on the Plaintiff and filing it in this court office within the time for serving and filing your statement of defence, or at any time before being noted in default. If you do so, the Plaintiff will be entitled to obtain a judgment for a sale with a reference and you will be entitled to notice of the reference.

If you hold a lien, charge or encumbrance on the mortgaged property subsequent to the mortgage in question and you do not serve and file a request to redeem, you may file a request for sale which must contain particulars of your claim verified by an affidavit, and must be accompanied by a receipt showing that \$250 has been paid into court as security for the costs of the Plaintiff(s) and of any other party having carriage of the sale.

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.

TAKE NOTICE: THIS ACTION WILL AUTOMATICALLY BE DISMISSED if it has not been set down for trial or terminated by any means within five years after the action was commenced unless otherwise ordered by the court.

Date Sept 28/16

Issued by A. Fajardo  
Local Registrar

Address of court office: 393 University Avenue, 10th Floor  
Toronto, Ontario  
M5G 1E6

**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: ADI DEVELOPMENTS (LINK) INC./ADI DEVELOPMENT GROUP INC.**  
4190 South Service Road, Suite 200  
Burlington, ON L7L 4X5

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

**AND TO: ILDINA GALATI**  
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: SAUL PERLOV**  
4-81 Zenway Blvd.  
Woodbridge, ON L4H 0S5

**AND TO: DEREK SORRENTI**  
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

**AND TO: OLYMPIA TRUST COMPANY**  
125-9<sup>th</sup> Avenue SE, Suite 2200  
Calgary, AB T2G 0P6

## CLAIM

1. The Plaintiff claims on his own behalf and on behalf of all members of the Class (as defined herein):
  - a) An Order certifying this proceeding as a class proceeding and appointing the Plaintiff as representative Plaintiff for the members of the Class and any appropriate subclass thereof;
  - b) The following relief:
    - i) A Declaration that the Defendant Fortress Real Developments Inc. ("**Fortress Developments**") holds its interest in trust for the Plaintiff in an agreement dated on or before September 4, 2012 with the Defendant Adi Developments (Link) Inc. (formerly Adi Developments Sutton Inc. ("**Adi**")) in the lands underlying the Sutton (also known as The Link) development at 5210, 5218, 5226, 5236 Dundas Street and 2500 Burloak Drive in Burlington, Ontario (the "**Sutton Project**");
    - ii) A Declaration that the Defendants Derek Sorrenti ("**Sorrenti**") and Olympia Trust Company ("**Olympia**") henceforth do not act in the capacity as trustees on behalf of the Plaintiff with respect to a syndicated mortgage (the "**Syndicated Mortgage**") registered against the Sutton Project lands;
    - iii) Appointment of a trustee or trustees to act on behalf of the Plaintiff with respect to her investment in the Sutton project;
    - iv) Immediate judicial sale of the lands underlying the Sutton project (more particularly described in Schedule "A" herein) pursuant to the provisions of Rule 64 of the *Rules of Civil Procedure*;

- v) An interim Order that all amounts paid to or held by Fortress or any of the Defendants as advances against anticipated profits and commissions be paid into Court pursuant to the provisions of Rule 45 of the *Rules of Civil Procedure*;
  - vi) An accounting of all funds received by the Defendants from the Plaintiff and paid by the Defendants to Adi;
  - vii) Disgorgement of all profits earned by all Defendants who the Court determines are fiduciaries of the Plaintiff with respect to the Sutton project;
  - viii) An equitable tracing of all funds received by the Defendants from the Plaintiff;
- c) In the alternative to subparagraph (b) above, rescission of all agreements between the Plaintiff and the Defendants with respect to his investment in the Syndicated Mortgage;
  - d) General damages in the amount of \$15,000,000;
  - e) Exemplary, punitive and aggravated damages in the amount of \$1,500,000;
  - f) Pre and post-judgment interest at the rate of 8% per annum pursuant to the terms of the Syndicated Mortgage (as defined below);
  - g) In the alternative to subparagraph (f) above, pre- and post-judgment interest in accordance with the *Court of Justice Act*, R.S.O. 1990, c. C-43 and the amendments thereto;
  - h) Costs of this action on a substantial indemnity basis together with the Harmonized Sales Tax thereon; and

- i) Such further and other relief as the nature of this case may require and to this Honourable Court may seem just.

### *Nature of the Action*

2. The class action against the Defendants concerns an investment made by the Plaintiff and other members of the proposed class in the Syndicated Mortgage. The Syndicated Mortgage was marketed and sold by the Defendants Fortress Real Capital Inc. ("**Fortress Capital**"), Fortress Developments (the two Fortress Defendants are collectively referred to as "**Fortress**"), Building & Development Mortgages Canada Inc. ("**BDMC**"), the Defendant FFM Capital Inc. ("**FFM**") and other mortgage brokerage firms.

### *The Parties*

3. The Plaintiff, David Martino ("**Martino**"), resides in the City of Toronto in the Province of Ontario.
4. Fortress Capital and Fortress Developments are corporations incorporated under the laws of Canada and Ontario respectively with offices in the Town of Richmond Hill. The companies are in the business of real estate development.
5. Adi is a corporation incorporated under the laws of the Province of Ontario with an office in the City of Burlington. The company is the amalgamation of two previous limited corporations, Adi Developments (Link) Inc. and Adi Developments Sutton Inc.
6. The Defendant Adi Development Group Inc. ("**Adi Guarantor**") is a corporation incorporated under the laws of the Province of Ontario with an office in the City of Burlington. Adi, Adi Guarantor are related companies.

7. BDMC is a corporation incorporated under the laws of the Province of Ontario with an office in the same location as Fortress in the Town of Richmond Hill. It is a related company to Fortress. One or more of the principals of BDMC is a shareholder of Adi. At the time of the events herein, BDMC was a licensed mortgage brokerage. BDMC also carried on business under the trade name Centro Mortgage Inc.
8. On February 1<sup>st</sup>, 2018 the Financial Services Commission of Ontario (“FSCO”) made an Order revoking the mortgage brokerage license of BDMC pursuant to section 19 of the *Mortgage Brokerages, Lenders and Administrators Act, 2006*, S.O. 2006, c. 29 (the “Act”). BDMC was ordered to pay an administrative penalty of \$400,000 pursuant to section 39 of the *Act*.
9. On April 20, 2018, the Ontario Superior Court of Justice appointed a trustee over all the assets, undertakings and properties of BDMC. In addition, all actions against BDMC were stayed and suspended. Accordingly, this action will not proceed against BDMC without the consent of the BDMC trustee or leave of the Court.
10. The Defendant, Ildina Galati (“Galati”), is a resident of the City of Vaughan and was a mortgage broker and the principal broker and director of BDMC at the relevant times herein. In January or February of 2018 Galati surrendered her mortgage broker license.
11. FFM is a corporation incorporated under the laws of the Province of Ontario with an office in the City of Vaughan. The company also carried on business under the trade name Fortress Financial Management. FFM was a mortgage brokerage licensed and governed by the provisions of the *Act*.
12. On February 1, 2018 FSCO issued an Order that FFM pay an administrative penalty under section 39 of the *Act* equal to \$235,000. On or about December 4, 2018 FFM made

an assignment in bankruptcy. Accordingly, this action is stayed against FFM without consent of the trustee in bankruptcy or leave of the Court.

13. The Defendant, Rosalia Spadafora (“**Spadafora**”), carries on business in the City of Vaughan and had been the principal broker of FFM from November 1, 2013 until her license was revoked by FSCO under section 19 of the *Act* on February 1, 2018.
14. The Defendant, Saul Perlov (“**Perlov**”), is a resident of the City of Toronto and was the principal broker of FFM from November 1, 2012 to October 31, 2013.
15. Sorrenti is a lawyer licensed to practice law in the Province of Ontario with an office in the City of Vaughan.
16. The Defendant, Sorrenti Law Professional Corporation (“**Sorrenti Law**”), is a professional corporation incorporated under the laws of the Province of Ontario with an office in the City of Vaughan. Sorrenti Law operates Sorrenti’s practice of law.
17. Olympia is a trust company incorporated under the laws of the Province of Alberta with its head office in the City of Calgary.

**Mortgage Law in Ontario**

18. In Ontario, the mortgage brokerage industry is governed by the provisions of the *Act* and its regulations.
19. The mortgage brokerage industry is regulated by FSCO, a regulatory commission established under the provisions of the *Financial Services Commission of Ontario Act, 1997*, S.O. 1997, c. 28.
20. Sections 2 to 5 of the *Act* requires that individuals and companies be licensed under the *Act* (as a broker or agent in the case of individuals and as a brokerage in the case of companies) in order to:



- a) Solicit a person or entity to borrow or lend money on the security of real property;
  - b) Negotiate or arrange a mortgage on behalf of another person or entity;
  - c) Carry on the business of dealing and trading in mortgages;
  - d) Solicit a person or entity to buy or sell mortgages;
  - e) Buy or sell mortgages on behalf of another person or entity;
  - f) Lend money on the security of real property; or
  - g) Hold themselves out as lending money on the security of real property.
21. The *Act's* regulations set out high standards of practice for mortgage brokerages, principal brokers, brokers, agents, mortgage administrators and brokerage officers and directors.
22. The *Act* 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.

**Background of Fortress and Its Business**

23. The following facts apply generally to all Fortress syndicated mortgages and specifically to the facts of this action.
24. Fortress was founded in 2008 by Jawad Rathore (“**Rathore**”) and Vincenzo Petrozza (“**Petrozza**”). Prior to that time Rathore and Petrozza had been active in the securities markets in Ontario.
25. Fortress enters into development agreements with developers/builders whereby Fortress promises to provide real estate financing for the developments in return for a profit participation of 50% in the development project.

26. To finance the projects, Fortress raises capital predominantly from small and unsophisticated investors who invest in syndicated mortgages. These mortgages are registered against the land underlying the planned real estate developments.
27. The two companies, Fortress Developments and Fortress Capital, are used interchangeably in the various transactions although it appears Fortress Developments is primarily responsible for the business transactions with developers/builders and Fortress Capital is primarily responsible for the raising of investment capital.
28. Both Fortress companies share office space, management and staff and capital is pooled by the two companies.
29. The investments are formally sold to investors by BDMC as Fortress is not licensed under the *Act*. Investors often never meet with BDMC or any of its agents prior to making their investment decision.
30. Fortress has developed a network of mortgage brokers and agents to sell its mortgage investments. Fortress has an agreement with three mortgage brokerage firms, FFM as well as FMP Mortgage Investments Inc. and FDS Broker Services Inc., to market the mortgage investments widely to other mortgage brokers and agents who, in turn, solicit interest in the Fortress investments.
31. Fortress develops professional sales and marketing packages that are circulated widely to its network of mortgage brokers and agents. The packages are also circulated directly to members of the public.
32. Potential interested investors are invited to seminars organized by Fortress, BDMC, FFM and the other mortgage brokers/agents.

33. In the marketing materials and at the seminars, the real estate projects are presented as large scale developments with blue-chip, established and reputable builders with decades of experience.
34. The syndicated mortgages are marketed as safe and secure investments that provide monthly interest payments at an 8% annual rate. Also, investors are told they will have the opportunity to earn additional profits when the real estate project is complete.
35. The investments are marketed as registered plan-eligible and safe and secure for retirement and savings investment. Registered plans include Registered Retirement Savings Plans (“RRSP”), Registered Education Savings Plans (“RESP”) and Tax Free Savings Accounts (“TFSA”).
36. The amounts raised by Fortress in the syndicated mortgages are formally lent to the developers through a loan agreement executed by a trustee such as Sorrenti and Olympia acting on behalf of investors. In this action, Sorrenti was the sole trustee on behalf of investors.
37. During the life of the syndicated mortgages, they are administered on behalf of investors by BDMC or Sorrenti. In this case, Sorrenti was the mortgage administrator.

**Olympia Doing Business in Ontario**

38. FSCO is responsible for the licensing of trust companies pursuant to the provisions of the *Loan and Trust Corporations Act*, R.S.O. 1990, c. L-25 (the “LTCA”).
39. Olympia is licensed as a trust company under the laws of the Province of Alberta.
40. In 2011 and again in 2013, Olympia sought a license from FSCO to operate as a trust company in the Province of Ontario so as to offer registered plans to investors in the province who wished to invest in syndicated mortgages.

41. In seeking a license, FSCO had the assistance of Fortress' counsel, Norton Rose Fulbright Canada LLP ("**Norton Rose**"). This law firm also provided Olympia with a tax opinion that the Syndicated Mortgage was in compliance with the rules set out by the Canada Revenue Agency ("**CRA**") with respect to investment of funds held in registered plans into syndicated mortgages.

42. Olympia's purpose in seeking to do business in Ontario was to partner or joint venture with Fortress to facilitate registered plan investments in Fortress syndicated mortgages. This was in both parties' mutual interest:

- a) For Fortress, its syndicated mortgage business in Ontario was only viable if money could be raised from holders of registered plans. No other trust companies or financial institutions licensed to do business in Ontario would permit registered plan clients to invest in Fortress syndicated mortgages through their plans.
- b) 80-85% of the money invested in Fortress syndicated mortgages is raised through holders of registered plans. If the holders of those plans could not invest in Fortress syndicated mortgages, the pool of available non-registered plan investment funds would not have been large enough to support Fortress' syndicated mortgage business.
- c) For these reasons, it was essential for Fortress that Olympia do business in Ontario to invest money on behalf of registered plan holders in Fortress syndicated mortgages.
- d) For Olympia, it allowed it to grow its customer base and earn substantial fees from Ontario residents who opened registered plan accounts.

43. FSCO refused to license Olympia in Ontario holding that sections 31 and 213 of the *LTCA* only permitted federally-incorporated trust companies to be licensed to do business in Ontario. Olympia refused to obtain a federal charter.
44. Notwithstanding FSCO's refusal to provide it with a license and its knowledge that it could not legally carry on business in Ontario, after being turned down for a license in Ontario, Olympia proceeded to do business in Ontario and opened registered plan accounts for all Fortress syndicated mortgage investors who wished to invest through their registered plans.
45. Fortress was fully aware that FSCO had turned down Olympia's application to do business in Ontario and that Olympia had moved forward with its Ontario business. Other Defendants (discussed below) were also aware of these facts.
46. FSCO required that Olympia cease doing business in Ontario in August 2017.

**Lack of Disclosure of Significant Information**

47. Fortress' agreements with developers/builders call for advance payments to Fortress of "anticipated profits" at the time financing is raised. This results in a substantial portion of an investor's money (approximately 35%) being retained by Fortress years before any profits are actually earned.
48. The funds retained by Fortress are also used to pay broker and agent commissions and to pay for independent legal advice ("ILA") allegedly provided to investors.
49. Upon an investment being made, the various mortgage brokers and agents (including referring brokers, agents and others) share a commission of 15%. This is significantly higher than traditional commissions paid in the mortgage industry.

50. Investors in the syndicated mortgages sign documentation acknowledging they have received ILA with respect to their investment. Investors are advised by Fortress that Fortress can provide a lawyer to give “free” ILA. If the investor wishes to use their own lawyer, the investor is told they are responsible for the lawyer’s fees.
51. Most if not all investors accept this offer of “free” ILA so as to save the cost of paying for the ILA. In this case, the ILA is usually provided by Sorrenti and others employed by Sorrenti Law who are paid by Fortress (and the borrowing developer) for this service.
52. The investor does not meet with the lawyer providing independent legal advice. The advice is provided on the telephone with the mortgage agent who was involved in obtaining the mortgage investment present for the call.
53. This ILA is neither independent nor is it legal advice. It is not provided in accordance with the Rules of Professional Conduct as established by the then Law Society of Upper Canada.
54. If the investor decides to proceed with the investment, Sorrenti acts as their lawyer in closing the transaction.
55. Fortress also retains another 16% of investor funds to pay investors their “interest” over the first two years of the loan. This means investors are paying themselves their own “interest” from the capital they invested. This is contrary to the provisions of the *Act* and regulations which state that interest on mortgages is to be paid by the borrower.<sup>1</sup>
56. The result is that the developer receives less than 50% of the funds raised from investors for use in the development of the project itself.

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<sup>1</sup> Section 23 of Regulation 189/08

57. FSCO requires that investors receive an appraisal of the investment property based on its “as is” value. Appraisals are to be prepared in accordance with the standards established by the Appraisal Institute of Canada. No appraisal was provided in this action.
58. Investors are usually provided, as in this action, with an opinion of value that is not prepared by a licensed appraiser and which sets out a value based on the project being complete. This is also not a current or “as is” value. The opinion of value is represented as an appraisal in FSCO-mandated disclosure documents given to investors.
59. The inflated appraised value prepared for Fortress is used to determine the loan to value ratio (“LTV”) for the property. All encumbrances against the property are divided by the value of the property. The higher the value of the property, the lower the LTV ratio.
60. A low LTV ratio is important because CRA requires that a mortgage may only be held by a registered plan if the LTV is less than 100%. Had Fortress used the true value of the development properties rather than inflated values, none of the syndicated mortgages would have been registered plan eligible.
61. None of the facts set out at paragraphs 47-60 herein are disclosed to investors. Nor were investors in registered plans advised that Olympia was not licensed to do business in Ontario.
62. The Plaintiff pleads that if these facts had been disclosed to investors, none would have invested in the syndicated mortgages.

**Purchase of the Sutton Project Lands**

63. The Sutton Project is a mixed-use development project in Burlington, Ontario encompassing four buildings with approximately 300 residential condominium as well as some commercial units in two of the buildings.

64. Adi's purchase of the first four of five parcels underlying the Sutton Project (5210, 5218, 5226 Dundas Street and 2500 Burloak Drive) for \$1.9 million was registered on title on November 8, 2012. The remaining parcel purchase by Adi (5236 Dundas Street) for \$733,076 was registered on title on June 14, 2013. This made the total purchase price for all of the land underlying the Sutton Project equal to \$2,633,076.
65. Adi provided no equity for the purchase of this land. All financing was provided by way of mortgages. At the time of the registration of the purchase of the first four parcels on November 8, 2012, the following encumbrances were on title:
- a) A mortgage in the amount of \$1,598,975 was on title in favour of Meridian Credit Union Limited ("**Meridian**") dating to October 20, 2011;
  - b) A new mortgage in the amount of \$1.8 million to The Morgan Investments Group Inc. ("**Morgan**").
  - c) A new mortgage to a number of individuals (the "**Bridge Financing**") in the amount of \$3,275,000; and
  - d) The Syndicated Mortgage with a principal (at that time) of \$5.6 million.
66. The total of these four mortgages was \$12,273,975. Of this amount, \$3,398,975 ranked higher in priority to the Syndicated Mortgage (the Meridian and Morgan mortgages).
67. The Meridian mortgage was discharged five days later on November 13, 2012. Martino pleads that some or all of the funds used to discharge the Meridian mortgage came from money raised in the Syndicated Mortgage. As of this date, only the \$1.8 million Morgan mortgage ranked higher in priority to the Syndicated Mortgage.
68. The Syndicated Mortgage was not registered on title to the fifth parcel of land (5236 Dundas Street) until February 4, 2016, approximately eight months after its purchase.



Accordingly, investors in the Syndicated Mortgage had no security over this land notwithstanding their money had been used for its purchase.

*Adi's Agreements with Fortress, Sorrenti and Olympia*

69. Approximately two months prior to the purchase of the first four parcels of land and approximately nine months prior to the purchase of the fifth parcel of land underlying the Sutton Project, on or before September 4, 2012, Adi agreed to borrow \$11.6 million (the “**Development Loan**”) from Fortress Developments (the “**Fortress Agreement**”). Key provisions of the Fortress Agreement were:

- a) The Development Loan was divided into a secured portion and an unsecured portion. The secured portion was to be secured by a mortgage registered against the Sutton Project property;
- b) Fortress Developments assigned its interest in the secured portion of the Development Loan to Sorrenti in Trust and Olympia in Trust. (A separate loan agreement between Sorrenti and Adi was executed on September 4, 2012 and is discussed below);
- c) Fortress was entitled to 50% of the final profit of the Sutton Project as its consideration for entering into the Fortress Agreement (less certain adjusting amounts);
- d) Adi paid Fortress Developments an initial project set-up fee;
- e) Adi agreed to pay an amount to a charity chosen jointly by Adi and Fortress Developments with both companies to share the tax receipt equally. In fact, it was the investors who truly paid the donation although they received neither credit nor the tax receipt for so doing;

- f) The term of the Development Loan was approximately three years to October 4, 2015 with an option for Adi to extend the term for a further six months to April 4, 2016;
- g) The Fortress Agreement allowed Fortress Developments to retain 35% of all amounts raised from investors as an advance against anticipated profits and for commissions and legal fees; and
- h) In addition to the 35% of investors' money withheld by Fortress Developments, a further amount from the funds raised from investors was to be set aside to pay investors two years of 8% interest per year.

70. The result of the Fortress Agreement was that Adi would receive less than 50% of the amounts raised from investors for the actual development of the Sutton Project.

71. By agreement dated September 4, 2012, Adi entered into a Syndicated Mortgage Loan Agreement ("SMLA") with Sorrenti in Trust with respect to the secured portion of the Development Loan. Key terms of the agreement were:

- a) A mortgage, the Syndicated Mortgage, would be registered against the Sutton Project property as security for the Development Loan. This was, in fact, done and registered in Land Registry Office #20 in Milton, Ontario on November 8, 2012 as Instrument HR1062915;
- b) The Syndicated Mortgage could be subordinated to construction financing not to exceed \$49.5 million. No other financial encumbrances were permitted in priority to the Syndicated Mortgage. Accordingly, both the Meridian and Morgan mortgages, both of which had priority over the Syndicated Mortgage, were in

breach of the terms of the SMLA as was all subsequent non-construction loan financing obtained by Adi on the Sutton Project lands;

- c) Principal of the Development Loan was to be up to \$11.6 million to provide for Adi's "soft costs to be incurred prior to the construction financing of the [Sutton] Project";
- d) The term of the Development Loan was approximately three years to October 4, 2015 with an option for Adi to extend the term for a further six months to April 4, 2016;
- e) Interest rate was 8% per annum, payable quarterly;
- f) The lenders could earn, under certain circumstances, a project completion fee equal to 12% of the principal of the Development Loan (subject to adjustments) to be paid not later than 30 days after substantial completion of the Sutton Project;
- g) There were certain waivable conditions precedent that had to be satisfied prior to Sorrenti making each advance under the Development Loan to Adi;
- h) Adi Guarantor guaranteed the obligations of Adi under the SMLA including repayment of the Development Loan;
- i) Subsections 16(a) to (e) of the SMLA dealt with Postponement and Subordination. Subsection 16(a) of the agreement stated:

The Lender [Sorrenti] covenants and agrees as follows:

- a) to postpone and subordinate the [SMLA] in favour of First-Ranking Construction Loan Security and to enter into such standstill agreements as shall be reasonable in the circumstances;

72. The SMLA was to be administered on behalf of investors by Sorrenti.

73. The result of the Fortress Agreement and the SMLA is that Fortress obtained a 50% interest in the Sutton Project without investing any of its own capital. All capital provided by Fortress was the capital of Martino and other investors. This fact was not disclosed to investors.
74. Nor did Adi invest capital in the Sutton Project. Its capital was also provided by the investors in the Syndicated Mortgage. This fact was never disclosed to investors.
75. Both Fortress and Adi knew that the Sutton Project would not be completed by the time the SMLA came due in October 2015 or April 2016. This fact was not disclosed to Martino or other investors.
76. Soon after the execution of the SMLA in November 2012, Sorrenti agreed with Adi to a standstill provision in the Syndicated Mortgage (in a document registered on title to the Sutton Project lands under the heading "Additional Provisions) that would preclude investors from acting upon their security in the event of default unless the construction lender consented or all construction financing had been repaid (the "Standstill").
77. ADI obtained construction financing of \$75 million from Meridian on or about April 5, 2016, about three and a half years after the SMLA was executed and the Standstill was registered on title.

**Opinion of Market Value**

78. Sorrenti retained the firm of Legacy Global Mercantile Partners Ltd. to provide an Opinion of Market Value with respect to the Sutton Project (the "Opinion").
79. The Opinion is contained in a letter dated August 22, 2012. This was about 2½ months before Adi had purchased the first four parcels of land in the Sutton Project.

80. The Opinion describes its mandate as providing “an opinion of value to reflect current market conditions, and the assumption of the approval of a site plan which allows for the use and density in the proposed site plan by Adi Development Group Inc.”.
81. The Opinion arrived at a market value for the land underlying the Sutton Project at \$10 million to \$11 million.
82. At the time the Opinion was provided, the Sutton Project property was not zoned to allow for the development that was to be marketed by Fortress and Adi. In order to proceed, it was necessary to obtain both an Official Plan and zoning amendment, both of which had not yet been submitted when the Opinion was written. This was never obtained although the City of Burlington and Adi did agree to terms on the zoning of the project on December 3, 2014, 15½ months after the date of the Opinion.

**Fortress Raises Capital from Martino and Other Investors**

83. In or about August of 2012 Fortress began its marketing efforts for the Sutton Project.
84. Fortress marketed the project widely to its network of referring mortgage brokers and agents as well as to members of the public. It held seminars for interested investors.
85. Martino is 47 years of age with a date of birth of July 13, 1971. He was employed in the automotive industry until 2011.
86. In 2011 Martino was invited to a dinner organized by Fortress to market one of its real estate development syndicated mortgages. The mortgage business interested him and he became a licensed mortgage agent and commenced employment with FFM.
87. FFM provided Martino with minimal training with respect to how to properly sell mortgage investments to clients and no training with respect to his obligations under the

*Act*. Nor was Martino provided with much background information with respect to the real estate developments he was asked to represent in selling syndicated mortgages.

88. Martino's principals at FFM encouraged him to obtain as many investors into Fortress syndicated mortgages as possible. From time to time, Martino would raise questions about certain aspects of the syndicated mortgages. At those times he was told not to worry about the particular question and that the mortgage investment was solid and fully secure.

89. Martino was never aware of the following facts:

- a) That the opinions of value provided on Fortress projects were not the same as formal appraisals and did not meet the disclosure requirements under the *Act*;
- b) That the current market value of the land underlying the Sutton Project was substantially less than the amount set out in the Opinion;
- c) That Fortress retained 35% of amounts raised as advances against anticipated profits;
- d) That investors' interest payments would be made from their own capital invested;  
and
- e) That the ILA offered to investors by Fortress, BDMC and FFM was not proper ILA.

90. Martino believed that the Fortress projects were safe and secure. In addition to selling his clients investments in the syndicated mortgages, he also invested his own money and money from family members.

91. In October 2012, Martino was introduced to the Sutton Project. He received marketing material about the project as well as a copy of the Opinion. As with the other Fortress

projects, Martino was advised by his superiors at FFM that the Sutton Project was safe and secure.

92. In reliance upon the oral and written representations made to him and the ILA later purportedly provided to him, Martino decided to proceed with the investment. Martino would not have proceeded with the investment had he been advised of the Misrepresentations (as defined below).

93. Martino invested \$50,000 from the RESP account set up for his children. The documents related to the investment were executed on October 30, 2012.

94. In addition, Martino's clients and family members invested a further \$510,000 in the Syndicated Mortgage, much of it RRSP money.

95. On the same day that Martino executed the Syndicated Loan documents, he had a telephone call with Sorrenti (or a lawyer in his office or under his direction) during which he was purportedly provided with ILA.

96. During the call, Sorrenti briefly described the documents he was signing and the structure of the investment. The only risk discussed with Martino was the risk that the real estate markets would decline. However, Sorrenti minimized that concern by emphasizing the Canadian real estate market was very stable.

97. Sorrenti did not review any of the significant risks of the investment with Martino. Although he knew or ought to have known of the substantial risks associated with an investment in the Syndicated Mortgage (the Misrepresentations set out below), he did not discuss those with Martino.

98. Sorrenti also did not advise Martino that the "advice" he was providing Martino was not true ILA because Fortress was paying Sorrenti's fees for the advice.

99. Martino was asked and did sign a document evidencing the ILA he purportedly received.

The document states that the material terms of the investment were reviewed with Martino and that he was advised of the investment risks.

100. On October 30, 2012, Martino completed a document entitled Client Suitability Form. It contained details of Martino's financial position and his desired investment risk profile.

101. All of these instructions were ignored in selling Martino an investment in the Sutton Project, a high risk investment. Although BDMC had no involvement with the sale of the investment to Martino, as the selling brokerage it was legally responsible for the sale and it too ignored the document's contents.

102. Sorrenti, as the mortgage administrator also had an obligation to advise Martino the Syndicated Mortgage was not a suitable investment for him and ignored his obligations.

103. Fortress, BDMC, FFM and Sorrenti knew an investment in the Syndicated Mortgage was inconsistent with Martino's risk profile and that their actions in selling the investment to him were contrary to their obligations under the *Act*.<sup>2</sup>

104. Martino pleads that an investment in the Syndicated Mortgage was not suitable for any investor, registered plan or not, regardless of the investor's risk profile.

**Subsequent Financing by Adi**

105. On or about March 28, 2013 the principal of the Syndicated Mortgage increased by \$3 million to \$8.6 million. The Bridge Financing was discharged on or about May 27, 2013.

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<sup>2</sup> Sections 43 and 45 of the *Act*, Sections 4, 12, 18, 24, 25, 26 and 27 of Regulation 188/08, Section 10.1 of Regulation 189/08



106. On or about June 14, 2013 (on the same date the fifth parcel of land underlying the Sutton Project (5236 Dundas Street) was purchased), Adi gave a mortgage in the amount of \$2,792,400 to Cameron Stephens Financial Corporation (“**Cameron Stephens**”). Adi provided no equity for the purchase of this parcel. The Morgan mortgage of \$1.8 million was also discharged on that day.
107. On the same day Sorrenti and Olympia subordinated the Syndicated Mortgage to the Cameron Stephens mortgage.
108. On April 1, 2014, the Cameron Stephens Mortgage was increased to \$4,592,400. On the same day, Sorrenti and Olympia subordinated the Syndicated Mortgage to the increased Cameron Stephens mortgage.
109. On April 10, 2014 Adi gave a new mortgage to Sorrenti Law Professional Corporation for \$3.5 million (ultimately increased to \$8 million). Martino is not aware of the details of this mortgage and whether it is another syndicated mortgage raised from other investors.
110. On February 27, 2015 the Cameron Stephens Mortgage was increased to \$5,160,000. On the same day, Sorrenti and Olympia subordinated the Syndicated Mortgage to the increased Cameron Stephens mortgage.
111. On or about October 14, 2015, Adi gave a mortgage in the amount of \$16 million to Aviva Insurance Company of Canada (“**Aviva**”). On the same day Sorrenti and Olympia subordinated the Syndicated Mortgage to the new mortgage.
112. On April 22, 2014, March 10, 2016 and September 6, 2016 construction liens have been registered on title to the lands underlying the Sutton Project which, under the terms of the SMLA, were acts of default by Adi.

113. Advances under the Development Loan funded by the Syndicated Mortgage have been made in tranches to Adi. It appears that \$11.6 million, was advanced by February 4, 2014.

114. Martino is not aware of the exact amount advanced to Adi from these funds as Adi did not receive all of the amounts raised under the Syndicated Mortgage because of the amounts retained by Fortress predominantly as advance payments against anticipated profits and to pay interest to investors.

**Construction Begins and Default Occurs**

115. Sales of the units in the Sutton Project began in July 2014.

116. Construction did not begin on the Sutton Project until sometime after May 28, 2015, after amendment of the Official Plan and zoning approval was obtained and Adi entered into certain required agreements with the City of Burlington.

117. Construction was not nearly complete by the due date of the Development Loan of October 4, 2015 and, accordingly, by letter dated July 1, 2015 Adi exercised its right to extend the Development Loan for a further six months to April 4, 2016.

118. On the due date of the Development Loan (and the Syndicated Mortgage) of April 4, 2016 BDMC issued a "Memo". The Memo stated that construction had commenced and stated that the SMLA contained provisions in subsections 16(a) to (f) for an "ongoing standstill, subordinate and postponement arrangement".

119. On May 12, 2016 BDMC issued another "Memo" asking investors to postpone their interest to an increased construction loan to be provided by Meridian by signing a Direction and Indemnity agreement that was enclosed.

120. In fact, the loan had been provided by Meridian to Adi over one month earlier and Sorrenti had already postponed the Syndicated Mortgage to the loan.
121. Martino refused to sign the Direction and Indemnity.
122. On August 5, 2016 BDMC issued a third “Memo” to investors in the Syndicated Mortgage. This Memo referred (incorrectly) to the expiry date of the SMLA as October 4, 2016 (instead of its actual expiry date of April 4, 2016). It then repeated the incorrect statements with respect to “standstill, subordinate and postponement arrangement[s]” and “interest accrual” set out in the April 4, 2016 Memo.
123. Martino’s legal position is as follows:
- a) The SMLA went into default under section 15 on April 4, 2016 when the Development Loan was not repaid.
  - b) While BDMC implied the “ongoing standstill” provisions from sections 16(a) to (f) of the SMLA in the April 4 and August 5, 2016 Memos included the Standstill, the provisions in section 16 of the SMLA do not bind Martino to the provisions of the Standstill.
  - c) Nothing in any of the documentation and agreements between Martino and any of the Defendants provided for a period of interest accrual at any time – before or after the date for repayment of the principal due under the Syndicated Mortgage.
124. Sorrenti as the lender/trustee under the SMLA was entitled and obligated as of April 4, 2016 to take all actions and exercise all remedies available as a result of the default of the agreement on behalf of his beneficiary investors.
125. Sorrenti took no steps to protect Martino’s interests and act upon Adi’s default.

126. Martino attempted to contact Sorrenti on several occasions by telephone and in writing to determine what steps were being taken by Sorrenti to enforce Adi's default under the Syndicated Mortgage. No response was received.
127. Sorrenti has never communicated with Martino and other investors in the Syndicated Mortgage to determine their instructions with respect to Adi's default under the SMLA.
128. To date, no sales of units in the Sutton Project have taken place. Martino has received no payments of principal or interest since the Syndicated Mortgage went into default. Martino is not aware of the full extent of his losses but pleads he will suffer the loss of most if not all of his investment in the Syndicated Mortgage.

**Legal Claims**

129. Martino pleads this action is appropriate for certification under the *Class Proceedings Act, 1992*, S.O. 1992, C. 6 in that:
- a) This Fresh as Amended Statement of Claim discloses one or more causes of action;
  - b) There is an identifiable class of two or more persons that would be represented by Martino;
  - c) The Fresh as Amended Statement of Claim raises common issues;
  - d) A class proceeding is the preferable procedure for the resolution of the common issues; and
  - e) Martino would fairly and adequately represent the interests of the class, will present a plan for the proceeding that will set out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the

proceeding and Martino does not have, on the common issues for the class, a conflict of interest with other class members.

130. The marketing and sales of investments in the Syndicated Mortgage and the ILA given to investors were identical for all investors in that:

- a) Sales materials for the Sutton Project were widely distributed and available to all potential investors;
- b) The documents investors were required to execute were identical;
- c) The representations made to investors with respect to how much they would earn were identical;
- d) The Misrepresentations (defined below) were made to all investors;
- e) The ILA was prepackaged and had been planned in advance by Fortress, Sorrenti and Sorrenti Law and was identical for all investors.

Pleadings Common to All or Most of the Defendants

131. The Plaintiff's claims against many of the Defendants are particularized below and are based on:

- a) Fraudulent and negligent misrepresentation;
- b) Negligence;
- c) Breach of fiduciary duty;
- d) Conspiracy to injure; and
- e) Breach of Contract.

132. Fraudulent and negligent misrepresentation, negligence and conspiracy to injure require that the Defendant owe the Plaintiff a duty of care. The Plaintiff pleads that the relationship with those Defendants against whom these torts are claimed was sufficiently

proximate and the foreseeability of harm if a tort was committed was sufficiently great that those Defendants owed him a duty of care. There were no policy reasons to negate a duty of care.

133. With respect to the requirements of proof for a claim of fraudulent and negligent misrepresentation, the Plaintiff pleads as follows:

- a) The Misrepresentations (set out below) constitute the misrepresentations made to the Plaintiff;
- b) The Misrepresentations were made in the Sutton Project marketing and other materials distributed to and reviewed by the Plaintiff including the agreements signed by the Plaintiff when investing in the Syndicated Mortgage. The Misrepresentations were also set out in general Fortress marketing materials including information available on the Fortress website. Last, the Misrepresentations were conveyed to the Plaintiff orally by agents and brokers acting on behalf of Fortress, BDMC and FFM, by Sorrenti during his "ILA" and during Sorrenti's and Sorrenti Law's representation of the Plaintiff;
- c) The Misrepresentations were made between 2011 when Martino was introduced to Fortress syndicated mortgages until October 2012;
- d) The Misrepresentations either constituted information that was untrue or it contained information that these Defendants should have but failed to disclose to Martino. These Defendants knew or ought to have known the Misrepresentations were untrue and contained information that should have been disclosed; and
- e) These Defendants acted fraudulently in the manner in which they dealt with the Misrepresentations which induced the Plaintiff to invest in the Syndicated

Mortgage. Alternatively, the Defendants acted negligently in the manner in which they dealt with the Misrepresentations, the Misrepresentations were reasonably relied upon by the Plaintiff in investing in the Syndicated Mortgage.

134. To the extent the Plaintiff relies upon breaches of statutory duty in this Fresh as Amended Statement of Claim, the Plaintiff pleads that while these breaches may not support a private cause of action, the Plaintiff relies upon them in support of the particular Defendants' failure to meet their common law obligations to him.

135. The Plaintiff pleads that those Defendants against whom a breach of fiduciary duty is claimed were in a relationship with him of trust and confidence that required them to act honestly, in good faith, and strictly in his best interests. These Defendants had the ability to exercise some discretion or power to affect the Plaintiff's interests making him vulnerable to their actions.

136. The Plaintiff pleads the actions of these Defendants have caused him to suffer damages. In the case of those against whom claims of breach of fiduciary duty are made, the Plaintiff pleads those Defendants should disgorge any profits earned as a result of their actions.

#### Fortress Capital and Fortress Developments

137. Fortress's actions amounted to fraudulent and negligent misrepresentation, negligence, breach of fiduciary duty, conspiracy to injure and breach of contract, all as particularized below in this Fresh as Amended Statement of Claim.

138. In addition, Fortress acted as a mortgage brokerage in selling an investment in the Syndicated Mortgage to Martino although it was not licensed to do so. As such, it owed

Martino the duties of a mortgage brokerage at common law and under the provisions of the *Act*. Martino pleads those duties included fiduciary duties.

139. The Plaintiff pleads that since Olympia and Fortress were partners or joint venturers, Fortress is responsible for the actions of Olympia.

*Fraudulent and Negligent Misrepresentation*

140. Fortress' fraudulent and negligent misrepresentations are made up of misrepresentations by Fortress as well as Fortress' failure to disclose material information to Martino (defined as the "Misrepresentations"), all as follows:

- a) The misrepresentation that the Syndicated Mortgage was a safe and secure investment when Fortress knew it was a risky investment, unsuited for all investors but particularly for investors with a lower to moderate risk profile. This information was contained in Fortress' marketing materials, was also provided to mortgage and referring agents who Fortress knew would communicate the information to investors;
- b) The intentional failure to disclose the significant risks associated with a syndicated mortgage to Martino;
- c) The failure to disclose that Fortress would receive advance payments of anticipated profits equal to 35% of the funds invested in the Syndicated Mortgage;
- d) The failure to disclose that commissions amounting to 15% of the funds raised would be paid to various brokers, agents and referring parties, substantially higher than normal commissions paid for investments of this kind;



- e) The failure to disclose that interest payments to investors would be made from the investors' own capital contrary to the provision of the Act.<sup>3</sup> This led investors who held their interest in the Syndicated Mortgage outside registered plans to pay tax on their own capital as interest;
- f) Misrepresentation of the current value of the Sutton Project lands to be \$10 million when it's true current or "as is" value was significantly lower (likely the \$2.6 million paid by Adi for the lands in November 2012 and June 2013);
- g) The misrepresentation that the Opinion was, in fact, an appraisal prepared in accordance with the standards set by the Appraisal Institute of Canada;
- h) The misrepresentation that the LTV ratio of the Sutton Project property was 72% thus misrepresenting that the investment was legal for registered plans. In fact, the true LTV ratio based on a value for the Sutton Project lands of \$2.6 million was 277% which meant it was not eligible under CRA rules for investment by registered plans;
- i) The misrepresentation that the legal advice provided for investors was true ILA when it was prepackaged and paid for by Fortress;
- j) The utilization and promotion of the services of Olympia thus implicitly misrepresenting that Olympia could carry on business in Ontario when it 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;

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<sup>3</sup> Section 23 of Regulation 189/08

- k) The failure to disclose that Fortress and Olympia were partners or joint venturers in order to facilitate registered plan investments in Fortress syndicated mortgages by having Olympia carry on business in Ontario unlawfully;
- l) The misrepresentation that the use of the funds was for “soft costs to be incurred prior to the construction financing of the [Sutton] Project” without disclosing substantial portions of the funds would be retained as advances to Fortress against anticipated profits, for payment of interest and to provide equity for the purchase of the Sutton Project lands;
- m) The misrepresentation that Fortress and Adi had provided capital to the Sutton Project;
- n) The failure to disclose that Fortress, BDMC and Adi were related entities and, as such, there might be a conflict of interest in mortgage brokerage advice given to Martino with respect to the investment;
- o) The misrepresentation that all zoning and other municipal approvals had been obtained;
- p) The misrepresentation that the Syndicated Mortgage would be repaid by October 4, 2016 with the possibility of a six month extension to April 4, 2016 when it knew the Sutton Project would not be complete by then and that investors would not be repaid amounts due to them for years after that date;
- q) The failure to disclose or disclose properly to investors that the Standstill would be inserted into the Syndicated Mortgage preventing investors from acting upon their security in the event of Adi default or when the Syndicated Mortgage came due

unless the construction lender consented to such action or until all construction financing had been repaid;

- r) The failure to disclose to investors that if the Syndicated Mortgage was not repaid when it came due, interest payments would stop and could be accrued until the Development Loan was repaid; and
- s) The misrepresentation that the Syndicated Mortgage would only be subordinated to construction financing up to \$45 million (plus a 10% contingency) as well as a new first mortgage in the amount of \$3.6 million prior to construction financing.

*Negligence and Breach of Fiduciary Duty*

141. The particulars of Martino's negligence and breach of fiduciary duty claim against Fortress are that:

- a) It assumed the duties of a mortgage brokerage under the *Act* when it knew it was not licensed by FSCO as a mortgage brokerage;
- b) It introduced the Sutton Project investment to Martino when only a licensed mortgage brokerage was entitled to make such introductions;
- c) It failed to take the steps required of a mortgage brokerage to ensure that the Syndicated Mortgage complied with all legal requirements and that proper disclosure of all material risks were made to Martino;<sup>4</sup>
- d) It failed to ensure the investments in the Syndicated Mortgage were appropriate investments for each investor based on the investor's background and risk profile;

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<sup>4</sup> Sections 5(2), 11(7) and (8), 43 and 45 of the *Act*; sections 4, 12, 18, 24, 25, 26, 27 and 40 of Regulation 188/08

- e) It marketed and recommended the Syndicated Mortgages as safe and secure investments when it knew they were risky investments not suitable for any investors;
- f) It provided or failed to provide the information set out in the Misrepresentations;
- g) It failed to ensure Martino obtained genuine ILA and arranged for ILA that was not truly independent as it was prepackaged and paid for by Fortress;
- h) It utilized the services of Olympia when it 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; and
- i) It failed to ensure the Syndicated Mortgage would only be subordinated to construction financing up to \$45 million (plus a 10% contingency) as well as a new first mortgage in the amount of \$3.6 million prior to construction financing.

Conspiracy to Injure

142. Martino pleads that Fortress conspired with BDMC, FFM, Galati, Spadafora, Perlov and Olympia to injure by way of unlawful conduct. Particulars of the tort include:

- a) Fortress conspired with BDMC, Galati, FFM, Spadafora and/or Perlov to provide or to omit providing the information set out in the Misrepresentations so as to induce Martino to invest in the Syndicated Mortgage with the knowledge that had he known of the information in the Misrepresentations, he would not have made the investment;
- b) Fortress conspired with Olympia to have Olympia carry on business in Ontario with the knowledge that such business could not be lawfully carried out and with the knowledge that if Olympia did not carry on business in Ontario, no other trust

company or financial institution with registered plans would allow investments in the Syndicated Mortgage. Fortress and Olympia knew that an inability to raise registered plan money made the syndicated mortgage business unfeasible as there was not enough non-registered plan money available to support the business;

- c) Fortress' and Olympia's conspiracy therefore allowed Fortress to make its syndicated mortgage business viable when it would not otherwise have been viable had Olympia Trust not unlawfully done business in Ontario. It also allowed Olympia to earn significant fees from registered plan holders that constituted the bulk of the company's profits between the years 2012 and 2017;
- d) Fortress conspired with Sorrenti and Sorrenti Law to plan in advance the prepackaged "ILA" these Defendants would give to investors which would not disclose or discuss the significant risks associated with the Syndicated Mortgage;
- e) The conspiracy of Fortress, BDMC, Galati, FFM, Spadafora and/or Perlov with respect to the Misrepresentations, the conspiracy of Fortress and Olympia with respect to Olympia carrying on business in Ontario and the conspiracy with Sorrenti and Sorrenti Law with respect to the ILA constituted unlawful acts;
- f) The conduct was directed towards procuring investment in the Syndicated Mortgage by Martino and other investors;
- g) These Defendants knew that the Syndicated Mortgages were risky investments and that there was a foreseeable possibility they would not be repaid which was not disclosed to Martino; and
- h) The Syndicated Mortgage did, in fact, go into default causing damages to Martino.

Breach of Contract

143. Martino executed an agreement with Fortress Capital, BDMC, Olympia and Sorrenti entitled the Memorandum of Understanding - Lender Acknowledgement and Consent Agreement (the “**Acknowledgement**”) dated October 30, 2012. Key representations made by Fortress Capital, BDMC, Olympia and Sorrenti in the document included:

- a) That Martino was a client of either Fortress Capital or BDMC and had been introduced to the investment by either Fortress Capital or BDMC;
- b) That the Syndicated Mortgage was RRSP-eligible;
- c) That the Syndicated Mortgage would be subordinated to up to \$45 million in construction financing (plus a 10% contingency) and a new first mortgage of \$3.6 million;
- d) That prior to advances being made to Adi, an updated valuation of the Sutton Project would be provided to the trustees confirming that the combined value of all registered mortgage security on the lands did not exceed the most recent valuation of the property;
- e) That the current value of the Ten88 lands was \$10 million;
- f) That Martino had received ILA with respect to his investment in the Syndicated Mortgage.

144. Martino pleads that Fortress’ execution of the Acknowledgement with these statements were contractual misrepresentations in that Fortress knew:

- a) Martino could not be a client of Fortress as Fortress had not been licensed as a mortgage brokerage under the *Act* and could not have Martino as its client;

- b) That the Syndicated Mortgage could not be RRSP-eligible since it knew that the true LTV ratio of the Sutton Project lands with the Syndicated Mortgage exceeded 100% making it ineligible for registered plan investment;
- c) That the Syndicated Mortgage would be postponed by Sorrenti to many unauthorized lenders;
- d) That advances would be made to Adi without updated valuations being made;
- e) That the current value of the Sutton Project lands was significantly lower than \$10 million; and
- f) That Martino had not received ILA.

Adi

145. Martino pleads Adi is in default of the provisions of the SMLA in that the agreement came due on April 4, 2016 without repayment of principal and interest due.

146. Martino pleads he is entitled to a judicial sale of the lands underlying the Sutton Project development pursuant to the provisions of Rule 64 of the *Rules of Civil Procedure* in order to obtain payment of the amounts due to him by Adi.

147. Martino pleads he has standing in equity to seek relief with respect to Adi's default under the SMLA.

148. Martino pleads that the Standstill is not enforceable against him for the following reasons:

- a) It was not disclosed to him at any time including during the provision of ILA. Adi knew or ought to have known the Standstill had never been disclosed to the Plaintiff;

- b) The Standstill nullified key provisions of the SMLA such as its payment, term and default sections. Even if some disclosure of the Standstill was provided, such disclosure was inadequate to make it clear to Martino the Standstill negated these key provisions of the SMLA;
- c) While different standstill provisions were contained in other documents executed by Martino, those provisions did not alert Martino to the extreme provisions of the Standstill;
- d) In the SMLA, Martino agreed to enter into standstill agreements “as shall be reasonable in the circumstances”. Martino pleads this phrase does not bind him to the terms of the Standstill for the following reasons:
  - i) The language used in the phrase is ambiguous and would not alert Martino that he was agreeing to standstill provisions as stringent and unreasonable as those set out in the Standstill that were inconsistent with the payment, term and default provisions of the SMLA;
  - ii) The Standstill was inserted in the Syndicated Mortgage terms three and a half years before Meridian provided construction financing. Therefore, the terms were not inserted because they were “reasonable” since Sorrenti would have had no basis to know what “reasonable” terms would be required three and a half years later;
  - iii) Meridian provided construction financing to Adi at the same time the Syndicated Mortgage came due. It knew or ought to have known the SMLA had come due and that monies were owed to Martino and the other investors;



- iv) Meridian also knew Sorrenti was acting as a bare trustee for investors in agreeing to the Standstill. Since a bare trustee has no independent power, discretion or responsibility, Meridian should have insisted Sorrenti obtain the consent of all Syndicated Mortgage investors to the terms of the Standstill;
- v) Fortress was Adi's partner in raising capital from investors for the Syndicated Mortgage. Martino pleads that the terms of the Standstill were inserted into the terms of the Syndicated Mortgage by Fortress. In light of Fortress' breach of its tort, contractual and fiduciary obligations to Martino, it is inequitable for Adi to be able to rely upon the provisions of the Standstill. Martino relies upon the provisions of section 11 of the *Partnership Act*, R.S.O. 1990, c P-5;
- vi) Fortress was Adi's agent in raising money for the Sutton Project from investors. Fortress' breaches of its duty of care, fiduciary duty and contract are legally binding on Adi. For these reasons, Adi is not legally or equitably entitled to rely upon the provisions of the Standstill;
- e) The beneficiary of the terms of the Standstill is Meridian. Only Meridian can seek to enforce its terms; and
- f) The Standstill was provided without consideration and is not enforceable.

149. Adi's actions were oppressive, unfairly prejudicial and unfairly disregarded the interests of Martino contrary to the provisions of sections 245 and 248 of the Ontario *Business Corporations Act*, R.S.O. 1990, c. B-16 entitling Martino to damages.

BDMC and FFM

150. BDMC and FFM were the selling brokerages with respect to investments in the Syndicated Mortgages.

151. BDMC's and FFM's actions amounted to fraudulent and negligent misrepresentation, negligence, breach of fiduciary duty, conspiracy to injure and breach of contract (BDMC only), all as particularized below in this Fresh as Amended Statement of Claim.

Fraudulent and Negligent Misrepresentation

152. The particulars of BDMC's and FFM's fraudulent and negligent misrepresentations are the Misrepresentations alleged against Fortress. References to Fortress therein should be read as references to BDMC and FFM.

153. FSCO requires that a document entitled Investor/Lender Disclosure for Brokered Transactions be provided to prospective investors in syndicated mortgages. One dated October 26, 2012 was provided to Martino (the "Disclosure") by or on behalf of BDMC. There were many misrepresentations and omissions in the Disclosure as follows:

- a) Failure to advise whether BDMC acted for the lender or borrower or both in the transaction as required;
- b) Failure to disclose its relationship with "each party to the transaction" as required;
- c) Failure to disclose material risks about the transaction that the investor should consider as required;
- d) Failure to disclose actual or potential conflicts of interest that might arise from the transaction as required;

- e) That the ILA that the Disclosure advised the investor to obtain and that BDMC knew Martino was to receive was not true ILA;
- f) Failure to disclose that BDMC might receive additional earnings from the Sutton Project as required;
- g) Misrepresentation that BDMC had complied with all requirements of the *Act*;
- h) Misrepresentation that an appraisal based on an “as is” value of the Sutton Project lands had been completed with a value of \$10 million;
- i) Misrepresentation that the LTV ratio was 72%;
- j) Misrepresentation as to the fees being paid to agents and lawyer;
- k) Failure to attach required documents including copies of any existing mortgages, appraisals, agreements of purchase and sale and evidence of Adi’s ability to meet the mortgage payments;
- l) Misrepresentation that BDMC had provided “all other information an investor of ordinary prudence would consider to be material” to their investment decision; and
- m) Failure to include a schedule of funds that had been provided to Adi and were to be provided in future.

*Negligence and Breach of Fiduciary Duty*

154. The particulars of Martino’s negligence and breach of fiduciary claim against

BDMC and FFM are that:

- a) They failed to take the steps required of a mortgage brokerage to ensure that the Syndicated Mortgage complied with all legal requirements and that proper disclosure of all material risks were made to Martino;

- b) They failed to ensure the investments in the Syndicated Mortgage were appropriate investments for Martino based on the investor's background and risk profile;
- c) They recommended the Syndicated Mortgage to investors when it was not an appropriate investment for any investor as it was not safe and secure and, in fact, was a risky investment;
- d) They failed to meet with Martino personally to ensure they met their obligations under the *Act* in selling an investment in the Syndicated Mortgage to him;
- e) They knew that Fortress was selling investments in the Syndicated Mortgage to investors unlawfully since Fortress was not licensed under the *Act* to do so;
- f) They failed to provide investors with documents required by FSCO to be provided as set out in the Disclosure;
- g) They failed to ensure Martino obtained genuine ILA and arranged for ILA that was not truly independent as it was paid for by Fortress;
- h) They knew Martino would be utilizing the services of Olympia 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; and
- i) They knew they were failing to meet their obligations under the *Act* and its regulations including BDMC's failure to properly complete the Disclosure provided to Martino.<sup>5</sup>

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<sup>5</sup> Sections 5(2), 11(7) and (8), 43 and 45 of the *Act*; sections 4, 12, 18, 24, 25, 26, 27 and 40 of Regulation 188/0

Conspiracy to Injure

155. Martino pleads that BDMC and FFM conspired with Fortress, Sorrenti and Olympia to commit the tort of conspiracy to injure by way of unlawful conduct.

156. Particulars of the tort are those set out in subparagraphs 142(a), (e) to (h) herein.

Breach of Contract

157. Martino signed two agreements with BDMC – the Acknowledgement and a Memorandum of Understanding (“MOU”) dated October 22, 2012.

158. With respect to the Acknowledgement, Martino relies upon his allegations set out in paragraphs 143-144 herein except that references to Fortress Capital in those paragraphs should be read as references to BDMC.

159. In the MOU, BDMC set out its duties to Martino as including the following:

- Suitability of the lender
- Know Your Client (KYC)
- Documentation Completion
- Merits of the Project
- Risk Disclosure
- Conflict of interest disclosure

160. Martino pleads that BDMC failed to meet these contractual duties to him and that this breach caused him damages. Had BDMC met its contractual obligations to Martino, he never would have invested in the Syndicated Mortgage and would not have suffered any loss.

Galati, Spadafora and Perlov

161. As the principal brokers of BDMC and FFM, Galati, Spadafora and Perlov had a statutory duty under the *Act* and its regulations to ensure the company and its brokers and agents complied with the *Act*'s provisions.<sup>6</sup> They knew of these obligations but failed to meet them.

162. Galati knew of BDMC's breach of its duty of care (fraudulent and negligent misrepresentation and negligence), breach of contract and breach of fiduciary duty to Martino, all as set out in paragraphs 152-160 of this Fresh as Amended Statement of Claim.

163. Spadafora and Perlov knew of FFM's breach of its duty of care (fraudulent and negligent misrepresentation and negligence) and breach of fiduciary duty to Martino, all as set out in paragraphs 152-160 of this Fresh as Amended Statement of Claim.

164. Galati, Spadafora and Perlov knew BDMC's and FFM's actions would cause harm to Martino. As principal brokers, they did nothing to prevent those breaches from happening contrary to their statutory obligations.<sup>7</sup> As principal brokers, they did nothing to develop policies for BDMC and FFM that would prevent those breaches from happening contrary to their statutory obligations.<sup>8</sup>

165. Galati, Spadafora and Perlov were, therefore, negligent and in breach of their fiduciary duties as a result of these actions.

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<sup>6</sup> Subsections 7(6) and (7) of the *Act*; Regulation 410/07, section 2

<sup>7</sup> Section 2 of Regulation 410/07

<sup>8</sup> Section 3 of Regulation 410/07

Sorrenti and Sorrenti Law

166. Sorrenti provided ILA to Martino, acted on Martino's behalf in closing the investment transaction, was the trustee for Martino for the SMLA and was also the administrator of the Syndicated Mortgage on behalf of investors.

167. The ILA was anything but independent legal advice. In reality, Sorrenti was acting on behalf of Fortress with respect to the Syndicated Mortgage. Martino pleads that Fortress and Sorrenti (and Sorrenti Law) planned in advance exactly what advice would be given to investors which would not disclose the significant risks associated with the Syndicated Mortgage. The advice was prepackaged and was identical for all investors.

168. Sorrenti's and Sorrenti Law's (with respect to the ILA and acting with respect to the transaction) actions amounted to negligent misrepresentation, negligence, breach of fiduciary duty and breach of contract, all as particularized below in this Fresh as Amended Statement of Claim.

169. In addition, Sorrenti and Sorrenti Law conspired with Fortress to injure Martino in planning in advance the prepackaged and deficient ILA that would be given to investors.

Negligent Misrepresentation

170. With respect to the ILA provided by Sorrenti and Sorrenti Law, these Defendants had an obligation to provide advice with respect to the legal risks associated with an investment in the Syndicated Mortgage.

171. Martino pleads that Sorrenti and Sorrenti Law knew or ought to have known of the Misrepresentations but failed to alert Martino to the Misrepresentations as part of the ILA being provided. They similarly failed to alert him to these issues in acting on his behalf in closing the investment transaction.

172. As such, this failure amounted to negligent misrepresentations by Sorrenti and Sorrenti Law with respect to the ILA and their representation of him in closing the transaction.

173. With respect to Sorrenti's actions as a trustee, Martino pleads that under the provisions of section 12 of the SMLA, he was required to satisfy himself with respect to certain conditions precedent before making advances to Adi. Second, under the provisions of the Acknowledgement, Sorrenti was obligated to obtain up to date valuations prior to making advances to Adi. Sorrenti failed in both obligations.

174. Third, Sorrenti knew of the "Memos" written by BDMC. He knew or ought to have known that Martino was not bound to the terms of the Standstill and that interest could not be accrued instead of paid. He failed to stop BDMC from circulating the Memos and after they were sent, he failed to advise Martino that these statements were not correct.

175. Martino pleads that these actions constituted negligent misrepresentations by Sorrenti with respect to his duties as a trustee.

176. With respect to Sorrenti's duties as the Syndicated Mortgage administrator, the *Act* and its regulations require that mortgage administrators be licensed but Sorrenti was not licensed.<sup>9</sup> In addition, Regulation 189/08 issued under the *Act* requires that an administrator:

- a) Shall not "give, assist in giving or induce or counsel another person or entity to give or assist in giving any false or deceptive information or document";<sup>10</sup>

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<sup>9</sup> Sections 5(2), 11(7) and (8) of the *Act*

<sup>10</sup> Section 43 of the *Act*



- b) Shall respond to all written complaints that he receives with a written response setting out a proposed resolution;<sup>11</sup>
- c) Shall not administer a mortgage if he has reason to doubt it is lawful;<sup>12</sup>
- d) Shall not act or omit to act if he is being used to facilitate “dishonesty, fraud, crime or illegal conduct”;<sup>13</sup>
- e) Shall disclose all conflicts of interest he has with respect to the mortgage;<sup>14</sup>
- f) Shall not pay funds to investors unless the payment is made from funds provided by a borrower. In fact, interest payments were made from the investors’ own capital;<sup>15</sup>
- g) Shall establish and implement policies and procedures that are reasonably designed to ensure the administrator acts in compliance with his obligations under the *Act*;<sup>16</sup>
- h) Shall establish a process for resolving complaints about the mortgage administration practices;<sup>17</sup> and
- i) Shall maintain errors and omissions insurance with extended coverage for fraudulent acts.<sup>18</sup>

177. Martino pleads Sorrenti by agreeing to act as administrator for the Syndicated Mortgage, represented to him that he would meet his obligations under the *Act* and its regulations.

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<sup>11</sup> Section 8 of Regulation 189/08

<sup>12</sup> Section 10 of Regulation 189/08

<sup>13</sup> Section 10.1 of Regulation 189/08

<sup>14</sup> Section 20 of Regulation 189/08

<sup>15</sup> Section 23 of Regulation 189/08

<sup>16</sup> Section 25 of Regulation 189/08

<sup>17</sup> Section 26 of Regulation 189/08

<sup>18</sup> Section 27 of Regulation 189/08

178. As such, Martino pleads that Sorrenti's failure to meet his legal obligations under the *Act* amounted to negligent misrepresentations by Sorrenti in his conduct as an administrator.

*Negligence and Breach of Fiduciary Duty*

179. With respect to the ILA, Sorrenti and Sorrenti Law's obligations were to provide advice with respect to the legal risks associated with an investment in the Syndicated Mortgage. With respect to acting on Martino's behalf in closing the transaction on his behalf, their duties were to act as a prudent lawyer would in providing advice, taking instructions and finalizing the documentation for the transaction.

180. Martino pleads that Sorrenti and Sorrenti Law knew or ought to have known that the Misrepresentations materially increased the risks to Martino of an investment in the Syndicated Mortgage but failed to alert Martino to the Misrepresentations as part of the ILA being provided. In particular, Sorrenti and Sorrenti Law failed to alert Martino to the fact that the ILA was not truly independent because it was being paid for by Fortress.

181. Sorrenti and Sorrenti Law similarly failed to alert Martino to these issues in acting on his behalf in closing the investment transaction.

182. Sorrenti and Sorrenti Law failed to alert Martino to the unreasonable provisions set out in the undated Mortgage Investment Direction and Indemnity Agreement (the "**Indemnity**") he executed with Olympia that they knew or ought to have known required him to:

- a) Seek ILA as well as tax and other professional advice before deciding to invest in the Syndicated Mortgage. Martino thought he was obtaining ILA from Sorrenti and Sorrenti Law but this was not, in fact, the case;

- b) Acknowledge that it was Martino's "sole and entire responsibility" to verify, *inter alia*, the Syndicated Mortgage was a "qualified investment" under the *Income Tax Act* (the "ITA");
- c) Acknowledge that Martino did not rely upon Olympia in deciding to invest in the Syndicated Mortgage or to advise him whether the Syndicated Mortgage was a suitable investment for Martino's RRSP; and
- d) Acknowledge that Martino was responsible for the collection of all mortgage arrears and to institute legal proceedings in the event the Syndicated Mortgage went into default notwithstanding that as a minority investor in the Syndicated Mortgage, he might not be able to compel that steps be taken to enforce his legal rights.

183. Sorrenti also failed to advise Martino that he was in a conflict of interest as a result of his multiple roles as the lawyer acting on Martino's behalf with respect to the investment, a trustee and administrator for the Syndicated Mortgage as well as the lawyer providing ILA. Sorrenti and Sorrenti Law were also in a conflict of interest because they were truly acting on Fortress' behalf, not the investor's, in providing ILA.

184. As such, Sorrenti and Sorrenti Law were negligent and breached their fiduciary duty in their provision of ILA and in acting on Martino's behalf in closing the transaction. Had their obligations been met, Martino pleads he never would have made an investment in the Syndicated Mortgage.

185. With respect to Sorrenti's actions as a trustee, Sorrenti was negligent and breached his fiduciary duty in the following respects:

- a) He was in a conflict of interest as a result of his multiple roles as a trustee for the Syndicated Mortgage in addition to his role as the lawyer providing ILA and acting on Martino's behalf with respect to the investment and administrator for the Syndicated Mortgage;
- b) He entered into the Standstill for no apparent reason when it was not in the interest of Syndicated Mortgage investors and it was not "reasonable" to do so as no construction lender had requested it;
- c) Having decided it was appropriate to enter into the Standstill, he failed to obtain instructions from investors confirming his intentions as he should have done as a bare trustee;
- d) He knew or ought to have known the investment funds were not being used for "soft costs to be incurred prior to the construction financing of the [Sutton] Project" as represented yet took no steps to prevent such unauthorized use being made of the funds;
- e) He failed to meet his obligations under section 12 of the SMLA to satisfy himself with respect to certain conditions precedent before making mortgage advances to Adi;
- f) He failed to obtain up to date valuations of the Sutton Project property before making mortgage advances to Adi as he was obligated to do under the terms of the Acknowledgement;
- g) He failed to prevent BDMC from sending the "Memos" to investors when he knew or ought to have known that Martino was not bound to the terms of the Standstill and that interest could not be accrued instead of paid;

- h) After BDMC sent the “Memos”, he failed to advise Martino that the statements in the Memo were not correct;
- i) Once the SMLA went into default, he failed to take steps to enforce investors’ security as he was obligated to do under the SMLA’s terms; and
- j) Once the SMLA went into default, he failed to properly inform investors of the default and obtain their instructions as to what steps should be taken to enforce their rights.

186. With respect to Sorrenti’s duties as the Syndicated Mortgage administrator, Martino pleads that Sorrenti failed to meet his statutory obligations as set out in paragraph 176 herein.

Conspiracy to Injure

187. Martino pleads that Sorrenti and Sorrenti Law conspired with Fortress to plan in advance the prepackaged “ILA” Sorrenti and Sorrenti Law would give to investors which would not disclose or discuss the significant risks associated with the Syndicated Mortgage. Particulars of the conspiracy are set out in subparagraphs 142(d) to (h).

Breach of Contract

188. Sorrenti’s relationship to Martino was contractual with respect to the ILA, closing the transaction on his behalf and his duties as a trustee. Sorrenti Law’s relationship to Martino with respect to the ILA and acting on the transaction was also contractual.

189. Martino executed a document entitled Investment Authority – Form 9D (the “9D”) dated October 30, 2012 with Sorrenti and Sorrenti Law regarding their retainer to close

the investment transaction on his behalf. Sorrenti and Sorrenti Law made the following representations in the 9D:

- a) That an “appraisal” of current value had been carried out on the Sutton Project property that set its value at \$10 million;
- b) That the LTV ratio for the Ten88 property was 72%; and
- c) That the Syndicated Mortgage would be repaid on October 4, 2015 or April 4, 2016 if extended. There was no reference to the Standstill that Sorrenti had executed.

190. These representations in the 9D were untrue which Sorrenti and Sorrenti Law knew or ought to have known. As such, Sorrenti and Sorrenti Law are in breach of contract.

191. Sorrenti was a party to the Acknowledgement. In that document, Sorrenti made the representations set out at paragraphs 143-144 herein. These representations were untrue which Sorrenti knew or ought to have known. As such, Sorrenti is in breach of contract.

192. Martino pleads that had Sorrenti not breached his obligations under the 9D and Acknowledgement, she would not have invested in the Syndicated Mortgage.

193. Martino and Sorrenti executed a document entitled Declaration of Bare Trust (the “**Bare Trust**”) dated October 30, 2012. Key terms of the agreement were:

- a) That Sorrenti held Martino’s interest in the Syndicated Mortgage as a bare trustee for Martino;
- b) That Sorrenti would deal with the Syndicated Mortgage “as directed by [Martino]”; and

c) That Sorrenti would accept “alterations, revocations and amendments to [his] powers” as Martino might determine at any time.

194. Martino pleads Sorrenti breached the terms of the Bare Trust as follows:

- a) With respect to the Standstill, he knew or ought to have known he should obtain instructions from investors before executing the document; and
- b) Once the SMLA went into default, he failed to properly inform investors of the default and obtain their instructions as to what steps should be taken to enforce their rights.

195. Martino pleads that had Sorrenti not breached his obligations under the Bare Trust, he would have taken more effective steps sooner to secure his rights as an investor in the Syndicated Mortgage. Those steps would have improved on the recovery he will otherwise obtain in this action.

#### Olympia

196. Martino invested in the Syndicated Mortgage through an RESP that he held with Olympia.

197. Olympia’s actions amounted to negligent and fraudulent misrepresentation, negligence, breach of fiduciary duty, conspiracy to injure and breach of contract, all as particularized below in this Fresh as Amended Statement of Claim.

198. Olympia’s actions have caused Martino to suffer damages.

199. Martino signed the Indemnity when he opened his account with Olympia. Key provisions of the agreement are set out in paragraph 182 herein.

Fraudulent and Negligent Misrepresentation

200. Olympia made one fraudulent and negligent misrepresentation by implication – that it could legally operate its trust business in Ontario - notwithstanding that FSCO had advised Olympia that according to the provisions of sections 31 and 213 of the *LTCA*, Olympia could not do business in Ontario.

201. In the face of this prohibition and its knowledge of its terms, Olympia nevertheless carried on business in Ontario until 2017.

202. Martino pleads that but for Olympia's actions, he would not have suffered any damages as no other financial institution in Ontario other than Olympia was willing to allow registered plan investments in Fortress syndicated mortgages.

203. Therefore, if Martino had not been able to invest through his RESP in the Syndicated Mortgage through Olympia, he would not have been able to invest at all.

204. Martino further pleads that the Fortress syndicated mortgage business was only viable if investors in registered plans could invest. There was insufficient investment capital outside of registered plans to make Fortress' business viable.

205. Therefore, if holders of registered plans could not have invested in Fortress syndicated mortgages, there would not have been a Fortress syndicated mortgage business to receive investments outside of registered plans.

Negligence and Breach of Fiduciary Duty

206. The particulars of Martino's negligence and breach of fiduciary duty claim against Olympia are that:

- a) It knew or ought to have known that it could not legally operate its trust business in Ontario; and



- b) It should not have permitted Martino to invest in the Syndicated Mortgage if it had acted in accordance with its obligations to Martino under the provisions of section 27 of the *Trustee Act*, R.S.O. 1990, c. T-23. The investment was not suitable for the following reasons which Olympia knew or ought to have known:
- i) The Syndicated Mortgage was a risky investment not suitable for a registered plan and, in particular, not suitable for Martino. Olympia did no due diligence as required on the investment and relied upon an opinion from Norton Rose which it knew or ought to have known did not accurately state that the Syndicated Mortgage was registered plan eligible under the provisions of the *ITA*;
  - ii) Olympia did not review Martino's risk profile to determine if an investment in the Syndicated Mortgage was appropriate for him;
  - iii) The ILA that Martino was to or had received referenced in the Indemnity was not true ILA that would alert him to the risks involved with the Syndicated Mortgage and the risks associated with his execution of the Indemnity;
  - iv) The Opinion was not an appraisal and the "as is" value of the Sutton Project lands was not \$10 million;
  - v) The LTV ratio for the Ten88 lands was not 72% as represented. The Syndicated Mortgage was not an eligible investment for a registered plan;
- c) It never met with residents of Ontario who were opening registered plans to ensure they understood the risks associated with syndicated mortgages in general and the

Syndicated Mortgage in particular and the obligations of the investor under the terms of the Indemnity;

d) It failed to instruct its agents who were opening registered plans with Ontario residents about their obligations to understand the risk profile of the investor, explain the risks of syndicated mortgages in general and the Syndicated Mortgage in particular and the obligations of the investor under the terms of the Indemnity.

207. Martino pleads that the provisions of the Indemnity do not shield Olympia from its liability for these allegations of negligence and breach of fiduciary duty including its obligations under the provisions of the *Trustee Act*.

208. In the alternative, Martino pleads that the provisions of the Indemnity should not be enforced as it would be unconscionable to do so in the circumstances.

#### *Conspiracy to Injure*

209. Martino pleads that Olympia conspired with Fortress to carry on business in Ontario with the knowledge that such business could not be lawfully carried out and with the knowledge that if Olympia did not carry on business in Ontario, no other trust company or financial institution with registered plans would allow investments in the Syndicated Mortgage. Full particulars of the conspiracy are set out in paragraph 142 herein.

#### *Breach of Contract*

210. Olympia owed Martino contractual obligations with respect to its actions as the holder of his registered plan. Martino pleads Olympia breached its obligations as follows:

- a) It knew or ought to have known that it could not legally operate its trust business in Ontario; and
- b) In permitting Martino to invest in the Syndicated Mortgage, it acted contrary to its obligations to Martino under the provisions of section 27 of the *Trustee Act*, R.S.O. 1990, c. T-23. The investment was not suitable for the reasons set out in paragraph 206 herein.

211. Olympia was a party to the Acknowledgement. Martino pleads and relies upon his allegations set out in paragraphs 143-144 herein except that references to Fortress Capital in those paragraphs should be read as references to Olympia.

**Representative Plaintiff and the Class**

212. Martino pleads that but for the actions of the Defendants, he would never have made his investment in the Syndicated Mortgage.

213. Martino pleads and relies upon the provisions of the following Acts and the Regulations passed thereunder:

- a) *Mortgage Brokerages, Lenders and Administrators Act, 2006*, S.O. 2006, c. 29;
- b) *Financial Services Commission of Ontario Act, 1997*, S.O. 1997, c. 28;
- c) *Loan and Trust Corporations Act*, R.S.O. 1990, c. L-25;
- d) *Partnership Act*, R.S.O. 1990, c P-5;
- e) *Business Corporations Act*, R.S.O. 1990, c. B-16;
- f) *Trustee Act*, R.S.O. 1990, c. T-23; and
- g) *Negligence Act*, R.S.O. 1990, c. N-1.

214. As an investor in the Syndicated Mortgage, Martino is representative of all other investors in the project.

215. Martino brings this action on his own behalf and on behalf of all persons in Canada (the “**Class**”) who were investors in the Syndicated Mortgage.

216. Martino and the Class plead this action involves:

- a) A breach of contract, tort and breach of fiduciary duty committed in the Province of Ontario; and
- b) Damages arising in Ontario as a result of said actions.

**Place of Trial**

217. Martino proposes that this action be tried at Toronto, Ontario.

DATE: March 28, 2019

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Lawyers for the Plaintiff

**SCHEDULE "A"**

**FIRSTLY**

**PIN NO.**

07184-0023 (LT)

**LEGAL DESCRIPTION**

PT LT 4, CON 1 SOUTH OF DUNDAS STREET, AS IN 846141, CITY OF BURLINGTON

**MUNICIPAL ADDRESS**

5210 Dundas Street, Burlington, Ontario

**SECONDLY**

**PIN NO.**

07184-0022 (LT)

**LEGAL DESCRIPTION**

PT LT 3, CON 1 SOUTH OF DUNDAS STREET, AS IN 831307; BURLINGTON/NELSON TWP

**MUNICIPAL ADDRESS**

5218 Dundas Street, Burlington, Ontario

**THIRDLY**

**PIN NO.**

07184-0021 (LT)

**LEGAL DESCRIPTION**

PT LT 3, CON 1 SOUTH OF DUNDAS STREET, AS IN 831307; BURLINGTON/NELSON TWP

**MUNICIPAL ADDRESS**

5226 Dundas Street, Burlington, Ontario

**FOURTHLY**

**PIN NO.**

07184-2197 (LT)

**LEGAL DESCRIPTION**

BLOCK 38, PLAN 20M822, BURLINGTON

**MUNICIPAL ADDRESS**

2500 Burloak Drive, Burlington, Ontario

**FIFTHLY**

**PIN NO.**

07184-4598 (LT)

**LEGAL DESCRIPTION**

PART OF LOT 3, CONCESSION 1 SOUTH OF DUNDAS STREET AS IN 569766, SAVE & EXCEPT PARTS 1 & 3, PLAN 20R20094; CITY OF BURLINGTON

**MUNICIPAL ADDRESS**

5236 Dundas Street, Burlington, Ontario

DAVID MARTINO  
Plaintiff

-and-  
FORTRESS REAL CAPITAL INC. ET AL.  
Defendants

Court File No. CV-16-561293-00CP

**ONTARIO**  
**SUPERIOR COURT OF JUSTICE**  
PROCEEDING COMMENCED AT  
TORONTO

**FRESH AS AMENDED STATEMENT OF CLAIM**

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**LAWYERS FOR THE PLAINTIFF**