Court of King's Bench of Alberta

Citation: Mann v MTM Income Trust, 2024 ABKB 161

Date: 20240313
Docket No: 1001 15998
Registry: Calgary

Between:

M. Garth Mann, Karen H. Mann, The Statesman Group of Companies Ltd., and Statesman Master Builders Inc.

Plaintiffs

- and -

MTM Income Trust, Ronald P. Mathison in his capacity as a Trustee of MTM Income Trust, David M. McGoey in his capacity as a Trustee of MTM Income Trust, MTM Commercial Trust, D. Alan Ross in his capacity as a Trustee of MTM Commercial Trust, David M. McGoey in his capacity as a Trustee of MTM Commercial Trust, Darryl Coates in his capacity as a Trustee of MTM Commercial Trust, Matco Investments Ltd., Ronald Mathison, Herbert Meiner, Brenher Properties Ltd., doing business as Wicklow Properties Ltd., Brenda Meiner, Riverside Quays Limited Partnership and Inglewood Quays Ltd.

Defendants

Docket No: 1201 03600

And Between:

Matco Investments Ltd., Inglewood Quays Ltd., and Riverside Quays Limited Partnership

Plaintiffs

- and -

The Statesman Group of Companies Ltd., Statesman Master Builders Inc., and M. Garth Mann

Defendants

Docket No: 1201 03846

And Between:

M. Garth Mann and the Statesman Group of Companies

Plaintiffs

- and -

Ronald P. Mathison

Defendant

Decision
of the
Honourable Mr. Justice O.P. Malik

Table of Contents

I. Introduction

[1] This trial comprises three actions relating to a failed development project known as Riverside Quays (the "Project") situated in the Inglewood area of Calgary.

[2] Initially, the Project contemplated the multi-phased development and construction of an inner-city community comprising six multi-family residential buildings including 625 condominium units, 69 townhomes, a 13,000 square foot amenity centre and 828 underground parking stalls.

[3] The first phase of the Project ("Phase 1"), including the construction of an underground parkade, an amenity centre, and the first building containing 124 condominiums was completed in the fall of 2009. Construction of the second phase of the Project ("Phase 2"), including a second building with 122 condominium units, two townhouses and additional construction to the parkade, commenced in the spring of 2010.

[4] The Project came to a stop in June 2010 with the issuance of Notices of Default and Termination that alleged breaches of the various constating agreements and with the subsequent court appointment of a Receiver.

[5] The Project was never completed as originally contemplated. The parties claim substantial damages against one another. Their litigation culminated in a lengthy trial, some 13 years later. What follows is my decision.

II. Facts and Analysis

A. The Parties

[6] This litigation involves disputes between two groups of parties.

1. The Statesman Group

[7] The first group is the Statesman Group of Companies Ltd. ("Statesman"), a family-run company founded by Mr. Garth Mann. Since 1976, it has constructed single family residential homes in Calgary under the Statesman name. Statesman has a portfolio of construction consisting

of projects in Alberta, BC, Ontario, and the US. While Mr. Mann recently stepped down as CEO of Statesman, he was its principal and directing mind during the relevant period. He is married to Karen Mann, who was a passive investor in the Project (Mr. Mann and Karen Mann are referred to as the "Manns").

[8] Jeff Mann is Mr. Mann's son. His involvement on the Project included hiring Mega Building Systems ("MBS") to design, supply and install the superstructure for the Phase 1 condominium building, serving as project manager for the Project from August 2009 to January 2010, overseeing the completion and move-ins for the Phase 1 building in 2009-2010, and being involved in the early stages of Phase 2 construction. He is currently Statesman's Vice President of construction and development. He was an investor in the Project.

[9] Kevin Ingalls is an experienced Chartered Account. He joined Statesman in 2003 and continues to serve as Chief Financial Officer ("CFO"). He has, throughout his tenure, been involved in various Statesman construction projects. He was an investor in the Project.

[10] Brad Milne was Statesman's general counsel from 2002 until his resignation in 2009. He was an investor in the Project.

[11] Mr. Mann appointed Herb Meiner as Vice President of Statesman, commencing in October 2009. Mr. Mann specifically hired him to "... fill the bill in terms of helping us with the communication issues between Matco and Statesman." Mr. Meiner resigned in June 2010.

[12] Rick Hamilton was employed with the Bank of Montreal ("BMO") as a senior account manager in the real estate finance group. He was Statesman's point of contact at BMO throughout the Project, and he collaborated with Statesman and Mr. Mann for many years on various projects.

[13] Mr. Mann, Mr. Ingalls, Mr. Milne, and Mr. Meiner had offices on the same floor at Statesman's corporate headquarters in Calgary. The Statesman office maintained an informal work environment where office doors were left open, allowing for frequent interaction and spontaneous meetings. Mr. Mann testified that he was contactable by "whatever means" including e-mail, conversations and going for lunch.

[14] Mr. Hamilton spoke of Mr. Mann's and Mr. Ingalls' working styles. He regarded Mr. Ingalls to be "beyond reproach." He and Mr. Ingalls, whom he thought of as being "very thorough", spoke "almost daily." He described Mr. Mann as a "micromanager" who "likes to touch everything." Mr. Milne testified that that from his experience working at Statesman, Mr. Mann had the oversight and ultimate authority over any consequential decisions.

2. The Matco Group

[15] The second group is Matco Investments Ltd. ("Matco"), a private holding corporation founded by Mr. Ron Mathison. Mr. Mathison has extensive experience in the world of finance through his involvement in various public and private companies. Matco has been involved in several development projects, including the construction of 8th Avenue Place, located in downtown Calgary.

[16] Ian Hill was and still is the CFO of Matco.

[17] Craig Elford was Vice President of real estate for Matco. He resigned from that position in January 2009.

[18] Iain McCorkindale was employed as a quantity surveyor and senior director with the Altus Group ("Altus"). He first became involved in the Project on behalf of Matco in the fall of 2008 to address various construction issues caused by MBS. He subsequently joined Matco in 2011 and is currently Matco's Vice President of real estate development.

[19] Wayne Veldhoen has known Mr. Mathison for 25 years. He has experience in construction, and Statesman retained his company to do excavation work on the Project for Phase 1. Mr. Mathison hired Mr. Veldhoen to conduct weekly visits to the Project and to monitor construction progress. In his read-in testimony, Mr. Mathison acknowledged Mr. Veldhoen was on site on a regular basis throughout the entirety of the Project up until Statesman's termination.

B. The Partnership Structure

[20] Matco acquired the lands on which the Project was to be constructed in 2004 for $6.5M. Matco did not have the expertise to develop the lands and sought out a partner. Mr. Mathison was familiar with the Statesman Group and, following an introduction to Mr. Mann in 2001, the two agreed to partner on the Project.

1. RQLP

[21] The ownership structure for the construction of the Project was established in 2006 by means of a limited partnership called Riverside Quays Limited Partnership ("RQLP"). Statesman Riverside Quays Limited ("SRQL") was set up as the general partner with MTM Commercial Trust as the limited partner (the "Commercial Trust").

2. SRQL

[22] Statesman and Matco jointly owned SRQL and each appointed two directors to SRQL's board of directors and management committee (the "Management Committee"). Matco's nominees were Mr. Mathison and Mr. Elford. Statesman's nominees were Mr. Mann and Mr. Milne. Mr. Elford stepped down in January 2009. Mr. Mathison did not replace him until a meeting of the Management Committee on June 9, 2010 ("the June 2010 MC Meeting"). Mr. Milne resigned his position as a director of SRQL in October 2009. Mr. Meiner replaced him that same month.

[23] As directors of SRQL, Mr. Mann and Mr. Mathison owed fiduciary duties to act honestly, in good faith and in the best interests of SRQL and RQLP. Additionally, Mr. Mann and Mr. Mathison owed similar fiduciary duties to Statesman and Matco, respectively.

3. The Investors

[24] RQLP was set up with a mutual fund structure so individual investors could purchase units and acquire ownership in the Project. RQLP issued 3.25M partnership units ("Units") with a value of $3.25M. The Commercial Trust held all of the Units but one, which was held by SRQL. In turn, the MTM Income Trust (the "Income Trust") owned all the Units of the Commercial Trust. The

Income Trust was structured as an RRSP eligible mutual fund trust and issued units to investors (the "Investors"), of which Mr. Mann, Ms. Mann and Statesman owned 33.6%, and Mr. Mathison and Matco owned 28%. A group of 145 individual investors owned the remaining 38.4%

4. The Trusts

[25] The trustees of the Commercial Trust were David McGoey, Darryl Coates, and Alan Ross (the "Commercial Trust Trustees"). The trustees of the Income Trust were Mr. Mathison, Mr. McGoey, and Mr. Coates (the "Income Trust Trustees"). The Trust Deed for the Commercial Trust (the "Trust Deed") confers upon the Commercial Trust Trustees broad discretion and powers.

[26] Section 9.6 of the Trust Deed requires that the Commercial Trust Trustees:

> ... shall act honestly and in good faith with a view to the best interests of the Trust and in connection therewith shall exercise the degree of care, diligence and skill that a reasonably prudent Person would exercise in comparable circumstances.

[27] Pursuant to section 9.1(b), the Commercial Trust Trustees:

> shall have, without further or other action or consent, and free from any power or control on the part of the Unitholders, full, absolute, and exclusive power, control and authority over the Trust Assets and over the affairs of the Trust to the same extent as if the Trustees were the sole and absolute beneficial owners of the Trust Assets in their own right, to do all acts and things as in their sole judgment and discretion are necessary or desirable for, or incidental to, carrying out the trust created under this Deed of Trust.

[28] Section 9.2 enumerates the Commercial Trust Trustees' powers and authorities that may or may not be exercised by the Trustees in their sole judgment and discretion and in such manner and upon such terms and conditions as they may from time to time determine proper:

> ...
>
> (b) to manage Trust assets;
>
> ...
>
> (ff) to do all such other acts and things as are incidental to the foregoing, and to exercise all powers that are necessary or useful to carry on the purpose and activities of the Trust, to promote any of the purposes for which the Trust is formed, and to carry out the provisions of this Deed of Trust.

[29] Section 9.8 of the Trust Deed stipulates the Commercial Trust Trustees may be found liable only:

> ... for their own actual fraud, dishonesty, or gross negligence. Without limiting the generality of, and subject to, the foregoing, no Trustee shall be liable for any loss

> or damage that may occur to the Trust Assets or any part thereof... or the income therefrom at any time from any cause whatsoever, including
>
> (a) the exercise of or failure to exercise a discretion or power, or the refusal or failure to concur in the exercise of a discretion or power;
>
> (b) the failure to attend to, interfere with, or inquire into the management of Persons the Securities of which form part of the Trust Assets, including:
>
> (i) the reliance on information given at meetings or otherwise by the management of such Persons,
>
> (ii) the failure to act upon any information received from inquiring into the management of such Persons or otherwise,
>
> (iii) the failure to require the management of such Persons to consult and inform the Trustees so that the Trustees may intervene if necessary to safeguard the interests of the Trust...

5. SMBI

[30] RQLP and Matco appointed Statesman Master Builder Inc. ("SMBI") a Statesman-affiliated company, to be the construction manager for the Project. Statesman staffed SMBI with its personnel. Mr. Mann was SBMI's president and sole director. Mr. Meiner was appointed SMBI's Vice President. Paul Duplessis was the project manager who oversaw the construction of the Project from inception until his departure in 2009. During his involvement on the Project in 2009-2010, Mr. Jeff Mann was an SMBI employee.

C. The Agreements

[31] Three agreements (collectively, the "Agreements") governed the operations of RQLP: the Limited Partnership Agreement ("LPA"), the Shareholders' Agreement ("USA"), and the Development Management Agreement ("DMA"). Matco's legal counsel drafted these Agreements which Mr. Milne negotiated and reviewed.

1. The LPA

[32] The LPA sets out the business and affairs of RQLP. It defines the respective roles and responsibilities of SRQL and the Commercial Trust, sets out the circumstances in which the Commercial Trust may, by extraordinary resolution, remove SRQL for breach of its obligations, and prescribes a period for curing a default.

[33] Section 7.2 of the LPA defines SRQL's obligations vis-à-vis RQLP and requires SRQL to:

> exercise its powers and discharge its duties honestly in good faith and in the best interests of [RQLP] and with the degree of care, diligence and skill that a reasonably prudent and qualified person would exercise in comparable circumstances.

[34] Pursuant to section 11.1(b)(iv), SRQL covenants it will:

> ... act in the best interests of RQLP and, in particular, will diligently enforce the rights of [RQLP] pursuant to the terms and provisions of any instrument or document on behalf of and in the name of [RQLP] from time to time as may be reasonably determined by [SRQL] to be in the best interests of [RQLP].

[35] Section 12.8(a) of the LPA permits the Commercial Trust to remove SRQL and appoint a successor if, as provided for in section 15.1(b):

> ... [SRQL] has breached its obligations under this Agreement in such a manner as would have material effect on the Business, assets or financial condition of [RQLP] and, if capable of being cured, such breach continues unremedied for a period of 20 business days after [SRQL] has received written notice from [the Commercial Trust]...

[36] Section 17.8 stipulates that any curable default of SRQL "resulting from an omission to take any measure within a prescribed period and having no material adverse effect on the Limited Partners of [RQLP] will be deemed to have been corrected if the measure is taken within 45 days following a notice by a Limited Partner requesting [SRQL] to remedy the default."

[37] Section 17.9 requires the parties to strictly perform their obligations under the LPA:

> No failure or lack of diligence by any party in proclaiming or seeking redress for any violation of, or insisting on strict performance of, any provision of this Agreement will prevent a subsequent act which would have originally constituted a violation of such provision or any other provision here of from having the effect of an original violation of such provision or any other provision hereof.

[38] Further, section 17.13 provides that failure to strictly perform any obligation or covenant does not constitute a waiver:

> The failure of any Partner to insist upon strict performance of a covenant hereunder or of any obligation hereunder, irrespective of the length of time for which such failure continues, shall not be a waiver of such Partner's right to demand strict compliance in the future. No consent or waiver, express or implied, to or of any breach or default in the performance of any obligation hereunder shall constitute a consent or waiver to or of any other breach or default in the performance of the same or of any other obligation hereunder.

2. The USA

[39] The USA governs Statesman's and Matco's respective rights and obligations as shareholders of SRQL. The USA sets the composition of the board of directors (synonymous with the Management Committee, as defined in the DMA) and addresses various financing requirements. Section 4.4 enumerates those acts, decisions, and resolutions which require the unanimous approval of the Management Committee (the "Major Decisions"). These include:

(a) Approving business plan and the budget of [RQLP];

...

(c) commencing construction of the Project...;

...

(f) approving related party transactions and major decisions with regard to these transactions;

...

(h) executing, modifying or terminating any contract to which [SRQL], any of its Subsidiaries or [RQLP] is party involving more than $100,000 in the aggregate;

(i) electing or approving a remuneration of senior management of [SRQL] or any of its Subsidiaries, if applicable;

...

(k) requiring additional capital contributions to [SRQL], any of its Subsidiaries or [RQLP];

...

(o) any decisions deviating from... banking policies;

(p) any other material decision or event outside the ordinary course of business of [SRQL], any of its Subsidiaries or [RQLP];

...

(r) the incurrence of debt by [SRQL], any of its Subsidiaries or [RQLP].

[40] Article 8 of the USA addresses Matco's and Statesman's financing obligations. Section 8.1(a) states that where financing for the Project is required, Matco and Statesman shall, where it can be obtained on reasonable market terms, obtain financing from third party borrowed sources rather than from their own financial resources. Section 8.1(c) states that where such financing is not available, each shall, "on a short term basis lend, monies to [RQLP] in order that the Project may proceed to be completed and such loans shall be repaid within 60 days of advance at the Royal Bank of Canada's prime lending rate plus 2% per annum" ("Interim Loans"). Over the course of the Project, Matco and Statesman contributed Interim Loans in equal amounts. Mr. Ingalls would notify each of Statesman and Matco when he required the payment of an Interim Loan and each of them would provide him with a cheque in the requested amount.

[41] Statesman is made the guarantor for the Project's financing pursuant to section 8.1.

[42] Article 7 of the USA deals with situation where Statesman or Matco has to advance a loan where the other has defaulted in its obligations to meet an obligation that is otherwise due and payable. Section 7.1(b) defines this as a contribution loan ("Contribution Loan"), repayable at the greater of 12% per year and the Prime Rate plus 8%, calculated and compounded monthly from the date that the defaulting party receives notice that the advance is being treated as a Contribution Loan.

[43] Article 6 addresses the consequences of Statesman or Matco being in default of their obligations. Section 6.1(e) provides that a default occurs where the defaulting party has failed to cure its breach of its obligation enumerated in section 4.4 within 10 days after having received notice of its breach. Where this has occurred, section 6.2 entitles the non-defaulting party, after having provided written notice to do so, to "bring any proceeding in the nature of specific performance, injunction or other equitable remedy" (6.2(a)), or "bring any action at law or in equity as may be permitted in order to recover damages or for such other remedy or remedies as may be available to it" (6.2(b)).

3. The DMA

[44] The DMA requires SMBI to act at the Management Committee's direction. Clause 3.02 confers upon the Management Committee the "full power and authority to conduct the business affairs of [RQLP] with respect to the Project. Pursuant to clause 1.01, SMBI is appointed the Project's development manager and is made "responsible for implementing the Project, subdivision, servicing, design, construction, marketing, and sales..." SMBI and its employees, agents and representatives agree to "take such actions on behalf of [RQLP] and [the Commercial Trust] as may be required to carry out its responsibilities" and in so doing, shall "implement all decisions" of the Management Committee which relate to Project.

[45] SMBI's responsibilities are enumerated at clause 1.02. These include:

> (a) preparing, for consideration and approval at times stipulated by the Management Committee, the Project plans, business plans, cash flow statements and capital and operating budgets for the Project setting forth the estimated capital, operating and other expenditures required in connection with, and estimated receipts and borrowing requirements for the period covered by, the plans or budget;
>
> ...
>
> (c) approving and arranging for payment by [RQLP] in a timely manner all expenditures incurred which relate to the Project which are contained in a budget approved by the Management Committee for each phase of the Project (the "Budget");
>
> ...
>
> (p) directing and supervising the construction of the Project through its on-site superintendent(s) and personnel...;

> ...
>
> (t) maintaining all accounting and operating records and cost reports;
>
> ...
>
> (v) preparing for the Management Committee all construction financing for the Project, preparing and administering all progress claims;
>
> ...
>
> (ii) inspect the Project for construction deficiencies, prepare a deficiency list and coordinate and expedite the correction of all items on the list;
>
> (jj) prior to the expiry of all warranty periods, inspect any elements in question, identify any defects and ensure such defects are rectified...

[46] Clause 1.04 provides that SMBI "is acting on behalf of [RQLP] in a fiduciary capacity, and that it will act honestly and in good faith and in the best interests of [RQLP]. Pursuant to clause 7.01(1)(a), SMBI covenants and agrees it will "exercise the degree of care, skill and diligence normally used in performing services of a similar nature...".

[47] Clause 1.05 requires SMBI to "act upon specific, reasonable and lawful directions from time to time received from and with the approval of the Management Committee." Clause 1.06 restricts SMBI's expenditures to the extent they have been "provided for in the Budget or as may be approved by [RQLP] in writing, subject to a budget variance of not more than three percent (3%) for any phase of the Project".

[48] Clause 3.02 confers upon the Management Committee certain obligations, duties, and responsibilities. These include:

> ...
>
> (f) except as specifically delegated to SMBI, approve and authorize the execution of all contracts, deeds, mortgage commitments, mortgages, financing, discharges, transfers, agreements, consents, plans, and all other documents as are required for the Project;
>
> ...
>
> (h) approve proposed and variance to sale prices, conditions, and terms of sale of multi-family housing units.

[49] Pursuant to clause 3.03, SMBI must obtain the Management Committee's approval for:

> (a) any matter requiring approval by [RQLP] pursuant to the terms of this Agreement;

...

(f) any material change to the plans for the Project;

...

(h) the acquisition or disposal of any property or the incurring of any non capital obligation involving a sum in excess of $50,000 for any transaction or group of similar or related transactions except for expenditures made and obligations incurred pursuant to the Budget;

(i) approval of pro forma budget, from time to time, and the proposed commencement of construction to be prepared by the Manager for the Project and all amendments thereto. The Manager shall update the Budget and obtain approval of the Management Committee to such revised Budget every six (6) months during the term hereof;

...

(k) approval of the construction contracts and other contract documents, the final plans and specifications and of all contracts for design or construction of the Project and for the supply of labour, services or material in connection there with provided in any disagreement Statesman alone shall determine the same;

...

(m) approval of the commencement of the project and the scheduling of the project or any material component thereof...

[50] Clause 3.04 requires SMBI to hold monthly meetings with the Management Committee unless otherwise agreed by the Management Committee. The purpose of these meetings is to review the status of the Project, provide financial reporting, and discuss issues of concern. Clause 3.04 further stipulates that the Management Committee must approve all budgets. SMBI must prepare monthly reports of actual expenditures compared to budgeted projections, costs to complete projections and shall advise the Management Committee of all expenditures over budgeted projections.

[51] Article V of the DMA addresses SMBI's provision of sales services. Clause 5.01 makes SMBI responsible for managing all aspects of the sales staff which, pursuant to clause 5.02, includes the discretion to "negotiate and settle the terms of all sales agreement [sic]" provided these will not have a "significant adverse financial effect on [RQLP]." Clause 5.04 requires SMBI to provide the Management Committee with various sales-related information, including:

...

(b) Monthly Reports: not less than 20 days after the end of each month in each year of the Term, prepare and provide to the Management Committee a

> written sales report for the Project including, but not limited to, current unsold units, sales activity and any problems with purchasers or prospective purchasers;
>
> (c) Keeping Records: The Manager shall maintain... information and reports with respect to matters arising under this Agreement in order for the Management Committee readily to [sic] extract all sales information pertaining to the sale of units in the form required by the Management Committee.

[52] Clause 5.05 of the DMA addresses sales commissions and fees. SMBI receives an in-house commission of $3,500.00 per townhouse sale (5.06(a)) and $2,750.00 for the sale of a multi-level unit (5.06(b)). SMBI must pay MLS commissions to realtors (5.06(c)) and may pay referral fees of $3,000.00 (5.06(d)). Further, SMBI is entitled to a $14,000.00 per unit fee pursuant to clause 8.01. Clause 8.02 stipulates that each of Matco and SMBI is entitled to payment of $800,000.00 for "strategic management services".

[53] Clause 9.08 stipulates that a waiver may only occur if it is provided for in writing and that any waiver of any default does "not extend to be taken in any manner to affect any other Default."

[54] Clause 2.02 addresses termination of SBMI's services. SMBI may be terminated without notice if it "misappropriates any monies or defrauds [RQLP] in any manner whatsoever." For breaches that do not fall within clause 2.02 or do not otherwise constitute "any material breach of default" by SMBI, clause 2.03 allows SMBI to be terminated with 30 days' notice:

> ... [RQLP] may give [SMBI] thirty (30) days written notice to cure such failure, omission, breach or default and provided that such failure, omission, breach or default is within the control of [SMBI] and reasonable attempts have not been made to cure the same, then, should the same not be cured or dealt with to the reasonable satisfaction of [RQLP] within such time, then, upon further written notice given by a partner to [SMBI], this Agreement shall terminate on the last day of the month during which such further notice was given.

[55] Mr. Milne testified that in negotiating the Agreements, he noted that the covenants Statesman had undertaken were "fairly onerous" and that he and Mr. Mann "didn't have a problem with that." However, he was concerned about initial drafts which did not set out a curing provision in the event of default, so he specifically requested the inclusion of a curing provision which Matco agreed to.

[56] Mr. Mann acknowledged that while Statesman previously had been involved in a joint venture, it had not participated in a limited partnership. He testified that he had reviewed the Agreements and, having received legal advice from Mr. Milne, understood them. I am satisfied the Agreements are valid and fully enforceable. They were negotiated and agreed to by two sophisticated and well-funded parties in a commercial context, in good faith and with each having received the benefit of legal advice.

D. Financing

[57] BMO (and various syndicated lenders) provided funding for the Project. Statesman had a long-standing relationship with BMO and had worked with Mr. Hamilton on various construction projects over the course of approximately 15 years.

1. The Initial Loan

[58] Initially, BMO agreed to finance the Project in the amount of $54M, divided into three facilities.

[59] Facility 1 included funding for the purchase of the lands and site servicing costs, over and above the Limited Partners' $3.25M investment. Facility 2 contemplated a loan to cover the cost of Phase 1 construction. Facility 3 contemplated funding for the construction of Phase 2.

[60] In November 2007, the original terms of the loan were amended whereby BMO agreed to lend RQLP approximately $85 million to cover costs for the Project up to the completion of Phase 2: $31 million for facility 1, $27 million for facility 2 and $27.5 million for facility 3. The terms were that construction of Phase 2 would commence once Phase 1 was 75-80% sold which was expected to be within 3-6 months of commencing Phase 1. It was anticipated that Phase 1 would be completed by February/March 2009 and that completion of Phase 2 would occur in August/September 2009. The plan was the BMO loan would be fully paid off once Phase 2 was completed and sold, at which time the Limited Partners would receive a pay-out of any profits.

2. The Credit Agreement

[61] In January 2008, RQLP, Statesman and BMO (and the other lenders) formalized a Credit Agreement. What had been referred to as the three facilities in previous loan documentation were now referred to as Facility "A" (financing for the pre-development phase); Facility 1 (for Phase 1 construction: the underground parkade, amenity centre and building A consisting of 124 units); and Facility 2 (for Phase 2 construction: building B consisting of 122 units and 2 townhomes).

[62] Pre-sales was a critical component for paying down the BMO loan because the Project did not have any other source of revenue. The Credit Agreement defines what constitutes an "Eligible Purchase Agreement" ("EPA") and requires that it not be made to a "related party" of RQLP, be subject to any "unusual conditions" as determined by BMO or have been amended except where authorized by BMO.

[63] The Credit Agreement defines the Project in section 1.01 as meaning, "the construction of the first two (2) phases..." It subjects each financing facility to various preconditions. Key amongst these is the precondition required to access funding for Facility 2 (construction of Phase 2), which, pursuant to section 7.05, requires RQLP and SRQL to have realized EPAs in respect of Lofts and Townhomes to be constructed under Phase 1 and Phase 2 at prices which represent an aggregate amount of not less than 75% of the total loan amount for facility 2, or approximately $20M.

[64] Pursuant to section 4.01, RQLP and Statesman provide a number of warranties, including:

> (j) Material Project Agreements. Each Material Project Agreement is in good standing and in full force and effect; the Borrower is in compliance in all material respects with the terms, covenants or agreements contained therein; and the Borrower has not received written notice or other written evidence of any breach of any of the terms, covenants or agreements contained therein by any of the other parties thereto...
>
> ...
>
> (r) Financial Information. All financial and other information provided by or in respect of [RQLP, SRQL and Statesman] was true, correct and complete in all material respects when provided and remains true, correct and complete in all material respects.
>
> ...
>
> (u) Full Disclosure. There are no facts known to [RQLP, SRQL and Statesman] which could reasonably be expected to materially adversely affect its liability to observe and perform its obligations under this Agreement or the other Loan Documents, or which if known to the Lenders could reasonably be expected to deter them from continuing to make Advances under the Facilities on the terms and conditions contained therein.

[65] Section 5.01 sets out the various covenants agreed to by RQLP and Statesman:

> (b) Maintain Existence: maintain and preserve its existence in good standing, and its rights, powers, licenses, privileges, franchises and goodwill, exercising the rights of renewal or extensions of any leases, licenses, concessions, franchises, or any other rights whatsoever which are necessary or material to the conduct of its operations and carry on and conduct its operations in a proper and efficient manner so as to protect its property and operations; and continue to carry on its operations and not materially change the nature of its operations from that being carried on at the date hereof...

[66] Pursuant to section 5.04, RQLP and SRQL provide various negative covenants, including:

> (e) Material Changes: liquidate or dissolve; cease to carry on business as now being conducted by it...

[67] Section 7.01 stipulates that BMO is not obligated to make any loan advance unless the warranties and representations RQLP and SRQL have made continue to be true and correct in all material respects (section 7.01(a)) and they have complied with all other obligations imposed upon them by the Credit Agreement (section 7.01(b)). Section 7.05 enumerates the conditions RQLP and SRQL must satisfy before BMO is required to advance funds in respect of Phase 2 construction.

[68] The parties subsequently entered into an Amended and Restated Credit Agreement dated April 2008 which was subject to two further amendments, in June and December 2009 which

essentially pushed out the maturity dates of each of the Facility loans (the "Amendments"). The second amendment (the "Second Amendment") added a new term which, at section 7, stipulated that if RQLP and Statesman had not made sufficient construction progress on Phase 2 by the Phase 2 lapse date of July 1, 2010, BMO could terminate Facility 2 funding.

[69] Statesman and BMO negotiated a third amendment to the Credit Agreement (the "Third Amendment") which Mr. Ingalls received from BMO on June 9, 2010. Importantly, the Third Amendment varied the criterion for obtaining Facility 2 funding from Statesman having achieved 75% of the total authorized loan to having made 166 EPAs for Phases 1 and 2. The Third Amendment was not ultimately executed.

3. Cuthbert Smith

[70] Cuthbert Smith is a quantity surveyor which BMO retained to monitor the Project and authorize monthly draws. Included in Mr. Ingalls' monthly draw request to Cuthbert Smith was a report outlining construction progress, budget information, a sales summary, an accounts payable ledger and an estimate of costs to complete. Mr. Ingalls attached a Statutory Declaration which he or Mr. Mann swore as to the accuracy of the information. Attached was a Borrower's Request for Advance signed by Statesman officers which, amongst other things, certified that RQLP was complying with its obligations pursuant to the Credit Agreement.

[71] Mr. David Whitehead was Cuthbert Smith's representative for the Project. He testified that he relied on Mr. Ingalls to provide him with accurate information so that he could properly report to BMO. He acknowledged his ability to properly do his job would be undermined if Mr. Ingalls provided him with inaccurate and incomplete information. He recognized that the purpose of the Statutory Declaration was to ensure the accuracy of the information he was being provided.

[72] In respect of the monthly sales summaries provided to him by Mr. Ingalls, Mr. Whitehead testified that while it was his standard practice to receive sale listings, he would not review them in detail and passed these on to BMO so it could assess the progress of monthly sales. However, he acknowledged that he noted the number of sales because their pace impacted on the Project's general progress and on financing costs.

E. Financial Reporting

[73] In addition to being CFO for Statesman, Mr. Ingalls served as CFO for SMBI. He understood he was the gateway through which all financial reporting for the Project passed to SRQL, BMO and Altus (and various other parties). He testified he was familiar with BMO's funding model and had reviewed the Agreements. He understood (despite his initial confusion) that the directors of SRQL were synonymous with the Management Committee. He understood that he was a fiduciary of both RQLP and SRQL and as such, was obliged to act honestly, in good faith, and in each of their best interests. He understood it was important for him to convey financial information accurately and to correct inaccuracies.

[74] Mr. Ingalls understood the importance of communicating sales progress because as he put it, "if there were no sales, there would be no revenue, and there would be no funds available to meet obligations." However, he appeared to minimize the importance of his sales information, stating that he viewed his sales summaries as merely providing "general sales information" which

was "never intended or required to be an inclusive very descriptive document". I disagree with this assessment, and I reject Statesman's argument that Mr. Ingalls' sales summaries were merely intended to provide a high-level overview without any reference to those sales being EPAs.

[75] I recognize that Mr. Ingalls' monthly reporting to the Management Committee included a narrative of monthly sales progress which in general terms indicated the number of new sales and the Project's total sales revenues to date. It is this information which Mr. Mathison reviewed. However, Mr. Ingalls' monthly reporting included a separate sales listing which recorded the particular unit sold, whether the sale was conditional or firm, the amount of the deposit received in respect of each sale, and a final tally of sales revenues. I acknowledge that conditional sales might not close and that purchasers who had paid a deposit might ultimately back out. In that respect, I agree with Statesman that Mr. Ingalls could not guarantee the final closing of a sale. However, I find it to be an inescapable conclusion that Mr. Ingalls understood the importance of sales to the Project, of accurately reporting these so that informed decisions could be made regarding the feasibility of the Project as it related to sales progress, and that those who received this information, including Cuthbert Smith, BMO, and the Management Committee, were entitled to presume that what he represented as being a firm sale was the most up-to-date, most accurate information he had that the unit met the requirements of an EPA.

[76] Mr. Ingalls conducted monthly budget meetings that Mr. Hill, Mr. Veldhoen and Mr. McCorkindale variously attended. Mr. Hill recalls Mr. Ingalls being responsive to questions. In his read-in evidence, Mr. Mathison testified that Mr. Hill and Mr. McCorkindale attended the meetings to keep him apprised of "anything that was unusual or that anything that was of concern." Mr. Ingalls testified he would make (sometimes significant) changes to his budget reporting but did not hear "a peep from anybody."

[77] In addition to his responsibilities for providing financial reporting and leading budget meetings, Mr. Ingalls reviewed, and had final sign-off authority with respect to, individual sales agreements. He monitored the payment of deposits, conditions of sale and the incentives offered by the sales team. His monthly budget summaries included sales commissions, referral fees and occasional realtors' MLS fees. Mr. Ingalls testified his budgets were accurate "to every penny."

F. Construction Begins

[78] Work on the Project began in 2006. Site servicing of the Project lands and construction of the south parkade commenced in September 2007, with construction of Building A starting shortly thereafter. Budget meetings, in which Mr. Ingalls, Mr. Milne and Mr. Elford participated, kicked off in February 2008. Mr. Ingalls presented a detailed budget for Phase 1 for discussion in March 2008. Following slight changes made by Mr. Elford and Mr. Ingalls, the Management Committee approved the budget for Phase 1 construction at its April 2008 MC Meeting. At Mr. Mathison's urging, the Management Committee resolved to explore second mortgage financing to meet future equity needs (in lieu of the parties having to advance Interim Loans). Vertical construction of an amenity centre and Building A commenced in the spring of 2008.

[79] The Management Committee held a total of 7 meetings over the course of the Project. Mr. Mann, Mr. Milne, and Mr. Mathison acknowledged the informality which governed the Management Committee's decision making. In his read-in testimony, Mr. Mathison acknowledged

the Management Committee informally approved the commencement of Phase 1 construction, Statesman's retention of trade contractors, and the Phase 1 budget. He agreed he did not raise complaints or objections about Statesman finalizing trade contracts above $100,000.00 (which was a Major Decision pursuant to section 4.4(h) of the USA that required the Management Committee's unanimous approval), and that work on the budget and Phase 1 construction proceeded without the Management Committee's formal approvals. Mr. Mathison acknowledged that Phase 1 was "run on a very informal basis" and that his approval was inferred in the absence of his disapproval. The Management Committee made decisions on a consensus basis. The Management Committee did not record votes and did not formally approve several draft resolutions that were prepared and circulated.

[80] Mr. Ingalls recalls that the Project started off optimistically. Mr. Mathison described the initial relationship between Statesman and Matco as being in a "honeymoon phase." Mr. Veldhoen recalls that the construction of Phase 1 (other than the MBS issue, discussed below) progressed smoothly. However, what started with a bang soon fizzled to a whimper with the onset of the global financial meltdown of 2008 (the "Financial Crisis") which caused a series of financial stressors that contributed to the Project's demise.

G. 2007 - 2008 Sales

[81] In February 2007, the sales environment was robust. For the period of February to July 2007, Mr. Ingalls' monthly sales summaries speak of a strong sales response and "extremely solid" sales center activity. In his monthly reporting to the Management Committee for September 2007, Mr. Ingalls confirmed that Statesman had signed 25 sales contracts. In his February 2008 report, Mr. Ingalls noted the Project had achieved a total of 75 sales for Buildings A and B for total revenue of $34M. This was shy of the $40.5M required to trigger BMO's precondition to commence funding for Phase 1 vertical construction which Mr. Ingalls predicted would occur by May 2008.

[82] However, from then on, sales tanked. The minutes of the April 2008 MC Meeting indicate that average monthly sales of about 11-12 dropped to 4, that it was difficult to sell the interior courtyard suites in Building A, and that another $5M in sales was required before BMO would release funding for Phase 1. There was concern about whether the Project would achieve a further $40M in sales required to meet funding for Phase 2, and that marketing Phase 2 suites should not begin until 80% of the sales units in Phase 1 had been sold. The minutes also note that Mr. Mathison reiterated his request to explore secondary financing to alleviate the payment of Interim Loans that Matco was having to contribute. However, Mr. Mathison agreed to provide Matco's share of an Interim Loan of $500,000.00. The Management Committee agreed Mr. Ingalls would provide a "summary of presale tests and when they would have to be met." At the end of April 2008, Mr. Ingalls provided his pre-sales analysis, showing he required another dozen sales to meet BMO's target for Phase 1 vertical construction.

[83] Each of March, April, and May 2008 was, as Mr. Ingalls put it, "not a great month for sales". By June 2008, the Project had satisfied BMO's precondition required for vertical construction of Phase 1. However, sales had largely flatlined with only 20 new sales between March and December 2008, an average of just over two per month. In May, Mr. Elford wrote to

Mr. Ingalls, Mr. Mathison, Mr. Milne, and Mr. Mann, sounding caution over Statesman making sales in Phase 2:

> I was surprised to hear we were pushing Phase 2 given after our last meeting when we discussed the need to think carefully about the timing for selling Phase 2. Also, while there may be some truth to the lead time issue for some buyers I suspect Phase 2 will sell initially as the better units get bought up first and we may end up with the more difficult units in both Phase 1 and Phase 2 continuing to drag out.
>
> Could you provide us with the current sales strategy for Phase 2?

[84] By May 2008, some movement had been made regarding Mr. Mathison's request for secondary financing as Statesman received a proposal for the provision of $4M. In the summer of 2008, there was an effort to explore how to better document decisions and approvals of the Management Committee. Mr. Elford provided a short memo which summarized the Agreements (this was in response to an action item arising out of the April 2008 MC Meeting) and he and Mr. Milne exchanged draft resolutions pertaining to the approval of the Phase 1 budget and to exploring Mr. Mathison's request for secondary financing.

[85] The Management Committee discussed sales at its meeting in September 2008 ("September 2008 MC Meeting") but by then, a crisis had emerged: MBS.

H. MBS

[86] When the Project was designed, the City of Calgary did not allow buildings over four stories to be made of combustible wood-frame construction. Consequently, Statesman envisaged that Buildings A and B would be composed of a steel superstructure.

[87] MBS held its own patent for such a system. It had previously collaborated with Statesman on numerous multi-residential projects. Mr. Jeff Mann testified that Statesman and MBS had a "good working history" and recalls there were no significant issues with MBS' work. Statesman selected MBS to provide the engineered design and build of the superstructure for Buildings A and B. It employed its own internal engineering division, including an Alberta-certified engineer, who was responsible for the engineering specifications. The structural engineering aspects of the superstructure were within MBS' scope of work.

[88] MBS was scheduled to commence its work in the spring of 2008. However, issues quickly emerged with MBS that delayed construction by several months. The first was that MBS did not provide up-to-date drawings that satisfied Canadian building permit requirements. The second was that its construction cranes were too short and needed to be built upon piles which, once initially constructed, had to be disassembled, designed, and re-assembled. Mr. Jeff Mann testified these issues caused delays of 4-6 weeks. As a result, MBS did not commence work until June 2008.

[89] In about August 2008, MBS had completed the framing of Building A. However, it was apparent from visual observations that the superstructure did not have adequate structural support, resulting in deflections to floor joists and in uneven floors. The cause of the problem seems to have arisen from the fact MBS had fabricated the supporting joists prior to final approval of the design drawing. The parties to this litigation agree MBS' work was deficient.

[90] Mr. Jeff Mann first learned of the MBS issue in mid-August 2008 from Mr. Duplessis, the Project's project manager. Later that month, he returned to Calgary from the US and visited the site. He participated in a meeting with Statesman and MBS at the end of August to address the issue, the delays that the various trades were causing, and the damage that reinforcing the trusses with additional welds was causing.

[91] Mr. Veldhoen first informed Mr. Mathison about the MBS issue after having driven by the site and having observed welding trucks with American license plates. Mr. Veldhoen thought this was odd because only welders who have their Canadian certification can perform structural welding. Mr. Duplessis advised that MBS had called in welders from the US to reinforce the floor trusses.

[92] Mr. Mathison's view was that Statesman was failing to provide "detailed oversight of the Project." He contacted Mr. Mann who, as he understood it, was unaware of the issue. Mr. Mann undertook to make inquiries. Mr. Mathison was sufficiently concerned with the situation that in September 2008, he retained Mr. McCorkindale to investigate.

[93] The minutes of the September 2008 MC Meeting indicate that while the Management Committee agreed MBS should continue with the remediation work, it would retain Mr. Arno Dyck of Kassian Dyck & Associates Consulting Engineers ("Kassian") to conduct a peer review of the structural design and repair. The Management Committee further agreed that if MBS did not resume work, it would retain TDL Drywall Inc. ("TDL"), a drywall company that had already performed work on Building A, to complete MBS' scope of work.

[94] Matters with MBS quickly deteriorated when MBS refused to cooperate and provide its engineered drawings. Statesman withheld MBS' August 2008 payment. MBS issued a stop work order the next month and subsequently registered liens on the titles to the Project which required separate litigation (the "Lien Litigation").

[95] At around this time, Statesman retained Mr. Dessario, a building technologist employed with Poon McKenzie Architects (subsequently renamed "NORR") to perform a preliminary assessment of MBS' work on Building A. Having confirmed that the joists were under-designed, NORR conducted a full structural review of Building A to determine if it needed to address further structural deficiencies.

[96] On October 22, 2008, Statesman notified Mr. Hamilton and Cuthbert Smith of what had transpired with MBS, that it was terminating its agreement with MBS, that it had retained Kassian to be the new engineer of record and that TDL would complete MBS' work. Mr. Mathison expressed concerns about his financial exposure, particularly with respect to the Interim Loans the parties were having to make to address the Lien Litigation. He was also concerned by what he learned from Mr. McCorkindale, that prior to October 2008, Statesman had not disclosed the MBS issue to BMO (although no evidence was led that from BMO's perspective, Statesman had failed to provide timely disclosure). Mr. Mathison was worried what further Interim Loans the Lien Litigation might require. In an e-mail to Mr. Mann and Mr. Milne in late October 2008, Mr. Mathison wrote:

> We should be moving with an alternative execution plan and be planning for a loan or equity injection to the project as the next thing is litigation and dealing with [BMO]. This is the issue here... as the project is 'liened'... [BMO] is going to be involved and it will involve us contributing money... A swift response and a demonstration to the Bank of financial commitment and attention will minimize our financial exposure. As I mentioned yesterday I have a greatly reduced appetite and tolerance for risk.

[97] The next day, Mr. Mann e-mailed Mr. Hamilton, stating that while he disagreed with MBS' liens and was retaining counsel to deal with the Lien Litigation, Statesman was prepared to provide over $1M to deal with the removal of MBS' liens. Mr. Ingalls advised Mr. Hamilton that each of Statesman and Matco would make an additional cash contribution of $550,000.00.

[98] Mr. Dyck conducted a review of Building A in the fall of 2008. His testimony, supported by his inspection report reports and by the observations of Mr. McCorkindale and Mr. Michael William who performed the welding inspections, is that many of the welding deficiencies and the deflection to at least one of the floor slabs were plainly visible and easily observable. Mr. McCorkindale testified that some of the issues were obvious from a "layman's visual perspective" and, having reviewed photos of the defective work, found the welding workmanship to be "shocking."

[99] By October 2008, MBS had withdrawn from the Project, the remediation work was ongoing and TDL was completing its work. By March 2009, Mr. Dyck certified the structural aspects of Building A to be in conformance with building code requirements. At this time, drywalling of the interior of Building A was under way.

[100] In May 2009, Mr. McCorkindale submitted a Cost to Complete Report with respect to the amounts Statesman had paid MBS before its termination. He estimated that Statesman had overpaid MBS by $132,000.00. However, he conceded that this estimate only included the "direct costs" required to complete MBS' scope of work and excluded the costs of delays, of hiring consultants, or having to repair damaged fixtures. Mr. McCorkindale also acknowledged that he had, in arriving at his estimate, benefited from his review of Mr. Dyck's final inspection report, prepared some 8 months after Statesman's payments to MBS.

[101] Mr. McCorkindale (with whom Mr. Veldhoen agreed) testified that once MBS' deficiencies were identified, Statesman worked with Mr. Mathison to quickly resolve the issue. Matco has not alleged that it was unreasonable for Statesman to hire MBS, to rely on MBS' engineer, or that Statesman should have brought in an outside engineer. The parties to this litigation agree MBS' deficient work and resulting costs are solely attributable to MBS rather than to Statesman.

[102] However, the MBS issue led Mr. Mathison to have two lingering concerns: that Statesman was not adequately supervising construction of the Project, and that Statesman was not providing BMO with full and timely disclosure.

I. Concerns About the Project

[103] In the fall of 2008, the parties were expressing worries about the Project's feasibility and the timing of vertical construction for Phase 2. By the end of 2008, each of Statesman and Matco had contributed $850,000.00 in Interim Loans, primarily to deal with MBS' liens. As Mr. Milne recalls, it was never a matter of not proceeding with Phase 2 but rather, when the commencement of Phase 2 would occur:

> Well, in 2008, it was becoming apparent that the market had slowed down appreciably, and we weren't getting the sales that we wanted to on the first building. So we started to discuss at that point delaying the construction of the second building.
>
> ...
>
> ... [Mr.] Mathison was particularly adverse to starting construction of Phase 2 during a poor economic climate, and [Mr.] Mann, on the other hand, was -- not that he didn't appreciate Mr. Mathison's concerns, but he was also concerned about the costs that would be associated with stopping construction, sending all the crews home, closing the sales centre, perhaps losing some valuable employees because we weren't able to continue with construction and sales. And also just the general overall effect that would have on the momentum in the optics of the Project.
>
> So [Mr. Mann] was wanting to go ahead, albeit with a delay, and [Mr.] Mathison was more risk averse.

[104] Mr. Mathison testified that from what he had seen with bank failures in the US, he wanted to be "very forthright and onside with our banks to make sure that they knew we were aware of all these things and dealing with them up front." Mr. Ingalls conceded that the continued feasibility of the Project depended on the parties assessing factors such as the market, the economy, the state of financing, the availability of trades and resolution of the MBS issue and that he, Mr. Mann, and the Management Committee would have to "weigh and consider those types of considerations in making decision about what to do with the [P]roject". He acknowledged this required him to provide accurate financial information to the parties who could then make informed decisions.

[105] Mr. Mathison understood that the Project was structured as a phased development which required assessment prior to proceeding with each phase. This was in accordance with Mr. Milne's update to Mr. Elford, Mr. Ingalls and Mr. Mathison in October 2007, where he explained that he had requested BMO provide its loan in the form of "accordion financing" that would allow flexibility, depending on market conditions, to ramp up or scale back the loan depending on market requirements and costs, and that "[s]hould we decide not to build the entire south parkade all at once, or not to start construction of the second building until we are further along on the first, because let's say the market slows down, we would be able to do so".

[106] Mr. Elford echoed Mr. Milne's sentiment. In an e-mail to Mr. Mathison in August 2008, Mr. Elford expressed the view that there was no obligation to go vertical on Phase 2 until there were sufficient sales and that the budget did not at that time allow for vertical construction of Building B. Mr. Milne agreed with Mr. Elford. He testified that from a financing and construction

point of view, deciding when a phase would be executed depended on a consideration of various factors, including presales, the general market condition, and the hiring of trades. That month, Mr. Ingalls sent Mr. Mann, Mr. Mathison, Mr. Elford and Mr. Milne a debt analysis, pointing out that a further $21M in sales was required to allow funding from BMO for vertical construction of Phase 2, and that given market concerns, the BMO loan agreements allowed for the pre-sales levels to be reduced if the parties injected additional equity.

[107] Statesman argues that the BMO loan was predicated on the construction and completion of Phase 2. It refers to the Credit Agreement which anticipates the construction of Phase 2: section 1.01, which defines the Project as including the completion of Phase 2; sections 5.01(b) and 5.04(e) in which RQLP and Statesman agree to carry on operations of constructing the Project and further agree not to cease carrying on business without BMO's prior approval; and section 7 of the Second Amendment which foresees the completion of Phase 2 by July 2010 (see above at paras 58-69).

[108] I agree. Statesman and Matco's shared intentions regarding the Project and the purpose for BMO funding was the completion of Phase 2 when the repayment of BMO's loan and the payout of profits to the Investors could occur. However, I do not take this to mean that the parties did not have discretion as to the timing of Phase 2 construction or that the requirements pertaining to BMO's continued funding superseded the parties' respective obligations pursuant to the Agreements. If anything, BMO was understanding of the sales environment and allowed adjustments to its funding model as evidenced by the Amendments and the Third Amendment and I see no reason why BMO would not have continued to allow for flexibility based on market conditions.

[109] In the fall of 2008, Mr. Mathison expressed his displeasure with what he perceived to be Stateman's lax adherence to the Agreements and the informality of the minutes of the Management Committee. He asked Mr. Elford to provide Mr. Milne with examples of an agenda and a draft form of resolution. Whatever his issues with the way the Management Committee was operating, Mr. Mathison took no formal steps to press the situation. He agreed he "did not put his foot down" and that at times he himself was in non-compliance with those same requirements.

[110] For example, Mr. Mathison conceded that the Management Committee could infer his approval in the absence of his disapproval in respect of decisions or votes. He did not replace Mr. Elford on the Management Committee when he retired in January 2009 until the June 2010 MC Meeting, some 18 months later, despite the USA requiring that vacancies be filled. While Mr. Mathison had the right to call a meeting of the Management Committee to call for a vote, he chose not to do so. He testified that the Management Committee did not take a formal vote to commence construction on the Project, and he does not recall whether draft resolutions circulated in the summer of 2008 and in February 2009 which addressed the approval of tender results and contract awards for Phase 1 were formally approved. In his read-ins from questioning, Mr. Mathison testified that while the Management Committee discussed Mr. Jeff Mann's involvement in the Project on several occasions, this was never reflected in the minutes.

[111] The minutes of the Management Committee meeting in January 2009 (the "January 2009 MC Meeting") indicate that Mr. McCorkindale mostly agreed with Mr. Ingalls' budget for Phase 1. Mr. McCorkindale believed Mr. Ingalls should have included the construction cost of the stairwell for Building B in the budget for the vertical construction for Phase 2 rather than for Phase

1. Mr. Ingalls and Mr. McCorkindale resolved this issue with Mr. Ingalls making the suggested adjustment. Mr. Milne provided an update on the Lien Litigation, noting it would take time for repayment of Statesman and Matco's Interim Loans.

[112] Mr. Ingalls agreed to provide a status report on current sales relative to BMO's pre-sales threshold and to circulate a revised budget. Since sales were slumping, Mr. Milne advised he needed the Management Committee's approval to adjust pricing and to approve Mr. Ingalls' and Mr. McCorkindale's revised budget and construction schedule. The minutes of the January 2009 MC Meeting note Mr. Mathison commenting, "given the current economic climate it is important that we not be offside on anything relating to our bank commitment" and that "it was important to be candid with the Bank". This comment reflected Mr. McCorkindale's concern about the way in which the stairwell had been allocated in the Phase 1 budget. Mr. Mann testified he agreed with Mr. Mathison's sentiments regarding transparent reporting to BMO and testified, "... we always are. We always are candid with the bank." The Management Committee agreed Mr. Milne would circulate a resolution proposing that SMBI's sales manager be given limited discretion to set pricing and for the leasing of parking stalls. From Statesman's perspective, leasing parking stalls was a good idea since it meant Statesman could reduce the price per unit by $45,000.00 with the stall being leased back to the purchaser or sold separately. While the resolution regarding the parking stalls lease was never formally ratified, Mr. Mathison informally approved it.

J. 2009 – November 2010 Sales

[113] Sales did not recover for most of 2009. There were no new sales from January to April 2009. There were only 13 new sales between December 2008 and mid-November 2009. At this point, BMO's loan stood at approximately $21M. In February 2009, Mr. Ingalls communicated that BMO was prepared to extend its loan due dates. In an e-mail to Mr. Mann, he expressed his concern about whether the Project would generate sufficient sales to meet the pre-sales threshold to commence Phase 2 and he mused whether Statesman should reduce unit prices by way of a 'blitz' sale. He commented that if Statesman reduced prices below BMO's minimum pricing threshold without the Management Committee's approval:

> I believe we risk Matco having sufficient cause to 'fire' Statesman from this project. [Mr. Mathison] can not be happy with progress to date. I may be paranoid but it may make sense to [Mr. Mathison] to have Statesman finish and fill up Phase 1 and then fire us and take control of the project with his people once Phase 2 starts (which may be quite some time). I do not want to give him the ability to do this with blatant disregard to our agreements. This is why we need a [M]anagement [C]ommittee meeting as soon as you return to either approve this plan or not.
>
> ...
>
> My sense and the view of many people I have talked to is that a significant price reduction likely will not generate many (if any) sales at this point in time as the 'fear' in the economy is stopping people from entering into any significant contracts. All indications are that it may be a long time before we sell another $20M in order to start Phase 2 which means we need to plan accordingly. Slashing pricing now may be a good decision if we believe it will generate enough sales to proceed

> through Phase 2 and 3 however I am not optimistic this would happen. If we proceed with the 'blitz' then we need to decide if we will do anything with current contracts or take the position that current customers will close or we will sue.
>
> ...
>
> At a minimum, we need management committee approval or risk losing Riverside to a GC and a marketing company controlled by [Mr. Mathison].
>
> We need to get Phase 1 completed!!!

[114] Mr. Mann recognized he was living through the "heart of the recession" and was concerned he would have to lay off "just about everyone" in July if Phase 2 did not commence in May. In March 2009, Mr. Ingalls sent Mr. Mann and Mr. Mathison an e-mail noting:

- The market has obviously stalled... almost no inner-city condo sales have occurred over the past few months;
- MLS pricing is down... Most developers have reduced pricing on new product with a few offering large discounts...
- about $20M in pre-sales are needed to start Phase 2;
- If significant unsold suites remain in Phase 1 – renting and rent to own deals can be considered;
- Sales staff have about 20 customers attempt to get out of their sales contracts. It is likely that a significant number of current customers will avoid closing;
- The few sales at Riverside in the past few months have all been with $45,000 off of the price under the leased parking option, $5,000 to $10,000 of free upgrades and discounts in the $10,000 to $25,000 range. I am not aware of any customer who would even consider purchasing at the list price.

[115] Mr. Ingalls advised that Statesman's sales staff was experimenting with various sales incentives "with little success in the 'dead' market of the past few months" and inquired what the sales team was authorized to do to produce sales contracts. One of the items for discussion listed in the agenda for the March 2009 Management Committee meeting (the "March 2009 MC Meeting") was the issue of sales and pricing strategy: "[s]trategies to meet Phase 2 pre-sale target (another $20M in sales) or deal with site shutdown after closing Phase 1".

[116] In March 2009, Statesman transferred one of its experienced salespeople, Mr. Sali, from the US to lead sales on the Project. Mr. Mann assisted the sales team to develop sales strategies and he frequently participated in sales meetings.

[117] One sales strategy was called the rental guarantee program. This involved having RQLP sell units as rental units that it would manage. RQLP would guarantee the owner the payment of

monthly rent. A variation of this strategy was the garden townhome strategy, outlined in a draft resolution to the Management Committee in August 2008. The garden townhome idea allowed purchasers to reserve the location of a future garden townhome by purchasing a rental unit, selling it back to RQLP when the townhome was ready, and applying the sale price as a credit against the cost of the townhome. The concept of the rental guarantee program caused some friction between Mr. Mann and Mr. Mathison, particularly in the summer of 2009 when it became a contentious issue.

[118] Mr. Mathison objected to the rental guarantee program, arguing that as a board member of various public companies, providing a guarantee on rental income was tantamount to selling a security, a measure which required regulatory compliance. He maintained his objections to the rental guarantee program in the summer of 2009, but Mr. Mann continued to explore ways in which he could advance the program through a Statesman-affiliated company.

[119] On August 13, 2009, in e-mail exchanges between Mr. Mathison and Mr. Mann, copied to Mr. Milne and Mr. Ingalls, Mr. Mann defended the rental guarantee program. He explained that generating revenue through rental guarantees was preferrable to price reductions that would result in significant revenue losses, would encourage purchasers to seek a price reduction before closing on their existing agreements, and would cause the Project to suffer a loss of prestige and credibility. As Mr. Mann put it:

> ... I do not see a tremendous opportunity of creating wealth from the aforementioned offer [the rental guarantee program]. My motivation was simply to maintain the momentum by meeting the criteria for financing Phase 2.
>
> If we shut down Phase 1, it will be a very unhappy group of Homeowners in Phase 1... we will also [lose] the Purchasers presently awaiting Phase 2... and pricing will drop for the future for the obvious reasons of the public's perception of a "Failed Project"

K. Continuing Concerns About the Project

[120] In an e-mail to Mr. Mann on August 14, 2009, Mr. Mathison firmly reiterated his opposition to the rental guarantee program. He also communicated his pessimism about the Project's continued viability, stating:

> ***[o]n the pricing matter, which is a separate but, in this context, a related issue, I think we should just wait until demand recovers. I am not in favor of commencing Phase 2 until we have evidence, reflected in demand, to support the commencement.*** I know you won't be pleased with this view, but it is my view, and I formed it considering in detail your countervailing arguments, which I respect. (Emphasis added)

[121] Mr. Mann replied to Mr. Mathison, copying Mr. Ingalls:

> ***For your future planning, unless a miracle happens and the sales volume picks up to 15 a month again... it appears that we will be shutting down Riverside Quays as soon as phase 1 is occupied (end of October).*** (Emphasis added)

> A quick estimate would suggest that this will cost many millions of dollars including the outstanding loan costs and probably the loss of this [BMO] loan for the future, the dismissal of staff, the loss of credibility for future sales and profits, as well as other related City of Calgary permitting cancellations.

[122] Mr. Mathison responded:

> I will review our arrangements as well.
>
> Thanks again for your efforts.

[123] Mr. Milne, who had resigned as Statesman's legal counsel, but who was still a member of the Management Committee, replied privately to Mr. Mathison, with whom he agreed:

> I understand your position and would likely be taking a similar one were I in your shoes. I am in no rush to proceed with Phase 2. I am loathe to significantly discount the units given the desirability of the location and product in better market conditions. I, therefore, prefer to wait until demand rebuilds and supply contracts...
>
> I know [Mr. Mann] would like to keep the on-site staffing busy with the commencement of Phase 2. This is more in Statesman's interest than the projects, in my view. Unless market conditions improve, I expect that construction will have to be halted after the completion of Phase 1, but the sales centre should remain open.

[124] Mr. Ingalls understood that Mr. Mathison was not in favor of commencing Phase 2 construction until there was sales demand. He understood that Mr. Mann and Mr. Mathison were considering sales performance as one of the factors to be assessed before moving ahead with Phase 2. Compounding the sales issue was that Statesman and Matco had continued to make Interim Loans throughout 2009 to deal with the Lien Litigation and address other issues. By the end of 2009, each of their unpaid Interim Loan balances stood at approximately $2.7M (Statesman's balance stood at approximately $1.88M with Statesman-related parties having contributed the remaining $823,000.00).

[125] I do not see how I can reasonably interpret the e-mail exchange between Mr. Mann and Mr. Mathison as anything other than an agreement between them to stop further work on the Project beyond the completion of Phase 1 until there was a material change in sales. Statesman argues Mr. Mathison was not entitled to rely on this exchange and should have sought further confirmation from Mr. Mann that further progress on the Project would not happen. I disagree. In my view, what was agreed to is clear: that there would be no further construction of the Project until there was a material improvement in sales and that variance from this agreement would have required Mr. Mann's and Mr. Mathison's explicit approvals.

[126] If Mr. Mathison understood from Mr. Mann's reply that the Project was on hold pending the occurrence of a "miracle" of 15 sales a month, he was mistaken. To the contrary, Mr. Mann testified he had no intention of stopping construction of the Project on the completion of Phase 1:

> ... I'm not a quitter. I don't quit, and we make things happen based on intelligent planning and based on our experience and what we've gone through over the last 50 years. So we don't -- we don't panic on things like this. We find ways of circumventing it and finding how we can make it happen.

[127] Mr. Mann testified his reply to Mr. Mathison was meant to be "tongue-in-cheek" and that Mr. Mathison was making a mistake:

> ... we would be offside with a lot of different people" including "the City of Calgary because at that time we had regained our building permit for phase number 2... I didn't want to let the City of Calgary down...
>
> ... it would have absolutely decimated our loan and our relationship with [BMO]... and we would be way offside with them for sure and it would have called the loan...
>
> ... [a]nd then more than that, I was terrified of what it was going to do to our reputation and relationship that we had with the sales that we had generated with all of the residents that have moved in at that particular time and were moving in.

[128] He further explained:

> ... I wanted to put that out and let it be known that the damage is -- is irreparable. Once you do that, it's like discounting your price that we talked about a minute ago. You drop the price a hundred thousand, your character is gone. Your responsibility and respectability on the site is gone. This would do even more so. This would have shut the community down and ruined its value for in perpetuity.

[129] When asked why he responded to Mr. Mathison's query the way he did, Mr. Mann testified:

> [w]ell, it was -- it was letting them know that there's disaster ahead. There was disaster ahead. If we follow directions of what -- what Mr. Mathison is telling us, where we don't -- we don't take advantage of some of the things that we're doing as a team, then we're no longer a team. It was a sign that -- that he was wanting to stop this community for some reason, and I wasn't impressed.

[130] He explained his decision to commence construction of Phase 2 in 2010. His use of the pronoun "we" in the following passage can only refer to Statesman rather than to Mr. Mathison and SRQL:

> We -- we felt confident that this was going forward. We felt positive that things had turned the corner, and Mr. Mathison seemed to be all -- all in for some reason. I think -- I kind of blamed it on this message that you just read -- or had me read, and I thought he's seen the light and we're going to go forward because he was well aware that phase 2 was going to be starting...

[131] At trial, Mr. Mathison testified that at this time, both he and Mr. Mann were concerned about sales, and he viewed Mr. Mann's response as "petulant". When challenged that he knew Mr. Mann wasn't a "quitter" and "would press on to do what he could do to improve sales", Mr.

Mathison acknowledged he knew of Mr. Mann's determination, "so the notion of him being persistent going forward is no surprise" but that he expected Statesman to "see it through when the market for these units improved, which would allow us to move forward".

[132] Whatever Mr. Mathison's understanding of Mr. Mann's "unless a miracle happens" comment, from then on, Mr. Mann was single-minded in pushing the Project forward. Mr. Mann testified his experience with previous recessions gave him confidence the market would "turn as it always does", that "you just have to wait it out", that "my intent was to make a miracle happen, which we did", that "we did a lot of things that were great in order to turn it around" and that, as far as he saw it, "Mr. Mathison was in favor of commencing with Phase 2". He testified that at the time, he believed he had two "aces" up his sleeve. The first was to engage BMO in a discussion regarding an adjustment to financing that would lower the pre-sales threshold required to commence construction on Phase 2. The second is captured in the following exchange:

> Q. And the other ace up your sleeve, sir, despite what you said to your partner and to your CFO in [the August 14, 2009, e-mail], it was always your intention to proceed with Phase 2 of the Project?
>
> A. Absolutely.
>
> ...
>
> Q. After this -- this e-mail on August the 14th, 2009, you recognized this was a critical point in the program, and Statesman needed to do something to move this momentum towards Phase 2, correct?
>
> A. Correct.

[133] The next day, Mr. Ingalls sent Mr. Mathison, Mr. Milne, and Mr. Mann an e-mail, requesting a Management Committee meeting to discuss the following topics:

> 1. Sales and pricing strategy
>
> (a) Do we want a sales price discounting strategy?...
>
> (b) Current appraisals support current pricing. Do we maintain current pricing and accept a site shutdown until sufficient Phase II sales are achieved?
>
> 2. Authorization to deal with Phase 1 customers who can't or won't close.
>
> ...
>
> 3. BMO financing.... Are there any other financing options we want to explore?
>
> 4. $4.6 Cash Call loan advance. Any action required?

[134] In September 2009, Mr. Ingalls reported the Project was overbudget by approximately $700,000.00. Mr. Mathison continued to push Mr. Ingalls and Mr. Meiner on the issue of secondary financing, and he asked that the next Management Committee meeting include a decision regarding the financing of Interim Loans. Mr. Mann was expressing his concern that purchasers were not willing to close their sale agreements which he referred to as a "serious HOLE in our possession."

[135] Despite these mounting financial pressures and Mr. Mann's and Mr. Mathison's agreement of August 2009, Mr. Ingalls and Mr. Mann devised a plan to push the Project forward. Mr. Ingalls acknowledged Statesman's plan consisted of three strategies: (1) engage in a sales strategy to move the Project forward; (2) lower the pre-sales threshold required to trigger BMO's Facility 2 funding; and (3) start vertical construction of Phase 2:

> Q. Sir, I'm going to suggest to you that part of the plan that was expressed by Mr. Mann was that there would be immediate discussions with [BMO] in the fall of 2009 involving making alternate financing arrangements so that the presales limit or the presales floor for phase 2 could be lowered; is that correct?
>
> A. Yes. We -- and we saw that. You -- you know, it just -- the discussions with [BMO] and other lenders, how -- how can we get this done? What are the possibilities? So those discussions were certainly held.
>
> Q. And another element of the plan was the creation of these artificial sales with trades whereby the trades would not have to close; correct?
>
> A. That sales strategy became part of the overall strategy to move this project forward. There's no doubt about that.
>
> Q. And the third element, sir, was moving forward with actual construction of phase 2 including the Hoover underground work with respect to the phase 2 parkade; correct?
>
> A. Yeah, the concept of some work needed to be done to keep the building permit valid was certainly an issue and -- and was certainly done. So that I would agree that is part of the plan to get to the point where you -- you start going vertical and building the second building.

L. The Sales Strategy

[136] While there were only 13 new sales from January to mid-November 2009, Mr. Ingalls' end-of-November 2009 report to the Management Committee states that Statesman signed 20 new sales contracts in that month alone. His sales listing includes 10 "firm" sales free of conditions with the payment of significant deposits. Mr. Mathison testified he was "surprised and somewhat skeptical" by the sudden sales increase given the "effectively flat sales for a long period of time."

[137] Mr. Ingalls explained how he came to receive these 10 sales. He testified that Mr. Meiner (who had started working at Statesman in October 2009 and to whom Mr. Ingalls directly reported)

gave him 10 sales contracts to review. Statesman had made these sales to people associated with Hoover Mechanical Plumbing ("Hoover"), a mechanical and plumbing contractor that had performed work on Phase 1 and that Statesman hired for Phase 2. What Mr. Ingalls knew but had decided not to report, was that the $400,000.00 or so in deposits paid on the Hoover sales did not, as with usual sales, represent new cash infused into RQLP but were cheques written by Hoover in exchange for SMBI releasing hold back funds that were owing to it for work it had performed on Phase 1. What he also declined to disclose was that these were not sales made in the ordinary course of business, to arm's-length purchasers who had selected the units, negotiated over the price, and sought discounts, upgrades, and incentives. He also knew that it was Hoover that had issued the cheque to cover the entire deposit amount for the 10 units, rather than the individual Hoover purchasers.

[138] Mr. Ingalls described his reaction to receiving the Hoover sales as lying somewhere between unusual and shocking. He asked Mr. Meiner for an explanation. Mr. Meiner advised he did not expect the Hoover purchasers would have to close on their sales because Statesman would continue to market their units and, hopefully, they would be re-sold. Mr. Meiner advised the Hoover sales would be legally binding if Statesman could not find new purchasers and that this kind of arrangement was common in the real estate industry.

[139] Mr. Ingalls testified, "I've never seen this. I'm not comfortable with it." He acknowledged that despite Mr. Meiner's assurance that the Hoover sales were legally binding, he was not sure what would happen if they were not resold:

> My expectation was I didn't know. There were a few possibilities in my mind, and if that time came, I didn't know exactly how it would play out. But it was certainly a possibility that these people could be closing on these units. How strong of a possibility that is, I didn't know. That's all just up to speculation.

[140] Mr. Ingalls understood Statesman had made the Hoover sales with the explicit purpose of meeting sales targets. He testified he had concerns about including the Hoover sales in his reports to the Management Committee, Cuthbert Smith, and BMO because they might not qualify as EPAs. Despite his misgivings, Mr. Ingalls decided to include them because:

> ... at that time [I] didn't have to deal with the issue. It -- might have to deal with the issue a long time down the road when it eventually came to -- to present whether we'd met a presale test or not, but at -- at that point in time, my view was they were a binding, legal sales agreement with an individual on the other side who was willing to sign it and then very likely would qualify and meet the criteria as a pre sale for financing purposes.

[141] Mr. Meiner informed Mr. Mann about the Hoover sales in a telephone conversation with him in November 2009. Mr. Mann did not ask Mr. Meiner whether the sales were legitimate and congratulated him. Mr. Mann did not see the Hoover sales as a major sales event because he felt the market was improving in the US and "so I felt it was coming. I thought we'd be there." Mr. Mann denied he was aware of any special conditions that did not require Hoover to close on the sales. However, in a letter to Mr. Mann dated July 6, 2010, (which was admitted as a trial exhibit

without any qualification as to its truthfulness), Mr. Purcell, one of Hoover's owners, provided the background:

> In November 2009, Brad Hoover received a call from [Mr.] Meiner at Statesman requesting that Hoover Mechanical sign purchase agreements for ten (10) units at Riverside keys phase one, building B. Brad was hesitant at first but was told by [Mr. Meiner] that agreeing to do this would allow us to start mechanical installations in building B quickly. We had not yet secured the contract for building B and felt obligated to sign these deals.
>
> After agreeing to this, Brad handed it off to me to handle. I spoke with [Mr. Meiner] and came to agreement that we would use hold back funds owed to us for the building A contract to pay the deposit amounts on ten (10) units. At that time, I also discussed the fact that we would definitely not be closing on any of these units and the deposit money would be returned to us as soon as a financing was secured. [Mr. Meiner] agreed and confirmed that these were temporary deals with no intention of closing. I also requested that the ten (10) agreements be made out to Hoover Mechanical but [Mr. Meiner] wanted to have individual names on the agreements. Again, I was hesitant to expose members of my staff to any contract but felt obligated and we went ahead and signed the deals.

[142] Mr. Ingalls testified he did not raise the Hoover sales with Mr. Mann because he had "little contact" with him, and in any event, Mr. Meiner advised him that Mr. Mann was "onside with this particular strategy." However, Mr. Ingalls qualified his answer under cross-examination and acknowledged that he didn't approach Mr. Mann because of his "uncomfortableness with the situation", that "he would be a baby, so to speak, not to go along with that kind of strategy", and that since he wasn't sure others weren't uncomfortable with the strategy, it was not a topic he wanted to discuss at Statesman's sales meetings. He explained that he did not address the issue further because he felt there were appropriate systems in place at the director level and that Mr. Meiner was keeping Mr. Mathison updated on developments:

> ... this was an issue that was being handled at the director level, and I wasn't a director. And as such, I was comfortable that, you know, they would deal with it. And I wouldn't have to deal with it till such time as it -- it -- it came to meeting a sales precondition, and then that was well into the future...

[143] Mr. Ingalls testified that in respect of the Hoover sales, he believed the units would be remarketed and consequently, the issue as to whether the sales would be binding on the Hoover purchasers would not arise. However, his evidence is contradicted by the fact that despite having sold two of the Hoover units to new purchasers, Statesman replaced those units with two others that it marked down as being "firm" sales to Hoover. What this indicates is that whatever Mr. Ingalls' initial understanding may have been that the Hoover sales would be re-sold to new purchasers, Statesman intended to keep reporting these sales as "firm" Hoover sales in its sales summaries when it came time to satisfy the pre-sales threshold for obtaining BMO's financing for Phase 2.

[144] In his December 2009 report to the Management Committee, Mr. Ingalls reported 8 new sales that month. Of these, 3 were listed as "firm" sales. Unbeknownst to the Management Committee, Cuthbert Smith, and BMO, these sales were entered into with individuals associated with another one of Statesman's contractors, Legacy Kitchens ("Legacy") on the same terms as Hoover (for a total of 13 sales). Mr. Meiner copied Mr. Ingalls and Mr. Mann on his correspondence with Legacy representatives on November 17, 2009, in which Mr. Meiner explained the terms of the Legacy sales:

> Thank you both for taking the time to meet with me today. As discussed please find below the details of how much we would like you and other individuals in your firm to put deposits down on several units.
>
> * Legacy Kitchens has included what has been invoiced and the hold back amount $104,897.77 owned by Riverside.
>
> * Based on the above amount we would propose that through individual names you purchase on paper 4 lofts.
>
> * As mentioned we will re sell the lofts during construction and you would then get your deposit money returned.
>
> * We will choose 4 lofts.
>
> * We will then exchange checks, we pay out what is owed to you and you in return through individual names write us back checks for the deposits.
>
> ...
>
> * As you can see this should not be a big problem for either party as we will not expect you to close, and we will be marketing them during construction which will take 12 months.

[145] Mr. Meiner's e-mail indicates the Legacy sales would continue to be marketed during construction which he estimated would take 12 months. This indicates that, as with the sales to Hoover, Statesman would continue presenting the Legacy sales as legitimate EPAs when it came time to meet BMO's pre-sales target for Phase 2 funding and that any units that sold would be replaced with new units attributed as Legacy sales.

[146] While Mr. Meiner copied Mr. Mann on his November 2009 e-mail, Mr. Mann denies being specifically aware that Statesman did not expect the Legacy purchasers to close. He testified he did not take much notice of Mr. Meiner's e-mail because "if it was contrary to our banking agreement, it wouldn't have been submitted anyway, so it was irrelevant." He elaborated further:

> I don't recall hearing anything about the fact that people were not expected to close 'cause, like I said, it wouldn't have mattered to me. It wasn't a big deal because I wouldn't have counted them anyway because I'm the guy -- I'm the guy that has to submit them to the bank. I'm the one that has the guarantee, so I have to make sure that we're following the protocols that we've agreed to. So they wouldn't have gone

> in no matter what, and so I was anxious to see [Mr. Meiner] being involved. I think that was great that he was trying to get involved and help us, but it -- they weren't going to get submitted.

[147] Mr. Ingalls' reporting to the Management Committee in June 2010 sheds light on the Legacy sales:

> Legacy arranged for three phase two sales contracts to be written by three individuals associated with Legacy and used 58,000 and change of the phase one cabinet contract hold back payment as the deposit requirement. An informal arrangement is understood that these units will continue to be marketed, and the Legacy sales contract will be cancelled once a firm contract is received from a new purchaser. And as such, a Legacy purchaser would never be required to close on the unit. Zero of these sales contracts have been sold to a new purchaser, and as such, three active Legacy sales contracts exist as of June 13th.

[148] Mr. Ingalls testified that just like with the sales to Hoover, the Legacy sales were part of Statesman's sale strategy to move the Project forward in which he, Mr. Mann, and Mr. Sali participated. Mr. Ingalls agreed that the purpose of the sales strategy was "to create the impression that there was sales progress being made with respect to the sale of units in Phase 2". He acknowledged the strategy was "designed to produce sales contracts that -- with the intention that that would help to move -- the Project move forward" and that "there would be no other real purpose for it" other than to present an impression of sales progress to Mr. Mathison and BMO.

[149] There were other sales in respect of which trade contractors paid deposits in exchange for receiving holdback monies owed to them for work already performed. In December 2007, Statesman made a sale to Mr. Giusti of the Giusti Group for two units. Statesman credited him approximately $340,000.00 towards the purchase price for work done by his company on the parkade. Mr. Ingalls documented this sale in his sales summary. Parenthetically, I note the sale never closed, Mr. Giusti lost his deposit, and Statesman sold the unit to someone else at a higher price and at a profit to RQLP due to significant upgrades Mr. Giusti had made.

[150] In February 2008, TDL agreed to purchase a unit for $780,000.00 with an original list price of $930.000.00. TDL and Mr. Duplessis agreed to reduce the purchase price by $150,000.00 in exchange for TDL reducing its payable for drywall work done in Building A. Mr. Mann testified he was aware of the arrangement and explained why Statesman made it:

> [w]ell, we -- we felt it was -- it was not costing the -- the limited partnership anything. We were reducing our -- our debt to the bank, and -- and it wasn't impacting the bottom line, so we felt very comfortable with it.

[151] Mr. Pollock, who testified on behalf of TDL, confirmed he had purchased the unit for a family member, that his intention was to close, and that Statesman had not offered him purchase opportunities on other units or any "side deal" arrangement that did not require TDL to close. However, Mr. Meiner had a different plan. In an e-mail sent by Mr. Meiner to Mr. Mann and Mr. Ingalls in November 2009, Mr. Meiner proposed that TDL pay deposits on an additional 10 units in phase 2. In reply to Mr. Meiner, Mr. Mann responded, "[p]lease do a spread sheet... but does

this not look like it will work for 10 suites?" Mr. Ingalls testified he understood Mr. Meiner's suggestion in respect of the additional TDL sales to be the same as those arranged with Hoover and Legacy.

[152] In April 2010, Mr. Mann and Statesman focused on pushing sales. E-mail correspondence between Mr. Sali, Mr. Meiner and Mr. Ingalls indicate Statesman was considering lowering the specifications on some of the difficult-to-sell suites so it could offer sales at a lower price point. Mr. Mann exhorted his sales team to "make as many sales as we can by June 30th" and, in a flurry of e-mails to his sales team, offered to deliver 6 sales with various trades who had been engaged on the Project including Home Solutions, Metro Paving & Roadbuilding ("Metro"), Bluebird Contracting Services ("Bluebird"), and TRL Engineering ("TRL"). Mr. Mann regularly followed up with his sales team regarding sales progress.

[153] Statesman made two "firm" sales with individuals associated with Bluebird in April 2010. Satesman applied the deposit amount of $44,000.00 in exchange for the release of holdback funds owing for trucking work that Bluebird had performed. In May 2010, Statesman entered into a "firm" sale with Metro and applied the $30,000.00 deposit against hold back monies.

[154] Statesman entered into a "firm" sale agreement with Soren Neilsen, owner of Home Solutions. Mr. Neilsen paid a deposit of $17,500.00 which, as with the other trade contract sales, simply represented a portion of hold back monies that Statesman owed it. Mr. Nielsen's explicit understanding was that his sale would not have to close at all. In June 2010, he contacted Mr. Sali via e-mail, inquiring: "Hey, you had said that I would be contacted to fill out some paperwork that would exempt us from having to close on the unit. Any news on this? I have not heard yet." Mr. Sali passed along Mr. Nielsen's inquiry to the Statesman office inquiring, "Mr. Nielsen... participated in our trade purchase program -- but requires the additional paperwork to be completed as per his e-mail below... would you please send him the amendment that we completed with the other trade deals?"

[155] The 'paperwork' Mr. Nielsen asked for and which Mr. Sali referred to as 'the amendment' which did not require Mr. Nielsen to close was formally incorporated in the agreements of two other trade sales. The first is a "firm" sale to NORR with a deposit of approximately $24,000.00 which Mr. Ingalls reported in his sales summary (along with the Hoover and Legacy sales) to the Management Committee in April 2010. The other is a "firm" sale to S&V Painting ("S&V") in April 2010 with a deposit of approximately $35,000.00 which Mr. Ingalls similarly reported. The NORR and S&V sales were the same as those involving Hoover, Legacy, Bluebird, and Home Solutions: SMBI selected the unit and determined the deposit amount the trade would pay. SMBI applied the deposits by NORR, and S&V against receivables owing for work performed. However, unlike the Hoover, Legacy, and Bluebird sales, the NORR and S&V agreements included a one-page addendum that contained two provisions. The first was that Statesman did not require NORR or S&V to close on the sale if Statesman could not find new purchasers. The second was that NORR or S&V would split any profit realized on the sale of the units above the original listed purchase price with RQLP.

[156] Mr. Ingalls testified he knew Statesman did not require NORR and S&V to close and that the S&V purchaser would not even have qualified for financing. He believed Mr. Meiner had been

too aggressive in advancing the sales strategy and was concerned about NORR and S&V not having to close on the sale. Mr. Ingalls testified he was not happy with these agreements but that:

> ... I knew that I was in control, and I was in control of what would ultimately be presented to the bank at some point if -- when the next presale test was met, and -- and I knew I could control that they never would be presented.

[157] Despite his misgivings, Mr. Ingalls chose not to disclose his concerns to anyone until June 11, 2010. He did not include the amendments in his sales summaries to the Management Committee, Cuthbert Smith, and BMO. Anyone relying on his sales summaries would not have known about the inclusion of agreements that did not require the NORR and S&V sales to close. When asked why he did not raise the issue in his reports to the Management Committee, he testified he "didn't think it appropriate" to use his reports to the Management Committee "to address that particular topic", that "one deal out of a whole bunch really doesn't matter that much, and it's not the hill to die on", and that he didn't feel it was worth it to have a confrontation at the time" particularly with Mr. Meiner who, in late 2009, was his new boss. When pressed whether he considered it to be fraudulent to present the NORR agreement to BMO as a legitimate EPA, Mr. Ingalls explained:

> ... if we or I drew funds based on documents such as this without a vetting process, that would probably fit into the world of, you know, fraud or doing bad things, I guess, or what have you, whatever the -- the correct legal term is.

[158] However, there is little doubt Mr. Ingalls knew the NORR sale was not a legitimate EPA and that reporting it as such was simply not true. When asked whether "it would have been fraudulent if this NORR contract was ever presented to [BMO] for the purpose of drawing funds," Mr. Ingalls replied "Yeah, I think I would agree with that. Although I guess I -- well, it'd certainly be wrong, yes".

[159] While Mr. Ingalls may have had misgiving about the NORR amendment, he had no such qualms about the S&V sale. Mr. Ingalls explained he had met with the principal of S&V, Mr. Dhesi (who had a long working relationship with Mr. Mann and Statesman). Mr. Dhesi indicated that he wanted to sign the agreement but was unwilling to close. Mr. Ingalls believed Mr. Meiner had pressured Mr. Dhesi into the sale and, preferring that Mr. Dhesi not be required to close, spoke with Mr. Meiner who suggested including the amendment. Mr. Ingalls agreed with Mr. Meiner's suggestion. Mr. Ingalls believed he had helped Mr. Dhesi which also meant the issue would, as he put it, be "off my desk" so that "I don't have to deal with it anymore."

[160] Statesman entered into additional sale agreements with various trades where deposits paid in connection with sales were exchanged for payments for work performed. These sales arose in April and May 2010, at a time when Mr. Mann was singularly focused on generating sales. (The sales made to Hoover, Legacy, Bluebird, Metro, NORR and S&V, 18 reported sales in total, are referred to as the "Trade Sales").

[161] From Statesman's and Mr. Hamilton's perspectives, selling to trades in a project in which trades were retained to perform work is an accepted industry practice. Mr. Milne recalls it was common at Statesman on other projects for trades to purchase units, either because they were

interested in the project or to "help Statesman meet the presale requirements and to get some momentum going on the project." He elaborated that it was also common for a unit, once purchased by a trade, to be re-marketed and resold. Mr. Milne further testified that it was usual for trade sales to proceed on the basis that a trade would receive a credit on monies owing for work performed to satisfy any cash to close requirements.

[162] Mr. Milne testified that he was not aware of any case where a trade sale was not required to close and testified "for obvious reasons, I would never have let that happen." Mr. Hamilton also testified he had no issues with trades entering into "bona fide purchase sale agreements" to be resold. However, like Mr. Milne, Mr. Hamilton testified he was not aware there were sales agreements which, if the unit was not resold, the original purchaser did not have to close. Further, Mr. Whitehead acknowledged he was not aware of any side deals Statesman had entered into with trades whereby invoices were either reduced or invoices were not issued for work performed.

[163] I accept Mr. Hamilton's and Mr. Milne's views regarding industry practise as I have no evidence to the contrary. But what constitutes reasonable industry practice in terms of promoting sales to trades, re-marketing units and exchanging hold back monies for sales deposits is an entirely separate issue from Mr. Ingalls' obligation to provide transparent financial reporting to those, including the Management Committee, Cuthbert Smith, and BMO, who were relying on his financial reporting so that they were fully aware of all the facts and could make reasonably informed decisions.

[164] Mr. Ingalls did not qualify any one of the Trade Sales in his reporting to the Management Committee, Cuthbert Smith, or BMO. He did not raise any concerns about the S&V and NORR sales. He did not report that the "deposits" from these sales did not represent a cash infusion (as with the case of a normal arm's-length purchaser) and that Statesman applied these against holdback monies for work already performed. He did not notify BMO about the nature of the Trade Sales when BMO was specifically asking for his accurate sales numbers in Statesman's and BMO's negotiations regarding the Third Amendment. He merely included these in his sales summaries as otherwise normal sales which would have looked to the reader like a a usual sale made in the ordinary course.

[165] There are several issues that arise with the Trade Sales. The Trade Sales are not legitimate EPAs. They were presented by Statesman to the Management Committee, Cuthbert Smith, and BMO as legitimate EPAs to give the impression that SMBI was making sales when Mr. Ingalls and Mr. Meiner knew or ought to have known that these sales were not intended to close.

[166] I find that Mr. Meiner was instrumental in the execution of the Trade Sales. He directed Mr. Sali to complete the paperwork involving the Trade Sales. He devised the Trade Sales involving Legacy, Hoover and NORR. He included the addendum into the S&V sale. I find that he (rather than Mr. Sali) initiated and devised the Trade Sale involving Home Solutions. I reject Statesman's view that he was a rogue actor. He was a senior Statesman officer and acted with SMBI's actual or ostensible authority. He had signing authority on behalf of Statesman. He reported his sales activity to Mr. Mann and Mr. Ingalls. Mr. Sali and Mr. Ingalls reported to him and took his direction.

[167] In my view, Mr. Ingalls chose expediency and the perceived value of "getting it done" over his fiduciary obligations. He was careless in so doing. I appreciate that Mr. Ingalls did not want to rock the boat, that he felt pressured by Mr. Meiner and that he believed the Management Committee should deal with the Trade Sales issue. In my view however, these are not excuses that a senior officer in Mr. Ingalls' position with his experience can invoke as a reason for ignoring the core content of his fiduciary obligations. I can find no plausible explanation for relieving him of these obligations particularly when it would have been so simple to do so, with an e-mail to Mr. Mann and notification to the Management Committee.

[168] Matco urges me to find that Mr. Ingalls acted dishonestly, that he knowingly participated in a scheme which he knew to be dishonest. I decline to do so. I found Mr. Ingalls to be a credible witness. He was generally forthcoming in his evidence. I did not find him to be evasive, misleading, or argumentative. While I acknowledge he may have yielded under cross-examination (which I would expect of any witness), I did not find him to be deceptive or untrustworthy. In my view, Mr. Ingalls' failure to take reasonable measures regarding the reporting of the Trade Sales has less to do with any deceitful intent and more to do with him participating in Statesman's "not a quitter" culture which justified ends over means.

[169] I find there is insufficient evidence for me to fairly conclude that Mr. Mann knew about the nature of the Trade Sales and the existence of the side arrangements with respect to the sales to NORR, S&V, and Home Solutions. From all accounts however, Mr. Mann was not a passive observer with Statesman's business and took a keen interest and active involvement in sales. In my view, Mr. Mann should have inquired about the sudden upsurge in sales being reported to him by Mr. Meiner starting in November 2009, when sales were otherwise moribund. But I must also recognize that Mr. Mann was distracted by serious health issues in the spring of 2010 for which he travelled to the US for treatment. I do not find it would have been reasonable for him to review every e-mail or to follow up on each telephone call particularly given that Mr. Meiner was responsible for the Project's day-to-day affairs.

[170] Mr. Ingalls and Mr. Mann vehemently assert they would never have presented the Trade Sales to BMO as pre-qualifying EPAs. Mr. Mann minimized the purpose of reporting sales information at all. He testified he could never be sure whether a sale would ultimately close, that finalizing a sale "is a process, but it changes at the 11th hour", and that sales reporting, at least between the intervals at which a new funding facility is sought, is information the bank doesn't give a "rat's behind" about. Whatever views Mr. Ingalls and Mr. Mann may honestly have held in this regard, it clear that from November 2009 up to the June 2010 MC Meeting, Mr. Ingalls presented the Trade Sales as legitimate EPAs when he understood his fiduciary obligations included duties to provide transparent financial reporting, to correct inaccuracies, and to qualify information so that it could be properly understood, particularly during a period of time when he knew his reporting was being relied on and that people trusted his work.

[171] I appreciate Statesman's argument that the Trade Sales account for such a small percentage of its overall sales (7% of total sales for Buildings A and B) that they would have had no material impact on the Project. I disagree. The Trade Sales were in Building B and accounted for approximately 30% of its sales. More importantly however, SMBI's representations of the Trade Sales as otherwise legitimate EPAs engaged SMBI's core obligations to act in good faith and to

honestly discharge its contractual obligations as well as Mr. Ingall's, and Mr. Meiner's fiduciary obligations.

M. Lowering the Pre-Sales Threshold

[172] Despite Mr. Mathison's and Mr. Mann's agreement in August 2009 not to proceed with the Project unless there was a material improvement in sales, from October-November 2009 to the spring of 2010, Mr. Mann and Mr. Ingalls were actively engaging BMO in renegotiating the terms of its Facility 2 loan.

[173] Mr. Hamilton testified that with the condominium market softening over the summer and into the fall 2009, Mr. Ingalls and Mr. Mann were "anxious" to start funding Phase 2. With respect to Statesman pushing this issue, he described Mr. Ingalls as a "dog on a bone":

> [Mr. Ingalls] was giving me periodic snapshots of what the debt would look like vis-à-vis closing and presales in -- in both buildings, closings. I believe he updated that -- his snapshot or his spreadsheet every hour. He was that hands-on with this thing. And he was very anxious to convince me that we should continue to fund -- or not "continue", to start funding the second building for -- for both our benefits on the basis of significant value of the project, the remaining project.

[174] In October 2009, Mr. Mann sent Mr. Hamilton an e-mail, exploring what financing options would allow Statesman to move ahead with Phase 2. He noted that BMO required another 16 pre-sales before meeting its revenue threshold for vertical construction.

[175] Mr. Mann is not noted as having made mention of his intention to proceed with Phase 2 at the October 2009 MC Meeting. Mr. Meiner reported that the building permit for Phase 2 had expired since SMBI was not doing any work. At this point, the Project was just short of being $1M overbudget. Mr. Mathison was expressing his unwillingness to make any further Interim Loans although given the Project's bills, he agreed to provide a further Interim Loan of $400,000.00. The Management Committee expressed concerns about the Project going overbudget and the minutes indicate that "over expenditures should be approved per the agreement made between Statesman and Matco." Mr. Meiner agreed to review the Agreements to determine how the parties had initially agreed to deal with Interim Loans. It was agreed SMBI would provide Mr. Mathison with a "detailed list of overages." The minutes indicate Mr. Ingalls had documents ready for the budget and "will provide a copy to [Mr. Mathison] (require agreement)." The minutes confirm that the open house for the completion of Building A was scheduled to take place in early November 2009.

[176] Mr. Ingalls continued to press the issue with BMO regarding the lowering of the presales threshold required of BMO's Facility 2 loan. In an e-mail to Mr. Hamilton in November 2009, Mr. Ingalls stated:

> [w]e need to start phase 2 in early 2010. This will allow the project to become cash positive and ensure BMO debt is repaid and then allow new funding to be put in place for Phase III and IV... I have attached a Pre-sale analysis - the 3rd option at the bottom shows our preferred solution which refinances the finished (or near finished) phase 1 inventory resulting in 14 additional Phase II pre-sales required to start funding Phase II. With the interest generated by the grand opening and a

> revived real estate marketplace, I understand we will be able to deliver at least 14 more contracts within about a month.
>
> Please review the attached and move towards making this happen (or please provide any other alternatives to begin Phase II). [Mr. Mann], [Mr. Meiner] and myself would like to meet with you, Dean and Marc to discuss on Thursday or Friday of this week. This issue is of critical importance to Statesman as decisions regarding our 2010 operations need to be made shortly.

[177] Mr. Ingalls offered suggestions, preferring BMO to refinance the remaining Phase 1 inventory which would, in conjunction with new pre-sales, allow funding for Phase 2. Mr. Mathison testified he was unaware of these discussions.

[178] In January 2010, Mr. Hamilton wrote back to Mr. Mann, Mr. Meiner, and Mr. Ingalls:

> Further to our recent discussions and your letter of October 9th wherein you requested an amendment to the presales requirements to enable you to commence the vertical construction of Phase 2 by February 01, 2010.
>
> You have indicated that you will commence construction of Phase 2 in February 2010, and the Borrower will pay Project Costs in respect of the Phase 2 from its own resources.

[179] I agree with Statesman that in principle, there was nothing sinister about Mr. Ingalls seeking a variation of the Credit Agreement. Mr. Ingalls was entitled to negotiate the best deal he could for Statesman. And, as Mr. Mathison acknowledged in his read-in testimony, he left it to Statesman to negotiate the various loan agreements. However, I find Mr. Ingalls should have apprised Mr. Mathison of these negotiations considering Mr. Mann's and Mr. Mathison's agreement reached in August 2009 and Mr. Hamilton's suggestion which envisaged that Statesman and Matco would have to pay for the Project's costs from their own resources. This would have required Matco to make further Interim Loans despite Mr. Mathison's objections of doing so without having obtained secondary financing.

[180] At this time, Mr. Hamilton was not yet prepared to take Mr. Ingall's proposals to BMO. Mr. Hamilton recalls he needed "liquidity on the project" and told Mr. Ingalls that if he could not get presales, he needed to replace these with additional equity. Mr. Hamilton testified he "looked very closely" at the presales numbers to determine whether there was a basis for BMO to review its financing which, "at the end of the day," he concluded, "it wasn't." He testified that in the late fall of 2009, he received from Mr. Ingalls hourly "very up to date" presales and the level of outstanding debt. Mr. Ingalls' sales numbers included the Trade Sales as they were being finalized.

[181] Despite Mr. Hamilton's initial reluctance to renegotiate BMO's funding model for Phase 2, Mr. Ingalls continued to advocate for the construction of Phase 2. In an e-mail to Mr. Hamilton in January 2010, Mr. Ingalls attached updated financial and sales analysis stating, "upon review of the substantial coverage BMO has at Riverside, it just makes so much sense to both parties to start funding Phase II". Mr. Hamilton replied to Mr. Ingalls the next day:

> Once again, it is not about how much security coverage the bank has, it's about liquidity, i.e., presales... Please be clear, we are also most anxious to start funding Phase 2, but not until pre sales requirements have been achieved.

[182] An agenda was prepared for a Management Committee meeting scheduled to take place in January 2010 which included the usual budget updates. The agenda does not include the presentation of the budget for Phase 2 or the commencement of construction of Phase 2. The meeting did not occur and was postponed to February 2010 (the "February 2010 MC Meeting"). In the meantime, Mr. Ingalls was keeping Mr. Mann and Mr. Meiner current on sales and the numbers required to meet BMO's revenue threshold required for Facility 2 funding. The evening before the February 2010 MC Meeting, Mr. Ingalls provided Mr. Mathison, Mr. Hill, Mr. Mann, and Mr. Meiner with a BMO debt analysis indicating 39 units had sold in Phase 2 with revenues totalling approximately $18M. His sales numbers included the Trade Sales.

[183] The minutes of the February 2010 MC Meeting (which Mr. Mann did not attend due to health issues) indicate TDL would be "on the ground" by March 2010 and that its scope needed to be clarified once the engineer which SMBI had retained to design the superstructure for Building B finished its design. The Management Committee discussed the TDL sale and the minutes note, "Mr. Mathison requires details of TDL's purchase for Phase 2 and any other purchases with work trade-offs (work in lieu of deposits)." Mr. Ingalls was assigned to provide the information. Mr. Ingalls does not recall whether he got back to Mr. Mathison. There is no mention in the minutes of a discussion regarding the budget for Phase 2, approval of trade contracts or of Mr. Ingalls' discussions with Mr. Hamilton. The minutes do not indicate that SMBI had commenced construction of Phase 2 or was planning construction but, to the contrary, note:

> [Mr. Meiner] replies that there is no significant construction being performed onsite and therefore do not require full onsite staff to perform this duty. Once Phase 2 construction starts; we will require onsite full time safety.

[184] From February 2010 onwards, Mr. Ingalls continued to provide Mr. Hamilton with numerous updates, including sales summaries. Mr. Hamilton testified that while the BMO loan documents did not require Statesman to provide monthly sales listings, he continued to rely on the accuracy of Mr. Ingalls' information which he expected was "entirely accurate", that the signatures and information contained in the sales agreement were true and accurate, that the sales would have satisfied the definition of an EPA, and that none of the sale agreements were subject to amendments. He testified he would want to be aware of any side deals that did not require a purchaser to close and that he considered such an arrangement to be an "unusual condition" that BMO would have to specifically accept. He does not recall such a case having arisen because Statesman had not made him aware of any.

[185] In early 2010, Mr. Mathison received two proposals regarding secondary financing, an issue that he had doggedly pursued with Mr. Meiner, Mr. Mann, and Mr. Ingalls. He testified he was "crystal clear" in his recollection that he "unequivocally communicated" to Mr. Mann and Mr. Ingalls that he had made it "fundamentally clear" that repayment of the loans was a precondition for approving Phase 2 construction. However, he could not recall whether he said so at a meeting or in an e-mail and Mr. Ingalls does not recall him having raised the issue until the June 2010 MC Meeting. On this point, I prefer Mr. Ingalls' testimony. Regardless, there is little question that from

2008 to 2010, Statesman understood that while Mr. Mathison was prepared to fund the Project's over expenditures through Interim Loans, he was unhappy doing so and was looking to have the Interim Loans repaid.

[186] In March and April 2010, Mr. Mathison was once again pressing the issue regarding secondary financing, particularly given Mr. Milne's formal request, made to SRQL in February 2010 for repayment of loans of $500,000.00 that he had made as part of the Stateman group to RQLP. Mr. Mathison wrote to Mr. Meiner, "I would strongly suggest we work towards obtaining a loan which allows us to retire the debt resulting from the partners' advances", "... the loans we advanced should be paid out as discussed", and "[a]s you know my view is that we should finance the second phase in a manner that allows all the advances to be repaid". However, as the secondary financing proposals were not sufficient to pay out BMO's outstanding loan and the Interim Loans, the issue was left unresolved.

[187] On April 13, 2010, Mr. Ingalls sent his sales summary, including the Trade Sales, to Mr. Hamilton, noting that revenue generated by presales exceeded the original target by $2.7M. He requested that BMO approve its Facility 2 loan. Mr. Ingalls testified he included the Trade Sales in his sales summary which he knew included the fraudulent NORR sale because it was his "standard practise to use my sales listing" and that the sales he presented were "an accurate list of the contracts... the partnership had entered into and... I wasn't about to change that for the purpose of, you know, a fairly high-level discussion to move the -- the financing forward". He was hopeful that Statesman would replace the questionable sales with new ones. In respect of the sale to NORR, he explained:

> ...if you're referring to the NORR contract, it would --yeah. It was a contract. It would have to be dealt with at some point so it would, I guess, remain a contract until it was dealt with and wasn't a contract. So kind of a separate issue from its not being used and presented to the bank for that presale test. You know, we never got there anyway, but it wouldn't have been in there.

[188] Mr. Ingalls' testified that he raised his concerns regarding the Trade Sales with Mr. Kirkham (who by then had replaced Mr. Hamilton) in the spring of 2010:

> I did have concerns. So I raised that with Mr. Kirkham prior to one of the times I sent the list...
>
> ...
>
> So, before I sent it, I -- phone call with [Mr. Kirkham], I said, Okay, I'm sending you the sales list. I do have concerns about a number of units on this, but let's work with these numbers. And we agreed that, you know, we'd deal with the concerns when the – when the time came for – for figuring out if we'd met a presale test or not.

[189] Mr. Ingalls denied intending to mislead BMO about the status of the Trade Sales. He explained:

> No, no -- no intention. I brought it up with [Mr. Kirkham]. We -- it -- so, you know, we worked with the numbers. And then ultimately, it's -- to some extent, it doesn't really matter until you -- you're comfortable, you think you've met a presale test. If you haven't met it, if the bank says you haven't met it, they won't fund. And then you wait a little longer. And if the bank thinks you've met it, then they would fund at that point in time.

[190] When cross-examined, Mr. Ingalls testified that his comments to BMO were "more of a generic statement, not specific certainly to [the NORR sale]." Given that Mr. Kirkham did not testify, I find there is insufficient evidence for me to conclude that Mr. Ingalls discussed the Trade Sales with sufficient specificity that would have permitted Mr. Kirkham to appreciate that they were problematic and might not constitute legitimate EPAs. There is certainly no evidence in any of Mr. Mann's or Mr. Ingalls' subsequent communications with Mr. Kirkham that Mr. Kirkham had been apprised by Mr. Ingalls of the issues pertaining to the Trade Sales.

[191] In April 2010, and as part of BMO's funding requirement for Phase 2, Outlook Realty Advisors Inc. ("Outlook") prepared an appraisal for BMO regarding Phase 2. Mr. Ingalls understood the appraisal would be relied upon by BMO as a precondition for continued funding. Mr. Ingalls was asked to provide Outlook with SMBI's updated sales and budget information, which included the Trade Sales. Statesman argues the appraisal does not actually use these in its valuation. I dismiss Statesman's argument because whether Statesman is correct matters little and ignores that whatever use Outlook may have made of the sales reports does not obviate Mr. Ingalls' duty to be forthcoming in his (and SMBI's) reporting obligations.

[192] Towards the end of April 2010, Mr. Meiner sent Mr. Mathison an e-mail, reporting:

> [w]ith respect to financing... We just met again with BMO last week and have sent them the latest sales information and they have said that it appears we have made the pre sales targets. We should hear next week on their decision.
>
> Here is the latest on our costs and sales for both Phases. I will sit with [Mr. Ingalls] in the morning... and we will send you a clear outline of where we are with obtaining BMO financing without the 2nd place charge to begin construction.

[193] In an e-mail dated April 28, 2010, to Mr. Mathison, Mr. Meiner advised "it appears we have made the presales targets. We should hear next week on their decision." Mr. Meiner provided Mr. Mathison with Mr. Ingalls' updated sales information. I note that sales had not improved much in the spring of 2010. In his reporting to the Management Committee for each of the months of March to May 2010, Mr. Ingalls referred to, a "difficult inner city condo market" with units being sold without their accompanying parking stalls at a reduced price of as much as $45,000.00 with significant incentives such as free upgrades and additional price reductions of $20,000.00 - $30,000.00.

[194] Mr. Mathison testified that while he was aware Statesman had been negotiating with BMO to extend terms, he did not have "any specificity on what was being negotiated" and that he was:

> ... surprised sales had progressed that much, but I -- I hadn't seen anything with respect to financing or really anything with respect to Phase 2 at the time, and I...

> noted that obviously they had been keeping BMO in the loop and -- and up to date, but I hadn't appreciated that there was a different arrangement with BMO being negotiated or anything like that.

[195] At around this time, Mr. Ingalls provided Mr. Kirkham with an updated sales and revenue summary stating "we have met our original pre-sale target which should allow funding with a draw request next month". By the beginning of May 2010, Mr. Meiner was reporting to Mr. Mathison that "we are also working with BMO as we have achieved certain sales over the past months, and we are very close to getting the BMO financing arranged for the start of construction on Phase 2". Mr. Meiner's sentiment was echoed by Mr. Ingalls in his monthly reporting to the Management Committee for the month of April 2010 wherein he stated, "[w]e continue to work with BMO, and I am expecting documentation in about a week which should allow Phase II funding to commence". Mr. Ingalls added, "Phase II BMO financing now appears likely." However, Mr. Ingalls had not yet provided Mr. Mathison with a Phase 2 budget to consider, and Mr. Mathison had not approved moving ahead with vertical construction of Phase 2.

[196] BMO was considering a new pre-sales threshold for Facility 2 funding which shifted the qualifier from revenue (75% of the Facility 2 loan amount) to sales (166 EPAs). Mr. Kirkham provided Mr. Ingalls with the proposed terms. Mr. Ingalls reported back to Mr. Mann and Mr. Meiner that there were 161 completed sales, which meant that only 5 more sales were needed by the end of June 2010.

[197] In the beginning of May 2010, Mr. Mann notified his sales team of BMO's revised terms. He targeted the middle of May for the commencement of Phase 2 vertical construction and pushed his team to move sales stating, "[w]atch how fast we move forward with the construction activity in May!"

[198] In the middle of May 2010, Mr. Kirkham asked Mr. Ingalls to provide him with up-to-date sales summary for both Phases 1 and 2 so he could complete the financing arrangements. Mr. Ingalls replied, "[h]ere is the right up-to-date info. We have added one new Phase 2 sale and firmed up 145 this week":

> 160 unconditional contracts are signed. The 5 conditional deals marked with a checkmark should firm up in another week which will put us at 165 deals which is 1 short of the 166.

[199] By this time, Mr. Ingalls had prepared a detailed budget for Phase 2 for Cuthbert Smith to review although he did not provide a copy to Mr. Mathison, Mr. McCorkindale, or anyone at Matco. On May 12, 2010, Mr. Meiner asked to arrange a meeting of the Management Committee to discuss, amongst other things, "Phase 2 go forward" and "construction". He advised Mr. Mathison, "[w]e have just met with BMO, and they have agreed to fund Phase 2. The commitment letter will be here tomorrow once received I will forward over to you."

[200] On May 31, 2010, BMO provided Mr. Ingalls with a draft of the Third Amendment. Several days later, Mr. Kirkham advised he was putting in the credit request for Phase 2. On June 2, 2010, Mr. Kirkham requested Mr. Ingalls' latest sales summary. Mr. Ingalls reported 163 firm sales with 3 sales expected to close by the middle of the month. As with all of his previous reporting to BMO,

his sales information included the Trade Sales (totalling approximately $7.5M). On June 8, 2010, Mr. Ingalls wrote to Mr. Kirkham advising:

> [w]e are meeting with [Mr. Mathison] tomorrow and would really like to have the final paperwork available for Phase 2 financing. Please let me know if this is possible. For your information, two more deals are firmed up, and the sales centre was very busy this weekend.

[201] Mr. Mathison testified Statesman first provided him with the Third Amendment at the June 2010 MC Meeting and denies Statesman had made him aware of it any earlier.

[202] In principle, I do not find that Statesman's negotiation of the Third Amendment is problematic. As Mr. Mathison acknowledged, it was up to Statesman to manage the Project's funding. However, the issue was Statesman's continued presentations of the Trade Sales to BMO as legitimate EPAs when Statesman knew BMO's agreement to the Third Amendment depended entirely on the liquidity generated by sales and on BMO being provided with accurate sales information.

[203] Statesman argues that the presentation of the Trade Sales to BMO is not problematic because these had not yet been presented for the purpose of qualifying for Facility 2 funding. I disagree. Stateman and SMBI knew it had an obligation to provide BMO with accurate financial reporting, particularly at a time when BMO was specifically relying on SMBI's sales summaries to decide whether it was prepared to agree to the Third Amendment. Statesman and SMBI cannot pick and choose when, to whom, and under what circumstances they will honestly fulfill their obligations. Further, Statesman's negotiations were premised on commencing construction of Phase 2 in May 2010, which it had not disclosed to Mr. Mathison and the Management Committee. I agree with Mr. Mathison that this, coupled with the actual commencement of Phase 2 construction was presented to him by Statesman as a *fait accompli* that would, if not objected to, have committed Matco to make future Interim Loans to deal with unfunded expenses, something Mr. Mann, Mr. Ingalls and Mr. Meiner understood Mr. Mathison adamantly opposed.

N. Commencing Phase 2 Construction

[204] At trial, Mr. Mann agreed that the commencement of construction of Phase 2 was a "material" component of the Project. His e-mails to the sales team in the spring of 2010 anticipated that vertical construction of Phase 2 would begin in mid May 2010, although SRQL and Mr. Mathison were not similarly informed.

[205] Mr. Hill does not recall if he knew that construction on Phase 2 would begin in the spring of 2010. In his handwritten notes from a budget meeting in November 2009, he wrote, "Phase II - start Feb 2010". His handwritten notes from a budget meeting in October 2009 say:

> <u>Phase II – Construction</u>
>
> Best Case Feb/Mar
>
> Opt (optimal) Apr

Worst June

[206] Mr. Hill was asked whether these notes anticipate construction commencing in Feb/March (best case), April (optimally) and June (worst timing). He could not recall. Mr. Hill does not remember any specifics from the budget meetings he attended other than to say he knew Mr. Mathison was interested in knowing when construction would commence on Phase 2 and that he would have conveyed this information to him. Mr. Hill's evidence holds little value and I found him to be a most unhelpful witness. He does not recall informing Mr. Mathison of the specifics of any budget meetings, does not recall whether there were ever any instances at any of the budget meetings where a matter of significance came to light that drew his particular attention, and does not have any specific recollection as to any of the discussions or topics that were covered at the budget meetings. It is unclear whether Mr. Mathison informed Mr. Hill what constituted a matter of significance that he wanted reported but even if he did, it does not appear Mr. Hill did so.

[207] In mid-May 2010, Mr. Mann, Mr. Meiner and Mr. Ingalls were advised that structural steel would arrive on the Project site by May 20-21, that steel erection would commence on May 24 and that vertical construction would be visible by May 31.

[208] It is odd that Mr. Mathison would have had no inkling that construction on Phase 2 had commenced in the spring of 2010. Mr. Veldhoen testified he visited the site regularly from 2007-2010. When he was not on site, he would drive by weekly to see where things were at. He recalls chatting with construction personnel, attending weekly site meetings, budget meetings and several meetings of the Management Committee. He testified that from 2007 to 2010, he was in regular contact with Mr. Mathison and would update him "very generally" on how things were progressing and would raise any concerns with him. Mr. Veldhoen remembers periodically speaking with TDL personnel, some of whom he had come to know. He testified that he was aware construction on Phase 2 had commenced but does not appear to have reported this development to Mr. Mathison.

[209] Mr. Jeff Mann testified that from early 2010 to June 2010, he attended the site almost daily. He recalls speaking frequently with Mr. Veldhoen, who was on site regularly:

> [m]y objective with [Mr. Veldhoen] was to show him what a great job we could do without [MBS] causing strife that they did on Phase 1 and therefore walking Phase 2 as we were erecting these steel panels under TDL performing the contract on that building, I would walk [Mr. Veldhoen] through that phase and show him how it's going together, the differences between the two systems, given that there's a patent on both. So they are distinctly different but similar. And I would outline those details to Wayne.
>
> And [Mr. Veldhoen] was very complimentary of our Phase 2 prowess. He was saying, What a great job it looks like in comparison to the MBS start. And so he was very complimentary of our work on Phase 2.
>
> ...
>
> We walked the project, and I very specifically wanted to impress [Mr. Veldhoen], knowing that it was a difficult venture with MBS on the first building. And so my objective was to dazzle.

> And so I would show [Mr. Veldhoen] the details of this system and why it's different and the patents and really the intricacies of what we're doing, just how the joists tie in differently to the concrete topping than the MBS system. They're both patented systems. And I would just like to inform [Mr. Veldhoen] of as much information as I could.

[210] When asked whether Mr. Veldhoen raised any concerns about his involvement on the Project, Mr. Jeff Mann testified:

> No. He was very -- I mean, I was out there with [Mr. Veldhoen] for several years between my Washington time, but -- so I wasn't -- if -- for me with [Mr. Veldhoen], it was, Hi, Wayne. How are you? And how can we accommodate? What can we do to update you and walk through and show you the project? And -- no, [Mr. Veldhoen] was very complimentary of our progress on Phase 2.

[211] Mr. McCorkindale testified he first became aware of a "ramp-up" meeting to discuss Phase 2 construction at a meeting with SMBI in May 2010. Both Mr. McCorkindale and Mr. Hill were present at this meeting on May 18, 2010. Mr. McCorkindale recalls the meeting was a "preparation meeting for Phase 2" but otherwise does not recall specifics. He asked Mr. Meiner if Mr. Mathison had approved Phase 2 construction to which Mr. Meiner said no. Neither Mr. McCorkindale nor Mr. Hill recall advising Mr. Mathison about the meeting.

[212] Mr. Pollock testified TDL was on-site and was performing work on Building B in late April-early May 2010. By that time, TDL had erected a large outdoor tent on site, measuring some 80 feet long and 5 feet wide which contained a shop facility to build many of the construction components used in Building B.

[213] Mr. Ingalls testified that prior to June 2010, Mr. Mathison had not told him *not* to commence Phase 2 construction. Mr. Ingalls was asked why construction on Phase 2 commenced prior to the finalization of the Third Amendment. He explained:

> You know, in general, that's how the business works. You -- in order to get a building done, you need to start pushing along -- you know, you gotta work on your -- or financing which takes several months. So we had started on that process and were confident that we'd get there.
>
> In order to eventually access your financing, you have to get your trades under contract as we saw and have them doing work because you have to -- the owners have to pay – pay the first equity, and then the bank will -- will come in and pay the rest of it.
>
> ...
>
> So this is what the partnership did with facility A. This is what the partnership did with... facility 1, facility 2, and it's what I've seen in just about every real estate development I've been involved in.

[214] As discussed in the next section, an example of pushing on with the work is a contract SMBI awarded to Hoover on April 16, 2010, for plumbing, gas, and HVAC for Phase 2 in the sum of approximately $3.6M. Hoover was instructed to commence shop drawings ‘asap’ and was advised a standard form contract would be signed in the Statesman office in 1-2 weeks.

[215] In reply to Mr. Meiner’s e-mail of May 12, 2010, advising that BMO had agreed to fund Phase 2 (see above at para 199), Mr. Mathison replied, “I understand that Phase 2 has commenced already. Please confirm.” Mr. Meiner answered:

> Phase 2 had a commencement in the parkade since Feb 2010 to ensure the building permit stays active. A couple of concrete piers were poured yesterday by Guisti. The wall panels are starting to ramp up in the onsite pre-fab shop starting today, full production of wall panels by the 17th of May, structural steel arrives on site 18th -19th of May and erection of steel on the 20-21st of May.
>
> TDL’s crane for standing steel arrives on the 17th of May.

[216] Mr. Mathison says this is the first time he was advised that construction on Phase 2 had commenced. He recalls having learnt at the October 2009 MC Meeting that the building permit for Phase 2 had expired because work was not being done. The Management Committee agreed that Statesman would pay a fee and seek an extension of the permit. However, Mr. Mathison testified he did not appreciate it was the City’s position that work had to commence for the permit to be reinstated. His understanding is bolstered by a letter sent by The City of Calgary in March 2010, advising that if work had not resumed by September 2010, the permit would expire but that a further reinstatement of the permit could be sought. I agree with Mr. Mathison there is nothing in the minutes of the October 2009 MC Meeting or in The City of Calgary’s correspondence that would have alerted him that construction of Phase 2 had or would begin.

[217] Mr. Mathison was aware of the minutes of the February 2010 MC Meeting that referenced TDL being “on the ground by March 1st, 2010” but understood TDL’s presence was to continue with its remediation work of MBS’ work on Building A. He was challenged on this point. He acknowledged attending the open house for Building A in November 2009. By then, Building A was mostly complete with occupancy starting. Mr. Mathison recalls going on a tour of the first floors of the building and remembered seeing areas of unfinished drywall where last minute work was still underway. However, Mr. Mathison’s recollection does not accord with Mr. Veldhoen’s opinion, who testified that once Building A was ready for occupancy, TDL had finished its work on Phase 1.

[218] On March 15, 2010, Mr. Ingalls provided Mr. Hill with a Statesman newsletter which publicly reported on the status of construction. The newsletter indicated that Building A had reached final building occupancy and that “now that the building is complete, we are moving towards starting Phase 2. We continue working in the Phase 2 parkade until weather improves, upon which time we will be starting on the superstructure. Anticipating Phase 2 start date is mid March”.

[219] Mr. Mathison acknowledged receiving an e-mail from Mr. Meiner at the end of March 2010 advising that TDL would “continue to work on site starting in the next few weeks and that

will ensure we are moving forward" but did not know what "work" Mr. Meiner was referring to. Mr. Mathison rejected any suggestion that Mr. Meiner was specifically referencing TDL's work for Phase 2 and he testified he was unaware that Hoover was installing plumbing and mechanical work in Phase 2.

[220] Mr. Mathison testified that he was in a "state of disbelief":

> I was aghast, as I mentioned earlier surprised, disappointed. You almost can't encapsulate the feelings of this kind of stuff because we of course, had been having discussions about all this -- these matters in the financing of the loans and being a precondition. And we have all our arrangements which are in place, notwithstanding that they hadn't been followed as carefully. And so I was -- I was very, very disappointed, angry, and frustrated with the whole process.

[221] He testified that there had been no discussions or approvals given regarding contracts for Phase 2 work, no discussions had taken place regarding the commencement of Phase 2 vertical construction, and that he was not aware of any discussions or presentation of a construction budget for Phase 2. While I agree that Mr. Mathison would have been taken by surprise regarding the commencement of vertical construction of Phase 2 and that no prior approval from him was sought, I can only surmise that he was either not sufficiently engaged in the Project through regular updates from Mr. Veldhoen and Mr. Hill, or he had not properly tasked Mr. Veldhoen and Mr. Hill with what questions to ask and what information to report. In any event, there was enough discussion about the anticipated construction of Phase 2 which was referenced in a progress report issued to the Investors by the Income Trust in March 2010 (see below under heading 'S'), that if Mr. Mathison didn't know, he should have known or should at least have made inquiries about when construction was scheduled to begin.

[222] Statesman argues the informality with which the Management Committee approached approvals for Phase 1 and in the way it conducted itself ought similarly to apply in respect of approvals required for Phase 2 and that, in keeping with his previous conduct, Mr. Mathison ought reasonably to be taken to have approved Phase 2 absent his express objection. Statesman further relies on the meaning of "Project" in the USA and DMA, defined to mean one project comprising of 6 phases rather than 6 separate projects.

[223] I disagree. I do not see how it can be reasonably argued that the parties' past conduct regarding informal approvals regarding the commencement of construction, the finalization of trade contracts (see below in the next section), or the presentation of a Phase 2 budget, and Statesman's interpretation of "Project" (with which I agree), could similarly apply in light of Mr. Mann's and Mr. Mathison's agreement reached in August 2009 not to proceed with the Project. Mr. Mathison was entitled to take Mr. Mann at his word and would reasonably have been surprised to learn of Mr. Mann's true intentions and SMBI's actions, none of which were communicated to him. In any event, Mr. Mann knew or ought to have known that in light of their very specific discussion in August 2009, no further progress on the Project with respect to Phase 2 should have occurred without the Management Committee's and Mr. Mathison's explicit approvals.

O. Unrecorded Trade Contracts

[224] In addition to having commenced construction on Phase 2 in January 2010, Statesman had finalized significant trade contracts for Phase 2 which were not contemporaneously recorded in SMBI's accounts payable ledger, disclosed in Mr. Ingalls' reporting to the Management Committee, or discussed at the February 2010 MC Meeting. Consequently, neither Mr. Mathison, Cuthbert Smith, nor BMO was aware of them.

[225] Mr. Ingalls testified about the process by which Statesman entered payables into its accounting system. It was a fairly straightforward process: invoices were date stamped when they were received and unless there was a specific issue, the invoices were recorded in Statesman's listing of accounts payable to be paid.

[226] The first example of such a trade contract was with Hoover. Mr. Ingalls and Mr. Mann testified they asked Hoover to start work to keep the building permit active before finalizing the contract. In January 2010, Mr. Purcell e-mailed Mr. Meiner asking when financing for Phase 2 would be done. Mr. Meiner replied, "just about." Mr. Purcell indicated Hoover had done "lots of work in the parkade" and would like to invoice some of its bill that month. Mr. Meiner replied, "[c]an you hold until next month". They agreed Hoover would "hold off on invoicing for the time being." In the beginning of March 2010, Mr. Purcell asked Mr. Meiner when Hoover would receive payment. Mr. Meiner asked Hoover to "hold off a little longer". On March 3, 2010, Hoover sent Mr. Meiner an e-mail, copied to Mr. Ingalls, inquiring whether Hoover could invoice its parkade work for Building B by the end of the month. Mr. Meiner replied, "yes, by the end of this month". Mr. Mann explained why Statesman asked Hoover to defer its invoice:

> ... we wanted to fund it, and so we asked if they would wait until July or August, and [they] agreed because we thought we would be there in terms of the number of precommitments in terms of our amendment number 3 to the credit agreement.
>
> ...
>
> We wanted to fund it through the bank draw and -- because it was going to be a fairly big tab. It was going to be over probably 500,000 and so we asked him just if you would consider working in carrying on without billing us until the month of July or August.

[227] Mr. Mann was asked whether "the delay you requested... was that solely tied to the expectation of when a bank draw would be available under facility 2?" Mr. Mann agreed there was no other reason and replied, "[t]hat was the plan." Hoover finally issued its invoice for work done on Phase 2 on March 25, 2010, in the sum of $850,000.00. However, the Hoover invoice was not date stamped and did not show up in Mr. Ingalls' reporting to the Management Committee until June 2010. At the time SMBI asked Hoover to perform work on Phase 2 and Hoover submitted its invoice, BMO had not yet approved funding for Phase 2.

[228] Mr. Hamilton testified that in the normal course, the credit agreements and "good banking practices" required Statesman's accounts payable listing to be accurate, transparent, and up to date. He testified he did not know that in the spring of 2010, Statesman was not properly recording trade contracts (including Hoover's) in its account payable ledger. He noted that no one from Statesman

had discussed the deferral of invoices with him or had asked whether this was an acceptable practice from BMO's perspective.

[229] The trade contracts that Statesman authorized in the months of February to June 2010 for Phase 2 construction total approximately $14.5M (the "Trade Contracts"). Statesman did not disclose these to Mr. Mathison until the June 2010 MC Meeting. Statesman entered into the Trade Contracts prior to finalizing its draft Phase 2 budget which occurred on May 31, 2010, and prior to Cuthbert Smith having prepared its preliminary report to BMO which occurred on June 17, 2010. Consequently, the Trade Contracts were unfunded expenses of which Matco was not aware which would have required it, had BMO not approved funding for Phase 2, to cover with Interim Loans.

[230] I agree with Statesman that in the ordinary course, lining up trades, organizing the construction schedule and signing trade contracts are steps that would naturally have preceded the commencement of construction on Phase 2. I also accept Mr. Ingalls' testimony that these were ongoing measures that had not yet been completed. However, the execution of the Trade Contracts was done without any authorization by the Management Committee, contradicted Mr. Mann's and Mr. Mathison's August 2009 agreement, and subjected Matco to potential liabilities which it was unaware of.

P. Mr. Jeff Mann's Involvement

[231] As discussed above under heading I, SMBI initially consulted Mr. Jeff Mann in the fall of 2008 to deal with the MBS issue. He returned to Calgary in early 2009. He testified that by that time, TDL had completed MBS' work to the top floor and roof and had corrected MBS' deficiencies. He recalls being on site daily. His job was to oversee the duties on the Project and his priority was to "get the building complete and occupied." He met with City officials and consulted with subcontractors, conducted site meetings, and conducted occupancy walk-throughs when Building A became ready for move-ins.

[232] It does not appear that his involvement on the Project was kept secret. He testified that he frequently interacted with Mr. Veldhoen, with whom he had "lots of interactions... daily throughout". He understood that Mr. Veldhoen's job was to report back to Mr. Mathison. He testified that in the interest of being "a communicative partner", "... I'd tour... [Mr. Veldhoen] around". In his read-ins from questioning, Mr. McCorkindale testified that he knew that Mr. Jeff Mann was working on the Project given his attendance at budget meetings. He testified that Mr. Mathison had not communicated his prohibition on Mr. Jeff Mann's involvement.

[233] In January 2010, Mr. Meiner requested that Mr. Jeff Mann "be 100% responsible" for the previous site superintendent's duties until the commencement of Phase 2. Mr. Jeff Mann saw the assignment as temporary because he was not a superintendent and he was, at the same time, overseeing all of Statesman's projects. He accepted Mr. Meiner's invitation. Mr. Jeff Mann attended the monthly budget meetings and participated in cost reporting meetings, attended variously by Mr. McCorkindale, Mr. Hill, and Mr. Elford, none of whom objected to his involvement.

[234] In April 2009, Mr. Mathison learned that Mr. Jeff Mann was assisting with the preparation of the Phase 2 budget. Mr. Mathison objected and invoked the USA which he believed prohibited family members from working on the Project. Mr. Mathison had always had strong objections to involving family members on development projects and insisted the USA incorporate his objection. Mr. Mathison testified that objecting to Mr. Jeff Mann's involvement was a "delicate" matter and that he discussed it over the telephone with Mr. Mann. Mr. Mann recalls this conversation occurred sometime in November-December 2009. He informed Mr. Mathison that Mr. Jeff Mann was Statesman's VP of construction, that he was taking on the acting project manager role due to Mr. Duplessis' departure and that Statesman, rather than RQLP was paying him. According to Mr. Mann, the issue "kind of dropped at that point." The outcome of this conversation is not in evidence, but Mr. Mathison agreed he did not formally pursue the matter any further with the Management Committee. Mr. Jeff Mann continued to be engaged on the Project into early 2010. Mr. Hill, who noted his attendance at a budget meeting in May 2010, wrote in his notes, "site supervision – Jeff Mann there now".

[235] In my view, Mr. Jeff Mann's involvement in the Project would have been obvious to any one of Mr. Veldhoen, Mr. Hill, and Mr. McCorkindale, all of whom were engaged by Mr. Mathison to report back to him. There is no evidence before me that would suggest that in the fall of 2009, Mr. Mann and Mr. Mathison resolved Mr. Jeff Mann's involvement on the Project. If Mr. Mathison had strong objections, it was incumbent on him to close the loop and formally address the issue at a meeting of the Management Committee, but he failed to do so.

Q. The TDL Promissory Note

[236] In early June 2010, Statesman owed money to TDL for work performed on an unrelated project in the US in respect of which TDL had registered a lien. Mr. Mann and TDL were negotiating a resolution. They agreed that Statesman would secure TDL's debt with a promissory note (the "TDL Promissory Note"). TDL's preferred position was to have the Manco Family Trust (Mr. Mann's private family trust) guarantee the loan, but this was unacceptable to Mr. Mann. Discussions ensued in April 2010 and, in response to the bank's query about which Statesman corporation would provide the guarantee and the relationship between that corporation and the Statesman entities involved in the project, Mr. Mann replied to TDL, "the company is the same one you presently have a multi-million dollar contract with... as you know".

[237] A meeting took place on Thursday, June 3, 2010, at Statesman's office between Mr. Mann and TDL's principal Mr. Pollock, to formalize various agreements, one of which was the TDL Promissory Note. Mr. Mann wanted to use "the name of the company... that's involved with the partnership of the Riverside Quays" but could not remember it. He asked an employee who told him it was SRQL. He added SRQL as the co-borrower and guarantor on the TDL Promissory Note and left the draft version, which contained various other handwritten notations, with Statesman's then legal counsel, Ms. Launa Schey, to type up. The next day, Mr. Mann asked Ms. Schey to compare the typed-up version with the version containing the hand-written notations because, as Ms. Schey testified, "[Mr. Mann] just wanted to make sure that it was correct, that there weren't any mistakes in it." Ms. Schey testified that on Monday, June 8, 2010, Mr. Ingalls came to her "quite alarmed", advising that Mr. Mann had mistakenly put SRQL as the guarantor rather than the Statesman Group of Companies Limited and that the "error needed to be fixed right away". She discussed the issue with Mr. Mann whom, she testified, seemed:

> quite concerned about it. He did not realize that he had made a mistake, and so he took it very seriously and wanted us to take steps immediately to have it corrected.

[238] TDL received the corrected version of the TDL Promissory Note by mid-June 2010.

[239] While Mr. Mann may have thought Statesman had addressed the correction, Mr. Mathison testified that at some point following the June 2010 MC Meeting, Mr. Meiner asked for a meeting:

> Mr. Meiner wanted to have a meeting with me, and for whatever reason, he felt it his obligation to disclose to me a fellow director of the general partner -- that [Mr. Mann] had entered into an arrangement where he provided the guarantee, specifically provided the guarantee or covenant of the Riverside project in support of a different project. And that was described to me that it was done with intent, and you know, the original arrangement had been changed by [Mr. Mann]. And he had, as I say, specifically used the project to support another project.

[240] Mr. Mathison denies knowing the TDL Promissory Note had been corrected. He testified he felt it was inappropriate to follow up with Mr. Mann to discuss the issue because of the "duplicity and misleading information" which he had received from Statesman following the June 2010 MC Meeting. He agrees he did not specifically ask Mr. Ingalls about the circumstances of the TDL Promissory Note because he believed Statesman "was endeavouring to deceive me with it." He recalled having a conversation with Mr. Pollock but did not ask him whether Statesman had revised the TDL Promissory Note. He made no further inquiries about the TDL Promissory Note despite Stateman's counsel advising him on June 30, 2010, that Statesman had corrected it.

[241] On June 24, 2010, Mr. Meiner provided Mr. Mathison with his draft resignation letter which in part reads:

> When I accepted the position as director of RQ (Riverside Quays) I had taken on the fiduciary duty of ensuring that there was full disclosure of all contractual responsibilities which would require to be fully disclosed to all directors and majority shareholders.
>
> I maintain I have disclosed all items large or small to all directors and major shareholders.
>
> I was questioned on June 22 in the office of Statesman whether I had shared the issue of [the TDL Promissory Note] with our major shareholder Matco. I had made the mistake of saying no as I felt I was under pressure by [Mr. Mann], [Mr. Jeff Mann] and [Mr.] Ingalls. I regret saying I had not. I know now that full disclosure is what I needed to do and am now doing so.
>
> Whether it was a clerical error or not as stated by [Mr. Mann] the [TDL Promissory Note] should have been disclosed. Therefore under my RQ responsibilities I disclosed the [TDL Promissory Note] to Matco our majority shareholder.
>
> I maintain that if this truly was a clerical error then it should have been disclosed.

...

[242] Mr. Meiner swore an Affidavit on July 4, 2010, which reiterates his allegations regarding the TDL Promissory Note. Mr. Meiner did not testify. I prefer the evidence of Mr. Ingalls, Mr. Mann, and Ms. Schey who provided a coherent description of the timeline and context surrounding the initial signing and rectification of the TDL Promissory Note. From their evidence, I conclude that the inclusion of SRQL as guarantor of the TDL debt was an honest clerical mistake which Statesman self-corrected, and that neither Mr. Mann nor anyone at Statesman intended to secure RQLP's assets in respect of Statesman's debt on an unrelated project.

R. The June 2010 Management Committee Meeting

[243] By the end of April 2010, Mr. Mathison believed it was "time to review operations". He was unhappy with the progress on the Lien Litigation, was concerned about whether he would ever obtain the secondary financing required to pay out his Interim Loans, and, despite having been advised by Mr. Meiner that construction costs for Phase 2 were $4-5M less than initially projected, was apprehensive about cost overruns and sluggish sales.

[244] The agenda for the June 2010 MC Meeting included an update on Phase 1, BMO financing for Phase 2, the Phase 2 go forward plan, construction costs and contracts, and scheduling. Mr. Mathison reviewed the agenda and suggested to Mr. Meiner, "we have not approved Phase 2 so I would like to suggest we... discuss the go forward plan for Phase 2 prior to the financing." In Mr. Mathison's view:

> [i]t seemed entirely presumptuous to discuss the financing for Phase 2 before Phase 2 had ever been considered by the committee or approved, so I thought we'd better discuss these matters in the appropriate order.

[245] On the morning of the June 2010 MC Meeting, Mr. Ingalls sent an e-mail Mr. Mathison, Mr. Meiner, Mr. Hill (whom Mr. Mathison was nominating to take Mr. Elford's vacant seat on the Management Committee) and Mr. Mann with the Third Amendment which he had just received. He advised a customer was closing the last of the 166 sale contracts the next day. He attached a financial snapshot indicating that 57 units had sold in Phase 2 for total revenue of almost $24.5M.

[246] Mr. Mathison described the June 2010 MC Meeting as "surreal":

> ... on cue it seemed from Mr. Mann, Mr. Sali breathlessly ran into the meeting with a scripted pitch on the notion that sales had increased dramatically since Phase 2 had commenced.
>
> ...
>
> We then turned our attention to [Mr. Ingalls] providing an update on Phase 1 wherein he reiterated that we were having -- still having difficulties with sales. And -- and if memory serves, that was 16 or 20% of the sales that we're having problem getting closed and were going to be remarketed.

We then started discussing sales, and in that context, [Mr. Mann] started explaining to me a Giusti sale. And the Giusti sale was -- was bizarre and very troubling in the sense that Giusti was being provided a huge discount on the purchase of two of the units that were put together or something, and he was using work that he'd done... in Phase 1 to pay for some of the Phase 2 suite. And the size of the discount was -- was I think $360,000 or something. So obviously a very material -- a very material discount in very unusual circumstances, very troubling circumstances because using work to pay for things etc. And all of that was done unilaterally by Statesman without any notice or discussion with us, and I didn't -- obviously was very surprised at that revelation and -- and said that.

And in the context of these things, I started asking more questions 'cause it was so unusual, and, of course, it was difficult to get information. Things were being conveyed reluctantly by [Mr. Mann], but in that context, he did say something that I found very unusual, and that is, that there were a number of trades that had expressed support by purchasing units, and he mentioned some number like 18 or something like that and then said, and some of them are actually expected to close, which I found once again, very, very unusual and troubling and started asking more, you know, questions about all the stuff associated with these sales and any other work sales. And the TDL matter also came up 'cause that was also a trade sale which had very troubling and unusual conditions or -- and they were being expressed -- it was very difficult to get the information out at that context.

We then actually discuss the Phase 2 financing. And [Mr. Ingalls] went through his analysis of Phase 2 and importantly indicated that there had been revisions to the banking arrangement, of which I was unaware, and that he had met the sales test or not quite met the sales test. There was -- the 166th sale was going to be completed the next morning, and the conditions would then be met for the sale.

He did acknowledge in that context, once again somewhat unusually, that that would have to be approved by the management committee.

We then turned our attention to, you know, Phase 2 in -- in general, and I noted in that context that I hadn't approved Phase 2. I wouldn't approve Phase 2 without all of the arrangements that we had previously discussed being taken care of and, particularly, a precondition that the MBS and other financing be repaid.

...

I hadn't seen anything relating to the construction contracts if such contracts had been let. And I said, there -- there does appear that... work is being done. I hadn't seen any construction contracts nor been made aware of any. I hadn't seen anything with respect to any of the financing that had been negotiated and was blissfully unaware, and all of this is -- in my judgment obviously --wholly inappropriate. Like, it was -- it was surreal.

...

> ... I think the Statesman folk are defensive and not being -- it's not easy to get answers when we're asking these questions. They're being evasive about things, which naturally arouses more effectively frustration on my part.
>
> ...
>
> ... it came up... that Statesman and [Mr. Mann] had unilaterally decided to pay their salesmen more money than we had agreed to. It was completely bizarre. Excuse me. Your -- your -- you have decided unilaterally to pay your people more. You are aware that we negotiated these agreements long and hard over several months with senior counsel on both sides, and so what would possess you to take it upon yourself to increase the quantum of money that you're paying because that's really our money that you're using and that's just not -- not the way it supposed to go. As I say, it was bizarre.
>
> And I asked for more information on the incremental and commissions that were paid outside of our arrangements, we were still discussing phase 2, and [Mr. Mann] also pointed out that because phase 2 is commencing and they hadn't even found a construction or project manager that [Mr.] Jeff Mann had been appointed construction manager. Naturally, this is something as well that had been specifically covered in our agreements. I voiced my extreme concern and displeasure that this stuff was going on in this fashion and said it wasn't in accordance with our agreements. We had these specific agreements that we had agreed to long and hard, and I was dumbfounded as to why they were being ignored and very angry about it.

[247] Mr. Ingalls' description of the June 2010 MC Meeting was that Mr. Mathison was "abrupt" and "quite rude" to Mr. Sali, "[y]ou couldn't discuss anything with Mr. Mathison that day", that Mr. Mathison was directing "some rage and swearing at Mr. Mann, you know, saying he had -- didn't know about this and hadn't approved it and was talking about stopping... the second building":

> ... that now was a pretty major construction site with a lot of guys on-site doing the framing. So all of a sudden, he's talking about stopping it. You know, I'm thinking that -- and this is -- this is crazy. The last time I saw [Mr.] Mathison was in our February meeting when most of the discussion was around moving forward and building the second building.

[248] The June 2010 MC Meeting concluded with an agreement between the parties to meet again on June 29, 2010. Mr. Milne testified that several days later, he received a telephone call from Mr. Mathison who vented his displeasure and confided that he planned to note Statesman in default (Mr. Mathison testified he does not have a recollection of this). Mr. Milne offered to be Matco's representative on the Management Committee. On June 12, 2010, Mr. Mathison replied, "[n]ot sure Statesman will be involved in this project..."

[249] Mr. Ingalls raised the issue of the Trade Sales with Mr. Mann (who had recently returned from the US where he was convalescing from surgery) for the first time on June 11, 2010:

> [s]o after that meeting, I didn't exactly know what was going on, who knew what. But I had to deal with that -- that issue, but also we had to deal with the development. We had to look to move forward with it, and the construction continued. And at some point, the financing would kick in. So start getting your head around that. Just about all the preconditions were met. And so we were focusing on -- on the presale condition. We knew now that it had to be 166 units, so I'm getting my head around that. And I described earlier my initial determination of my concern with some of the units that, you know, there was -- now is the time to deal with that.
>
> So this was an issue dealt with at the director level. [Mr.] Mathison on June 9th was now a very irate, different director. I wasn't sure exactly about [Mr.] Meiner. So this issue needed to be dealt with. So I -- at the director level, so I went to the director that I trusted and knew who would deal with it. And that was [Mr.] Mann. So I went to see [Mr. Mann].
>
> ...
>
> So I went and sat down with [Mr. Mann] in his office and -- and said, [Mr. Mann], we've got to deal with these presales and described, you know, the trade sales obviously. We need an absolute determination of -- of whether these things are -- are going to count or not count. You know, I said, we've got two that definitely are not going to count. So those aren't going anywhere, but -- but there's -- you know, the others need to be determined. And -- and I was not about to make that determination.

[250] Mr. Ingalls testified that his revelation to Mr. Mann about the Trade Sales appeared to be "news to [Mr. Mann], which I -- I had thought he had known all along, but that appeared not to be the case." Mr. Ingalls testified Mr. Mann said, "no better way to deal with them than by letting the bank deal with them." Mr. Mann phoned Mr. Kirkham and provided him with an outline of what Mr. Ingalls had reported. Mr. Mann recalls telling Mr. Kirkham:

> we wanted to do what was based on our -- our requirement with the bank, and we were not going to submit nothing that did not have the intention of closing. I made it very clear to him, and then I wrote it in a letter to him as well.

[251] I find that Mr. Mann's reaction on being informed by Mr. Ingalls about the Trade Sales is consistent with his testimony that he was not previously aware of them. Mr. Mann did not conceal what he had learned, did not interfere with Mr. Ingalls providing Mr. Mathison with Statesman's disclosure and did not subsequently reach out to Mr. Mathison to minimize what had occurred. I find that his response was forthright and appropriate. That being said, I disagree that Statesman voluntarily disclosed the Trade Sales to BMO. Statesman could have disclosed this information from November 2009 onwards but did not to so until issues came to a head at the June 2010 MC Meeting with Mr. Mathison demanding that he be provided full disclosure.

[252] Several days later, Mr. Kirkham contacted Mr. Ingalls, advising that he had been instructed to contact each of the purchasers to determine if they intended to close. This process occurred at

the Statesman office on June 21, 2010. A total of 14 of the Trade Sales were not going to close. In October 2010, only 155 sales were finalized, 11 less than the threshold sales required to fund Phase 2 construction pursuant to the Third Amendment.

[253] Mr. Mann testified he did not know the problematic sales were "created for the purposes of convincing the bank that funding should occur on phase 2". He explained that he would never have asked purchasers not to close on their sales, that he was not aware any of the trades had been "coerced" into buying a unit, or that trades who did not purchase a unit would be denied work. Mr. Mann testified that what he was "hoping for" was that the sales to trades would "actually close" and that "most of the trades sales that I've reviewed... would have been submitted." He testified that he did not withhold any information regarding these sales from Mr. Kirkham because Statesman operated:

> [u]nder what's called an 'open-kimono policy' at our office, and so we all have kimono, and we just talk, but it's not something that we're going to do anything devious. It just doesn't happen. We never do.

[254] Mr. Mann left it to Mr. Ingalls and Mr. Meiner to provide Mr. Mathison and Mr. Hill with Statesman's disclosure, including updated financial statements, copies of trade sale contracts, a spreadsheet with commentary on any problematic sales such as the Trade Sales or those containing non-standard clauses, disclosure of Statesman's contracts with its sales members and a listing of all sales incentives and commissions that it had paid.

[255] Statesman's disclosure, provided for the first time to Mr. Mathison, confirmed the following:

- The Giusti sale involved a credit given for work performed in the sum of approximately $340,000.00;
- The addendum attached to the S&V sale, the transfer of $35,000.00 in holdback funds to satisfy the deposit and the agreement to share any profit between Mr. Dhesi and RQLP on the profit realized from the sale;
- The TDL sale involved a credit of $150,000.00 in exchange for TDL reducing its contract for drywall work done on Phase 1;
- The addendum attached to the NORR sale, the transfer of an amount owing of approximately $23,0000.00 to satisfy the deposit and the agreement to share any profit between Mr. NORR and RQLP on the profit realized from the sale;
- The deposits which Bluebird paid for its sales were funded with the release of $44,000.00 in holdback funds;
- The informal arrangement entered into with respect to the remaining 9 unsold Hoover units which did not require them to be closed if they had not sold;

- The deposit paid on the Home Solutions sale was funded with the release of $17,500.00 in holdback monies and the "undocumented understanding" there would be no requirement to close on the unit;

- There was no expectation that the 3 unsold Legacy sales, whose deposits had been funded with the release of approximately $60,000.00 in holdback funds would be required to close; and

- The $30,000.00 deposit paid on the Metro Paving Sale was funded through the release of holdback monies.

[256] Mr. Ingalls' disclosure revealed other issues in respect of various payments and commissions paid to its sales staff and others:

- Mr. Sali's salary of $42,000.00 and commissions, which RQLP had paid. Mr. Ingalls was requesting that the Management Committee "approve of this relationship or advise otherwise so appropriate accounting can be done." In total, RQLP paid approximately $150,000.00 in referral fees;

- SMBI was paying another sales professional a monthly allowance of $1,000.00 plus commissions;

- RQLP had paid a total of $12,000.00 in referral fees, $6,000.00 of which RQLP paid to an SMBI employee. Mr. Ingalls was asking for the Management Committee's approval of the arrangement or to "advise otherwise so that appropriate accounting can be done;" and

- SMBI had purchased a bus for $30,500.00 (USD) to transport owners to and from downtown. Mr. Ingalls noted the Management Committee "will need to decide how to handle this transaction".

[257] Mr. Ingalls' disclosure included the following memo (the "Statesman Memo"):

> **Riverside Quays Phase II Trade Sales Contracts**
>
> Several trades were targeted to generate additional sales contracts at Riverside Quays. They have all done work on the project and were interested in maintaining a good working relationship with Statesman. Two of the purchasers, S&V Painting & Decorating Ltd and NORR Architects Planners were not comfortable with the terms of the contract (specifically the requirement to close) and as such additional written agreements were executed to address the requirement to close while still demonstrating support for Statesman and the Riverside Quays project.
>
> With these written provisions included with the sales contract, these two contracts would, of course, not be included when calculating whether a pre-sale test had been met for financing purposes when a bank draw is being requested.

Bluebird Sales Contracts

Gerry & Cindy Van Ginkel purchase of unit 544 and Ken Kirk purchase of unit 644 in Phase II of Riverside Quays dated April 10, 2010. The purchasers are part of Bluebird Contracting Services Ltd. which did some servicing work at Riverside Quays. Bluebird performed $44,000.00 worth of trucking work (to confirm when) at Riverside Quays which was delayed and never dealt with by ex-project manager Paul Duplessis. The $44,000.00 owing was applied as $22,000 to each of the 2 sales contracts as a deposit credit.

...

Hoover Mechanical Plumbing & Heating Ltd. sales contracts

Hoover arranged for 10 phase II sales contracts to be written by Hoover associated individuals (2 each from 5 different individuals) and utilized $397,597.10 of the Phase I mechanical contract holdback payment as the deposit requirement for these sales contracts.

An informal arrangement is understood that these units will continue to be marketed and the Hoover sales contract will be cancelled once a firm contract is received from a new purchaser and as such, the Hoover purchaser would never be required to close on the unit.

One of the ten sales contracts has been sold to a new purchaser and as such, 9 active Hoover sales contracts exist as of June 13, 2010.

Note that Hoover closed the full price purchase of unit 609 in Phase I at Riverside Quays and continues to own the unit.

Home Solutions Corporation Sales Contract

Home Solutions purchase of unit 249 in Phase II of the Riverside Quays dated May 4, 2010. The purchaser is one of the finishing contracts for Phase I of the Riverside Quays. A payment of $17,500 was made by Home Solutions Corporation for the deposit applied to this sales contract. A currently undocumented understanding exists that there will not be a requirement to close on the suite. The purchaser is requesting written confirmation.

Legacy Kitchen Design Group sales contracts

Legacy arranged for 3 phase II sales contracts to be written by 3 individuals associated with Legacy and utilized $58,186.80 of the Phase I cabinet contract holdback payment as the deposit requirement for these sales contracts. Units are...

An informal arrangement is understood that these units will continue to be marketed and the Legacy sales contract will be cancelled once a firm contract is received

> from a new purchaser and as such, the Legacy purchaser would never be required to close on the unit.
>
> Zero of the three sales contracts has been sold to a new purchaser and as such, 3 active Legacy sales contracts exist as of June 13, 2010.
>
> **Doug Hickey Sales Contract**
>
> Doug Hickey purchase of unit 233 in Phase II of the Riverside Quays dated May 5, 2010. The purchaser is an owner of Metro Paving and Roadbuilding Ltd who is the Phase I paving contractor. $30,000 of the Phase I contract holdback was transferred to become the deposit applied to this sales contract.
>
> ...

[258] Mr. Ingalls disclosed that a total of six units were being rented out on various terms, a purchaser had received a loan towards the purchase price of a suite, a credit of $71,800.00 had been applied against the cost of one of the units in exchange for a payable related to a crane rental, and there were a handful of suites that were likely not going to close and would have to be remarketed.

[259] Mr. Ingalls agreed that at this point, the Project was facing a "liquidity crisis" with "bills to pay, and so you got to figure out how to pay them." In his reporting to the Management Committee on June 15, 2010, he noted:

> ... cash balance is negative (cheques held back keep the bank account positive) and Statesman has inserted $75,000.00 to cover some small invoices. A/P balance at 5/31/2010, is $1,842,371 with current A/P at 6/15/2010 at $1,720,931. Interest of approximately $70,000.00 and GST of approximately $54,000.00 will also be due at the end of June. Only a small portion may be available from bank draws. Funding the liabilities or the alternative of dealing with the creditors is a critical issue for Riverside Quays.

[260] Sales improved for the month of June 2010, with Mr. Ingalls reporting 14 new sales. He and Mr. Mann believed Statesman would achieve the 166 EPA threshold by July or August by the latest.

[261] In an e-mail exchange between Mr. Ingalls and Mr. Mathison on June 16, 2010, Mr. Mathison asked, "[w]hat information and schedules have been provided to BMO in respect of these [Trade Sales]?" Mr. Ingalls replied that Statesman had not provided BMO with the Trade Sales for the purpose of satisfying BMO it had met the 166 sales threshold:

> ... [copies] of [purchase sale agreements] were given to BMO when the first pre-sale test was met back in 2008. No additional [purchase sale agreements] have been required by or given to BMO since. In order to access the Phase II financing under the unsigned third amendment, 166 sales contracts need to be sent to BMO. This is often one of the last steps required to begin advances and I only send our lenders

> copies of sales contracts for which, after my final review, I am satisfied meet the bank's requirements...

[262] At trial, Mr. Mathison testified how Statesman's disclosures impacted on his assessment about the Project moving forwards:

> ... I reiterate that none of the information that has been disclosed here, all of the unsavoury things and any of the budgetary matters, has been approved. None has even been brought to my attention before, and I point out that having it never having been brought to my attention, it is tough to approve. And I'm not approving anything until we're fully satisfied with all of the matters, including all of the pre -- pre-agreed-to protocols set out in our various agreements, none of which have been -- virtually none of which have been adhered to.
>
> And at this point, I'm actually still wondering -- you know, when you have this kind of a circumstance where stuff isn't in the financial records, and activities are going on which -- which -- which you are being misled about, as I say, the whole nature of your -- of your understanding of the relationship, the fiduciary relationship, is -- is gutted. Like, you don't know what to believe in any context. Like, what -- like, on all the other numbers, all the other stuff that -- you know, we've now had this cascade of information. I'm still asking at this point, Is there anything else you want to bring to my attention that's possibly imaginable?
>
> And, you know, in the context of approving a Phase 2, I think we've discussed that -- that in this context, particularly with Phase 1, sales were -- had -- had been proven difficult to close. There were budget overages. The budget overages didn't even include the MBS matters. We had at this point been disclosed of all of the contractual problems like the requirement to close that were brought to our attention. And so there's -- there's no notion of approving something. You'd need -- you know, all of the -- the preconditions that one would ordinarily do as set out in the agreement, and as prudent business people that you would do, hadn't been addressed.
>
> ...
>
> Well, the fundamental tenet of the relationship, of a fiduciary relationship in the context of the development management agreement and that of the -- the -- you know, being a director of a company. I'm a director of the general partner. And this is the company that is drawing on a bank -- or purporting to draw in short order on a bank facility where we know there has been misleading disclosure, miss -- actual, you know, contractual arrangements which have been -- which are not existent being presented to the bank. I mean, it was terrifying circumstance to be in.

[263] Mr. Ingalls did not provide any of Statesman's disclosure to Cuthbert Smith, which at this time was working on preparing its preliminary budget report for Phase 2 and which (as far as I can tell) was unaware of the fallout of the June 2010 MC Meeting.

S. Income Trust Report

[264] In March 2010, the Income Trust Trustees issued their 2009 year-end progress report (the "Progress Report") to the Investors. The Progress Report provided an update on the completion of Phase 1 and total sales achieved for Phases 1 and 2. The Progress Report indicates that Phase 2 construction will start "soon" with an anticipated completion date of mid to late 2011, that the Project had thus far generated $7M in total profits, and that cash distributions would be made once Phase 2 was completed.

[265] I appreciate that Mr. Mathison, as one of the Income Trust Trustees, would have been aware of the Income Trust Report and its reference to construction starting "soon". However, anticipating construction is not the same as approving construction and I do not read this update as either expressing Mr. Mathison's acquiescence to Statesman's decision to commence construction or his approval for future construction.

[266] The deed of trust for the Income Trust is identical to the Trust Deed. The Income Trust Trustees were not entitled to have any involvement in the Project. While the Income Trust Trustees failed to hold annual meetings of Unitholders, comply with the audit requirements, and hold annual elections to appoint income trust trustees as per the requirements of the deed of trust for the Income Trust, they are granted unfettered discretion (article 9.1(b)) in the exercise of their powers and are liable only for acts of fraud, dishonesty, and gross negligence (article 9.8). Statesman has not cited any authority for the proposition that solely failing to adhere to the procedural requirements of the trust deed for the Income Trust constitutes a breach of the Income Trust Trustees' contractual, fiduciary, and statutory duties.

T. The Commercial Trust Trustees

[267] Following the receipt of Statesman's disclosure, Mr. Mathison retained counsel and took two further steps. The first was to meet with the Commercial Trust Trustees. The second was to set up a meeting with BMO.

[268] Each one of the Commercial Trust Trustees had worked with or for Mr. Mathison and had done work with one of his companies. Mr. Ross had been Mr. Mathison's lawyer for 25 years and joined one of Mr. Mathison's companies in 2006, with which he was still employed in 2010. Mr. Coates started doing consulting work with Mr. Mathison's companies in 2004, around the same time Mr. McGoey met Mr. Mathison. Since then, Mr. McGoey had been engaged in various Matco-related corporate work. The Commercial Trust Trustees had offices in Matco's head office. Mr. Mathison testified that the Commercial Trust Trustees were appointed because of their educational and business experience background. It does not appear that the Commercial Trust Trustees disclosed to Mr. Mann and Statesman their relationship with Mr. Mathison and the various Matco companies for whom they worked.

[269] Mr. Mathison sought out Mr. Ross' help in 2006 to develop the limited partnership structure and address tax implications. Mr. Ross viewed his role as "protecting the assets of the trust for the benefit of... the... Income Trust" and that he had broad discretion and could exercise his best judgment in doing so. He understood that the Income Trust Trustees were not permitted to interfere with the business of the Commercial Trust and that the Commercial Trust Trustees

were prohibited from being involved in RQLP's business. He acknowledged that Mr. McGoey and Mr. Coates exercised dual roles as Income Trust Trustees and Commercial Trust Trustees but believed it "would be easy to separate those duties" as "people wear two hats all the time, three hats."

[270] Upon returning to his office from the June 2010 MC Meeting, Mr. Mathison called a brief meeting with Mr. McGoey and Mr. Ross and told them what he had learned:

> As the -- as this information became available, I did have a meeting with the trustees and disclosed to them the information that had been disclosed to me... and... I thought that the behavior was egregious and brought it to the trustees' attention in a quick meeting.

[271] Mr. Mathison explained his thinking:

> I said, you know, here is the information that I've come across. You know, these -- these aren't allegations or anything and not suspicions. These are things that they have told me they are doing. You know, I've received e-mail notifications from their CFO describing all of this stuff, and it's very troubling and unsavory, and we're going to have to do something.
>
> ... And my thinking at the time was that they should avail themselves of counsel, and actually, Mr. Ross, being his senior lawyer with significant experience in this trust matter, obviously pointed out, yes we're in a different chair, and we need to take counsel. And I believe they did.
>
> ... I was relying on the narratives prepared by Mr. Ingalls that we've gone through here. And, you know, this was information that had come to my attention, brought to my attention from them.

[272] In June 2010, the Commercial Trust Trustees had limited knowledge of the Project. They were not aware of the tensions between Statesman and Mr. Mathison. Mr. Ross understood Statesman and Matco owned approximately the same number of Units. He does not recall there having been any meetings of the Commercial Trust Trustees between 2007 and 2010. Mr. McGoey testified he met Mr. Ingalls in the initial stages of the Project and that they agreed RQLP's tax returns would be prepared and filed by Mr. Ingalls and that he would file the tax returns for the Income Trust. Mr. McGoey reviewed the LPA in 2006 and was familiar with its terms. In June 2010, Mr. McGoey understood the Project had been a success with the completion of Phase 1. He reviewed Mr. Ingalls' financial statements and incorporated them in the preparation of the Income Trust's financial statements and tax filings.

[273] Prior to June 2010, none of the Commercial Trust Trustees (other than Mr. McGoey who had read the LPA), had reviewed the Agreements or any of Mr. Ingalls' financial reporting to the Management Committee. Nor had they spoken with anyone at Statesman or BMO regarding the Project. While Mr. McGoey and Mr. Coates were aware Statesman was the guarantor of the BMO loan, the Commercial Trust Trustees were generally unaware how the Project was being funded. Mr. Ross testified he had not investigated how replacing SRQL would impact financing. Mr. McGoey was aware that terminating SRQL would halt financing and bring the Project to a stop.

[274] Mr. Ross described his involvement:

> I do recall that [Mr.] Hill and [Mr.] Mathison returned to the Matco office on June 9th, and they -- we had a discussion -- I believe all three trustees were present at that discussion -- wherein we were advised of a number of concerns that Matco had in connection with the project.
>
> From there, things developed very, very quickly. I recall [the Statesman Memo] which described a significant number of false or misleading sales, which was one of the items that Mr. Mathison had returned from the meeting with, which -- was very concerned.
>
> I also recall being advised that Phase 2 had been commenced without the approval of Matco, and I believe there were other issues, including the general partner pledging the assets of the partnership in support of an unrelated Statesman project.
>
> ...
>
> ... things happened very quickly. I believe the information download following the June 9th meeting happened that evening and in various discussions over the next several days. My recollection is that [the Statesman Memo] confirming these deceitful sales landed on my desk around June -- between June 14th and June 16th.

[275] Mr. Ross understood that Statesman did not require the Hoover and Legacy sales to close and had been "put forward for some purpose that was inherently misleading" if not fraudulent. He understood Phase 2 construction had commenced without Matco's approval and that Statesman had pledged the Project as security for another unrelated Statesman project (the TDL Promissory Note issue). Mr. Ross testified he did not review any of the trade sale contracts, was not aware of discussions between Statesman and BMO regarding the sales and further, did not know what BMO's position was with respect to the Trade Sales. Mr. Ross acknowledged that the only information he reviewed before issuing the Default Notice was the Statesman Memo as well as information he learned from discussions with Mr. Mathison and Mr. Hill.

[276] Mr. Coates recalls that he first learned of the fallout from the June 2010 MC Meeting when Mr. McGoey came into his office and reported there being "troubling issues". He asked Mr. McGoey for more information and thereafter followed up with Mr. Hill. Mr. Coates was told that the Project was proceeding without formal approval, that questionable payments to contractors had been made, that there was an issue with Mr. Jeff Mann's involvement, that unauthorized sales commissions had been paid, that questionable sales had been made to trades and that there was an issue regarding the TDL Promissory Note. Mr. Coates discussed these issues with Mr. Mathison. In his read-in testimony from questioning conducted in 2014, Mr. Coates testified he did not review any documentation prior to sending off the Notice of Default and the Extraordinary Resolution. He relied on what information was conveyed to him by Mr. Mathison, Mr. McGoey, and Mr. Hill. Mr. Coates was mostly concerned about the Project moving forward without formal approval or financing and with the nature of the problematic sales although he knew that Statesman had not submitted these to BMO. Mr. Coates testified that his rationale to proceed with the issuance of the

Notice of Default and the Extraordinary Resolution was to protect the Income Trust, of which he believed Mr. Mathison to be the largest unitholder.

[277] Mr. McGoey understood the issues with Statesman were the false reporting of the Trade Sales to BMO and Cuthbert Smith, unauthorized construction of Phase 2, the payment of unauthorized sales commissions and the involvement of unauthorized personnel (Mr. Jeff Mann). He testified that the most important document he reviewed was the Statesman Memo which described the "false sales and the arrangements made with various trades" although when he was questioned in 2014, he testified he did not remember what documentation he had reviewed regarding the fraudulent sales. In his read-in testimony, he admitted that all the information he received regarding the allegations against Statesman came from Mr. Hill or Mr. Mathison. He further testified the Commercial Trust Trustees had not considered a plan with respect to Statesman's removal although he understood that removing Statesman would place it offside its BMO loan commitments and would bring the Project to a halt.

[278] Between June 21 and June 28, 2010, the Commercial Trust Trustees met frequently amongst themselves but did not keep written notes of their discussions or any other written records. They had counsel advising them. They did not conduct any independent inquiries or discussions with Statesman, BMO, or any of the trades. Mr. Ross testified the Commercial Trust Trustees did not contact Statesman because "we had already heard from Statesman." Mr. Coates recalls the Commercial Trust Trustees "had sufficient evidence of improper, inappropriate sales contracts, and I believe that we had sufficient evidence that there was no formal approval for building 2".

[279] Mr. Mathison was pressed on what commentary or views he imparted to the Commercial Trust Trustees. He testified that while he viewed Statesman's behavior as "egregious and unconscionable," he felt it was up to the Commercial Trust Trustees to "make their own minds up about these things." Mr. McGoey acknowledged Mr. Mathison referred to the Trade Sales as being fraudulent though he denies Mr. Mathison alleged Statesman's actions constituted bank fraud. He does not recall Mr. Mathison advising of his intention to terminate Statesman.

[280] Mr. Ross testified that at no time was he "directed or instructed by Mr. Mathison to take the steps we did." When asked whether Mr. Mathison's word "was a significant component of your ultimate decision to issue the notice of default and the subsequent extraordinary resolution", Mr. Ross answered, "I would say the information that he provided us as confirmed and elaborated upon in the Statesman Memo were significant factors in our -- in my decision to replace the general partner".

[281] Mr. Coates testified that "in all of my interactions with [Mr.] Mathison, he's never directly or indirectly implied or asked me to do anything -- like, ordered me to do something. I have a working relation with him. I work with people, and I do not work for them."

[282] Mr. McGoey testified that Mr. Mathison was generally not involved in the Commercial Trust Trustees' discussions. He recalled that, "it was mostly the trustees... as the documents and evidence became clearer" and the purpose was to "try to understand as complete as we could during this crisis period of exactly what the general partner had done." He denied that the Commercial Trust Trustees "were simply doing the bidding of Mr. Mathison."

[283] Mr. McGoey concluded “these were very serious matters that we had to deal with and which resulted in the documents previously shown of the June 21st default notice and request for a meeting”. Mr. McGoey confirmed he did not contact Statesman and believed the Statesman Memo “had already revealed the nature of the sales contracts that they had created.” He did not believe Statesman’s breaches were curable:

> ... we’d come to the conclusion that the behavior of the general partner was incurable. The dishonesty shown in the sales agreement descriptions by Mr. Ingalls, the trust that -- that we should’ve had in the general partner was gone.
>
> The dishonesty was there, and in the best interests of the unitholder, the commercial trust, we issued this extraordinary resolution to protect the assets of the commercial trust.
>
> ...
>
> ... we believed that a dishonesty represented in these contracts is incurable and that the trust that should -- that we should’ve had in them was gone. It was irrevocably broken.

[284] Mr. Coates testified he was aware of the curing provision but took the view that “broken trust is not curable...” particularly in respect of Statesman having proceeded with construction on Phase 2. Mr. Ross’ view was that “dishonest, deceitful behavior cannot be cured.” He testified he and the other Commercial Trust Trustees concluded it had to replace SRQL due to:

> [t]he deceitful, misleading contracts were such that they were completely outside of commercial practice and resulted in a complete loss of confidence in the general partner, complete breach in the relationship between the limited partner and general partner.

[285] Mr. Ross explained the Commercial Trustees took the step of calling for an Extraordinary Resolution to remove SRQL:

> [b]ecause the limited partners, being the commercial trust, had completely lost confidence in the ability of the general partner. The general partner had entered into the... deceitful and dishonest contracts, possibly fraudulent contracts, and that wasn't behavior that the limited partner -- limited partnership -- limited partners of the limited partnership were prepared in any way to acquiesce in.

[286] The decision taken by the Commercial Trust Trustees to issue the Notice of Default parallels Mr. Mathison’s views who, shortly after having received Statesman’s disclosure, formed the intention to issue a Notice of Default. On June 15, 2010, Mr. Mathison demanded that Statesman arrange security to guarantee Matco’s Interim Loans and several days later, forwarded on to Mr. Mann a proposed mortgage that would have paid these out. Mr. Mathison acknowledged he was “moving in a hurry at this point” although he understood he required BMO’s approval to register any additional mortgage.

U. Request For a Meeting, Notices of Default and Extraordinary Resolution

[287] On June 21, 2010, the Commercial Trust served Statesman with:

(a) A Request for Meeting within 30 days, addressed to SRQL, signed by Mr. Ross, to remove SRQL as the general partner for failing to act in the best interests of RQLP pursuant to section 11.1(b)(iv) of the LPA ("Request for Meeting");

(b) A Notice of Default to SRQL, signed by Mr. Ross, for failing to conduct the affairs of SRQL in the best interests of RQLP pursuant to section 11.1(b)(iv) of the LPA (the "SRQL Notice of Default").

[288] That day, Mr. Mathison, on behalf of Matco, served Statesman with:

(a) A Notice of Default to Statesman, for acting contrary to the USA (the "Statesman Notice of Default") by making the following decisions without the approval of the Management Committee:

(i) Approving the appointment of Mr. Jeff Mann as project manager of the Project, contrary to section 4.4(f);

(ii) Executing contracts involving more than $100,00.00 in the aggregate, contrary to section 4.4(h);

(iii) Approving the renumeration of senior management, contrary to section 4.4(l);

(iv) Making decisions which deviate from banking policies, contrary to section 4.4(o);

(v) Commencing construction of Phase 2 of the Project, contrary to section 4.4(p); and

(vi) Incurring debt including the signing of the TDL Promissory Note, contrary to section 4.4(r).

(b) A Confirmation of Termination of SMBI under the DMA for misappropriating monies and defrauding the partnership (the "SMBI Termination") pursuant to section 2.02(b) of the DMA by:

(i) Paying commissions and other unauthorized payments to its salespeople, contrary to section 5.06(b);

(ii) Paying unauthorized referral fees, contrary to section 5.06(d);

(iii) Executing the TDL Promissory Note;

(iv) Paying monies to Giusti for masonry work that it had not completed and applying monies which Giusti was owed against the purchase of units; and

(v) Executing rental guarantees contrary to specific direction.

[289] Mr. Coates acknowledged that the Request for Meeting gave the Commercial Trust Trustees 30 days in which to hold a meeting to remove SRQL. However, on June 28, 2010, the Commercial Trust Trustees served SRQL with a notice of an Extraordinary Resolution, removing it for failing to exercise its powers and duties in good faith and in the best interests of RQLP and appointing a Matco-affiliated company, 1358846 Alberta Ltd. ("135"), to be the successor general partner.

[290] Mr. Coates testified the Commercial Trust Trustees took the decision to issue the Extraordinary Resolution because "we hadn't heard anything from the general partner." Mr. Ross does not specifically recall what occurred between June 21 and June 28, 2010, other than to say that having received advice from legal counsel, "a meeting was not going to happen". Mr. McGoey does not recall receiving any new information during this period but did not contact Statesman to see if the issues could be cured because the "dishonesty displayed... in the sales memo created by Mr. Ingalls was very troubling to the trustees, and that was the major reason that the [E]xtraordinary [R]esolution was issued."

[291] Mr. Mathison testified that he was not involved in the preparation or issuance of the documents signed by Mr. Ross on behalf of the Commercial Trust Trustees although he acknowledged he had reviewed them and agreed with them. Mr. Ingalls testified he found the allegations to be vague and "didn't seem to make a whole bunch of sense." He reached out to Mr. Meiner to see what he could do. Mr. Ingalls testified that while he and Mr. Mann were prepared to attend the meeting scheduled for June 29, 2010, Mr. Mathison was not. By this time, Statesman and Matco had each retained counsel.

[292] On June 28, 2010, Mr. Ingalls sent Mr. Mathison an e-mail advising RQLP's liabilities stood at over $2.6M (including the $1.2M incurred in respect of Phase 2 construction) which RQLP needed to pay by way of an Interim Loan. Mr. Ingalls requested Matco pay half, or $1.3M, stating "[p]lease advise if and how you would like me to proceed". Mr. Mathison replied, "[s]ee a lawyer". Two further Interim Loan requests were made to Mr. Mathison in June and September 2010 for total Interim Loans being sought of just over $2.2M, none of which Matco paid (the "Requested Contributions").

V. Meeting With BMO

[293] On June 21, 2010, Mr. Mathison e-mailed Mr. Kirkham to set up a meeting. They agreed not to inform Mr. Mann. Mr. Mathison explained his reason for calling the meeting ("Meeting With BMO"):

> I think we've been through many the disclosures that were provided to me by the Statesman folks, and I mentioned that I -- in light of the disclosures and the gravity of the disclosures and then the -- the types of disclosures, I felt compelled to seek legal advice, which I did. And the notion of reaching out to the bank is something -- an action I took after consulting with counsel.
>
> ...

> I wanted to inform Mr. Kirkham of the circumstances that I had become aware that Statesman had told me was going on -- were going on Riverside, and I thought that it best be -- be done in that context privately and between us.

[294] Mr. Mathison objected to any impropriety in providing Mr. Kirkham with Statesman's disclosures. He testified:

> ... I'm a director of the company that has provided information to the bank. I am not -- [BMO] is not my relation -- I don't have a banking relationship with them. I'm a director of the company. I have every right to speak to the bank in the context of these matters... That was the purpose of the meeting.

[295] He explained that he wanted to assure Mr. Kirkham he had not taken part in what he believed to be Statesman's misrepresentations:

> I said, listen, they're your client. I want you to be aware of this activity that I have learned. This isn't -- I'm not alleging anything on -- in respect of Statesman; this is stuff that they have told me they are doing. I am not involved in any way in this type of behavior, so I want you to know that I'm not involved. That this is being disclosed to you and that they are your client, and I can't speak to your relationship with your client or what your views are of this matter. I'm just telling you what they've done and that I'm not involved with it. And, naturally, you need to make your own assessment of the circumstance.

[296] He provided Mr. Kirkham with Statesman's disclosures and a copy of the Request for a Meeting, the Notices of Default and Confirmation of Termination. In his e-mail to Mr. Kirkham, Mr. Mathison noted, "[m]y primary concern at this point is to ensure you are totally informed about all our 'concerns' and go forward contingencies. All of this will, to a large extent, depend on how this plays out but you will always be totally 'in the loop".

[297] Mr. Kirkham agreed to meet. The Meeting With BMO, which included Mr. McCorkindale, Mr. Mathison and Mr. Kirkham, occurred the next day. There is no evidence that Mr. Mathison provided BMO with information other than Statesman's own disclosure, the Request for Meeting, the Notices of Default, and the Confirmation of Termination. Mr. Mathison testified he advised Mr. Kirkham to make up his own mind. He acknowledged the Confirmation of Termination represented his view that SMBI had misappropriated monies and defrauded RQLP.

[298] Mr. Mathison knew that his allegations would "set off alarm bells." He testified that Mr. Kirkham was "poker-faced about his reaction".

W. Subsequent Events

[299] On July 2, 2010, BMO notified SRQL it had received the Default Notices and Extraordinary Resolution and that it was not prepared to continue funding. From then on, events (the "Subsequent Events"), have occurred with this Court's authorization and approval. On July 8, 2010, Matco brought an Originating Application to appoint a Receiver for the Project, terminate the services of SMBI and remove and replace SRQL. Matco filed a Certificate of Lis Pendens against the Project lands. On October 12, 2010, this Court granted an interim injunction enjoining

Statesman from conducting further construction, but otherwise declined to appoint a Receiver or make any decision regarding the status and continuing involvement of SRQL and SMBI.

[300] From July to October 2010, Mr. Fedoryn, from BMO's special loans department, reviewed the individual sales contracts for Phases 1 and 2 and provided BMO's view as to whether they qualified as EPAs. By October 2010, he had approved 155 sales for Phases 1 and 2. Ms. Schey testified BMO had concerns with sales where there had been a trade-off or credit for amounts owing for work performed. In an e-mail to Mr. Mann and Mr. Ingalls in early October 2010, Mr. Fedoryn writes that with respect to the sale to TDL:

> [t]his sale has been approved by the lenders as a one off sale but the Lenders will not be receptive to allow any future trade offs to Building Trades to occur with unpaid work in place of contract discounts being used as a set off against a unit sale price, and certainly not without the Lenders' prior knowledge and full consent to this type of complex sale transaction.

[301] Statesman continued to pay the interest on BMO's loan up until November 2010. Mr. Mann testified it did so because he knew BMO would pull its funding if there was a partnership dispute and he was working to see if "Mr. Mathison would reconsider his position". At the same time, Mr. Mann was advising Mr. Fedoryn that Statesman wanted to finish the Project and was committed to facilitating move-ins for Building A. On November 16, 2010, Statesman advised Matco it would stop paying interest unless Matco contributed its 50% share (approximately $2.2M). Matco refused and Statesman ceased making payments. Default of BMO's loan occurred on November 30, 2010.

[302] In December 2010, BMO issued demand letters and provided notice to enforce security on its outstanding loan balance of just over $15M. On December 15, 2010, this Court granted an order placing SRQL and RQLP into Receivership and appointed a Receiver Manager (the "Receiver") to manage the Property, return all deposits paid with respect to Phase 2 EPAs and complete the construction, marketing, and sales of the remaining Phase 1 residential units. The Receiver retained SMBI to perform these duties and testified it received Statesman's full cooperation in providing construction and site-related services until Statesman was replaced in April 2011.

[303] In December 2010, TDL filed a lien on the Project in the sum of $600,000.00 with respect to work it had performed on Phase 2 (the "TDL Lien Claim").

[304] In February 2011, this Court granted an application brought by Matco and the Commercial Trust Trustees to assign BMO's outstanding loan balance to Bonnyrigg Capital Ltd. ("Bonnyrigg"), a Matco-affiliated company.

[305] In July 2011, the Income Trust held a rights offering (the "Rights Offering) to pay off Bonnyrigg's loan and other debts and to provide additional working capital. Mr. Mann was aware of the Rights Offering but he and Statesman declined to participate. The Income Trust Trustees settled on a subscription price of $5.00 per share which was arrived at by looking at various appraisals, outlook reports and RQLP's financial statements. Mr. Coates and Mr. McGoey testified that they were not aware of anyone challenging the MTM Income Trust's valuation. The Rights Offering, advertised with a Rights Offering Circular dated July 29, 2011, raised just over

$20M, 96.4% of which Matco contributed. In the result, Mr. Mathison and Matco's ownership share in the Project increased from 28% to 66% while Statesman and the Manns' share decreased to 15.2% from 33.6%.

[306] In August 2011, this Court granted an application brought by Matco and the Commercial Trust Trustees to replace SRQL with 135. The Court directed the Receiver to report back on a mechanism for resolving lien claims and directed 135 to complete any minor repair work, market, and sell the remaining units, conduct the Lien Litigation, and arrange for any necessary financing. 135 was subsequently replaced with Inglewood Quays Ltd. ("IQL") to be the new development manager to complete construction of the Project under a new development management agreement.

[307] On October 15, 2011, m2i Development Corporation ("m2i"), a Matco-affiliated company, was appointed as the new development manager of the Project under a new development management agreement.

[308] On December 14, 2011, this Court granted an order terminating and removing SMBI. The Court lifted the interim injunction that prohibited further construction, thereby allowing IQL to complete Phase 2.

[309] On December 13 and 16, 2011, this Court granted a further order (the "December 13 and 16 Order") which approved a Claims Procedure ("Claims Procedure") to be administered by the Receiver and IQL for dealing with creditors' claims brought against RQLP and Statesman as of December 15, 2010, and enumerated a list of creditors in Appendix 'A' and the amount of their claims that were subject to the Claims Procedure. SMBI was one such creditor and brought a claim in the sum of $892,156.00. SMBI filed a further notice of claim in the sum of $317,625.00. On December 16, 2011, Statesman Group filed a proof of claim for $4,886,068.57. In correspondence dated January 24, 2012, Mr. McCorkindale (on behalf of IQL) advised SMBI that its claim of $892,156.00 was disputed because SMBI had not fulfilled its obligations to RQLP. Mr. McCorkindale further advised that SMBI's additional claim and Statesman's claim were being disputed as they were not listed in Appendix 'A' as claims subject to the Claims Procedure. SMBI's and Statesman's claims were abandoned and ultimately, were not resolved.

[310] Upon a mandatory redemption of the Income Trust units in 2013, Statesman and the Manns were left with an ownership share of 15.2% with Matco and Mr. Mathison's share being 67.2%.

[311] IQL resolved the TDL Lien Claim for the sum of $296,611.19 (which the Receiver reviewed and approved) and this Court approved the resolution on October 29, 2012. In 2014, IQL settled the Lien Litigation for the sum of $1.75M. In 2015, IQL completed Phase 2 of the Project albeit under a rebranded name and with a new design. No further development or construction of the Project has occurred since.

X. The Breaches

[312] Mr. Mann and Mr. Mathison agreed to jointly develop the Project. The Agreements required them to make decisions together in the best interests of the Project, RQLP and the Investors. Neither was entitled to ignore the other or proceed as he saw fit. Neither was entitled to conduct his affairs in a way that preferred his own interests to the detriment of the other, SRQL or

RQLP. Each of them understood that the Investors had money at stake in the outcome of RQLP. Each of them understood that it was important to be honest and transparent in their dealings with each other and with SRQL, RQLP, and the Commercial Trust Trustees.

[313] Each of Mr. Mann, Mr. Ingalls and Mr. Meiner, as senior officers of Statesman and SMBI (and in Mr. Mann's and Mr. Meiner's case, directors of SRQL), owed fiduciary duties to SRQL, RQLP, Mr. Mathison and Matco to act in good faith and to perform the contractual duties of Statesman and SMBI honestly. Mr. Mathison and senior officers of Matco owed similar duties to SRQL, RQLP, Mr. Mann and Statesman. In fulfilling their contractual duties pursuant to the DMA and USA, each of Statesman and Matco was obliged to discharge its contractual obligations in good faith. Pursuant to the DMA, Mr. Ingalls and Mr. Meiner, as senior officers of SMBI, owed fiduciary obligations to RQLP in the discharge of its duties. As the borrower and guarantor of BMO's loan, RQLP and Statesman respectively, owed contractual duties to BMO.

[314] As senior officers of SMBI, each of Mr. Ingalls, Mr. Mann and Mr. Meiner knew or ought to have known that they owed duties to SRQL to provide it with forthright reporting so that SRQL could make reasonably informed decisions. They knew or ought to have known that their fiduciary obligations to SRQL required them to conduct the affairs of SMBI and Statesman in good faith without preferring Mr. Mann's and Statesman's interests over Mr. Mathison's and Matco's. Mr. Ingalls and Mr. Mann understood they had an obligation to provide transparent and honest reporting to BMO.

[315] In its written submissions, Statesman argues: "Mr. Mathison's actions on behalf of Matco were done with the sole intent of removing Statesman from the Project so that a Matco controlled entity could gain complete control. This was in clear breach of Matco's duty to act honestly and good faith under the USA."

[316] I disagree. For the reasons I have outlined above in respect of the Trade Sales, SMBI's reliance on the Trade Sales in lowering the pre-sales threshold, its execution of the Trade Contracts, and the unauthorized commencement of construction of Phase 2, and for those reasons discussed below, I find that each of Mr. Mann, Mr. Ingalls and Mr. Meiner is in breach of his various duties. I find that Mr. Mathison is not in breach of his corresponding duties.

1. Duty of Good Faith and Honesty In Contractual Performance

[317] Contractual performance is subject to the principle of good faith which requires parties to "perform their contractual duties honestly and reasonably and not capriciously or arbitrarily": ***Bhasin v Hrynew***, 2014 SCC 71 at para 63. Assessing when this principle may be invoked "calls for a highly context-specific understanding of what honesty and reasonable performance require" to give effect to the parties' legitimate contractual interests: ***Bhasin*** at para 69. What flows from this principle is a duty of honest performance which "requires the parties to be honest with each other in relation to the performance of their contractual obligations": ***Bhasin*** at para 93. While the duty of honesty does not go so far as to impose upon the contracting parties a fiduciary duty or a requirement to subordinate their interests to the other party, parties must "be able to rely on a minimum standard of honesty" and must "not lie or otherwise knowingly mislead each other about matters directly linked to the performance of the contract": ***Bhasin*** at paras 86 and 73. See ***Canlanka Ventures Ltd v Capital Direct Lending Corp***, 2021 ABCA 115 at paras 19-24 for a

summary of the principle of good faith and the duty of honesty. While the duty of honesty does not impose upon the parties a unilateral duty to disclose information, it does not allow a contracting party to actively or intentionally mislead or deceive the other party in respect of their contractual performance: ***Bhasin*** at para 87 and ***Canlanka*** at para 24. There are three situations in which good faith performance is required of the contracting parties: (1) where they must cooperate to fulfill the objects of the contract; (2) where they must exercise some contractual discretionary powers for purposes for which they were conferred; and (3) to prevent them from engaging in behavior which would allow them to evade their contractual obligations: ***Bhasin*** at paras 49-51.

[318] The duty of good faith requires a party exercising a discretionary power must do so in a manner that is consonant with the purpose for which the discretion was created: ***Wastech Services Ltd v Greater Vancouver Sewerage and Drainage District***, 2021 SCC 7 at para 70. Impermissible uses of discretionary power include those for an extraneous purpose that falls "outside the range of choices" intended by the parties to fulfill their contractual bargain or that are unconnected to the purpose for which the discretion was given: ***Wastech*** at para 71 and ***Eisler v Connor, Clark & Lunn Financial Group Ltd***, 2021 BCSC 1280 at para 49.

[319] I appreciate Statesman's argument that the parties' shared intentions were to complete the Project and that Statesman's actions in pushing forward with the Project were done with the ultimate purpose of fulfilling those intentions. I am mindful that Mr. Mann had successfully shepherded developments through various downturns and that his instinct -- that sales would improve (as they did in June 2010) -- was correct. Mr. Mann is an accomplished builder and undoubtedly can credit Statesman's many achievements to his tenacity and determination.

[320] One of the benefits of the phased nature of the Project was that it gave the parties flexibility in moving forward. In this case, the need for flexibility primarily arose from the Financial Crisis which impacted sales, the Project's only source of income. Other stressors emerged, including the expenditures and delays caused by MBS, cost overruns, and the continued requirement for Interim Loans which Mr. Mathison wanted met with secondary financing. While I accept Statesman's argument that characterizing the Project as being in a "liquidity crisis" by June 2010 is somewhat overblown given the way in which the parties had largely navigated the previous financial stressors, I find that starting as early as the fall of 2008, the Project's viability and continued progress were issues that needed to be addressed.

[321] Mr. Mann and Mr. Mathison had different priorities. Mr. Mann was determined to complete the Project, move people in, and retain Statesman's prestige. For him, it was never about *if* the Project would proceed but a question of *when*. He was bold. In contrast, Mr. Mathison is not primarily a developer. He had other business commitments. He was concerned about being stretched too thin. He was cautious.

[322] Whatever their individual preferences, Mr. Mann and Mr. Mathison had to find a way to work together. The Project's mechanism for doing so was through the Management Committee. In order for the Management Committee to properly manage the Project and for the directors to fulfill their fiduciary duties, they required up-to-date, accurate, and transparent financial reporting so that they could make reasonably informed decisions about how to proceed. It was SMBI's obligation to provide the Management Committee with that information. That obligation fell to Mr. Ingalls.

[323] On August 14, 2009, Mr. Mann and Mr. Mathison agreed that the Project would not progress without there being a material improvement in sales. As CEOs of their respective companies, as co-owners of SRQL and as directors of the Management Committee with effectively equal say, Mr. Mann and Mr. Mathison needed to agree on Major Decisions. They were also entitled to rely on each other to abide by agreements they reached between them. Yet, the facts show that Mr. Mann undertook a course of action that he clearly knew was contrary to his agreement with Mr. Mathison and that preferred Statesman's own interests over Mr. Mathison's and Matco's.

[324] As Mr. Ingalls testified, Mr. Mann's plan consisted of three strategies: generate sales momentum, lower the pre-sales threshold for Phase 2 funding, and commence vertical construction of Phase 2. Mr. Ingalls, Mr. Meiner, and the Statesman team would have been familiar with Mr. Mann's determination. They reported, and were ultimately accountable, to him. They would have worked hard to put his plan into action.

[325] As senior officers for Statesman and SMBI, Mr. Ingalls and Mr. Meiner (who was also a director of SRQL) would or should have known of the terms of the various Agreements. Mr. Ingalls understood what constituted an EPA pursuant to the Credit Agreement. Mr. Ingalls and Mr. Meiner would have understood how important sales progress was to the future funding and feasibility of the Project. They would both have known that BMO required sufficient sales to meet the qualifying threshold for Phase 2 funding. Both knew or ought to have known that any one of the Trade Sales entered into was not a legitimate EPA because it was not a legally binding sale made in the ordinary course of business to an arm's-length purchaser without unusual terms. Mr. Ingalls knew, or ought to have known that it was inappropriate to represent the Trade Sales as legitimate sales to the Management Committee, Cuthbert Smith, and BMO and that as a result of his misrepresentations, they were deprived of the information they were entitled to.

[326] I find that Mr. Meiner was the ringleader in actualizing the Trade Sales scheme and that he did so with Mr. Ingalls' knowledge and participation. In effect, I find that Mr. Meiner was very much one of the Statesman team. I accept Mr. Purcell's evidence, outlined in his letter to Mr. Mann on July 6, 2010, that Mr. Meiner assured Hoover its 10 sales would never have to close and that these were made with a view to expediting Hoover's approval to perform work on Phase 2. Similarly, Mr. Meiner's e-mail to Legacy dated November 17, 2009, copied to Mr. Ingalls and Mr. Mann, reflects that the Legacy sales were similar to the ones made with Hoover and would continue to be marketed over the next 12 months of construction. Mr. Meiner was complicit in crafting the sale to NORR and, at Mr. Ingall's specific request, the S&V sale which explicitly released those purchasers from having to close. I have found that Mr. Meiner was involved in arranging the Home Solutions sale on the same terms as NORR and S&V.

[327] Despite his contrary assertion, I find that Mr. Ingalls could not reasonably have concluded that the 13 Trade Sales entered into with Hoover and Legacy were legally binding. Mr. Ingalls' decision to replace the Hoover units which had sold with new units attributed as Hoover sales indicates that his intention was to maintain the sale of 10 units to Hoover irrespective of how many were sold. Were I to find this was not in fact his intention, then I find he did not possess the requisite expertise from which to reasonably conclude these sales were legally enforceable and therefore, any views he may have had were entirely speculative.

[328] It is clear from his evidence that Mr. Ingalls knew the Trade Sales were problematic. He knew that the NORR and S&V sales were not legitimate EPAs. Yet, he presented these and the remaining Trade Sales to SRQL, Cuthbert Smith, and BMO as legitimate EPAs when he knew or should reasonably have known that they did not qualify as such. Mr. Ingalls' misrepresentations were not fleeting. They were sustained over the course of approximately 8 months, from November 2009 to the June 2010 MC Meeting. There were numerous off-ramps that Mr. Ingalls could have taken. He could have reported his concerns about the Trade Sales to Mr. Mann, Mr. Mathison, or to Mr. Hamilton/Mr. Kirkham at any time. He could have expressed his misgivings about Mr. Meiner to Mr. Mann. He chose not to do so. Mr. Ingalls' actions furthered Mr. Mann's plan to lower the sales threshold with a view to more quickly securing Phase 2 financing. I find that in respect of the Trade Sales, his actions, along with those of Mr. Meiner, were done to overcome Mr. Mathison's resistance in respect of continuing on to Phase 2, convince BMO to lower the sales threshold required to commence construction on Phase 2, and to present the Project's continued progress and the commencement of Phase 2 construction as inevitable.

[329] I accept Mr. Mann's evidence that he did not have actual knowledge of the Trade Sales. However, he testified that even if he did, it wouldn't have mattered until they actually counted as pre-qualifying sales. Mr. Mann is Statesman's driving force and would have understood that his direction to Mr. Ingalls, Mr. Meiner, and to the Statesman sales team to generate sales, particularly in the spring of 2010, would have placed them under pressure to do so. While he may not have been specifically aware of what Mr. Meiner was up to, he should, like Mr. Ingalls and Mr. Mathison, have been surprised about the sudden sales surge in November 2009. He should have been startled by Mr. Meiner's telephone call regarding the Hoover sales in November 2009 and his e-mail regarding the Legacy sales on November 17, 2009, and should have asked questions. There is nothing objectionable about Mr. Mann wanting to push sales. The issue is that this strategy was part of his overall plan to push the Project forward into Phase 2 when he knew this to be contrary to what he and Mr. Mathison had agreed. I find that Mr. Mann's decision to embark on a course of action which he knew was contrary to his agreement with Mr. Mathison emboldened the Statesman team, including Mr. Ingalls and Mr. Meiner, to take whatever actions were required to meet his instructions. In my view, Mr. Mann's failure to exercise appropriate oversight contributed to Mr. Ingalls' and Mr. Meiner's actions and to SMBI's various breaches.

[330] While Mr. Mann may not have been aware of the nature of the Trade Sales, he, along with Mr. Ingalls, knew that Statesman was finalizing significant Trade Contracts on Phase 2 when he had agreed with Mr. Mathison not to commence Phase 2 construction. The Trade Contracts were not authorized by the Management Committee and were not disclosed to the Budget Committee or to BMO. I reject Statesman's explanation that the execution of the Trade Contracts was merely preparatory work. I find that keeping the Trade Contracts off of Statesman's accounts payable ledger furthered Mr. Mann's objective to move ahead with the commencement of Phase 2 construction in the spring of 2010 despite Mr. Mathison's clearly stated objection.

[331] Finally, I reject Statesman's assertion that SMBI was reasonably entitled to rely on the Management Committee's previous informality that governed operations in Phase 1 to conclude that formal requirements for seeking the Management Committee's approval regarding the Trade Contracts and the construction of Phase 2 were similarly relaxed. This assertion ignores that the circumstances existing during Phase 1 construction were markedly different by the time Phase 2

was being contemplated and that further, Mr. Mann's and Mr. Mathison's agreement effectively put each of them on notice that Phase 2 could not proceed without each other's explicit consent.

[332] I will now turn to an assessment of Mr. Mann, Statesman and SMBI's specific breaches, as raised in the Notice of Default to Statesman and in the Confirmation of Termination to SMBI.

[333] In respect of the Notice of Default issued to Statesman, the meaning of "related party transaction" in section 4.4(f) in the USA is not defined and I find that it is not sufficiently clear to preclude Mr. Jeff Mann's participation on the Project. Further, while the Management Committee may not have approved of Mr. Jeff Mann's involvement, Mr. Mathison was, or should have been aware of it and did not pursue the matter further.

[334] Further, I have concluded that the TDL Promissory Note was an error and did not pledge Project assets in respect of an unrelated debt contrary to section 4.4(r) of the USA.

[335] No evidence was led to show Statesman approved the remuneration of any of its senior management contrary to section 4.4(i) of the USA (this allegation was intended to refer to Statesman's payment of remuneration, commissions, and referral fees to members of its sales team and others, contrary to Article V of the DMA).

[336] However, I find that Statesman's unauthorized approvals of the Trade Contracts to an aggregate value of approximately $14M, 6 of which totalled in excess of $800,000.00, constitutes a breach of section 4.4(h) of the USA and, while not specifically invoked in the Notice of Default, is contrary to clauses 1.02(a), 1.02(c), 1.06 and 3.03(k) of the DMA. I acknowledge that despite there being no contemporaneous formal approval by the Management Committee of the trade contracts for Phase 1, Mr. Mann's, and Mr. Mathison's communications in August 2009 put Mr. Mann on notice that Mr. Mathison's previous waiver where Major Decisions required the Management Committee's unanimous approval pursuant to clause 4.4 of the DMA, no longer applied (sections 17.9 and 17.13 of the LPA).

[337] Further, I conclude that Statesman's presentations of the Trade Sales to Cuthbert Smith and BMO constitute deviations from banking policies contrary to section 4.4(o) of the USA as well as a breach of Statesman's warranty to provide BMO with accurate financial information and full disclosure contrary to sections 4.01(r), 4.01(u) of the Credit Agreement. These breaches would have justified BMO's refusal to advance funding for Phase 2 in accordance with sections 7.01 and 7.05(a).

[338] Finally, I agree that Statesman's unilateral commencement of construction of Phase 2 despite Mr. Mann's and Mr. Mathison's agreement not to proceed until sales improved and Mr. Mann's acknowledgement that construction of Phase 2 was a material component of the Project constitutes a breach of sections 4.4(p) and 4.4(c) of the USA and clauses 3.03(f) and 3.03(m) of the DMA. While not specifically referenced in the Notice of Default to Statesman, I agree with Mr. Mathison that Statesman's commencement of construction without prior approval by the Management Committee of a finalized Phase 2 budget constitutes a breach of sections 4.4(a) of the USA and clauses 1.02(a), 1.02(c), 3.03(i), and 3.03(m) of the DMA.

[339] With respect to the Confirmation of Termination served on SMBI pursuant to the DMA, I agree that Statesman's unauthorized payment of referral fees (increasing the amount from $300.00

to $3,000.00) is contrary to clause 5.06(d) of the DMA, that unauthorized sales commissions of approximately $51,000.00 were made contrary to clause 5.06(b) and (d) of the DMA and that the commissions were charged by SMBI to RQLP without the Management Committee's approval (these unauthorized payments are collectively referred to as the "Unauthorized Sales Fees").

[340] Matco alleges that Statesman acted contrary to the terms of the DMA. I agree. I find that Statesman's failure to record the amounts owing in respect of the Trade Sales in its account payable system constitutes a breach of Statesman's obligations pursuant to clauses 1.02(t) and (v). I also agree that in awarding the 16 Trade Contracts with an aggregate value of approximately $14M, 6 of which totaled more than $800,000.00 without the approval of the Management Committee, Statesman breached its obligations pursuant to section 4.4(h) of the USA and clauses 1.06 and 3.03(k) of the DMA.

[341] I also agree that in failing to record that the Trade Sales involved the exchange of holdback monies for work performed for deposits paid or the reduction of a unit's sale price in exchange for the value of work performed, Statesman was in breach of its obligations pursuant to clauses 1.02(v) and 5.04 of the DMA (although I disagree with Matco that these had a significant adverse impact on RQLP contrary to clause 5.02 of the DMA). However, while I conclude MBS' deficient welds should have been identified earlier had there been more regular inspections (clause 1.02(ii) of the DMA), Matco has failed to prove Statesman otherwise failed to provide competent and adequate construction staff (clause 1.12 of the DMA) and that Statesman failed to take prompt steps to address MBS' deficiencies (clause 1.02(jj) of the DMA).

[342] Mr. Mathison described the impact of Statesman's breaches as driving "a stake through the heart of the relationship." While overwrought, I fundamentally agree with him that Statesman's actions "struck at the very core of the relationship... eviscerating [Matco's] trust" and that Matco and the Commercial Trust Trustees were reasonably entitled to view Statesman as having repudiated its contractual obligations and treating the Agreements, and their relationship, as having come to an end.

[343] I conclude that collectively, Statesman's numerous material breaches of the Agreements constitute a "material breach or default" in respect of which SMBI was entitled to receive notice of default pursuant to section 2.03 of the DMA.

[344] Despite my findings regarding SMBI's conduct, I find that Mr. Mann and his sales team exhausted reasonable efforts to resuscitate an otherwise dormant sales market in late 2008 and for most of 2009. Further, I find Mr. Jeff Mann to be thoughtful and knowledgeable and I conclude that his involvement on the Project, including his efforts to address the issues caused by MBS, greatly contributed to the advancement of the Project during this time.

2. Fiduciary Duties

[345] Directors and officers must "act honestly and in good faith view a view to the best interests of the corporation" and must "exercise the care, diligence, and skill that a reasonably prudent person would exercise in comparable circumstances: *Alberta Business Corporations Act*, RSA 2000, c B-9, s122(1) ("*ABCA*"). While the scope of this duty remains context specific, it includes an obligation to avoid a conflict of interest, particularly for personal gain; to manage the assets of

the corporation in pursuit of the realization of the objects of the corporation"; and to serve the company "selflessly, honestly and loyally": ***Sonic Holdings Ltd v Savage***, 2021 BCCA 441 at paras 75 and 79.

[346] Each of Mr. Mann, Mr. Ingalls, and Mr. Meiner understood that as senior officers of Statesman or SMBI, they owed fiduciary duties of honesty, good faith to RQLP and SRQL. They had an obligation to act in the best interests of RQLP. For the reasons that I have discussed in the preceding section, I conclude that each of them has breached these duties.

[347] Fiduciary duties do not disappear because exercising them is inconvenient or unprofitable. If Statesman's "open kimono" approach to business means anything, it means the most when it is hardest to do. Mr. Mann, Mr. Ingalls, and Mr. Meiner cannot sacrifice their fiduciary obligations on the altar of "getting it done." They are certainly not permitted to do so because it was in Statesman's interests, aligned with their expectation that Mr. Mathison would acquiesce to Statesman's demand that the Project continue or that Statesman's actions would never be discovered. Mr. Mann embarked on a plan which he knew was contrary to the agreement he had reached with Mr. Mathison. In my view, he did so to further his and Statesman's interests in pushing the Project forward. I do not excuse Mr. Ingalls from his responsibility. His fiduciary obligations were owed independently of any direction he received from Mr. Mann and Mr. Meiner. Mr. Meiner does not appear to have had any understanding of his fiduciary obligations and if he did, he simply chose to ignore them.

3. Oppression

[348] The Manns, Statesman and SMBI allege that Mr. Mathison's, Matco's, RQLP's and IQL's actions during the Subsequent Events constitute oppression, including Mr. Mathison's and Mr. McCorkindale's Meeting With BMO, Matco's refusal to pay the Requested Contributions, the Unauthorized Sales Fees, and its litigation of the various court proceedings. It is alleged that Mr. Mathison and Matco acted in an oppressive manner that was prejudicial to and unfairly disregarded the interests of Statesman as a shareholder of SRQL, SMBI as a creditor of SRQL or of Mr. Mann as director of SRQL.

[349] Oppression is an equitable remedy that grants the court wide discretion to redress the harm where an act done by a corporation or the way its business or affairs or the powers exercised by a director has been conducted in a manner that is oppressive or unfairly prejudicial or that unfairly disregards the interests of any security holder, creditor, director, or officer: *ABCA*, section 242. To prove a claim for oppression requires a two-step inquiry (***BCE v 1976 Debentureholders***, 2008 3 SCR 560 at para 68):

> (1) does the evidence support the reasonable expectations asserted by the claimant? and (2) does the evidence establish that the reasonable expectation was violated by conduct falling within the terms "oppression", "unfair prejudice" or "unfair disregard" of a relevant interest?

[350] Where oppression has been established, the court has wide latitude to enforce "not just what is legal but what is fair": ***BCE*** at para 58.

[351] In my view, the evidence does not support a claim in oppression, particularly as it relates to Mr. Mathison's conduct. I find that he did not exercise his powers as a director of SRQL in a manner that was oppressive and prejudicial to and unfairly disregarded Statesman's and Mr. Mann's interests. In my view, the Project came to a halt because of the various breaches caused by Mr. Mann, Statesman, Mr. Ingalls, Mr. Meiner and SMBI that I have identified above.

[352] I find that the Meeting with BMO does not constitute oppression. In my view, Mr. Mathison's request to call the meeting with Mr. Kirkham was both timely and responsible. He had just learned about the Trade Sales, the Trade Contracts, and that Statesman had commenced construction of Phase 2. He was, as a member of the Management Committee and as an Income Trust Trustee, justified in confronting BMO with Statesman's own disclosure and to reassure BMO that he had not participated in Statesman's various reporting breaches.

[353] Nor do I find there to be any evidence that Mr. Mathison directed or induced the Commercial Trust Trustees to take the actions they did. While I acknowledge that Mr. Mathison was initially present in discussions with the Commercial Trust Trustees, the evidence indicates that the Commercial Trust Trustees made their own decisions and independently formed their own views based upon the information they reviewed and discussed. While their position may ultimately have aligned with Mr. Mathison's interests in terminating SBMI and taking over the Project, I do not find that they acted upon Mr. Mathison's direction or inducement.

[354] Contrary to what Statesman has asserted, there is no evidence Mr. Mathison induced or directed Mr. Meiner in any of the latter's actions, orchestrated a conspiracy against the interests of SRQL, intentionally placed RQLP in distress for any reason, unlawfully engaged in any action to cause BMO to cancel its credit facilities, arbitrarily took action to frustrate the Project's continued progress or engaged in any action that would have allowed him and Matco to cause Statesman, the Investors and SMBI to lose their interests in RQLP.

[355] Further, all of Mr. Mathison's, Matco's, RQLP's and IQL's actions during the Subsequent Events have been endorsed through court applications and cannot now be challenged for oppression.

[356] Consequently, I dismiss this claim.

4. Interference with Economic Interests

[357] The Manns, Statesman, and SMBI further allege that Mr. Meiner and Mr. Mathison intentionally interfered with Statesman's and SMBI's relationship with BMO, causing damage to Statesman, SMBI and the Investors. This claim is founded on the allegations that Mr. Meiner deliberately engaged in the Trade Sales with a view to causing RQLP to be in breach of its obligations pursuant to the Credit Agreement and further, that Mr. Meiner's misrepresentation regarding the TDL Promissory Note and Mr. Mathison's misrepresentations made during the Meeting With BMO were done to precipitate RQLP being in breach of its obligations with BMO.

[358] The tort of causing loss by unlawful means is "available in three-party situations in which the defendant commits an unlawful act against a third party and that act intentionally causes economic harm to the plaintiff": ***AI Enterprises v Bram Enterprises Ltd***, 2014 SCR 177 at para 5. The impugned conduct is unlawful "if it would be actionable by the third party or would have

been actionable if the third party had suffered loss as a result of it": ***AI Enterprises*** at para 5. "Unlawful means" must be narrowly interpreted and requires that the defendant intentionally targeted the plaintiff for economic harm. Economic harm that is caused incidentally does not qualify as it is "an accepted part of market competition": ***AI Enterprises*** at paras 74 and 95. A tortfeasor's intent to cause economic harm to the claimant as an end or to cause economic harm to the claimant because it is a necessary means of achieving an end that serves some ulterior motive must be considered: ***AI Enterprises*** at para 95.

[359] The evidence does not substantiate such a claim. No evidence was led regarding Mr. Meiner's ultimate objectives regarding his conduct. I find there to be no evidence that his conduct was undertaken with a view to damaging Statesman, SMBI and the Investors. To the contrary, I find that his participation in the Trade Sales was done to advantage, rather than to harm, Statesman's and SBMI's interests. There is no evidence regarding his understanding of the TDL Promissory Note and I am not prepared to infer that his communications with Mr. Mathison were intended to cause harm to the Manns, Statesman and SMBI when these could just have easily arisen from his honest belief surrounding its circumstances, or from a desire to exonerate or ingratiate himself with Mr. Mathison. I have already addressed Mr. Mathison's and Mr. McCorkindale's communications in their Meeting with BMO. There is simply no evidence Mr. Mathison created a partnership dispute or made false allegations of fraud and misappropriation with the purpose of inducing a breach of the Credit Agreement, causing harm to Statesman and SMBI, or placing the Project into receivership. This claim is dismissed.

5. Civil Conspiracy

[360] Finally, the Manns, Statesman, and SMBI claim that Mr. Mathison, Mr. Meiner, Mr. McCorkindale, Matco, the Commercial Trust Trustees or any combination thereof, conspired to deprive SMBI and Statesman of their interests in the Project thereby causing them, and the Investors, harm.

[361] The tort of civil conspiracy requires a plaintiff to prove that the predominant purpose of the defendants' conspiracy, whether pursued by lawful or unlawful means, was to cause the plaintiff harm. The plaintiff must prove that the defendants intended to harm the plaintiff rather than merely acting out of self-interest: GHL Fridman, *The Law of Torts in Canada*, 3rd Edition (Toronto: Carswell, 2010) at pages 730-731. Where the defendants sought to harm the plaintiff through unlawful means, the plaintiff need not demonstrate that the predominant purpose of the defendants' conduct was to cause harm so long as the plaintiff can prove the defendants ought to have known the plaintiff likely would be harmed. In either case, the defendants' conduct must have caused the plaintiff actual harm: ***Canada Cement LaFarge Ltd v British Columbia Lightweight Aggregate Ltd***, [1983] 1 SCR 452 at paras 33-34. An assessment is made at trial whether there is sufficient overlap between the plaintiff's underlying causes of action and the civil conspiracy claim such that the doctrine of merger applies, or whether the facts of the conspiracy claim demonstrate the parties acted in concert to increase the harm caused to the plaintiff and is relevant to punitive damages: ***Lipinski v Speranza***, 2020 ABQB 445 at para 87.

[362] There is no evidence that Mr. Meiner and Mr. Mathison or Mr. Mathison and Mr. McCorkindale conspired to cause harm to Statesman and SMBI. For reasons that I have discussed above, there is no evidence that the predominant purpose of Mr. Mathison's and Mr.

McCorkindale's Meeting with BMO was to cause harm to Statesman and damage Statesman's relationship with BMO. I dismiss the claim.

6. Defamation

[363] Mr. Mann and Statesman allege that during his meeting with Mr. Kirkham, Mr. Mathison defamed Mr. Mann and Statesman:

> [Mr. Mathison] accused Statesman and its principal [Mr. Mann] of attempting to defraud BMO by presenting fraudulent presales contracts to BMO in respect of Building #2. [Mr. Mathison] also stated to BMO that if BMO provided funding in respect of Building #2, it would be doing so on the basis of fraudulent information furnished by Statesman and [Mr. Mann] ("Defamatory Statement").
>
> (Paragraph 18 of Statesman's Statement of Claim (Action No. 1201-03846).

[364] Further, the Manns, Statesman and SMBI allege that during his meeting with BMO, Mr. Mathison made a series of false misrepresentations including the presentation of the Trade Sales, that SRQL had been terminated from the Project, that he had not approved the construction of Phase 2, that tradesperson would not get paid and that SMBI and Statesman had engaged in misconduct.

[365] Statesman refines its argument in its written submissions. It argues that Mr. Mathison's statement to BMO was false "because no presales contracts for Facility 2 had been submitted to the Bank and by then Mr. Mann was well aware of the questions concerning certain trade sales and had contacted BMO about them" and because "Mr. Ingalls had informed Mr. Mathison in writing that no sales contracts had been submitted to the bank."

[366] Mr. Mann testified to the effect that the appointment of the Receiver had on Statesman's relationship with BMO:

> Well, we were persona non grata. We couldn't get a loan from the Bank of Montreal unless it was cosigned by another party. It spread around to pretty well all of the major five banks, six banks, actually, and we were unable to get financing from any of them because of this notification of bank fraud. You don't say those things to a bank and expect to be in business. So that really was the pickle that -- that really injured us. So I remember asking TD, and I asked CIBC on a financing deal, and they weren't -- they turned us down. They weren't even interested in learning the facts.

[367] Mr. Mann testified that Statesman lost out on a number of development opportunities, had to sell a development project in the US at a loss, and that while it wasn't until 2013 that Statesman was finally "got forgiven", Stateman's reputation has never entirely recovered, particularly with the people who moved into the Project.

[368] In my view, Statesman cannot succeed with its claim for defamation.

[369] I appreciate that defamation is a "strict liability" tort and that a plaintiff need only prove three essential elements: (1) that the impugned words were defamatory in that they would tend to lower the plaintiff's reputation in the eyes of a reasonable person; (2) that the words in fact refer to the plaintiff; and (3) that the words were communicated to a third party: ***Grant v Torstar Corp***, 2009 3 SCR 640 at para 28; Raymond E. Brown, *Brown on Defamation*, 2nd Ed. Vol 1 (Toronto: Thomson Reuters, 1999)(loose-leaf 2021) at Ch 3:5; Allen M. Linden, Bruce Feldthusen, Margaret Isabel Hall, Erik S. Knutsen and Hilary A.N. Young, *Canadian Tort Law*,11th Ed. (Toronto: LexisNexis, 2018) at page 747; and see ***Cron v Libby***, 2023 ABKB 167 at para 11, aff'd ***Cron v Libby***, 2024 ABCA 125).

[370] However, justification or "truth" is a complete defence to an action for defamation (*Brown on Defamation* at Ch 10:01; ***Cron*** (KB decision) at para 21), as is the defence of conditional or qualified privilege (*Brown on Defamation* at Ch 13:1). The defence of justification requires a defendant to "substantiate all material facts contained in the allegation" and it is sufficient for a defendant to prove the truth of the substance of the statement rather than every minute detail: *Canadian Tort Law* at page 766. The defence of qualified privilege excuses a statement made without malice on a privileged occasion where "a person seeks to protect or further his or her own legitimate interests, or those of another, or interests which he or she shares with someone else...": *Brown on Defamation* at pages 13-6 and 13-7. There is no precise test as to when an occasion of qualified privilege arises and an objective test is used to determine "whether a reasonable person, having regard to the relationship of the parties and the surrounding circumstances, should as a matter of public policy be entitled to speak in the way in which he or she did": *Brown on Defamation* at pages 13-47 to 13-52. In the context of a business relationship (such as this), there must be a mutuality of interest between the parties making and receiving the financial information such that the party making the (otherwise defamatory) statement is communicating with a view to discussing legitimate business interests and the party receiving the information has some legitimate interest in the matter, or a right to know and act on it: *Brown on Defamation* at pages 13-190 to 13-195, 13-210 to 13-218, and 13-233 to 13-237.

[371] When he received Statesman's disclosure following the June 2010 MC Meeting, Mr. Mathison asked Mr. Ingalls: [w]hat information and schedules have been provided to BMO in respect of these [purchase sale agreements?]". Mr. Ingalls replied:

> [c]opies of [purchase and sales agreements] were provided to BMO when the first pre-sale test was met back in 2008. No additional [purchase and sales agreements] have been required by or given to BMO since. In order to access the Phase II financing under the unsigned third amendment, 166 sales contracts need to be sent to BMO. This is often one of the last steps required to begin advances and I only send out lenders copies of sales contracts for which, after my final review, I am satisfied meet the Bank's requirements.

[372] In my view, Mr. Ingall's statement is disingenuous. The evidence clearly establishes that Mr. Ingalls had been providing BMO with the Trade Sales commencing in November 2009 with a view to lowering the sales threshold required to access funding for Phase 2. In any event, Mr. Mathison was not disclosing any new information that BMO had not already received. Mr. Mathison was merely ensuring that BMO understood the Trade Sales did not qualify as EPAs and that BMO should not treat them as such.

[373] I find that Mr. Mathison did not made any misrepresentations or defamatory comments about Mr. Mann, SMBI, or Statesman. Mr. Kirkham was not called to testify, and the only evidence is that of Mr. Mathison and Mr. McCorkindale. I accept Mr. Mathison's evidence that he was aware of the sensitive nature of the Statesman-BMO client relationship and that he did not do anything to unnecessarily inflame the situation. Further, I accept his evidence that his intention in meeting with BMO was not to undermine, smear or tarnish Statesman's reputation but to communicate his genuine concern about what he had learnt and to ensure BMO understood he had not participated in what he viewed as Statesman's fraud.

[374] What Mr. Mann and Statesman identify as the Defamatory Statement is, in my view, substantially true. If I am wrong, then Matco has made out the defence of qualified privilege. Mr. Mathison was a member of the Management Committee, and owed duties to the Investors as an Income Trust Trustee. He had genuine and well-founded concerns about Statesman's and SMBI's actions. Upon Mr. Ingalls providing Mr. Mathison with Statesman's and SMBI's disclosure regarding the Trade Sales, the Trade Contracts and the commencement of Phase 2, an occasion of qualified privilege arose which entitled, if not compelled him to raise his concerns to the Project's lender. I find that in doing so, Mr. Mathison acted in good faith and without malice and that he did not make false representations.

[375] Mr. Mann and Statesman argue that Mr. Mathison's statements made to Mr. Kirkham "had an immediate and devastating impact" on Mr. Mann and Statesman's reputation which resulted in the BMO loan being transferred to BMO's special loans department, BMO ceasing to make further advances, BMO losing trust in Statesman, and BMO refusing to do business with Statesman for years. They allege that as a result, the "word" got around in banking circles and that other banks refused to do business with Statesman", resulting in Statesman losing out on other projects due to its inability to secure financing. While Mr. Mann and Mr. Ingalls testified about the difficulties Statesman experienced in securing financing for several years, no evidence was led that BMO's actions were caused by anything said by Mr. Mathison and Mr. McCorkindale during the Meeting with BMO rather than BMO having independently come to its own view on a review of the circumstances. Nor, should I add, was any evidence presented that Mr. Mathison's actions caused other banks to refuse Statesman funding.

[376] Accordingly, I dismiss Mr. Mann's and Statesman's defamation claim.

Y. The Commercial Trust Trustees' Actions

[377] As Commercial Trust Trustees, each of Mr. Ross, Mr. Coates and Mr. McGoey owed a duty of care to the Income Trust and owed a fiduciary duty to the Investors. As an Income Trust Trustee, Mr. Mathison owed fiduciary duties to the Investors.

[378] The Manns, Statesman and SMBI allege that in breach of the LPA, the Commercial Trust through the Commercial Trust Trustees, failed to conduct independent inquiries to substantiate Mr. Mathison's allegations, failed to provide SRQL with the requisite curing period pursuant to sections 17.8 or 15.1 of the LPA, removed SRQL without providing sufficient written notice and in contravention of the requisite curing period pursuant to section 15.1(b) of the LPA and failed to establish that breaches under the LPA had occurred. It is further alleged that Mr. Mathison and one of the Commercial Trust Trustees and/or Income Trust Trustees advised tradespeople working

on the Project to register liens against RQLP with a view to causing a breach of the Credit Agreement and participated in the Meeting with BMO with a view to encouraging BMO to appoint a Receiver, cease advancing funds and decline to proceed with the Third Amendment.

[379] In my view, these claims cannot succeed. I find that as a result of the various breaches committed by Mr. Mann, Mr. Ingalls, Mr. Meiner, Statesman and SMBI, the Commercial Trust Trustees were justified in concluding that SRQL had failed to act in the best interests of RQLP pursuant to section 11.1(b)(v) of the LPA and that issuing the Extraordinary Resolution to remove SRQL pursuant to section 12.8(a) was warranted.

[380] Pursuant to section 27 of the *Trustee Act*, SA 2022, c T-8.1 (the "*Act*") a trustee must, in administering the trust, act in good faith and in the best interests of the object of the trust. They are entitled to rely on the "business judgment rule" which allows them some discretion when making business decisions: ***Renegade Capital Corporation v Dominion Citrus Limited***, 2013 ONSC 1590 at paras 91-92 and ***Laxey Partners Limited et al v Strategic Energy Management Corp et al***, 2011 ONSC 6348 at para 77. A trustee must not knowingly allow a situation to arise where there is a conflict between a trustee's personal gain and the performance of his or her duties unless permitted by the trust instrument: section 28 of the *Act*. A trustee administers the trust property on behalf of the beneficiary and must always put the trust and the beneficiary's interests first: *Waters' Law of Trusts in Canada*, 5th ed, (Toronto: Thomson Reuters), 2021 at pages 42-43. The duties expected of a trustee are to act honestly and with a level of skill and prudence expected of a reasonable person administering his or her own affairs. Section 27(3) of the *Act* requires a trustee to "exercise that greater degree of skill in the administration of the trust" where, "because of the trustee's profession, occupation or business, the trustee possesses or ought to possess a particular degree of skill that is relevant to the administration of the trust" than an ordinarily prudent person would have. A trustee cannot delegate his or her duties to another or personally profit from his or her dealings with the trust property: ***Valard Construction Ltd v Bird Construction Co***, 2018 SCC 8 at para 17. A trustee's duties are primarily informed by the trust instrument, but the general law regarding a trustee's duties, rights and obligations continues to apply where the trust instrument is silent: ***Valard*** at para 15.

[381] The Commercial Trust confers upon the Commercial Trust Trustees near unfettered discretion. In a case such as this, my ability to interfere with the exercise of the Trustees' discretion is limited: ***Twinn v Trustee Act***, 2022 ABQB 107 at paras 132-135 (see also ***Ghag v Ghag***, 2021 BCCA 106 at paras 45-47):

> [132] When trustees act on "unfettered discretion" provided to them in a trust deed, the Court will have a very limited role in supervising the exercise of that discretion. This was explained in ***Fox v Fox Estate*** (1996), 1996 CanLII 779 (ON CA), 28 OR (3d) 496, 10 ETR (2d) 229 (***Fox***) where the Ontario Court of Appeal said, at para 11:
>
> > The entire question of the degree of control which the courts can and should exercise over a trustee who holds an absolute discretion is filled with difficulty. The leading case, or at least the case to which reference is almost always made, is Gisborne v Gisborne (1877), 2 App Cas 300 (HL). It stands for the proposition that so long as there

> is no "mala fides" on the part of a trustee the exercise of an absolute discretion is to be without any check or control by the courts.

[133] However, even where a trustee acts in the "absolute and uncontrolled discretion of the trustee", this does not mean that "this discretion is beyond all power of review by the Court": ***Dunlop v Ellis*** (1917), 41 OLR 303 at p 307 (ON Sup Ct).

[134] In ***McNeil v McNeil***, 2006 ABQB 636 at para 84, Romaine J also explained the limited circumstances in which a Court may intervene in the exercise of a trustee's absolute discretion:

> When … the discretion afforded to the trustees is broad and relatively unfettered, the Court should be reluctant to intervene unless it can be shown that the trustees acted in bad faith, are guilty of obvious misconduct, were not authorized to act in the manner they did … or took into account irrelevant considerations...

[135] See also ***Hoffman v Hoffman Estate***, 2019 ABQB 473 at para 20; ***Hunter Estate v Holton*** (1992), 1992 CanLII 7735 (ON SC), 7 OR (3d) 372 (ON CJ) (***Hunter Estate***).

[136] Donovan W.M. Waters, *Law of Trusts in Canada*, 5th ed (Toronto: Thomson Reuters Canada Ltd, 2021) (Waters) at 1054 identifies three categories of cases in which a court may intervene in the exercise of a trustee's unfettered discretion:

1) The decision is so unreasonable that no honest or fair-dealing trustee could have come to that decision;

2) The trustees have taken into account considerations which are irrelevant to the discretionary decision they had to make;

3) The trustees, in having done nothing, cannot show that they gave proper consideration to whether they ought to exercise the discretion.

[382] Article 9(1)(b) of the Commercial Trust grants the Commercial Trust Trustees, "full, absolute and exclusive power, control and authority over the Trust Assets" while article 9.8 limits their liability to gross negligence (absent allegations of fraud and dishonesty which Statesman does not raise). The Commercial Trust Trustees are exempt from liability for exercising or refusing to exercise their discretion or power pursuant to article 9.8(a) while article 9.8(b) grants them wide discretion as far as what information they require before deciding.

[383] I do not fault Satesman for questioning the actions of the Commercial Trust Trustees. They deliberated and arrived at their decisions with no formal process and without any record keeping. They discussed the issues and shared information amongst themselves and included Mr. Hill and Mr. Mathison, although precisely to what extent, we do not know. Each of them had business ties

to Mr. Mathison or his companies and worked out of Matco's head office. They did not disclose their relationships with Mr. Mathison to Statesman. None of them conducted inquiries of their own or looped back with anyone at Statesman to seek further information or to clarify what information they had. They faxed their correspondence of June 21, 2010, to Statesman on Matco's letterhead with Mr. Mathison's cover letter. They issued the Notice of Extraordinary Resolution well before the 30 days that their Request for Meeting called for.

[384] However, what would more process or more time have accomplished in terms of yielding a different result? I have concluded that Statesman breached its duty of good faith and honesty in contractual performance and that Mr. Mann, Mr. Ingalls, and Mr. Meiner breached their fiduciary duties. I find that the Commercial Trust Trustees, who essentially reached the same conclusion, acted properly and in conformance with their obligations. They may have done so on incomplete information, without a clearly defined and transparent process, and without the procedural requirements Statesman may have preferred. They could have asked for more details. However, I agree with their conclusion, namely that, derived from a reasonable interpretation of Statesman's own disclosure, the Commercial Trustees could reasonably conclude that Statesman's actions irretrievably severed the trust relationship with Matco. This was one of a number of reasonable decisions that was open to them to make based upon the available information and their business judgment. If gross negligence is defined as a "wilful, wanton or reckless misconduct, or such utter lack of all care as will be evidence thereof" or "as a very marked departure from the standards by which responsible and competent people... habitually govern themselves" (***Alberta Treasury Branches v Cam Holdings LP***, 2016 ABQB 33 at para 50) or if, as Statesman's argues, includes the Commercial Trust Trustee's failure not to undertake enquiries or investigations (Statesman relies on the Australian case of ***DIF III – Global Co-Investment Fund LP v Babcock & Brown International Pty Limited***, 2019 NSWSC 527, applies), then I do not find the Commercial Trust Trustees to have been grossly negligent in their conduct.

[385] Nor do I find that the higher standard in section 27(3) of the *Act* applies since no evidence has been presented that, as a result of any one of the Commercial Trust Trustees' profession, occupation of business, they possessed a particular degree of skill relevant to the administration of the Commercial Trust that an ordinary person would not ordinarily have. In my view, there is nothing in the administration of the Commercial Trust that requires a trustee to possess any particular professional, occupational or business background. Requiring the Commercial Trust Trustees to discharge a higher standard of care for no other reason than that they are lawyers or Chartered Accountants broadens the application of section 27(3) in a manner that is not supported by a plain reading of the *Act* and is not supported by any evidence that this was the legislature's intent.

[386] In ***Tridelta Investments Counsel Inc v GTA Mixed-Use Developments GP Inc***, 2023 ONSC 5099, a court had to assess whether a general partner's breach of its obligations to exercise its powers and discharge its duties honestly, in good faith, and in the best interests of the limited partners, and to exercise its standard of care falling outside of the limited partnership agreement warranted its removal by the limited partners. This issue had previously been addressed in ***Village Gate Resorts v Moore et al***, (1997), 47 BCLR (3d) 153, where the British Columbia Court of Appeal held at para 34:

> ... the limited partnership structure... relies on a substratum of trust and confidence in the integrity and ability of the general partner. It was surely the intention of the draftsman of the Agreement that the Limited Partners could take action to bring the relationship to and where that trust and confidence have fallen away. This loss of trust and confidence cannot now be restored any more than the past breaches can now be "cured" in any real sense.

[387] In ***Tridelta Invesments*** at paras 179 and 186, the court relied on ***Tridelta Financial Partners Inc v Zephyr Abl Ser-A 4.87% Jan 25***, 2020 ONSC 5211 and ***Village Gate Resorts*** and concluded that,

> ... a loss of trust and confidence can be a basis for removal of a general partner separate and apart from specific breaches of the Limited Partnership Agreements. It will be case specific. Where, as here (and in ***Zephyr***), there are established breaches of specific provisions of the Limited Partnership Agreements, they may add to the loss of trust and confidence. While decided in the different context of a dissolution of a partnership, ***PWA Corp. v. Gemini Group Antomated Distribution Systems Inc.*** (1993), 1993 CanLII 9401 (ON SC), 101 D.L.R. (4th) 15 (Ont. Gen. Div.) makes the equally important point, at para. 184, that a "serious departure from the proper conduct or management of the enterprise's affairs" is required in order to substantiate an allegation of loss of trust.

[388] At para 182 in ***Tridelta Investments***, the court cited from ***PWA*** (at para 183), noting that in assessing whether the requirements for establishing a loss of trust and confidence have been made out,

> a court must examine whether there is a valid basis to establish a *lack of probity, good faith or other improper conduct on the part of the other partners. Indeed, there must be a serious departure from the proper conduct or management of the enterprise's affairs*: *Loch v. Blackwood Ltd.*, 1924 CanLII 529 (UK JCPC), [1924] A.C. 783 at p. 796, [1924] 3 W.W.R. 216, and *Re R.J. Jowsey Mining Co.* (1969), 1969 CanLII 520 (ON CA), 6 D.L.R. (3d) 97 at p. 106, [1969] 2 O.R. 549 (C.A.).

[389] At paras 183 to 186 of ***Tridelta Investments***, the court concluded:

> [183] What the court is looking for to establish an alleged loss of confidence and irreparable breakdown in the relationship between the Limited Partners and the Original General Partners is "a lack of probity, good faith or other improper conduct." This alleged breach of duty has a number of components as at April 8, 2021, many of which overlap with the breaches of specific sections of the Limited Partnership Agreements...
>
> [184] It is the cumulative effect of the specific breaches, the multitude of related-party transactions, and the overarching lack of transparency and disclosure in this case that is alleged to constitute a sufficiently serious departure from the proper conduct or management of the affairs of the Limited Partnerships as of April 8,

> 2021 for the Tridelta Funds to have lost confidence in the Original General Partners.

[390] In my view, the court's finding in ***Tridelta Investments***, that an assessment as to whether the loss of trust and confidence in the general partner due to its general conduct outside the strictures of the LPA, equally applies here. I have discussed those breaches as they relate to the promulgation of the Trade Sales, the commencement of Phase 2 construction and the execution of Trade Sales without Mr. Mathison's prior approval and in the face of Mr. Mann's and Mr. Mathison's August 2009 agreement which I will not repeat.

[391] Suffice it to say, the information contained in the Statesman Memo provided the Commercial Trust Trustees with sufficient information to justify their belief that SRQL's actions had not been conducted in the best interests of RQLP, constituted a serious departure from the proper conduct and management of RQLP's affairs, and amounted to a sufficiently serious rupture in Mr. Mathison and Matco's trust in SRQL such that they were justified to terminate SRQL pursuant to the Extraordinary Resolution.

[392] In the result, I do not find that the Commercial Trust Trustees breached their contractual, fiduciary, or statutory duties. There is insufficient evidence that would allow me to conclude that their ties to Mr. Mathison and Matco prevented them from being independent and impartial. I find that the Commercial Trust Trustees' decision to note SRQL in default was, in all the circumstances, justified. They had sufficient information before them to reasonably conclude that Statesman's unilateral and unauthorized actions in respect of the Trade Sales, the Trade Contracts and the commencement of Phase 2 construction were not made in the best interests of RQLP, contrary to section 11.1(b)(iv) of the LPA. The Commercial Trust Trustees argue that the information they received which formed the basis of their decisions came from Statesman rather than from a third party. This is an important point because their duties to engage in independent inquiries regarding the information they received may well have been engaged if the information they reviewed came from a third party. In such a case, a duty may well have arisen to substantiate the information directly with Mr. Mann or Mr. Ingalls. But that is not what happened here.

[393] I have addressed the conduct of Mr. Mann, Mr. Ingalls, Mr. Meiner, Statesman and SMBI which I will not once again repeat and concluded that their actions, which struck at the core of the trust relationship with Mr. Mathison, could not be cured. In the result, I find that the Commercial Trust Trustees' decision to issue the Extraordinary Resolution pursuant to section 12.8(a) of the LPA due to SRQL's failure to exercise and discharge its duties in accordance with the standard of care set out in section 7.2 was in all respects informed, justified and reasonable.

III. Conclusions Regarding Liability

[394] I dismiss the Manns', Statesman's and SMBI's various liability claims against Mr. Mathison, Mr. Meiner, Matco, RQLP, IQL, the Income Trust Trustees and the Commercial Trust Trustees (Action No. 1001-15998).

[395] I dismiss Mr. Mann's and Statesman's defamation claim against Mr. Mathison (Action No. 1201-03846).

[396] I allow Mr. Mathison's, IQL's and RQLP's various liability claims against Statesman, SMBI and Mr. Mann (Action No. 1201-03600).

IV. The Manns', Statesman's and SMBI's Damages Claims

[397] While I dismiss the Manns', Statesman's and SBMI's substantive Actions, there are a number of damages claims that I must address.

A. Reimbursement of the Requested Contributions

[398] I dismiss Statesman's claim for reimbursement of its half share of the Requested Contributions. These were Project-related costs that were incurred unilaterally by Statesman without Matco's explicit approval or were incurred following Statesman's, SMBI's, and Mr. Mann's material defaults, the issuance of the Extraordinary Resolution, and Matco's filing of the Originating Application for the appointment of a Receiver. I agree with Matco that the Requested Contributions required unanimous approval of the Management Committee pursuant to section 4.4(k) of the USA, that no such approvals were obtained (as had previously been the case for requests for Interim Loans), and that Statesman was not reasonably entitled to expect that Matco would meet its unilateral demands for reimbursement, particularly when Statesman was materially in breach of its various obligations pursuant to the Agreements.

B. Reimbursement of Statesman's Interim Loans

[399] In its Amended Amended Statement of Claim filed on January 20, 2023, Statesman seeks a declaration in equity that the Interim Loans it advanced to RQLP of $1,883,872 be repaid in equity in the Income Trust or in cash plus interest pursuant to the USA. This claim was originally brought by the Manns and Statesman in an Amended Statement of Claim, filed on August 11, 2011, in which they sought:

> (j) a declaration that Interim Loans advanced to the Partnership shall be repaid in equity in MTM Income Trust

[400] The Amended Statement of Claim did not name RQLP as a defendant.

[401] On February 24, 2022, this Court granted Statesman's application to amend its Amended Statement of Claim and add RQLP and IQL as defendants to the action: ***MTM Commercial Trust v Statesman Riverside Quays Ltd***, 2022 ABQB 157 and to add a new claim:

> (h) a declaration that Interim Loans advanced to the RQ Limited Partnership shall be repaid in equity in MTM Income Trust or alternatively, the cash equivalent plus interest as set out in the Shareholder's Agreement.

[402] Despite Matco's position that the amendment was statute barred due to limitations, this Court allowed Statesman's proposed amendment and noted at para 12:

> ... Nevertheless, section 6 of the *Limitations Act*, RSA 2000 c L-12 does permit new claims to be advanced when they arise in connection with the same transaction. Accordingly, provided the issues arise out of the original Project, my inclination is

to allow the amendments and leave the limitations issue to be dealt with by the trial Judge.

[403] This Court made the following additional comments at paras 18-25:

> [18] The next group of amendments with which I deal relate to the addition of IQL, the Matco successor to the Statesman entity which was removed as General Partner and construction manager in favor of IQL. The other party is the Limited Partnership, Riverside Quays Limited Partnership. These amendments deal with the claim of the Statesman Group with respect to money advances they made to the Project prior to the originating application which was heard before Justice Romaine.
>
> [19] Under the agreements which governed the Project, the parties were to, whenever possible, utilize conventional financing. This was not always possible as, for example, when builder's liens were filed. Indeed, a significant builder's lien was filed by Mega Cranes Ltd. which put the Project offside BMO's financial requirements and both the Matco Group and the Statesman Group were required to advance sufficient monies to remove the builder's lien. The total amount was in excess of five million dollars. It was common ground that the parties advanced the money and the record is replete with the timing and amounts of the advances. The only issue among the parties was whether or not the parties advancing the money had any rights other than the rights of an unsecured creditor. The agreement provided that if the money was not repaid within a certain period of time, the lenders were entitled to assume positions of equity. Other discussions took place as a result, of which Statesman alleged that the Matco Group agreed to grant a mortgage for the sums advanced.
>
> ...
>
> [22] The existence of the advance was understood and the underlying debt was not part of the claim. Indeed, the agreements which lead up to the advances were referred to in separate pleadings. Advances were understood to be owing to both the Matco Group and the Statesman Group.
>
> [23] In accordance with Reasons for Judgment issued, I dismissed the Counterclaim, not on the basis that the money was not owing, but solely because Statesman's claim for a demand mortgage had not been made out. Nor did I deal with the assertion by Statesman in its main action wherein it claimed units in the partnership because of the failure to repay the advances made. (Page 19 of the Statement of Claim issued October 28, 2010).
>
> [24] The Matco Group asserts that my judgment which summarily dismisses the Counterclaim makes this proposed amendment either *res judicata* or a collateral attack on my judgment. They argue that, despite the fact that I did not determine that these amounts were not owing, the amendment is prohibited on the basis of estoppel or merger. Statesman argues that a plaintiff must assert all possible claims

> with respect to the cause of action. However, Matco was not arguing that the advances were not made or that they did not need to be repaid.
>
> [25] In my view, it was obvious to all that an accounting among the parties dealing with all of the advances would be achieved during the litigation. The only thing which changed was the identity of those playing the key roles in the project, i.e., the General Partner, which changed from a Statesman entity to a Matco entity. It was contemplated by the parties that the new entity would assume the role of the General Partner, which would carry on with the Limited Partnership as before. To the extent that the amendments sought by Statesman seek only to achieve the naming of the right parties, the proposed amendments are allowed. These claims arise out of the original Project and should be dealt with in the litigation.

[404] The Court's decision was upheld on appeal: ***MTM Commercial Trust v Statesman Riverside Quays Ltd***, 2022 ABCA 328.

[405] Matco asserts that Statesman's amended claim as outlined in (h) of its Amended Amended Statement of Claim is barred pursuant to sections 3(1)(a) and 3(1)(b) of the *Limitations Act*, RSA 2000 c L-12 (the "*Limitations Act*") and that the claim is not salvaged by the operation of section 6(4) of the *Limitations Act* since the claim in relation to the Interim Loans is not "related to the conduct, transaction or events described in the original pleading in the proceeding".

[406] Statesman argues the exception allowed for in section 6(4) of the *Limitations Act* applies as there has never been any dispute between the parties as to the amount of the Interim Loans that was advanced or that these should have been repaid in the normal course. The parties' expectations in this regard is reflected in the fact that previous Interim Loans made by Statesman and Matco in 2006-2007 were fully repaid on January 31, 2008.

[407] I agree with this Court's finding in ***MTM Commercial Trust*** that it would have been obvious to all from the facts and the Amended Statement of Claim that the Interim Loans were known to the parties and "that an accounting among the parties dealing with all of the advances would be achieved during the litigation".

[408] However, I agree with Matco that in order to achieve an equitable outcome on this point, both Matco and Statesman are entitled to make a reciprocal claim for reimbursement from RQLP for Interim Loans advanced for the period January 1, 2009, to June 21, 2010. The applicable rate of interest on the Interim Loans is Royal Bank of Canada's prime lending rate plus 2% per annum, in accordance with section 8.1 of the USA.

[409] I note that Statesman's entitlement regarding repayment of its Interim Loans excludes claims brought by other Statesman-related parties that: (i) have either been resolved (898294 Alberta Ltd.); (ii) are being litigated separately (Mr. Ingalls) or (iii) were never brought at all (Mr. Sali). Matco is entitled to reimbursement of Mr. Milne's Interim Loans of $568,540.94, due to an assignment effected in 2010.

[410] Statesman's and Matco's experts agreed on the math underlying the applicable interest calculations in respect of the Interim Loans. This same methodology will apply for calculating the total interest owing on the Interim Loans.

C. Dilution Loss

[411] The Manns and Statesman argue that as a result of the Rights Offering (see above at para 305) which was "completely unnecessary", they suffered a dilution of their respective interests. They say that had the Rights Offering not occurred, they would have maintained their 33.6% ownership share in the Units. In my view, this argument is untenable. There is no evidence that the Rights Offering was an oppressive measure intended to unfairly deprive them of their interest or that the subscription price was set at a nominal value with a view to diluting their interests. The evidence is that the Rights Offering was instituted with the legitimate purpose of paying off Bonnyrigg's indebtedness and meeting additional liabilities. The Manns and Statesman could have participated. They were aware of the Rights Offering, did not challenge the valuation, and elected not to invest further. The result is that their ownership share became diluted by Matco's $20M investment. To allow them to claim anything more than their diluted share would give them an entirely unearned windfall and I see no justifiable lawful reason to do so.

V. Matco's, IQL's and RQLP's Damages Claims

[412] I must now assess Matco's, IQL's and RQLP's damages with respect to its Action (Action 1201-03600 A breakdown showing particulars of the damages claimed is set out at para 329 of their written argument.

[413] The Receiver provided its final consolidated statement of receipts and disbursements in Appendix "A" to the Receiver's seventh report, dated December 8, 2011. The Receiver's account of fees and disbursements was approved pursuant to the December 13 and 16, 2011 Order. It is some of these fees and disbursements that IQL now seeks as damages.

A. Costs Related to Phase 1

1. MBS

[414] IQL seeks reimbursement for costs it incurred to address the MBS issue. There are three elements of its claim: (1) the actual cost of the MBS settlement, of $1,666,667.00; (2) consultant's fees paid in respect of the MBS claim; and (3) legal fees.

[415] Statesman argues that IQL's claim, filed on March 19, 2012, has been brought out of time and is therefore barred pursuant to section 3(1) of the *Limitations Act*. I disagree. While the issues underlying the Lien Litigation commenced in 2008, it was agreed that Statesman would prosecute the litigation. However, it was not until this Court's order of August 31, 2011, that the Lien Litigation was assigned to IQL (see above at paragraph 306). This is when IQL would first have known that it had a claim against Statesman for any settlement reached with MBS. In the result, I find that IQL's claim is not barred by limitations.

[416] In the ordinary course, Statesman and Matco would have shared equally the obligations arising out of the Lien Litigation settlement. I find that this arrangement should apply here as the MBS issues pre-date Statesman's, SMBI's and Mr. Mann's material breaches. Consequently, half of the amount of settlement reached in the Lien Litigation, being $833,333.50 plus interest, shall be set-off against Statesman's entitlement for reimbursement of the Interim Loans.

[417] IQL seeks repayment of approximately $3,200.00 for a consultant's costs incurred in advising IQL's lawyers on the MBS settlement. No evidence was provided as to the need or reasonableness of the consultant's invoice. Without any further context, this claim is dismissed.

[418] IQL's claim for its legal fees of approximately $750,000.00 incurred in resolving the Lien Litigation is not recoverable. I fail to see how legal fees in this amount can be considered reasonably incurred in light of the overall value of the settlement reached. Further, since IQL has not provided a breakdown of its legal fees, I have no way of assessing what its reasonable costs might be. In the result, its claim for legal fees is dismissed.

2. Excess Commissions

[419] While I have concluded that these excess commissions of approximately $51,000.00 were not approved in the DMA, I find that these were reasonable payments that Statesman made in its best efforts to encourage legitimate sales which benefited RQLP. Consequently, I find these are not recoverable.

3. Remediation of Phase 1 Work

[420] IQL asserts that various issues emerged with Statesman's work on Building A and Phase 1 that required remediation which it paid for. These include addressing water leaking into the parkade, hiring a consultant to address issues with the exterior envelope, repairing inadequate flashing and weatherproofing, repairing roof leaks, revising the hot water circulation and ventilation systems to address heat gain issues, and installing a centralized cooling system, all for a total cost of approximately $1.1M. I have reviewed the various invoices and consultants' reports prepared in respect of this work.

[421] Mr. McCorkindale testified about these costs. However, he is a cost consultant and was not qualified to give expert evidence about whether the deficiencies arose from Statesman's negligence. While he could speak about the heat gain issues which were felt particularly by the residents living in units facing west and south, he is not otherwise qualified to offer evidence about the necessity of carrying out the remediation work and whether the costs of repairs were covered by warranty (it does not appear any warranty claims or legal proceedings were pursued). He did not counter Mr. Mann's evidence that Statesman's construction of Phase 1 was in accordance with the Project's design specifications.

[422] While IQL has proven its costs in remediating certain issues arising from Phase 1 construction, it has not established that Statesman, through its negligence of for any other reason, is responsible for these. Consequently, I dismiss its claim for damages in this regard.

4. m2i's Managerial Services on Phase 1

[423] m2i claims it should be reimbursed in the approximate sum of $300,000.00 for managerial services it provided pursuant to an agreement reached between RQLP and m2i on January 14, 2013, which allowed m2i to charge a monthly fee of $10,000.00 for services performed to address the "MBS litigation, Phase 1 and future Phase matters (excluding Phase II) and Condominium Board Involvement". I have been provided with a series of monthly invoices, but these do not disclosed the nature of those services. As discussed above, IQL has not established that Statesman

is responsible for any of the deficiencies that arose on Phase 1 and the monthly invoices do not allow for any meaningful review as to whether these costs are reasonable. Further, no justification has been presented as to why m2i is entitled to this additional fee over and above what SMBI agreed it would be paid under the DMA. This claim is unsubstantiated and is dismissed.

B. The Receiver's Costs and Expenses

1. Receiver's Fees

[424] The Receiver's fees of $292,995.00 plus interest were incurred as a result of Statesman's breaches. They are recoverable and are set off against any amount recoverable by Statesman against RQLP with respect to the Interim Loans.

2. Receiver's Counsel and Filing Fees

[425] The Receiver paid counsel fees of $355,875.00, additional anticipated legal costs of $51,000.00, and filing fees of $140.00. I understand that these were reviewed by this Court and approved pursuant to the December 13 and 16, 2011 Order. These costs are recoverable. While a breakdown of these costs has not been provided to me, the December 13 and 16 Order was not appealed. Consequently, these costs must be paid and shall be set off against Statesman's entitlement for reimbursement of its Interim Loans.

3. SMBI

[426] As referred to above at paragraph 302, the Receiver retained SMBI to provide property management and construction services until April 2011. The Receiver was satisfied with SMBI's performance. These are costs IQL would have had to incur in any event and are therefore not recoverable.

4. Consulting

[427] The Receiver incurred consulting fees of approximately $135,000.00 to address the deficiencies arising from Phase 1 consulting. For the reasons I have discussed at paragraphs 420-423, these costs are not recoverable.

5. Completion of Phase 1 Inventory

[428] These are the Receiver's costs which IQL claims in the sum of approximately $960,000.00 for remediating the various issues that emerged with the Phase 1 construction. Some of these costs are broken down in the Receiver's fifth report dated August 11, 2011. They were spoken to by Mr. McCorkindale. Other than those identified and discussed at paragraphs 420-423 above, these costs include having to arrange for a temporary garbage facility (which would have to remain in place until the end of Phase 2 construction in any event), to address various other deficiencies arising from the construction of Building A, including certain design elements for an amenity centre, and building code requirements for a chiropractor's clinic (these costs were recouped by repurposing the amenity centre as a chiropractic clinic), landscaping and clean up costs (which IQL would have had to incur in any event), a deficiency list for Building A, and the costs of retaining a consultant to assist recouping a potential City of Calgary refund. I found Mr. McCorkindale's evidence in

respect of these costs to be unhelpful and vague, at least in so far as establishing that Statesman and SMBI are responsible for them. Consequently, and for the same reasons that I have outlined above, this claim is dismissed.

C. Phase 2 Costs

1. Resolution of the TDL Lien Claim

[429] As discussed above at paragraph 311, this Court approved the settlement of TDL's lien claim in the sum of $296,611.19. TDL's work, most of which was destroyed in IQL's redesign of Building B, should not have proceeded without Matco's approval. I have no evidence before me that this work unjustly enriched Matco. Consequently, I find that this cost is recoverable and shall be set off against Statesman's entitlement to reimbursement of its Interim Loans.

D. Punitive Damages

[430] In their Amended Statement of Claim, Matco, IQL and RQLP seek punitive damages. However, they have not articulated the basis for making such a claim in either their oral or written argument. I can only surmise they have abandoned this claim and I dismiss it.

VI. Conclusions Regarding Damages

[431] I find that Matco, IQL and RQLP are entitled to the following damages against Statesman, SMBI and Mr. Mann:

(a) One half of the MBS settlement, $833,333.50;

(b) Receiver's fees of $292,995.00;

(c) Receiver's total legal fees and filing fees of $407,015.00;

(d) TDL Lien settlement of $296,611.19.

TOTAL DAMAGES OF $1,829,954.69 + PJI, TO BE SET OFF AGAINST STATESMAN'S ENTITLEMENT FOR REIMBURSEMENT AGAINST RQLP OF ITS INTERIM LOANS OF $1,883,872, WITH INTEREST CALCULATED AT ROYAL BANK OF CANADA'S PRIME LENDING RATE PLUS 2% PER ANNUM

VII. Disposition

[432] Action 0201-03846 is dismissed.

[433] Action 1001-15998 is allowed to the extent that Statesman is granted the cash equivalent of its Interim Loans, calculated in accordance with section 8.1(c) of the USA.

[434] Action 1201-03600 is allowed with damages assessed as aforesaid at paragraphs 414-430.

[435] Should the parties require further assistance regarding the calculation of interest on damages which I have awarded, they shall contact my Judicial Assistant, Christina Norman, via e-mail at christina.norman@albertacourts.ca to discuss next steps.

[436] Once the issue of damages has been resolved, the parties shall contact Ms. Norman to schedule a remote hearing so that a process for determining costs may be discussed. Alternatively, the parties may provide me with a joint proposal, including timelines, regarding costs submissions.

Heard February 27 to May 3, 2023, December 20 to 23, 2023, and January 15 and 16, 2024.
Dated at the City of Calgary, Alberta, this 13th day of March, 2024.

O.P. Malik
J.C.K.B.A.

Appearances:

J.L. Lebo K.C., E.B. Crosley, J. Neuman, D. Carmichael, E. Sato, and T. Campbell, McLennan Ross LLP
for Mr. Garth Mann, Karen H. Mann, The Statesman Group of Companies Ltd., and Statesman Master Builders Inc.

E.W. Halt K.C. and M. Tiessen, Peacock Linder Halt & Mack LLP
for Ronald P. Mathison in his capacity as a Trustee of MTM Income Trust, Ronald Mathison, Matco Investments Ltd., Inglewood Quays Ltd., and Riverside Quays Limited Partnership

P.R. Mack K.C. and M. Tiessen, Peacock Linder Halt & Mack LLP
for David M. McGoey, in his capacity as a Trustee of MTM Income Trust, D. Alan Ross, in his capacity as a Trustee of MTM Commercial Trust, David A. McGoey, in his capacity as a Trustee of MTM Commercial Trust, Darryl Coates in his capacity as a Trustee of MTM Commercial Trust