

COURT FILE NUMBER	2003-06728
COURT	COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE	EDMONTON
PLAINTIFFS (DEFENDANTS BY COUNTERCLAIM)	<b>ROMSPEN MORTGAGE LIMITED PARTNERSHIP AND ROMSPEN INVESTMENT CORPORATION</b>
DEFENDANTS (PLAINTIFFS BY COUNTERCLAIM)	<b>3443 ZEN GARDEN LIMITED PARTNERSHIP, LOT 11 GP LTD., LOT 11 LIMITED PARTNERSHIP, ECO-INDUSTRIAL BUSINESS PARK INC., ABSOLUTE ENERGY RESOURCES INC., ABSOLUTE ENVIRONMENTAL WASTE MANAGEMENT INC. AND DANIEL ALEXANDER WHITE</b>
PLAINTIFFS BY COUNTERCLAIM	<b>3443 ZEN GARDEN LIMITED PARTNERSHIP, LOT 11 GP LTD, LOT 11 LIMITED PARTNERSHIP, ECO-INDUSTRIAL BUSINESS PARK INC, ABSOLUTE ENERGY RESOURCES INC, ABSOLUTE ENVIRONMENTAL WASTE MANAGEMENT INC and DANIEL ALEXANDER WHITE</b>
DEFENDANTS BY COUNTERCLAIM	<b>ROMSPEN MORTGAGE LIMITED PARTNERSHIP, ROMSPEN INVESTMENT CORPORATION, RICHARD WELDON and WESLEY ROITMAN</b>

COURT FILE NUMBER	1903-21473
COURT	COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE	EDMONTON
APPLICANTS	<b>LOT 11 LIMITED PARTNERSHIP by its general partner LOT 11 GP LTD., ECO-INDUSTRIAL BUSINESS PARK INC., ABSOLUTE ENERGY RESOURCES INC., ABSOLUTE ENVIRONMENTAL WASTE MANAGEMENT INC. AND DANIEL ALEXANDER WHITE.</b>
RESPONDENT (S)	<b>ROMSPEN INVESTMENT CORPORATION</b>

DOCUMENT

**AFFIDAVIT**

ADDRESS FOR SERVICE AND  
CONTACT INFORMATION OF PARTY  
FILING THIS DOCUMENT

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**AFFIDAVIT OF WESLEY ROITMAN**  
**Sworn on November 16<sup>th</sup>, 2020**

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I, WESLEY ROITMAN, of Toronto, Ontario, SWEAR AND SAY THAT:

**A. Introduction**

1. I am Managing General Partner of Romspen Investment Corporation ("Romspen"), the manager and administrative agent for Romspen Mortgage Limited Partnership ("RMLP"). As such, I have personal knowledge of the matters and facts hereinafter sworn to, except where stated to be based on information and belief, and where so stated, I verily believe the same to be true.
2. I have sworn a series of Affidavits in these proceedings filed on the following dates:
  - (i) March 31, 2020 (the "1<sup>st</sup> Affidavit");
  - (ii) April 1, 2020 (the "2<sup>nd</sup> Affidavit");
  - (iii) April 20, 2020 (the "3<sup>rd</sup> Affidavit");
  - (iv) April 22, 2020 (the "4<sup>th</sup> Affidavit");
  - (v) April 28, 2020 (the "5<sup>th</sup> Affidavit");
  - (vi) June 15, 2020 (the "6<sup>th</sup> Affidavit").

(collectively as the "Prior Affidavits").

3. Instead of restating information and reproducing documents that have already been produced in these proceedings, I will simply refer to relevant portions of the Prior Affidavits.

**B. The Parties**

4. The particulars of the parties to this action and application are set out in paragraphs 3 – 15 and Exhibit “A” to the 1<sup>st</sup> Affidavit.
5. At all material times hereto, Romspen was, and continues to be, engaged in the business of mortgage investing.
6. At all material times hereto, I was a Managing General Partner of Romspen.
7. At all material times hereto, Richard Weldon (“**Weldon**”) was a Managing Partner of Romspen.
8. At all material times hereto, both Weldon and I were acting in our capacities as representatives of Romspen and not in our personal capacities.

**C. The Acquisition Loan**

9. On June 6, 2013, Romspen, as lender, granted to Daniel Alexander White (“**White**”), as borrower, a Mortgage Loan Commitment Letter (the “**White Commitment**”) to a maximum principal amount of \$40,000,000. The White Commitment was given by Romspen in connection with the potential purchase and development of an industrial site in Fort McMurray, Alberta. The transaction contemplated in the White Commitment did not close and, consequently, no monies were advanced thereunder. Attached hereto and marked as **Exhibit “1”** to this my Affidavit is a true copy of the White Commitment.
10. Subsequent to the granting of the White Commitment and the transaction in Fort McMurray not closing, Romspen and White continued, from time to time, to discuss various potential investment opportunities. At various times, White expressly encouraged me to advise him of various potential investment opportunities that Romspen became aware of.
11. In October, 2014, Weldon, on behalf of Romspen, raised with White the prospect of using amounts not advanced under the White Commitment to invest in a real estate development in Austin, Texas (the “**Austin Lands**”).

12. On July 30, 2015, Romspen and each of Lot 11 Limited Partnership (“LP”) by its general partner Lot 11 GP Ltd. (“GP”), Eco Energy GP Ltd. (“Eco GP”), Eco Energy Limited Partnership (“Eco LP”), and Absolute Energy Resources Inc. (“Absolute Energy”) (collectively the “Original Acquisition Loan Borrowers”) entered into an Amended and Restated Commitment Letter (the “Amended White Commitment”) which served to amend the White Commitment. Attached hereto and marked as **Exhibit “2”** to this my Affidavit is a true copy of the Acquisition Loan.
13. The Amended White Commitment was executed in order to accommodate an advance for the acquisition of a land assembly in Lamont, Alberta.
14. On August 31, 2015, Romspen and the Original Acquisition Loan Borrowers executed Supplement No. 1 to the Amended White Commitment (the “Acquisition Loan”) in order to permit the Original Acquisition Loan Borrowers, all of whom were directly or indirectly owned or controlled by White, to invest in MOS8 Partners Ltd., a Texas limited partnership, and MOS8 GP, LLC, a Texas limited liability corporation, its sole general partner (collectively “MOS8”). MOS8 was formed to acquire and develop the Austin Lands.
15. On September 30, 2015, MOS8 acquired the Austin Lands. Romspen made advances to the Original Acquisition Loan Borrowers to enable them to make capital contributions to MOS8 (the “MOS8 Arrangement”).
16. Subsequent to MOS8 acquiring the Austin Lands, Romspen, with the concurrence of the Original Acquisition Loan Borrowers, selected Weldon and International Development Management LLC (“IDM”), to serve as the co-manager of the development of the Austin Lands. Christopher Milam (“Milam”), at all material times, was employed by IDM.
17. The Acquisition Loan, pursuant to paragraph 3 thereof, was to be disbursed in multiple tranches with the first tranche being approximately \$3,100,000. The maximum approved loan amount was \$40,000,000.
18. The Acquisition Loan contained a provision that Romspen had no obligation to advance. In particular, paragraph 34 stated:

**34. NO OBLIGATION TO ADVANCE**

It is understood that neither the preparation nor the registration of any of the documents contemplated herein shall bind the Lender to advance the funds or any unadvanced portion thereof, it being agreed that the advance of funds or any part thereof from time to time shall be in the sole, absolute, unfettered and unqualified discretion of the Lender.

19. The Acquisition Loan also contained an entire agreement provision. In particular, paragraph 40 stated:

**40. ENTIRE AGREEMENT**

This Commitment, together with its schedules and any agreements, instruments and other documents herein contemplated to be entered into between, by or including the parties hereto constitute the entire agreement between the parties hereto pertaining to the subject matter of this Commitment and supersede all prior agreements, undertakings, negotiations and discussions, whether oral or written, with respect thereto. There are no other warranties or representations and no other agreements between the parties hereto in connection with the Loan provided for herein except as specifically set forth in this Commitment and the Borrowers' application relating thereto.

20. The Acquisition Loan was subsequently amended by:

- (i) Supplement No. 2 (May 31, 2016);
- (ii) Supplement No. 3 (June 17, 2016);
- (iii) Supplement No. 4 (August 19, 2016);
- (iv) Supplement No. 5 (November 9, 2016);
- (v) Supplement No. 6 (August 1, 2017); and
- (vi) Supplement No. 7 (February 1, 2018).

21. On June 17, 2016, Romspen and the Original Acquisition Loan Borrowers executed Supplement No. 3 to the Acquisition Loan which, among other things, removed Eco GP and Eco LP as borrowers and added Symmetry Asset Management ("**Symmetry**"), an Alberta registered company that was either directly or indirectly owned or controlled by White, as a borrower (the "**Supplement No. 3 Borrowers**"). Attached hereto and marked as **Exhibit "3"** to this my Affidavit is a true copy of Supplement No. 3 to the Acquisition Loan.

22. Under the terms of the Acquisition Loan and Supplements Nos. 2 and 3, Romspen advanced various additional tranches to the Original Acquisition Loan Borrowers and the Supplement No. 3 Borrowers, as the case may be, to assist them in making capital contributions to MOS8 to facilitate (a) the development of the Austin Lands; and (b) the purchase of the interests of the other limited partner in MOS8. In addition, the supplements were used to make various changes to the lending arrangements.
23. On June 22, 2016, each of Weldon, as nominee and bare trustee for Symmetry, MOS8 Holdings LLC, IDM, MOS8 Partners Ltd. and MOS8 GP LLC entered into a Limited Partnership and Membership Interest Purchase Agreement (the "**Purchase Agreement**"). Attached hereto and marked as **Exhibit "4"** to this my Affidavit is a true copy of the Purchase Agreement.
24. Under the terms of the Purchase Agreement, Weldon purchased the interests in MOS8 as nominee, agent and bare trustee for Symmetry. Prior to execution of the Purchase Agreement, IDM and Weldon, as co-managers of the Austin Lands development project, appointed White as the General Partner of MOS8 and Milam agreed to cease taking actions on behalf of MOS8. It was a term of the Purchase Agreement, particularly Article 4.2, that each of IDM, Milam and MOS8 were released of any and all liabilities, with the exception of indemnity obligations as set out in Article 4.5 of the Purchase Agreement, in respect of their management of MOS8.
25. On August 19, 2016, Romspen and the Supplement No. 3 Borrowers executed Supplement No. 4 to the Acquisition Loan which, among other things, removed Symmetry as a borrower and added Zen Garden Limited Partnership and 3443 Zen Garden Limited Partnership ("**Zen Garden**") as covenantors (the "**Supplement No. 4 Borrowers**"). Zen Garden was, at the time of Supplement No. 4, a Texas limited partnership controlled directly or indirectly by White and was the entity proposed by White to later take title to the Austin Lands from MOS8. Attached hereto to and marked as **Exhibit "5"** to this my Affidavit is a true copy of Supplement No. 4 to the Acquisition Loan.
26. On November 9, 2016, Romspen and the Supplement No. 4 Borrowers executed Supplement No. 5 to the Acquisition Loan which, among other things, added Eightfold Developments LLC ("**Eightfold**") as a covenantor (the Supplement No. 4 Borrowers and Eightfold shall collectively be referred to as the "**Ultimate Borrowers**"), and increased the maximum approved loan amount to

\$25,750,000. Attached hereto and marked as **Exhibit "6"** to this my Affidavit is a true copy of Supplement No. 5 to the Acquisition Loan.

27. Under the terms of Supplement Nos. 5, 6 and 7 to the Acquisition Loan, the Ultimate Borrowers each granted a release and waived all claims against Romspen and its past and present officers, directors, shareholders, partners, employees, agents and attorneys. In particular, paragraph 6 of each of Supplement Nos. 5, 6 and 7 to the Acquisition Loan stated:

**6. Release**

Borrowers and Covenantors, for themselves and their respective successors and assigns, hereby release and waive all claims and/or defences they now have against Lender and its successors and assigns on account of any occurrence relating to the Loan, the Commitment, the Security or the Properties that accrued prior to the date hereof. This release and waiver is effective as of the date of this Supplement and is binding on each Borrower and Covenantor and each of their respective successors and assigns and will enure to the benefit of the Lender and its successors and assigns. The term "Lender" includes, but is not limited to, its present and former officers, directors, shareholders, partners, employees, agents and attorneys.

Attached hereto and marked as **Exhibits "7"** and **"8"** respectively to this my Affidavit are true copies of Supplements Nos. 6 and 7 to the Acquisition Loan.

**D. The Zen Garden Loan**

28. In the early parts of 2018, following execution of Supplement No. 7 to the Acquisition Loan, Romspen and the Ultimate Borrowers commenced discussions around increasing the amount of the credit facility in order to permit completion of the development of a portion of the Austin Lands.
29. It was ultimately agreed between Romspen and the Ultimate Borrowers that they would execute a new form of loan agreement with associated security documentation. On April 27, 2018, RMLP, as lender, and Zen Garden, as borrower, entered into a Loan Agreement (the "**Zen Garden Loan Agreement**"). A complete copy of the Zen Garden Loan Agreement is appended as Exhibit "B" to the 1<sup>st</sup> Affidavit.

30. The Zen Garden Loan Agreement was guaranteed by each of White, LP by GP, Eco-Industrial Business Park, Inc. ("**Eco-Industrial**"), Absolute Energy and Absolute Environmental Waste Management, Inc. ("**Absolute Environmental**") in Alberta and by Eightfold in Texas (collectively as the "**Zen Garden Guarantors**").
31. One of the primary purposes of the Zen Garden Loan Agreement was to consolidate the amounts then due and owing under the Acquisition Loan and to provide for additional construction financing for the continued development of a portion of the Austin Lands. Under Section 2.1(a) of the Zen Garden Loan Agreement, Zen Garden acknowledged that the amount due and owing under the Acquisition Loan, as at April 17, 2018, was \$35,479,831.72.
32. The Zen Garden Loan Agreement contains a provision whereby Zen Garden and the Zen Garden Guarantors released Romspen of all claims under the Acquisition Loan. In particular, Section 2.1(c) states:

(c) RELEASE. AS A MATERIAL PART OF THE CONSIDERATION FOR EACH PARTY'S EXECUTION OF THIS AGREEMENT, BORROWER PARTIES AND RIC, LENDER AND ALL AGENTS, ATTORNEYS, AFFILIATES AND SUBSIDIARIES ("**LENDER PARTIES**") HEREBY EACH UNCONDITIONALLY AND IRREVOCABLY JOINTLY AND SEVERALLY RELEASE AND FOREVER DISCHARGE THE OTHER FROM ANY AND ALL LIABILITIES, OBLIGATIONS, ACTIONS, CLAIMS, CAUSES OF ACTION, SUITS, PROCEEDINGS, DEMANDS DAMAGES, COSTS AND EXPENSES OF EVERY KIND WHATSOEVER, INCLUDING, WITHOUT LIMITATION, ATTORNEY'S FEES, ARISING FROM OR RELATING TO ANY ALLEGED ACT, OCCURRENCE, OMISSION OR TRANSACTION OF WHATSOEVER NATURE OCCURRING OR HAPPENING WITH RESPECT TO OR ARISING OUT OF THE ACQUISITION LOAN AND THE ACQUISITION LOAN DOCUMENTS.

Attached hereto and marked as **Exhibits "9"** and **"10"** to this my Affidavit is page 2 of the Zen Garden Loan Agreement and page 2 of Schedule 1.1 to the Zen Garden Loan Agreement.

33. The Zen Garden Loan Agreement contains a provision whereby Zen Garden waives any and all right to assert a counterclaim against RMLP. In particular, Section 11.1, in part, states:

**Section 11.1 Waiver of Counterclaim.** All amounts due under this Agreement or the Loan Documents shall be payable without setoff, counterclaim or any deduction whatsoever. Borrower hereby waives the right to assert a counterclaim, other than a compulsory counterclaim, in any action or proceeding brought against Borrower by Lender or its agents, or otherwise offset any obligations to make payments required under the Loan Documents.



Attached hereto and marked as **Exhibit "11"** to this my Affidavit is page 47 of the Zen Garden Loan Agreement.

34. The Zen Garden Loan Agreement contains a governing law provision. Section 12.2, in part, states:

**Section 12.2 Governing Law.** Except as otherwise expressly set forth herein, this Agreement shall be governed, construed, applied and enforced in accordance with the laws of the state where the Austin Property is located without regard to the conflicts of law provisions thereof ("**Governing State**"). Borrower, the Borrower Parties hereby consent to personal jurisdiction in the Governing State. JURISDICTION AND VENUE OF ANY ACTION BROUGHT TO ENFORCE THIS AGREEMENT OR ANY OTHER LOAN DOCUMENT OR ANY ACTION RELATING TO THE LOAN OR THE RELATIONSHIPS CREATED BY OR UNDER THE LOAN DOCUMENTS ("**ACTION**") SHALL, AT THE ELECTION OF LENDER, BE IN (AND IF ANY ACTION IS ORIGINALLY BROUGHT IN ANOTHER VENUE, THE ACTION SHALL AT THE ELECTION OF LENDER BE TRANSFERRED TO) A STATE OR FEDERAL COURT OF APPROPRIATE JURISDICTION IN THE GOVERNING STATE. BORROWER HEREBY CONSENTS AND SUBMITS TO THE PERSONAL JURISDICTION OF THE STATE COURTS OF THE GOVERNING STATE AND OF FEDERAL COURTS LOCATED IN THE GOVERNING STATE IN CONNECTION WITH ANY ACTION AND HEREBY WAIVES ANY AND ALL PERSONAL RIGHTS UNDER THE LAWS OF ANY OTHER STATE WHICH OBJECT TO JURISDICTION WITHIN SUCH GOVERNING STATE FOR PURPOSES OF ANY ACTION. GUARANTOR HEREBY IRREVOCABLY SUBMITS TO THE JURISDICTION OF ANY SUCH STATE OR FEDERAL COURTS IN ANY SUIT, ACTION OR PROCEEDING, AND EACH GUARANTOR DOES HEREBY DESIGNATE AND APPOINT...

Attached hereto and marked as **Exhibit "12"** to this my Affidavit is pages 50 and 51 of the Zen Garden Loan Agreement.

35. The Zen Garden Loan Agreement contains a provision which confirms the nature of the relationship between Zen Garden and RMLP. In particular, Section 12.10 states:

**Section 12.10 Relationship of Borrower and Lender.** The relationship between Borrower and Lender is solely that of debtor and creditor, and Lender has no fiduciary or other special relationship with Borrower, and no term or condition of any of the Note, the Security Instruments, this Agreement and the other Loan Documents shall be construed so as to deem the relationship between Borrower and Lender to be other than that of the debtor and creditor relationship established pursuant to the Loan Documents.

Attached hereto and marked as **Exhibit "13"** to this my Affidavit is page 53 of the Zen Garden Loan Agreement.

36. The Zen Garden Loan Agreement contains a prior agreements provision. In particular, Section 12.16 states:

**Section 12.16 Prior Agreements.** This Agreement and the other Loan Documents contain the entire agreement of the parties hereto and thereto in respect of the transaction contemplated hereby and thereby, and all prior agreements among or between such parties, whether oral or written, including any term sheets, discussion outlines or commitment letters (as may be amended) between any of the Borrower Parties and Lender are superseded by the terms of this Agreement and the other Loan Documents. In the event of any conflict between the terms of this Agreement and the Loan Term Sheet, the terms of this Agreement shall govern.

Attached hereto and marked as **Exhibit "14"** to this my Affidavit is page 54 of the Zen Garden Loan Agreement.

37. The Zen Garden Loan Agreement contains a limitation on liability provision. In particular, Section 12.21, states:

**Section 12.22 Limitation on Liability.** Notwithstanding anything contained herein to the contrary, Borrower agrees that none of Lender, or its agents or employees shall be liable to Borrower for any monetary damages (including any special, consequential or punitive damages whatsoever), whether in contract, tort (including negligence and strict liability) or any other legal or equitable principle and Borrower's sole remedies shall be limited to commencing an action for specific performance under the Loan Documents.

Attached hereto and marked as **Exhibit "15"** to this my Affidavit is page 56 of the Zen Garden Loan Agreement.

38. The Zen Garden Loan Agreement contains a writing requirement provision. In particular, Section 12.27, states:

**Section 12.27 Modification, Waiver in Writing.** No modification, amendment, extension, discharge, termination or waiver of any provision of any Loan Document, nor consent to any departure by Borrower therefrom, shall in any event be effective unless the same shall be in writing signed by the party or parties against whom enforcement is sought, and then such waiver or consent shall be effective only in the specific instance, and for the specific purpose, for which given. Except as otherwise expressly provided herein, no notice to, or demand on Borrower, shall entitle Borrower to any other or future notice or demand in the same, similar or other circumstances.

Attached hereto and marked as **Exhibit "16"** to this my Affidavit is page 57 of the Zen Loan Agreement

**E. The Alberta Security**

39. In addition to the guaranty from Eightfold in Texas, Romspen was granted, among others, the following instruments in Alberta as additional security for the Zen Garden Loan Agreement:

- (i) Mortgage from GP acting in its capacity as general partner for LP, and its own capacity, dated April 17, 2018 in the sum of USD \$40,000,000;
- (ii) Assignment of Leases and Rents from GP, dated April 17, 2018;
- (iii) General Security Agreement from GP and LP, dated April 17, 2018;
- (iv) Mortgage from Eco-Industrial, dated April 17, 2018 in the sum of USD \$40,000,000;
- (v) Assignment of Leases and Rents from Eco-Industrial, dated April 17, 2018;
- (vi) General Security Agreement from Eco-Industrial, dated April 17, 2018;
- (vii) General Security Agreement from Absolute Energy, dated April 17, 2018;
- (viii) General Security Agreement from Absolute Environmental, dated April 17, 2018;  
and
- (ix) General Security Agreement from White, dated April 17, 2018.

(collectively the "**Alberta Security**")

A complete copy of the Alberta Security is appended as Exhibits "B" – "G" to the 3<sup>rd</sup> Affidavit.

40. Details of the lands contemplated in the mortgages granted by each of GP and Eco-Industrial (the "**Mortgages**") are set out in paragraphs 22 and 23 of the 1<sup>st</sup> Affidavit.

41. Each of GP, LP, Eco-Industrial, Absolute Energy and White granted to RMLP, dated April 17, 2018, guarantees for the repayment of all amounts advanced to Zen Garden pursuant to the Zen Garden Loan Agreement (the "**Alberta Guarantees**"). Complete copies of the Alberta Guarantees are appended as Exhibits "H" – "L" to the 3<sup>rd</sup> Affidavit.

42. The Mortgages obligate GP and Eco-Industrial to pay taxes due and owing in respect of the mortgaged lands. In particular, paragraph 2 states:

That save as hereinafter described, the Mortgagor will pay when and as same fall due, all taxes, rates, liens, charges, encumbrances or claims (hereinafter sometimes referred to as the "taxes") which are or may become charges or claimed against the mortgaged premises, or in respect of this mortgage. The Mortgagor shall pay to the Mortgagee on each date on which a payment is due hereunder an additional amount estimated by the Mortgagee required to pay the full amount of taxes when they next become due. The Mortgagor further covenants and agrees to transmit to the Mortgagee the tax bills and other notices affecting the imposition of taxes forthwith after the receipt of same by him and to provide evidence of payment within thirty (30) days of the due date for payment.

Attached hereto and marked as **Exhibit "17"** to this my Affidavit is a true copy of page 2 of the Mortgages.

43. The Mortgages also reference particular events of default. Paragraph 18(a)(ii) states:

The Mortgagor covenants and agrees that notwithstanding any other provision in this Mortgage, the Mortgagee may deem this Mortgage to be in default in the event that the Mortgagor does or becomes subject to any of the following which is deemed to be an Event of Default:

- (ii) the Mortgagor fails to make any other payment required to be made under the Mortgage;

Attached hereto and marked as **Exhibit "18"** to this my Affidavit is a true copy of page 12 of Schedule "B" to the Mortgages.

44. In the event of a default under the Mortgages, Romspen is entitled to appoint a Receiver. Paragraph 11(a) of Schedule "B" to the Mortgages states:

Any time after default hereunder the Mortgagee may in writing from time to time appoint a Receiver of the mortgaged property and may from time to time remove the said Receiver and appoint another in his stead, and any such Receiver appointed hereunder shall have the following powers.

Attached hereto and marked as **Exhibit "19"** to this my Affidavit is a true copy of page 5 of Schedule "B" to the Mortgages.

45. The General Security Agreements executed by each of GP, LP, Eco-Industrial, Absolute Environmental, Absolute Energy and White (the "GSAs") obligate, as a positive covenant, each of them to pay taxes. Paragraph 4.1(4) states as follows:

So long as this Agreement remains in effect, Debtor covenants and agrees:

- (4) to pay all taxes, rates, levies, assessments and other charges of every nature which may be lawfully levied, assessed or imposed against or in respect of Debtor or Collateral as and when the same becomes due and payable.

Attached hereto and marked as **Exhibit "20"** to this my Affidavit is a true copy of pages 4 and 5 of the GSAs.

46. The GSAs also reference particular events of default. Paragraph 11.1(1) states:

The occurrence of any of the following events or conditions shall constitute Default under this Agreement:

- (1) the nonpayment when due, whether by acceleration or otherwise, of any principal or interest or other monies forming part of the indebtedness or the failure of Debtor to observe or perform any obligation, covenant, term, provision or condition contained in this Agreement or any other agreement, deed, indenture or arrangement between Debtor and Creditor;

Attached hereto and marked as **Exhibit "21"** to this my Affidavit is a true copy of page 7 of the GSAs.

47. In the event of a default under the GSAs, Romspen is entitled to appoint a Receiver. Paragraph 13.1 states:

Creditor may take possession of, collect, demand, sue on, enforce and receive Collateral and give valid and binding receipts and discharges therefor and in respect thereof, and upon Default Creditor may appoint or re-appoint any person(s), whether an officer or officers or an employee or employees of Creditor or not, to be a receiver or receivers (a "Receiver", which term when used herein and shall include a receiver and manager) of Collateral (including any interest, income or profits therefrom) and may remove any Receiver so appointed and appoint another in his stead. Any such Receiver shall, so far as concerns responsibility for his acts, be deemed the agent of Debtor and not Creditor, and Creditor shall not be in any way responsible for such misconduct, negligence, or nonfeasance on the part of any such Receiver, his servants, agents or employees.

Attached hereto and marked as **Exhibit "22"** to this my Affidavit is a true copy of page 8 of the GSAs.

48. The Guarantees executed by each of Eco-Industrial, Absolute Energy, Absolute Environmental and White each set out the rights of Romspen on the occurrence of a default. Paragraph 3.4 states:

If default shall occur under any one or more of the Security Documents, the Lender shall in its sole discretion be at liberty to proceed against the Guarantor without any demand for payment being made by the Lender upon the Guarantor for payment, or payment of all or any portion of the Moneys owing or payable by virtue of this Guarantee or any one of the Security Documents and whether default or notice of default shall have occurred or shall have been given or not as to the Moneys or any portion thereof or under any one or more of the Security Documents and the Guarantor hereby waives any and all rights that it may have to any such notice or demand.

Attached hereto and marked as **Exhibit "23"** to this my Affidavit are true copies of pages 1 and 4 of the Guarantees.

**F. Defaults under the Zen Garden Loan Agreement and the Alberta Security**

49. On October 11 and 23, 2019, Romspen and RMLP's counsel in Texas issued Notices of Default under the Zen Garden Loan Agreement to each of Zen Garden, 3443 Zen Garden GP LLC, White, Eco-Industrial, Absolute Energy, LP, GP, Eightfold, Absolute Environmental and Adam Zarafshani ("**Zarafshani**"). Copies of the October 11 and 23, 2019 Notices of Default are appended as Exhibits "**M**" and "**N**" to the 3<sup>rd</sup> Affidavit.
50. On October 11, 2019, Romspen issued a Notice of Intention to Enforce Security pursuant to section 244 of the *Bankruptcy & Insolvency Act*, RSC 1985, c. B-3 as amended ("**BIA**"), to each of Zen Garden, Eightfold, GP, LP, Absolute Energy, Absolute Environmental, Eco-Industrial and White (the "**Demand and Notice**"). Copies of the Demand and Notice are appended as Exhibit "**C**" to the 1<sup>st</sup> Affidavit.
51. Zen Garden's default under the Zen Garden Loan Agreement triggered an automatic default under the Alberta Security. In addition, each of GP, LP, Absolute Energy, Absolute Environmental, Eco-Industrial and White were independently in breach of the Alberta Security by virtue of GP and Eco-Industrial having failed to pay outstanding taxes, as at February 13, 2020, on the lands secured under the Mortgages. As at that date, the outstanding tax obligations exceeded CDN.

\$800,000. Attached hereto and marked as **Exhibit "24"** to this my Affidavit is true copies of the tax statements dated February 13, 2020 in respect of the lands secured by the Mortgages.

52. On June 14, 2020, counsel for Romspen obtained updated tax statements in respect of the lands secured under the Mortgages. Appended as Exhibit "E" to the 6<sup>th</sup> Affidavit is copies of the outstanding tax statements totaling excess of \$1,300,000
53. On November 10, 2020, counsel for Romspen obtained updated tax statements in respect of the lands secured under the Mortgages. The outstanding tax obligations now exceed \$1,385,000. Attached hereto and marked as **Exhibit "25"** to this my Affidavit is true copies of the tax statements dated November 10, 2020.

**G. The United States Bankruptcy Proceedings**

54. On March 22, 2020, Zen Garden was petitioned into involuntary bankruptcy in the Texas Western Bankruptcy Court by its creditors. Appended as Exhibit "F" to the 1<sup>st</sup> Affidavit is a copy of the Notice of Bankruptcy in respect of Zen Garden.
55. I have reviewed the Affidavit of Dan White filed in these proceedings on November 13, 2020. In reviewing White's Affidavit, I note that, at Exhibit "C", he attaches the Chapter 11 Trustee's (the "**Texas Trustee**") Emergency Motion (the "**Motion**"). The Motion is a pleading that contains allegations and does not contain evidence of the Texas Trustee.
56. Irrespective of the fact that the Motion does not contain evidence on the part of the Texas Trustee, Mr. White's evidence is entirely incomplete. Romspen has reached a settlement in principle with the Texas Trustee, who was appointed by the Bankruptcy Court as the independent fiduciary over Zen Garden and all of its assets and liabilities in the bankruptcy estate. The Texas Trustee's and Romspen's settlement in principle has been documented in the Chapter 11 bankruptcy plan (the "**Plan**"), and filed of record for the Bankruptcy Court's approval. Attached hereto and marked as **Exhibit "26"** to this my Affidavit is a true copy of the Plan.
57. The Plan marks a global resolution of any and all disputed issues between Zen Garden and Romspen. I am advised by Romspen's Texas counsel, Thomas Scannell ("**Scannell**") of Foley & Lardner, and do verily believe that as the court appointed fiduciary over all of Zen Garden's assets (including causes of action) and liabilities, the Texas Trustee holds the exclusive standing and

authority to bring, assert, allege, settle and ultimately resolve any and all claims and causes of action against Romspen.

58. The accusations and alleged liability expressly included in the Plan settlement encompass the Texas Trustee's allegations raised in the Emergency Motion to Limit Romspen's Credit Bid (the "**Credit Bid Challenge**"). Attached hereto and marked as **Exhibit "27"** to this my Affidavit is a true copy of the Texas Trustee's Credit Bid Challenge.
59. I am further advised by Scannell and do verily believe that nothing contained in the Texas Trustee's Credit Bid Challenge constitutes a finding or conclusion of the Bankruptcy Court. Rather, the contents of the Texas Trustee's Credit Bid Challenge are nothing more than accusations and allegations raised by the Texas Trustee in connection with, at the time the Credit Bid Challenge was filed, ongoing settlement negotiations and posturing leverage against Romspen. Romspen has always denied and disputed, and continues to deny and dispute, the allegations raised in the Texas Trustee's Credit Bid Challenge. I note that the substance of the Texas Trustee's Credit Bid Challenge largely mirrors the allegations contained in White's pleadings in the adversarial proceeding he has commenced against Romspen in Texas.
60. In connection with the alleged claims and liability that the Texas Trustee asserted against Romspen, the Texas Trustee once sought to limit Romspen's credit bid rights. The Texas Trustee ultimately withdrew his challenge to Romspen's right to credit bid on the Austin Lands. The Texas Trustee's and Romspen's agreement resolving the Credit Bid Challenge was approved by the Bankruptcy Court and entered on the docket as a "Stipulation". Attached hereto and marked as **Exhibit "28"** to this my Affidavit is a true copy of the Stipulation.
61. As set forth in paragraph 2 of the Stipulation, not one allegation in the Texas Trustee's Credit Bid Challenge is deemed conclusive or a finding against Romspen. In fact, the Bankruptcy Court ordered the exact opposite:

For the sake of clarity, nothing in this Stipulation shall be construed, presumed or deemed to be an admission against Romspen or a presumption of any kind that Romspen has engaged in any acts of wrongdoing. By entering into this Stipulation, Romspen shall not be presumed or deemed to have any liability or exposure of any kind. Romspen adamantly opposes the allegations contained in the Trustee's Credit Bid Challenge, and all of Romspen's and the Trustee's, Debtor's and Estate's respective rights and remedies in connection therewith, including, without limitation, all claims,



causes of action, defenses, evidence, authorities and other allegations are expressly reserved”

62. Ultimately, Romspen’s credit bid was approved by the Bankruptcy Court as the highest and best bid for the Austin Lands, and a sale of the Austin Lands to Romspen is in the best interests of all parties to Zen Garden’s bankruptcy case. On October 7, 2020, the Bankruptcy Court entered an order approving Romspen’s credit bid (the “**Sale Order**”) and granting Romspen title to the Austin Lands free and clear of all liens, claims and encumbrances. Attached hereto and marked as **Exhibit “28”** to this my Affidavit is a true copy of the Sale Order.
63. In addition to resolving the Credit Bid Challenge allegations through a voluntary settlement with the Texas Trustee (as documented and approved by the Bankruptcy Court in the Stipulation), Romspen and the Texas Trustee have also reached a global settlement through the Plan, which provides for a partial recovery for the unsecured creditors of Zen Garden in exchange for a full release of all liability, claims, allegations, accusations, causes of action and any other disputed issue between Romspen and the Texas Trustee (on behalf of himself, Zen Garden and Zen Garden’s bankruptcy estate, creditors, assets and liabilities).
64. I am further advised by Scannell and do verily believe that the Texas Trustee is authorized to enter into this global settlement, subject to Bankruptcy Court approval, because the Texas Trustee is the sole and exclusive court-appointed fiduciary in charge of looking out for the best interests of Zen Garden. Specifically, the Texas Trustee is charged with the obligation to ensure that any settlements reached will maximize the return to creditors of Zen Garden.
65. After months of investigation by the Texas Trustee and his professionals, specifically including, without limitation, review of thousands of pages of documents, interviews with numerous fact witnesses, and consultation with Zen Garden’s pre-bankruptcy attorneys who brought litigation against Romspen, the Texas Trustee, in an exercise of his business judgment, has concluded that the settlement with Romspen (as documented by the Plan) is in the best interests of Zen Garden, its assets, liabilities and all parties in interest, and will maximize the return to Zen Garden’s creditors. This Plan settlement encompasses all of the allegations raised in the Credit Bid Challenge.

66. I am further advised by Scannell and do verily believe that the Plan is currently pending Bankruptcy Court approval, and that Plan settlement approval is expected to be entered by order of the Bankruptcy Court on or about the first part of January, 2021 at the final Plan confirmation hearing.

**H. The Alberta Proceedings**

67. Upon Romspen issuing the Demand and Notice, each of LP, GP, Eco-Industrial, Absolute Energy, Absolute Environmental and White (the "**White Group**") brought an application, in Court File No. 1903-21473, to stay Romspen from taking any enforcement steps under the *BIA*. The application was supported by an Affidavit from Adam Zarafshani ("**Zarafshani**").

68. As the parties were in the process of attempting to negotiate a resolution of amounts owing under the Zen Garden Loan Agreement, they agreed to a Consent Order which served to stay Romspen from taking enforcement steps under the *BIA*. A copy of the Consent Order filed on October 25, 2019, is appended to the 1<sup>st</sup> Affidavit as Exhibit "D".

69. Notwithstanding that Zarafshani swore an Affidavit in support of the White Group in October, 2019, White and his Texas entities sued Zarafshani and others, including Romspen, in Texas in August, 2020. In addition, the White Group has since commenced three separate actions in Alberta against Zarafshani. Attached hereto and marked as **Exhibits "29", "30" and "31"** to this my Affidavit are true copies of the Statements of Claim that various entities within the White Group have issued against Zarafshani and others.

70. Romspen and RMLP filed its Statement of Claim as against the White Group on March 31, 2020. At the time of the Statement of Claim being filed, the total amount due and owing under the Zen Garden Loan Agreement was USD \$96,760,975.69 with interest continuing to accrue at the rate of USD \$44,384.00 per diem thereafter. A copy of a Statement of Indebtedness as at March 26, 2020 is appended as Exhibit "G" to the 1<sup>st</sup> Affidavit.

71. In addition to filing the Statement of Claim on March 31, 2020, Romspen also filed an application to appoint a Receiver and Manager over the assets of the White Group. The application was supported by the 1<sup>st</sup> Affidavit and the 2<sup>nd</sup> Affidavit.

72. The application was opposed by the White Group. In support of their position, the White Group tendered an Affidavit from Gerrit Vandepol ("**Vandepol**") who identified himself as the sole officer and director of each of Absolute Environmental and Eco-Industrial.
73. Romspen's application was heard by Associate Chief Justice Nielsen on April 2, 2020 who adjourned the application *sine die* but ordered, among other things, that Romspen was "entitled to appoint an Interim Monitor of its choice to monitor the business operations of the" White Group (excluding White personally) (the "**Nielsen Order**"). His Lordship further directed, at paragraph 7, that:
- Management of the corporate Respondents shall cooperate and provide information to the Interim Monitor. The Interim Monitor shall have full access to all of the corporate Respondents' business operations and assets and shall have the ability to observe the operations of the corporate Respondents. The Interim Monitor will have access to all the business records of the corporate Respondents. The Interim Monitor will be entitled to be physically present at the business premises of the corporate Respondents.
74. In connection with the Nielsen Order, Romspen retained MNP Ltd. to act as the Interim Monitor.
75. The White Group appealed the Nielsen Order. The appeal however, was struck as the White Group failed to take necessary steps to prosecute the appeal.
76. On April 30, 2020, Romspen brought an application before Mr. Justice Hillier for an extension of the Nielsen Order. In advance of the application before Mr. Justice Hillier, I was questioned on my Affidavits filed on March 31 and April 20 and 22, 2020. In addition, prior to the application being heard by Mr. Justice Hillier, White submitted a comprehensive Affidavit of White, and Vandepol submitted a further Affidavit.
77. Despite the submissions of counsel and the evidence of White and Vandepol, Mr. Justice Hillier extended the Nielsen Order to June 19, 2020 (the "**Hillier Order**").
78. Notwithstanding that Vandepol swore Affidavits on behalf of the White Group in April, 2020, Weldon and I were contacted by Vandepol in mid-August, 2020. At that time, Vandepol advised that White had terminated him, effective immediately, from his positions within the White Group.

79. The Nielsen Order, as extended by the Hillier Order, has been further extended twice by consent. The most recent extension is scheduled to expire on November 27, 2020.

**I. Breaches of the Nielsen Order (As Extended)**

80. Notwithstanding the direction in the Nielsen Order that the White Group “cooperate and provide information to the Interim Monitor”, they have not done so. There are many requests for information, records and documentation that remain outstanding.

81. The Nielsen Order was in place for an initial 30-day period. Despite the requests of the Interim Monitor, the White Group waited until the day before the application before Justice Hillier to supply documentation and then opposed an extension of the Nielsen Order. Attached hereto and marked as **Exhibit “32”** to this my Affidavit is correspondence dated April 20, 2020 from counsel to the Interim Monitor detailing the efforts that it had undertaken to secure the cooperation of the White Group.

82. I am advised by counsel for Romspen in these proceedings, Kevin Barr (“**Barr**”) of Borden Ladner Gervais LLP, and do verily believe that at the application before Mr. Justice Hillier, counsel for the White Group advised the Court that the White Group had provided virtually all, if not all, of the records and documents requested by the Interim Monitor.

83. While I do not doubt that counsel for the White Group genuinely believed that their clients had complied with all of the requests for information, records and documentation made by the Interim Monitor, that was not accurate. Appended as Exhibit “C” to the 6<sup>th</sup> Affidavit is a true copy of correspondence from the Interim Monitor dated June 12, 2020 detailing requests for information, records and documentation that remained outstanding.

84. Despite the fact that the White Group had failed to deliver on various requests for information, records and documentation, the Interim Monitor delivered its First Report on June 6, 2020. A copy of the Interim Monitor’s First Report is appended as Exhibit “D” to the 6<sup>th</sup> Affidavit. In addition, paragraphs 14 and 15 of the 6<sup>th</sup> Affidavit summarizes the Interim Monitor’s First Report.

85. Attached hereto and marked as **Exhibit “33”** to this my Affidavit is a true copy of the Interim Monitor’s Second Report, exclusive of attachments, dated August 5, 2020.

86. Attached hereto and marked as **Exhibit "34"** to this my Affidavit is a true copy of a report dated September 10, 2020 from the Interim Monitor, inclusive of attachments, detailing a record of various requests made of the White Group. In particular, I note that the Interim Monitor had requested a copy of documentation generated by Vandepol in the 60 days prior to his termination from the White Group and that such request had been refused. I am advised by Barr, and do verily believe, that, despite numerous requests of the White Group's counsel to supply documentation generated by Vandepol in the 60 days prior to his termination from the White Group, that request remains unanswered.
87. Attached hereto and marked as **Exhibit "35"** to this my Affidavit is a true copy of an email exchange dated September 16, 2020 between the Interim Monitor and a representative of the White Group wherein the Interim Monitor references not having received meaningful financial information since July 15, 2020.
88. Attached hereto and marked as **Exhibit "36"** to this my Affidavit is a true copy of an email exchange dated October 16, 2020 between the Interim Monitor and a representative of the White Group wherein the Interim Monitor was continuing to make requests for information, records and documentation with little cooperation.
89. The Interim Monitor is continuing to report to Romspen with respect to requests for information, records and documentation requested of the White Group. Attached hereto and marked as **Exhibit "37"** to this my Affidavit is a true copy of an email dated November 5, 2020 from the Interim Monitor summarizing requests of the White Group that remain outstanding, some of which date back to July, 2020.

**J. Summary Judgment**

90. I do verily believe, based on the evidence contained herein, that there is no genuine issue with the respect to the claims asserted by Romspen and RMLP and that the only issue is as to amount.
91. I do verily believe, based on the evidence contained herein, that there is no merit to the Counterclaim being advanced by any of Zen Garden, GP, LP, Eco-Industrial, Absolute Energy, Absolute Environmental and White.

**K. Conclusion**

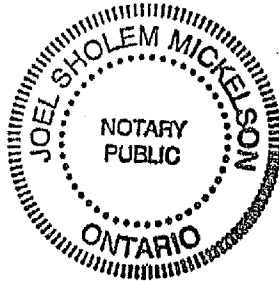
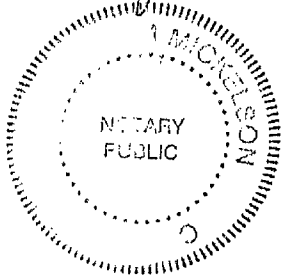
92. I am authorized to swear this Affidavit on behalf on Romspen.
93. I make this Affidavit for no improper purpose.
94. I make this Affidavit in support of an Order for the following relief:
- (a) a Declaration that each of GP, LP, Eco-Industrial, Absolute Energy, Absolute Environmental and White are in default under the terms of the Alberta Security and the Alberta Guarantees;
  - (b) to the extent necessary, an Order lifting the stay referenced in paragraph 2 of the Consent Order granted by the Honourable Mr. Justice J. Gill granted on October 25, 2019 in Court File No. 1903-21473;
  - (c) a Declaration that each of Zen Garden, GP, LP, Eco-Industrial, Absolute Energy; Absolute Environmental and White are in breach of the Order granted by the Honourable Associate Chief Justice K.G. Nielsen, as subsequently extended, on April 2, 2020;
  - (d) an Order granting summary judgment in favour of Romspen and RMLP;
  - (e) an Order granting summary dismissal of the Counterclaim filed by Zen Garden, GP, LP, Eco-Industrial, Absolute Energy, Absolute Environmental and White;
  - (f) in the alternative, an Order striking out certain allegations advanced in the Counterclaim;
  - (g) a Receivership Order appointing MNP as Receiver and Manager over the assets and undertakings of each of GP, LP, Eco-Industrial, Absolute Energy, Absolute Environmental and White;
  - (h) in the alternative, an Order appointing MNP as Interim Receiver and Manager over the assets and undertakings of each of GP, LP, Eco-Industrial, Absolute Energy, Absolute Environmental and White;
  - (i) to the extent necessary, an extension of the Nielsen Order;

- (j) in the further alternative, an Order for foreclosure in respect of the lands contemplated under the Mortgages;
- (k) in the further alternative, an Order for a judicial listing of the lands contemplated under the Mortgages; and
- (l) such further and other relief as this Honourable Court may deem appropriate.


SWORN BEFORE ME at Toronto, Ontario, this  
16<sup>th</sup> day of November, 2020.

\_\_\_\_\_  
A Notary Public in and for the Province of  
Ontario

\_\_\_\_\_  
WESLEY ROITMAN

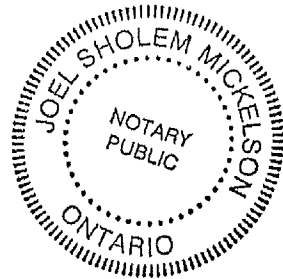


This is Exhibit "1" referred to  
in the Affidavit of Wesley Roitman  
Sworn before me this 16<sup>th</sup> day of November, 2020



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A Notary Public in and for  
the Province of Ontario





June 6<sup>th</sup>, 2013

Symmetry Asset Management Inc.  
1250 Hayter Road  
Edmonton, AB, T6S 1A2  
Attention: Dan White

Dear Dan:

**Re: \$40 Million (Maximum) First Mortgage Financing (the "Loan")  
Ft. McMurray Property  
Eco-Industrial Business Park (Lot 11), Edmonton**

---

We are pleased to inform you that, on the basis of the information and the documents supplied by you, Romspen Investment Corporation as trustee (the "Lender") hereby submits to you this offer of mortgage financing ("Commitment") in connection with the properties above mentioned and more fully described in Section 4 below.

**This Commitment must be accepted by the Borrower and received by the Lender, together with the Standby Deposit as hereinafter set out, no later than 5 days from the date hereof, failing which this Commitment shall become null and void without further notice.**

**1. BORROWER**

A limited partnership or other single-purpose entity to be formed, acceptable to the Lender (the "Borrower"), which represents that it will be the legal and beneficial owner of all property and assets comprising the security required pursuant hereto.

**2. COVENANTOR**

A limited partnership to be formed to own the Edmonton Property (defined below)(the "Covenantor").

The Covenantor, jointly and severally with the Borrower, covenants and agrees to satisfy all terms, conditions and requirements herein contained and each of the Borrower and Covenantor acknowledge and agree that their obligations hereunder, including, without limitation, the obligations to repay the Loan, shall constitute primary obligations and shall be joint and several.

**3. APPROVED LOAN AMOUNT**

The maximum approved loan amount is \$40,000,000 (the "Loan Amount"). The Loan is comprised of two facilities:

- (a) a facility of approximately \$20,000,000, to assist the Borrower in acquiring the Ft. Mac Property (the "Acquisition Facility"); and
- (b) a facility of approximately \$20,000,000, to assist the borrower in paying the costs of developing the Ft. Mac Property (the "Development Facility")

#### **4. PROPERTIES AND PROJECT**

Those properties set out in Schedule Q (the "Properties", and each, a "Property", and, individually, the "Ft. Mac Property" and the "Edmonton Property"). The improvements that the Borrower intends to construct on the Ft. Mac Property are herein referred to as the "Project".

#### **5. ADVANCE DATES**

Subject to the terms of this Commitment, the first advance of the Loan ("First Advance") shall take place on the completion of the Borrower's acquisition of the Ft. Mac Property ("First Advance Date"). Subsequent advances of the Loan as part of the Development Facility (each, an "Advance") will be made by way of periodic advances on a cost-to-complete basis in accordance with the Approved Plans and the Project Budget (as defined in Schedule A), as the Project proceeds, upon the satisfaction or waiver by the Lender, as applicable, of all conditions precedents set forth herein or in the Security. Each Advance will be for not less than \$500,000, and Advances will not be made more often than once per month. The total advanced at any time must not exceed the cost in place. Each advance of funds under the Loan is referred to as an "Advance".

#### **6. INTEREST RATE**

The interest rate for Loan is 12% per annum, calculated and compounded monthly, in arrears, on the amounts advanced from time to time from each Advance date, as well after as before maturity, default or judgment.

During the first 12 months of the Loan Term, interest shall accrue. Commencing in the 13<sup>th</sup> month of the Loan Term, the Lender may require the borrower to make monthly interest payments of up to 75% of the interest accrued on the Loan Amount from the beginning of the 13<sup>th</sup> month, and any accrued and unpaid interest and costs thereon. The Lender will determine the amount of such monthly interest to be paid, in its sole discretion, by taking into account, among other things, any payments received from lot sales on the Ft. Mac Property, the value of its Security, and the progress of the development of the Project on the Ft. Mac Property. The Lender will give the Borrower notice before the expiry of the 11<sup>th</sup> month of the Loan Term of its determination of the amount of such required interest payment.

#### **7. TERM**

The term of the Loan is 2 years commencing from the Interest Adjustment Date (the "Loan Term"). The date on which the Loan Term expires is sometimes referred to herein as the "Loan Maturity Date". The Loan shall not be repaid prior to the Loan Maturity Date, unless a prepayment privilege is provided herein.

The "Interest Adjustment Date" will be either the 1st or the 15th (as chosen by the Lender) of the month following the First Advance Date.

## 8. USE OF FUNDS

The proceeds of the Loan will be used to:

- (a) assist the Borrower in purchasing the Ft. Mac Property (as to approximately \$20,000,000);
- (b) assist the Borrower in advancing the Project in accordance with the Approved Plans and the Project Budget (as to approximately \$20,000,000); and
- (c) pay fees and transaction costs.

## 9. SECURITY

The following security for the Loan shall be granted in favour of the Lender, in form and content satisfactory to the Lender and its legal counsel (hereinafter collectively referred to as the "Security"):

- 9.1 a first-ranking mortgage of each Property, in the Loan Amount;
- 9.2 a first-ranking general assignment of all present and future rents pursuant to leases and offers to lease (Offers to lease and leases affecting the Properties are herein collectively referred to as the "leases". That is, the word "lease" herein shall be deemed to include any offer to lease) affecting the Properties together with all insurance and indemnities covering the said rents and of all income and accounts derived from the Properties including all proceeds receivable from early termination of any of the leases and all other benefits and advantages to be derived therefrom. The Lender may in addition, in its absolute discretion, require attornment or attornment and subordination agreements to be entered into by the tenant under any of the leases. Any security interest granted by a tenant in favour of the Borrower shall be assigned and transferred to and in favour of the Lender under the terms of the assignment of rents granted to the Lender;
- 9.3 first-ranking specific assignments of all leases for tenants occupying or to occupy more than 5% of rentable area or generating more than 5% of total rental revenue, and of all rents payable under such leases, of all insurance indemnities covering the said rents and of all income and accounts derived therefrom, including all proceeds received from early termination of such leases, together with tenant acknowledgements for such tenants in the form set forth in Schedule "F" hereto and, if required by the Lender, attornment or attornment and subordination agreements in respect thereof. The Lender shall be entitled to register the specific assignments of such leases and to require notices of each such lease to be registered against title to the Properties by the Borrower in such order as requested by the Lender;
- 9.4 general security agreements charging all the personal property of the Borrower and Covenantor, respectively, including, without limitation, goods, chattel paper, documents, accounts, intangibles, securities, monies, books and records and all replacements of, substitutions for and increases, additions and accessories to the foregoing and proceeds thereof, present and future;
- 9.5 a specific assignment of all the Borrower's right, title and interest in, to and under all material contracts and agreements affecting or with respect to the Properties and the Project, as required by the Lender, with all necessary consents of the other parties thereto;

- 9.6 acknowledgment of the status and terms of any contracts affecting or with respect to the Properties and the Project including, without limitation, any pertaining to ownership, insurance, shared facilities, passageway agreements or other similar matters specifically, but without limitation, confirming the good standing of such contracts and the rights of the Lender under its security;
- 9.7 if any Property is a condominium, a specific assignment of all of the Borrower's right, title and interest in and to all purchase agreements, sales proceeds and purchaser deposits. In addition all condominium association voting rights shall be assigned to the Lender, or its nominee;
- 9.8 if any charge or security interest is to be registered with the Lender's prior written consent on title to any Property or against the Borrower or Covenantor in subordinate priority to the Lender's security such subordinate charge or secured party shall provide to the Lender a subordination and standstill agreement in a form acceptable to the Lender;
- 9.9 an unconditional, joint and several covenant by the Covenantor as principal debtor and not as surety for the performance of all obligations of the Borrower with respect to the Loan, it being understood that the Lender shall not be obliged to proceed against the Borrower or to enforce or exhaust any security before enforcing its rights against the Covenantor;
- 9.10 assignment of all insurance policies with respect to the Properties and the Project and all proceeds and benefits therefrom in favour of the Lender;
- 9.11 assignment, postponement and subordination by the respective shareholders or partners of the Borrower and Covenantor, and their general partners ("General Partners"), in favour of the Lender, of any and all loans, indebtedness, distributions of income and/or capital owing or due to them from time to time by the respective Borrower and/or Covenantor;
- 9.12 an environmental indemnity from the Borrower and Covenantor;
- 9.13 a completion guarantee from the Covenantor;
- 9.14 a pledge of all issued and outstanding partnership interests of the Borrower and Covenantor;
- 9.15 a pledge of all shares of the General Partners of the Borrower and of the Covenantor;
- 9.16 such further and other security as legal counsel for the Lender may reasonably require.

**10. TRANSACTION FEES AND RELATED COSTS**

Administration Fee:	\$1,000
Lender's Fee:	\$3%**
Insurance Risk Management Fee:	\$1,500*
Lender's Basic Legal Fee (estimated):	\$30,000*
Lender's Advance Fee (per Advance):	\$1,000
Lender's Legal Fee (per Advance):	\$500*

\* plus disbursements and taxes, if applicable.

\*\*payable as to 2% upon each Advance, and 1% of the aggregate of all Advances, at the earlier of maturity, default or prepayment

In addition to the aforementioned, the Borrower agrees to pay all costs, fees and expenses in connection with the transaction contemplated by this Commitment, including, without limitation:

- 10.1 engineering, environmental assessment, appraisal, credit information, inspection, architectural, project monitoring, cost consultancy, survey and any and all other professional and advisory costs as may be reasonably incurred by the Lender;
- 10.2 registration, recording and filing fees, taxes and the like with regard to all documents required by the Lender's solicitors to be registered, recorded or filed.

Such fees and costs may, at the option of the Lender, be deducted from any advance of the Loan.

## **11. STANDBY DEPOSIT**

In consideration of the issuance of this Commitment and in recognition of the considerable effort that the Lender must immediately undertake in order to make funds available for closing, the Borrower agrees to submit to the Lender, together with this executed Commitment, \$250,000 ("Standby Deposit"), by way of a certified cheque, draft or wire payable to the Lender. The Lender hereby acknowledges receipt of \$50,000 as part of the Standby Deposit.

The Standby Deposit shall bear no interest while in the possession of the Lender. Save as otherwise provided for herein, such Standby Deposit shall be credited to the Borrower at the time of the first advance of the Loan.

## **12. ADVANCES AND CONDITIONS PRECEDENT**

### **12.1 General**

- 12.1.1 Subject to the other terms and conditions set forth in this Commitment, the Lender shall disburse the proceeds of the Loan to or on behalf of the Borrower in the amounts and as specified in Section 3 herein.
- 12.1.2 The Borrower and Covenantor shall be the legal and beneficial owners of a good and marketable freehold title to the Properties and all personal property associated therewith. The Properties and the personal property related thereto or used in connection with the operation thereof or which is necessary to the use and operation thereof, shall be free and clear of all security interests, claims or other encumbrances, with the exception of the Security provided for in this Commitment and encumbrances permitted by the Lender, the whole to the complete satisfaction of legal counsel for the Lender.
- 12.1.3 All taxes, assessments, utility charges and other charges affecting the Properties, other than amounts which are not yet due and payable, or, in respect of the Edmonton Property, which are being appealed or contested in a diligent

manner, shall have been paid prior to each advance of the Loan, failing which they shall be paid from the proceeds of any advance.

- 12.1.4 The Borrower and Covenantor shall fulfill all their obligations under any laws entitling a creditor to exercise rights against the Properties. In this respect, they shall provide to every government office, utilities provider, and other authority named by the Lender, an authorization by which the Lender or any person authorized by it as its legal counsel, agent or manager, shall be able to obtain, confirmation that all payments, declarations and other filings of the such parties are up to date, whether the authority concerned has issued or will issue a default notice or demand for payment to any party and whether any such notice concerns arrears. Each such authorization shall remain in effect and will be replaced as required by the Lender from time to time until the Loan has been fully repaid.
- 12.1.5 Within five (5) business days from acceptance of this Commitment, the Borrower and Covenantor shall deliver to the Lender's legal counsel the following documents (where applicable):
- 12.1.5.1 copies of all contracts affecting the Properties or the Project or relating thereto, including, without limitation, executed offers to lease or leases, standard offer and lease agreements and all information related to such leases.
  - 12.1.5.2 if any Property is a condominium, copies of all condominium documentation, including the condominium corporation's by-laws;
  - 12.1.5.3 required insurance policies;
  - 12.1.5.4 evidence that property taxes have been paid or, in respect of the Edmonton Property, are being appealed or contested in a diligent manner;
  - 12.1.5.5 certified copy of a resolution of the Borrower's and Covenantor's General Partner's board of directors authorizing this transaction;
  - 12.1.5.6 certified copies of the constating documents of the Borrower and of Covenantor, and the General Partners;
  - 12.1.5.7 an original up to date surveys of the Properties prepared by a duly qualified land surveyor showing the location of all improvements on the Properties accompanied by a certificate wherein the surveyor confirms that the location of the improvements comply with applicable municipal set-back requirements (or, if not, setting on details of the non-compliance); such survey must be in a form acceptable to the Lender's counsel; and
  - 12.1.5.8 any other documents required hereunder and reasonably requested by legal counsel for the Lender.

## 12.2 Advance Requirements

The advance of the Loan is conditional upon the receipt by the Lender of the following documents, in form and substance satisfactory to the Lender and upon fulfillment by the Borrower and Covenantor of the following conditions precedent as well as those set out in Schedule A or Schedule B hereto or elsewhere herein, to the entire satisfaction of the Lender:

- 12.2.1 the Security and any other documents relating to the Loan that are required or contemplated hereunder or which the Lender and its legal counsel may deem necessary, shall have been received and approved to the complete satisfaction of the Lender and its counsel and duly executed and registered and perfected, as the case may be and all approvals required by the Lender or its counsel shall have been given;
- 12.2.2 a lender's title insurance policy issued by an insurance company acceptable to the Lender and in form and content satisfactory to the Lender the premium for which will be paid by the Borrower or Covenantor.
- 12.2.3 a favourable opinion of the Borrower's, General Partners' and Covenantor's counsel on the due formation, power and authority of the Borrower and Covenantor, the due authorization, execution, delivery, validity and enforceability of this Commitment and the Security and such other matters as the Lender or its counsel may reasonably require;
- 12.2.4 a certificate of the Borrower and/or Covenantor confirming the truth and survival of the representations and warranties contained herein;
- 12.2.5 receipt of a fully executed original copy of the purchase and sale agreement and amendments thereto for the Properties and favourable opinion report thereon prepared by the Lender's counsel, if applicable;
- 12.2.6 evidence that the Borrower and Covenantor have complied with their obligations with respect to insurance requirements as more fully set out in Schedule "L", together with a favourable opinion of the Lender's insurance consultant on the adequacy of all insurance policies and or bonding required to be delivered or maintained hereunder;
- 12.2.7 evidence that all taxes, rates, assessments and charges which may be levied or imposed against the Properties or the Borrower's or Covenantor's businesses, including all utilities charges and all amounts capable of forming a charge against the Properties, have been paid in full or, in respect of the Edmonton Property, are being appealed or contested in a diligent manner. The Guarantor will provide full disclosure of the property tax appeal in respect of the Edmonton Property, and, depending on the results of the Lender's due diligence investigations, the Lender may, as a condition of the First Advance, require a holdback or payment into escrow of the disputed amount;

- 12.2.8 evidence that the Borrower and Covenantor have complied with all statutory requirements for deduction at source and remittance to applicable fiscal authorities, including, without limitation, those under the *Income Tax Act* (Canada), the *Excise Tax Act* (Canada), the *Canada Pension Plan Act* (Canada) or the *Employment Insurance Act* (Canada).;
- 12.2.9 evidence that the income generated from the Edmonton Property and the income to be generated from the Project are at levels satisfactory to the Lender, in its sole and absolute discretion;
- 12.2.10 evidence, to the Lender's satisfaction, of sufficient cash equity invested by the Borrower in the Project from its own funds, and a satisfactory review of such equity arrangements and the sources of such equity;
- 12.2.11 site inspections of the Properties have been completed on behalf of the Lender and the results of the inspections are satisfactory to the Lender;
- 12.2.12 the construction schedule, contractors, cost estimates and quality standards for the Project shall be consistent with the pro forma Project scope as approved by the Lender;
- 12.2.13 satisfactory interviews with the Borrower's principals have been conducted by the Lender;
- 12.2.14 the entrance by the Borrower into a contract with a general contractor acceptable to the Lender, on terms and conditions acceptable to the Lender, and the issuance of payment and/or performance bonds in respect of the contract or subcontracts, as the Lender may require;
- 12.2.15 prior to any Advance in respect of the Project, an architect's certificate in the form set out in Schedule O and addressed to the Lender certifying that the Project complies with all applicable construction, zoning and other governmental requirements;
- 12.2.16 the Lender and its legal counsel shall have approved the site plan for the Project as approved by the governmental authority having jurisdiction and all other plans submitted in connection with the Project;
- 12.2.17 an environmental report prepared, at the expense of the Borrower, by qualified environmental consultants acceptable to the Lender, addressed to the Lender or, alternatively, accompanied by a letter of transmittal from the environmental consultants who prepared the report allowing the Lender to rely upon the same and to use it for mortgage purposes, disclosing no site contamination or hazardous substances and confirming, to the satisfaction of the Lender, that the Properties comply with Environmental Laws (as defined in Schedule B hereof). The Borrower and Covenantor hereby agree to provide all available information with respect to environmental matters and to fully disclose to the Lender any relevant facts about environmental matters promptly as they come to light;



- 12.2.18 an appraisal and feasibility report about the Properties and the Project in form and substance satisfactory to the Lender, prepared at the expense of the Borrower by a qualified appraiser acceptable to the Lender, addressed to the Lender or, alternatively, accompanied by a letter of transmittal from the appraiser allowing the Lender to rely upon it and to use it for mortgage purposes;
- 12.2.19 copies of all leases affecting the Properties, executed by the parties thereto, including, without limitation, those listed in Schedule "G" hereto, or a certified rent roll in a form acceptable to the Lender and reviewed by and found satisfactory to the Lender and its counsel. In addition, an estoppel certificate from each tenant occupying or to occupy 5% or more of the Properties; total rentable area or generating 5% or more of total rental revenue from the Properties and attornment and subordination agreements from tenants as required by the Lender, shall have been executed by the tenants as required and found satisfactory to the Lender;
- 12.2.20 if there are existing structures on the Properties, a report from a qualified structural engineer, addressed to the Lender, addressing the structural soundness of those existing improvements, the contents of which are acceptable to the Lender;
- 12.2.21 no event shall have occurred and be continuing or would result from making of any advance under the Loan, which constitutes an event of default or would constitute an event of default under any of the Borrower's or Covenantor's obligations, except when such default is cured by notice or elapsed time or both;
- 12.2.22 the Lender and its counsel shall have approved all contracts and documents affecting or with respect to the Properties and the Project;
- 12.2.23 if the Property is a leasehold interest under a ground lease, a copy of the ground lease and, if applicable, insurance trust agreement and any other agreement entered into with the ground lessor;
- 12.2.24 if the Project includes subdividing the Property to create condominiums, all draft condominium documents;
- 12.2.25 true copies of all plans which have been submitted to the municipality or to any other government authority in connection with the Project;
- 12.2.26 true copies of all significant contracts respecting the Project including, without limitation, the agreement with the general contractor, if any, and any project management agreement;
- 12.2.27 any co-owners agreement or trust agreement in effect with respect to a Property;
- 12.2.28 evidence of compliance with *The Proceeds of Crime (Money Laundering) and*

*Terrorist Financing Act* (Canada) and Regulations, including but not limited to:

- (a) Each signing officer (up to 3) is to provide, **at least 3 days prior to funding**, the completed Agent Examination of Identification as set out in Schedule C;
- (b) Borrower, Covenantor and General Partners are to provide, **at least 3 days prior to funding**, with the following:
  - (i) Corporation profile report or Certificate of Status confirming their existence;
  - (ii) Executed Certificate of Incumbency setting out the names of all directors and officers, and the office held by each officer;
  - (iii) Executed director(s)' resolution authorizing the transaction;
  - (iv) Shareholders' or partners' register.

- 12.2.29 approval by the Lender of the limited partnership agreement of the Borrower, including, without limitation, the provisions in respect of the Participation Units (as defined herein), including, among other things, audit rights, major decision rights, rights with respect to fundamental changes and other changes that would affect the value of the Participation Units, and other protective provisions for the Participation Units; and
- 12.2.30 determination by the Lender's tax advisors of no adverse income tax consequences in respect of the Participation Units;
- 12.2.31 approval by the Lender of the limited partnership agreement of the Covenantor;
- 12.2.32 notwithstanding anything contained herein, no advances shall be made by the Lender until such time as the Lender is in receipt of, and has reviewed, all due diligence material referred to in Schedule A of the letter agreement dated September 13, 2012, and not hereinbefore requested; and
- 12.2.33 notwithstanding anything contained herein, no advance shall be made by the Lender until the Lender is advised by its legal counsel that, having regard to all the circumstances, such advance should be made.

### **13. REPRESENTATIONS AND WARRANTIES**

The Borrower, the General Partners and the Covenantor (the "**Credit Parties**", and each, a "**Credit Party**"), as applicable, represent and warrant to the Lender, which shall be true and correct for each Advance hereunder, as follows, and acknowledge that the Lender is relying on all such representations and warranties in entering into this commitment and making all Advances of the Loan hereunder.

- 13.1.1 The request for and use of proceeds of any Advance by the Borrower will constitute an affirmation or re-affirmation by each Credit Party of the representations and warranties contained herein and in any document related hereto, including, without limitation, any Security delivered pursuant hereto;

- 13.1.2 Each Credit Party is an entity duly organized and validly existing and in good standing under the laws of the jurisdiction of formation/incorporation/amalgamation/continuance, as applicable, and registered to do business in each jurisdiction in which it carries on business;
- 13.1.3 Each Credit Party has full corporate power, right and authority to enter into and perform its obligations under each of the documents to which it is a party and has full corporate right, power and authority to own and operate its assets and property and to carry on its business;
- 13.1.4 The execution and delivery by each Credit Party of this Commitment and the applicable Security and the performance of its obligations thereunder do not and will not conflict with or result in a breach of any of the terms, conditions or provisions of its charter documents or bylaws;
- 13.1.5 The execution and delivery by each Credit Party of this Commitment and the applicable Security and the performance of its obligations thereunder have been duly authorized or will, prior to the First Advance Date, have been ratified by all necessary corporate or other action, and no authorization under any applicable law and no registration, qualification, approval, designation, declaration or filing with any government body, agency or authority having jurisdiction over any Credit Party is or was necessary therefore, except as contemplated herein;
- 13.1.6 Each Credit Party possesses all consents, approvals, permits and authorizations under any applicable law which are necessary in connection with the operation of their respective businesses. All such consents, approvals, permits and authorizations are in full force and effect and no Credit Party is in default in any respect thereunder which default would have a material adverse effect. No action exists, is pending or threatened which has as its object the revocation, amendment or qualification of any such consent or authorization and all applicable appeal periods in respect of such actions have expired;
- 13.1.7 No Credit Party is in default in any respect under any material indenture, mortgage, deed of trust, agreement or other instrument to which they are a party or by which they or any of their property may be bound and which default would have a material adverse effect on their property or their prospects;
- 13.1.8 Each applicable Credit Party is the legal and beneficial owner of the applicable Property, and will have good and marketable title and possession thereto, free from all mortgages, charges, liens or other encumbrances whatsoever, except for the Security and Permitted Encumbrances, and no person other than Dan White has any direct or indirect interest in the Properties, other than has been disclosed to and agreed to by the Lender;
- 13.1.9 Each Credit Party has filed all tax returns which are required to be filed by each of them and has paid or remitted when due all taxes, assessment and government charges imposed upon them which if unpaid could result in any charge or other encumbrance on their properties except such tax, assessment

or charge which is being contested in good faith and for which the applicable Credit Party has made adequate reserves;

- 13.1.10 The applicable Credit Party has obtained and is in compliance (i) with all terms and conditions of all authorizations which are required under any environmental law, the non-obtaining of which and the lack of compliance with which would have a material adverse effect, and (ii) with all environmental laws, non-compliance with which would have a material adverse effect. No Credit party generates hazardous materials or transports, treats or disposes of any hazardous materials nor is any Credit Party aware of any underground storage tanks or surface contaminants located on the Properties other than those that have been reported to the Lender. No Credit Party, to the best of their knowledge, has ever caused or permitted (i) a release of any contaminant from or on a Property or (ii) any hazardous materials to be placed, held, located or disposed of on or under a Property the effect of which could reasonably be anticipated to have a material adverse effect. No enforcement action, investigation or outstanding order from any official body in respect of any hazardous materials or release of contaminants is existing, threatened or impending;
- 13.1.11 The Property is zoned to permit the improvements being constructed by the Borrower and is in compliance with all relevant zoning and by-laws of the applicable municipality and the Borrower has all permits, certificates, approvals or permissions required for the construction of the improvements;
- 13.1.12 The applicable Credit Party has complied and will, at all times during the prosecution of the Project and in the operation of the Edmonton Property, comply with the requirements of the *Builder's Lien Act* (Alberta) and the regulations pursuant thereto;
- 13.1.13 All property taxes, levies, assessments, penalties or other costs payable to a municipality or other local government in respect of each Property have been paid and no such amount is in arrears or is due and unpaid, other than amounts in respect of the Edmonton Property which are being appealed or contested in a diligent manner.
- 13.1.14 Each Credit Party has provided the Lender or its solicitors with true, complete and correct copies of all constating documents including registers of directors, partners and shareholders;
- 13.1.15 All information pertaining to the current and proposed uses of the Properties and viability of the Project and the Credit Parties' financial condition have been fully disclosed to the Lender. There is no legal action instituted, threatened or pending against the any Credit Party or any Property or Project which has not been disclosed to the Lender in writing in connection with the application for the Loan and the Borrower has no notice of any work orders, deficiency notices or notices of violation pertaining to any Property;
- 13.1.16 All financial and other information provided by the Credit Parties to the Lender, including but not limited to financial and other information provided in respect of the

values and other matters pertaining to the Properties and the Project is true and accurate and may be relied upon by the Lender in executing this Commitment and making the Loan;

#### **14. GENERAL COVENANTS**

Notwithstanding any other provision of this Commitment, each Credit Party, as applicable, covenants and agrees as follows.

- 14.1.1 Upon obtaining (i) knowledge of the occurrence of any default under any agreements to which any Credit Party is a party, (ii) notice of litigation, arbitration, or proceedings before any official body, or (iii) information respecting the business, operations or financial condition of such Credit Party as the Lender may from time to time reasonably request, promptly to give the Lender details of such occurrence or other matter including copies of relevant documents;
- 14.1.2 To preserve and maintain in full force and effect its qualifications to carry on business including, without limitation, all rights, consents and authorizations relating thereto and not cease to conduct its business as conducted at the date of this Commitment, and to conduct its business in a proper, efficient and businesslike manner and in accordance with good business practices;
- 14.1.3 To comply with all applicable laws and duly observe in all material respects all consents and authorizations and valid requirements of any governmental body, agency or authority having jurisdiction;
- 14.1.4 To keep proper books of account in accordance with sound accounting practice, and provide the Lender with such financial information in respect of the Properties and Project that the Lender may request, and to provide the Lender with access thereto during normal business hours;
- 14.1.5 To permit the Lender or any representative of the Lender on reasonable notice to visit and inspect the Properties and to interview architects, contractors, and others involved with the Project, in the presence of a representative of the Borrower;
- 14.1.6 To keep in force insurance in respect of the Properties and the Project which meets the Lender's requirements herein or in the Security;
- 14.1.7 To keep the Properties or cause the Properties to be kept in good repair, working order and condition consistent with all consents, authorizations, and applicable laws and, from time to time, (i) to make and cause to be made all needful and proper repairs, renewals, replacements, additions and improvements thereto in accordance with prudent management practices, and (ii) not to permit to be terminated or suspended for any period of time any of its right, title or interest in or to any authorization or consent applicable to the Project;

- 14.1.8 To maintain and cause to be maintained and to defend and take all action necessary or advisable at any time and, from time to time, to maintain, defend, exercise, or renew their right, title and interest to their respective properties and assets including, without limitation, the Properties and the Project;
- 14.1.9 To make full and timely payment of all obligations hereunder whether now existing or hereafter arising and duly comply with all the terms and covenants contained in this Commitment or in any other agreements entered into pursuant hereto;
- 14.1.10 To pay and discharge as they become due all payments due and owing under, or with respect to, any previous indebtedness created or security given by them to any person and will observe, perform and carry out all the terms, covenants, provisions and agreements relating thereto and any default in payment of any monies due and payable under or relating to any previous indebtedness or security or in the observance, performance or carrying out of any of the terms, covenants, provisions and agreements relating thereto will be deemed to be a default hereunder at the option of the Lender and any and all remedies available to the Lender hereunder by reason of any default hereunder or by law or otherwise will be forthwith available to the Lender;
- 14.1.11 To notify the Lender promptly upon obtaining knowledge of the institution or anticipated or threatened institution of any proceedings for the expropriation of any part of the Properties or of any other part of their respective property or assets if such expropriation could reasonably be anticipated to affect the Project. If any such property or assets are taken or damaged in or by any such expropriation proceedings or otherwise, the awards of compensation payable to any Credit Party as a result of such expropriation shall be and are hereby assigned to the Lender;
- 14.1.12 At the Borrower's cost and expense, upon request of the Lender, duly execute and deliver, or cause to be duly executed and delivered, such further instruments and do and cause to be done such other acts as may be necessary or proper in the reasonable opinion of the Lender to carry out more effectually the provisions and purposes of this Commitment or any other agreements entered into with the Lender;
- 14.1.13 To diligently construct the Project and perform and do all things and acts that are necessary to complete the Project in accordance with the Approved Plans and the Project Budget;
- 14.1.14 In the event of cost overruns or other unforeseen developments in prosecuting the Project, to use their own money as may be required by the Lender from time to time to pay those costs so that, at all times, the unadvanced portion of the Loan will not be less than the Lender's then current estimate of the cost to complete the Project;
- 14.1.15 To make all requests for Advances using the form of draw request required by the Lender;

- 14.1.16 To provide undertaking/cost completion guarantee executed by the Credit Parties, agreeing to complete the Project and to fund from their own resources, all costs overruns, (that is, costs in excess of the Project Budget determined on a cumulative basis), as soon as such overruns arise or are identified by the Lender. The Borrower will not be eligible for further Advances until such cost overruns are funded by the Borrower or Covenantors; and
- 14.1.17 At all times and in particular on the date of each Advance, Borrower shall comply with all requirements of of the *Builder's Lien Act* (Alberta) (the "BLA") and the regulations pursuant thereto. The Lender may retain from any Advance such amounts as it considers advisable to protect its interest from subordination or other prejudice under such legislation. The Borrower shall provide additional security, information and documentation as may be required by the Lender to preserve and ensure in all respects the absolute priority of the Security over any rights of any existing or potential lien claimants. The Lender reserves the right to hold back additional amounts due to suppliers or contractors, which may be due under the BLA. Furthermore, the Lender shall have the right to make payments directly to suppliers or contractors for the Borrower's account as if advanced directly to the Borrower, as the Lender may deem necessary.
- 14.1.18 If any Credit Party is in default in any covenant to be performed by them hereunder or under the Security, the Lender may perform any covenant capable of being performed by the Lender and if the Lender is put to any costs, charges, expenses or outlays to perform any such covenant, they will indemnify the Lender for such costs, charges, expenses or outlays and such costs, charges, expenses or outlays incurred by the Lender (including solicitors' fees and charges incurred by the Lender on a substantial indemnity basis) and will be secured by the Security;
- 14.1.19 That in any judicial proceedings taken to enforce this Commitment and the covenants hereunder or to enforce or redeem the Security or to foreclose the interest of the Borrower in any property subject thereto, the Lender will be entitled to costs on a substantial indemnity basis.

## 15. NEGATIVE COVENANTS

The Credit Parties covenant with the Lender that they will not, without the consent in writing of the Lender:

- 15.1 make changes to the Approved Plans (including, without limitation, water lines, sewer lines, roads, electricity lines, and other such infrastructure), to the Project timetable, or any material changes to the Project Budget without the prior written consent of the Lender. A "material change" means a variance of \$25,000 or greater from the Project Budget approved by the Lender;
- 15.2 make, give or create or attempt to make, give or create any mortgage, charge, lien, security interest or encumbrance upon any Property or the Project or any part or parts thereof, including personal property collateral subject to any of the Security, except as permitted by this Commitment;
- 15.3 make any payments to any person other than in the normal course of business;
- 15.4 except in accordance with the Project Budget previously approved by the Lender, make any payments of salaries, bonuses or other remuneration to:



- (a) any shareholder, partner, director or officer of the Borrower or Covenantor;
  - (b) any person related by blood or marriage to any of the persons described in (a) above;
  - (c) any corporation controlled by the Borrower or the Covenantor or by the Borrower or the Covenantor and their respective associates (within the meaning of the word "associate" as defined in the *Business Corporations Act* (Ontario)); or
  - (d) in any calendar year in aggregate in excess of the amount prescribed by the Lender from time to time in writing (and if no amount is prescribed the amount will be the amount paid in the calendar year prior to the calendar year in which the Security is executed);
- 15.5 make any payment (whether for principal, interest or otherwise) on account of indebtedness owing to, or when initially incurred was owing to, partners, shareholders or directors of the Borrower or Covenantor or related companies or individuals;
  - 15.6 make loans or extend credit to any person (including specifically if it is a corporation, any partner, directors, officers or shareholders of the Borrower or the Covenantor and any person related by blood or marriage to such persons or any corporation controlled by such person or relative or by the Borrower or the Covenantor) except customers of the Borrower in the ordinary course of business;
  - 15.7 purchase or redeem any of the shares or ownership interests or otherwise reduce the share or partnership capital of the Borrower or the Covenantor;
  - 15.8 in any way vary or alter the share or partnership ownership structure of the Borrower or Covenantor or permit the transfer of any shares or other ownership interests of the Borrower or Covenantor;
  - 15.9 declare or provide for any dividends or other payments based upon share or partnership capital of the Borrower or Covenantor;
  - 15.10 except for operating lines of credit maintained in the ordinary course of business, raise or borrow any money from any person other than the Lender, shareholders of the Borrower or Covenantor and trade creditors of the Borrower or Covenantor in the ordinary course of business; or
  - 15.11 guarantee, indemnify any person for, or endorse for accommodation, the obligations of any other person, directly or indirectly.

## 16. EVENTS OF DEFAULT

- 16.1 The whole of the outstanding balance of the Loan (including principal, interest, bonus and costs) will immediately become due and payable and the Security will become enforceable in each and every of the following events (each an "Event of Default"):
  - 16.1.1 if any Credit Party fails to observe or perform something required to be done or some covenant or condition required to be observed or performed hereunder or pursuant to

the Security, including but not limited to the payment of monies when due hereunder, whether principal, interest, fees, costs or other charges;

- 16.1.2 if any Credit Party does, or permits to be done, anything which they have herein agreed not to do or permit to be done hereunder or pursuant to the Security or this Commitment;
- 16.1.3 if any representation or warranty given by any Credit Party (or any director or officer thereof) hereunder or pursuant to the Security is untrue in any material respect;
- 16.1.4 if an order is made or a resolution passed for the winding-up of any Credit Party, or if a petition is filed for the winding-up either of any Credit Party;
- 16.1.5 if any Credit Party commits or threatens to commit any act of bankruptcy or becomes insolvent or makes an assignment or proposal under the *Bankruptcy and Insolvency Act (Canada)* or a general assignment in favour of its creditors or a bulk sale of its assets, or if a bankruptcy petition is filed or presented against any Credit Party;
- 16.1.6 if any proceedings with respect to any Credit Party is commenced under the *Companies Creditors Arrangement Act (Canada)*;
- 16.1.7 if any execution, sequestration, extent or any other process of any Court become enforceable against any Credit Party or if a distress or analogous process is levied against the property of any Credit Party or any part thereof;
- 16.1.8 if any Credit Party permits any sum which has been admitted as due by it or is not disputed to be due by it and which forms or is capable of being made a charge upon any Property or the Borrower's interest therein or other properties and assets subject to the Security, in priority to the Security to remain unpaid after proceedings have been taken to enforce the same as a prior charge;
- 16.1.9 if any Credit party defaults in any material respect in observing or performing any term, covenant or condition of any debt instrument or similar obligation by which it is bound, whether secured or not;
- 16.1.10 if, without the prior written consent of the Lender, any Credit Party sells, agrees to sell, sub-lease, or otherwise disposes or agrees to dispose of any Property or Borrower's interest therein or any part or parts thereof or any interest therein;
- 16.1.11 if, without the prior written consent of the Lender, any Credit Party grants or agree to grant any further mortgage over the any Property or the Project or any part or parts thereof or any interest therein or otherwise permit any of any Property to be encumbered in any manner other than by encumbrances specifically permitted hereunder;
- 16.1.12 if any Credit Party defaults under any material contract entered into by them with respect to the Project;
- 16.1.13 if, without the prior written consent of the Lender, there is, in the opinion of the Lender, a change of effective control of any Credit Party;

- 16.1.14 if the Borrower, either directly or indirectly, ceases or threatens to cease to carry on business;
- 16.1.15 if, in the sole opinion of the Lender, an adverse material change in risk occurs in respect of any Credit Party, any Property or the Security;
- 16.1.16 if the Lender in good faith and on commercially reasonable grounds believes that the ability of any Credit Party to repay the Loan to the Lender or to perform any of the covenants contained in this Commitment or the Security is impaired or is about to be impaired or in jeopardy; or
- 16.1.17 if an event of default occurs under any of the Security.
- 16.2 The Lender may waive any Event of Default, provided always that no waiver by the Lender or any failure to take any action to enforce its rights or to enforce any security will extend to or be taken in any manner whatsoever to affect any subsequent Event of Default or the rights resulting therefrom.
- 16.3 All remedies stipulated for by the Lender hereunder or in any of the Security will be deemed to be in addition to and not restrictive of the remedies which the Lender might be entitled to at law or in equity and the Lender may realize any of the Security or any part thereof in such order as it may be advised and any such realization by any means will not bar realization of any other security or any part or parts thereof nor will any single or partial exercise of any right or remedy preclude any other or further exercise thereof nor will the failure on the part of the Lender or any delay in exercising any rights under this Commitment or any of the Security operate as a waiver.
- 16.4 If an Event of Default has occurred and is continuing, in addition to and not in limitation of any rights now or hereafter granted under applicable law or the Security, the Lender may without notice to the Borrower and at any time and from time to time set-off, apply or transfer any or all sums owing from time to time by the Lender to the Borrower towards the satisfaction of the outstanding balance of the Loan (including principal, interest and other amounts owing).

The Credit Parties agree to indemnify and save harmless the Lender and each of its directors, officers, employees and agents from and against all liabilities, claims, losses, damages, costs and expenses in any way caused by or arising directly or indirectly from or in consequence of the occurrence of any Event of Default under this Commitment or under the Security. The Credit Parties further agree to indemnify and save harmless the Lender and each of its directors, officers, employees and agents from and against all liabilities, claims, losses, damages, costs and expenses (including investigation costs, clean up costs, and any other actions necessary pursuant to any applicable environmental laws, and all reasonable legal fees, costs and expenses, on a solicitor and own client basis), asserted against or for the account of the Lender, in any way caused by or arising directly or indirectly from or in consequence of the occurrence of any material non-compliance by any Credit Party or any of their agents or other representatives of applicable environmental laws. The indemnities provided for in this paragraph shall survive the termination of this Commitment and the repayment of the Loan.

## 17. TERMINATION

In the event the Borrower is in default for any reason whatsoever under the terms of this Commitment, or if it does not fulfill the conditions for disbursement of the Loan in accordance with the terms and conditions contained herein or in any other agreement or document relating to this Commitment, no later than five (5) business days prior to the First Advance Date, or if any information or document supplied by the Borrower is found to be incomplete or inaccurate in a material respect or if for any reason the Borrower does not accept all or a part of the proceeds of the Loan when the Lender makes them available, the parties to this Commitment hereby acknowledge that the Lender shall be entitled, at its discretion, to cancel its obligations under this Commitment and to retain the Standby Deposit as liquidated damages. In that event, this Commitment shall thereafter, subject as hereinafter provided, be void and of no further effect, without any further recourse by either party against the other except that, notwithstanding the forfeiture of the Standby Deposit, the Borrower and Covenantor shall remain liable and be required to pay and reimburse the Lender all fees, costs and expenses as set out in Section 10 whether or not the Loan is made. Provided that, if the Borrower's offer to purchase the Ft. Mac Property is not accepted by the vendor, this Commitment shall be void and of no further effect, and the Lender shall be entitled to retain \$50,000 of the Standby Deposit, plus an amount sufficient to reimburse itself for all of its fees legal fees incurred to the date of such notice. These agreements with respect to the Standby Deposit and the Borrower's and Covenantor's obligations to pay fees, costs and expenses are enforceable by the Lender notwithstanding the termination of this Commitment, each of such covenants and agreements having an independent existence from the other rights and obligations under this Commitment.

## 18. OTHER FINANCING TERMS

### 18.1 Repayment and Monthly Instalments

Subject to the provisions of Section 6, interest computed as provided in Section 6 shall be payable monthly in arrears on the same day of each and every month throughout the Loan Term. The Lender may, in its sole discretion, apply a portion of the proceeds from any Advance to pay the interest accrued to the date of the Advance. The Lender may also, in its sole discretion, withhold from the proceeds of any Advance sufficient money to be a reserve for paying interest which will accrue thereafter on the Loan until the cash flow from the Project is sufficient to service the Loan.

With respect to any advance under the Loan, funds shall be deemed advanced on the earliest of:

- (i) the date that the funds are removed from the Lender's account and designated to the Borrower's account or as the Borrower may direct, or
- (ii) the date upon which the Borrower or its authorized representative has requested the funds to be advanced; or
- (iii) in the case of the first advance, the date scheduled for the first advance as herein set out or as amended pursuant to any written agreement between the Borrower and the Lender.

Upon expiry of the Loan Term, the principal of the Loan, together with interest and all other amounts due and owing by the Borrower to the Lender under the Security (as defined herein) shall become immediately due and payable.

It is hereby agreed that in case default shall be made in payment of any sum to become due for interest at any time appointed for payment thereof as aforesaid, compound interest shall be payable and the sum in arrears for interest from time to time, as well after as before maturity, shall bear interest at the rate aforesaid. If the interest and compound interest are not paid within one (1) month from the time of default, a rest shall be made and interest at the rate aforesaid shall be calculated on the aggregate amount (including all unpaid interest) then due, as well after as before maturity, and so on each month. All such interest and compound interest shall be a charge upon the Property.

#### 18.2 Reserve Fund for Realty Taxes

The Borrower shall maintain all tax accounts current. However, the Lender shall have the right to require the establishment of a reserve for payment of property taxes and payment of monthly payments based on the Lender's estimate of the annual taxes in accordance with the provisions of the standard mortgage terms set out in Schedule B hereto.

The Lender shall not be responsible for the payment of any taxes except as expressly provided for in the Commitment or the Security.

The Lender acknowledges that the Covenantor owner of the Edmonton Property is appealing the property tax assessment thereon. Such Covenantor covenants and agrees to keep the Lender informed as to the progress of such appeal and to pay all property taxes when due upon the conclusion of a final settlement or a final unappealable determination thereon.

#### 18.3 Method of Payment of Monthly Instalments of Interest

The Borrower shall remit payments via an automatic debit service, by submitting the Authorization Form attached hereto as Schedule "D", together with a "void" cheque. If there are any changes to the Borrower's regular payment, the Lender will provide notice at least ten (10) days in advance of the debit. The account information provided in this respect will be kept confidential.

#### 18.4 Condition upon Maturity

In the event that the Borrower fails to repay the principal and interest outstanding on the Loan Maturity Date or any renewal thereof agreed to by the Lender, the Lender may, at its sole discretion, extend the mortgage for a period of one (1) month from the original Loan Maturity Date or any renewal thereof agreed to by the Lender, at an interest rate equal to the higher between the Interest Rate for the Loan and the then Royal Bank of Canada Prime Rate per annum plus five percent (5.00%) per annum, calculated and payable monthly. If the Lender does so elect to extend the term for one month but the Loan has not been repaid or renewal has not been finalized within this one (1) month period, then there will be no further extensions and the Lender may exercise its remedies under the Security.

The interest rate applicable will be determined by the Lender as of the first (1st) Banking Day of the month in which the Loan matures.

In this Commitment, "Royal Bank of Canada Prime Rate" means the rate of interest, expressed as a percentage per annum, published and quoted by Royal Bank of Canada or its successor at the bank's head office in Toronto, Ontario, as a reference rate then in effect for determining interest rates on commercial loans in Canadian Dollars in Canada and which is commonly known as the bank's prime lending rate.

"Banking Day" for the purposes of this clause, will mean a day on which the said head office in Toronto, Ontario, for the Royal Bank of Canada or its successor is open for business and which is not a Saturday, Sunday, civic or statutory holiday.

All other terms and covenants under the existing Security shall continue to apply after the term of the Loan is so extended.

The Loan may be paid in full at any time during the one (1) month extension period without notice, bonus or penalty, other than payment of the Extension Fee and any applicable discharge fees as hereafter set out.

An extension fee which is the greater of Five Thousand Dollars (\$5,000.00) or one percent (1.00%) of the outstanding balance shall be added to the principal balance if the Lender elects to extend the term of the Loan under this clause.

#### **19. LEGAL COUNSEL**

The title report, Security and all other documents relating to the Loan shall be prepared by the Lender's counsel who shall act on behalf of the Lender:

Witten LLP  
Attention: John Little

The Borrower shall be responsible for all legal costs involved in the preparation, settlement, execution and delivery of this Commitment, the Security and all other documentation related to the Loan.

#### **20. PREPAYMENT PRIVILEGE**

The Borrower shall, when not in default, have the right to prepay all of the amount outstanding under the Loan prior to the Loan Maturity Date, on any payment date (i.e. each monthly anniversary of the Interest Adjustment Date), upon giving the Lender one (1) month written notice in advance of payment, or upon payment of a bonus equal to one (1) month's interest, in lieu of such notice.

#### **21. PARTIAL DISCHARGES**

Provided the Loan and Security are not in default and are in all respects in good standing, the Lender agrees to provide a partial discharge of its Security upon the closing of a sale of the Edmonton Property to a bona fide arm's-length purchaser, upon the fulfillment and satisfaction of each of the following conditions to the complete satisfaction of the Lender:

- (a) such partial discharge is permitted by law;
- (b) the Lender receives:
  - i. the Net Sales Proceeds from such sale; or
  - ii. acceptable alternative security, to its complete satisfaction, in its sole discretion, acting reasonably;
- (c) such partial discharge (if granted) will not impact the value or enforceability of the Lender's remaining Security, and the ratio of the Loan to the value of the Security remaining after the granting of such partial discharge, as determined by the Lender, is at a level acceptable to the Lender; and
- (d) the Lender's is paid its reasonable legal fees and expenses for such partial discharge.

"Net Sales Proceeds" means the amount determined by subtracting from 100% of the gross sales proceeds from the sale of the Edmonton Property as approved by the Lender: (i) reasonable legal fees as approved by the Lender; (ii) reasonable (as compared to the sale of a similar property) real estate commissions, (iii) GST remittances to be paid by the Edmonton Property owner, (v) other adjustments on the statement of adjustments for the Edmonton Property as approved by the Lender.

## **22. SURVEY**

The Borrower shall deliver to the Lender within five (5) business days prior to the first advance for its examination an up-to-date fully monumented survey of each Property prepared by a duly qualified Alberta land surveyor showing, inter alia:

- 22.1 boundaries and dimensions of the Property;
- 22.2 location of all buildings and other improvements (if any) on the Property and, if any structure offends municipal set-back requirements, the amount of the encroachment on the set-back area;
- 22.3 names of adjacent streets;
- 22.4 location of all registered easements, rights of way, etc.

The survey certificate shall be approved by the legal counsel for the Lender. If said survey is not an original signed and sealed survey, the Borrower hereby undertakes to deliver to the Lender, at least five (5) business days prior to the disbursement of the first advance of the Loan, three (3) original signed and sealed copies of the said survey. In addition, the Borrower shall deliver to the Lender: (i) at least five (5) business days prior to the disbursement of the first advance of the Loan, a letter, in form satisfactory to the legal counsel of the Lender, from the land surveyor who has prepared the same addressed to the Lender confirming that the Lender may rely upon such survey; and (ii) immediately prior to each advance, a solemn declaration of a senior officer of the Borrower certifying that, since the preparation of the said survey, no new easement has been created, no

construction or modification of any building shown thereon has been effected and no new construction has been erected by a neighbor along the boundaries of the land described therein.

**23. REFINANCING**

23.1 The Lender shall have a right of first opportunity to finance or arrange any replacement financing for each Property, or for any further development of such Property or any improvements to be developed on such Property (herein collectively referred to as the "Permanent Financing").

23.2 In connection therewith the Borrower shall provide to the Lender in writing as soon as same is applicable a request for Permanent Financing together with all information necessary for the Lender to process such request and within a reasonable time after delivery to the Lender of all reasonably required information, the Lender shall be given a first opportunity to provide an offer of Permanent Financing.

23.3 The Lender shall also be given a continuing right of first refusal to provide an offer of Permanent Financing to the Borrower on terms substantially the same as any other written offer of financing received from a third party lender, which the Borrower is prepared to accept and copy of which the Borrower shall provide to the Lender.

**24. OWNERSHIP OF THE BORROWER AND COVENANTOR**

The Borrower and entity Covenantors declare and represent that their ownership is as follows:

***Borrower***

Type of Security		Owner

***Covenantor***

Type of Security		Owner

**25. SPECIAL PROVISIONS**



### 25.1 Participation Fee

As a collateral advantage to the Lender, and in consideration of the Lender agreeing to make the Loan to the Borrower at the interest rates provided herein and on the other terms and conditions set out herein, the Borrower agrees to issue to the Lender or its nominee limited partnership units of the Borrower ("Participation Units"). The Participation Units will entitle the holder thereof to 15% of the net profits realized from the development, sale and/or earlier refinancing of any portion of the Ft. Mac Property upon the closing of any such sale or refinancing, and to 15% of any net lease payments, upon the leasing of any portion of the Ft. Mac Property. For the purposes of the foregoing:

- (i) net profits shall be calculated in accordance with IFRS and allocated reasonably to the portion of the Property sold, with no deduction or allocation of expenses made for any overhead, salaries to Dan White or any other employee of the Borrower or Covenantor, or any other expenses paid to any related party; and
- (ii) net lease payments shall be calculated as the net rent received after payment of all realty taxes and other operating costs required to be paid by the landlord, less any interest payable to third party lenders.

For greater certainty, the Lender's (or its nominee's) ownership of the Participation Units will continue regardless of the repayment of indebtedness under the Loan.

The terms upon which the Participation Units are to be issued will be set out in a limited partnership agreement, which limited partnership agreement shall be on terms and conditions satisfactory to the Lender, in its sole discretion.

### 26. CROSS-DEFAULT

The Borrower and Covenantor hereby acknowledge that any default with respect to this Loan will constitute a default with respect to any other debt owing by any of them to the Lender or to an affiliate of the Lender. Vice versa, a default in paying any other debt of the Borrower or a Covenantor owing to the Lender or to an affiliate of the Lender will constitute a default with respect to this Loan. For the purpose of this clause, "affiliate" has the meaning given in the *Business Corporations Act* (Ontario).

### 27. SIGNAGE

Subject to compliance with applicable municipal by-laws, the Lender shall be entitled to place on the Ft. Mac Property signage indicating the Lender's participation in the funding of the Project.

### 28. ADVERTISING BY LENDER

The Lender may, in its advertising, describe and/or picture the Properties without identifying the Borrower or Covenantor. The cost of any such advertising shall be paid by the Lender.

The Borrower agrees that Lender may advertise the availability of the within Loan to its potential investors by providing details of the Loan by any means whatsoever including but not limited to, letter, fax, e-mail and posting on the Lender's website.

**29. MAXIMUM RATE**

If the "interest" (as defined or determined by the statute establishing or defining illegal rates of interest) charged or chargeable ("Interest") under the offer of credit in this Commitment, on the credit advanced pursuant to this Commitment or pursuant to any Security (any of which Interest provision is referred to as the "Interest Provisions") would, except for this paragraph, constitute an illegal rate of interest, then the Interest on the credit so advanced or secured will be reduced such that the total Interest under the Interest Provisions will be that amount or rate which collectively equates to that rate of interest that is 1% per annum less than the minimum rate that would be an illegal rate of interest, calculated according to generally accepted actuarial practices and principles. Such reduction will be effected by reducing, or refunding to the Borrower, such of the interest, charges, and expenses (or a combination thereof) constituting Interest payable as may be designated by the Lender in its sole discretion.

**30. FURTHER ASSURANCES**

The Credit Parties shall with reasonable diligence do all such things and provide all such reasonable assurances as may be required to consummate the transactions contemplated by the Commitment, and shall provide such further documents or instruments required by the Lender as it may deem necessary or desirable to effect the purpose of this Commitment and carry out its provisions.

**31. APPLICABLE LAW**

The terms and conditions of this Commitment as well as all other documents relating to the execution of the transactions provided for by this Commitment shall be governed by and interpreted in accordance with the laws of the Province of Alberta and the Borrower and Covenantor hereby irrevocably attorn to the jurisdiction of the courts of the Province of Alberta.

**32. AMENDMENT**

The terms or requirements of this Commitment or any security may not be waived or varied orally, or by any course of conduct of any officer, employee or agent of the Lender. Any amendment to this Commitment must be in writing and signed by a duly authorized officer of the Lender and the Borrower; provided, however, that the Lender may unilaterally extend the date for return of this Commitment or receipt of any documentation upon written notice to the Borrower.

**33. ASSIGNMENT BY BENEFICIAL OWNER AND/OR BORROWER**

Neither the Borrower nor the Covenantor shall assign its rights or obligations pursuant to the Commitment or the security required by the Commitment, in whole or in part, without the Lender's prior written consent, which consent may be withheld in the Lender's sole and absolute discretion.

**34. NO OBLIGATION TO ADVANCE**

It is understood that neither the preparation nor the registration of any of the documents contemplated herein shall bind the Lender to advance the funds or any unadvanced portion thereof, it being agreed that the advance of funds or any part thereof from time to time shall be in the sole, absolute, unfettered and unqualified discretion of the Lender.

### **35. ENUREMENT**

This Commitment shall enure to the benefit of the Lender and its successors and assigns and be binding upon the Borrower, the Covenantor and their respective heirs, personal representatives,, successors and assigns.

### **36. CONFIDENTIALITY**

The Borrower and Covenantor acknowledge and agree that the terms and conditions recited herein are confidential between the Borrower, the Covenantor and the Lender. The Borrower and Covenantor agree not to disclose the information contained herein to a third party without the express consent of the Lender.

### **37. ASSIGNMENT AND SYNDICATION**

The Lender shall have the right from time to time, without the consent of the Borrower, to assign, sell, pledge, convey, syndicate, grant participations or transfer all or any portion of the Loan and Security, whether directly or by way of securitization, and as part of any such transaction the Lender is hereby authorized to provide to prospective participants in such transactions all information received by the Lender regarding the Credit Parties, the Properties and the Project. Borrower agrees to cooperate with Lender's efforts to do any of the foregoing and to execute all documents reasonably required by Lender in connection therewith which do not materially adversely affect Borrowers' rights under the Loan Documents.

### **38. CREDIT AUTHORIZATION AND CONSENT TO DISCLOSURE**

The Lender may collect, retain, release, disclose, exchange, share, transfer and assign from time to time, as it may determine in its sole discretion, all information and materials (including financial statements and information concerning the status of the Loan, such as existing or potential Loan defaults, lease defaults or other facts or circumstances which might affect the performance of the Loan) provided to or obtained by it relating to the Borrower, the Covenantor, the General Partners, the Properties or the Loan (both before and after the disbursement of funds and/or default thereunder) without restriction and without notice to or the consent of any Borrower or Covenantor or General Partner (and such parties hereby irrevocably consents thereto):

- (a) to any person who has, who acquires, or who proposes to acquire an interest in the Loan;
- (b) to the respective third party advisors and agents (such as lawyers, accountants, auditors, consultants, appraisers and credit verification sources) of such persons;
- (c) to the public or any group in any offering memorandum, prospectus or other disclosure document relating to any sale, syndication or securitization of the Loan (including all initial and continuing disclosure requirements), regardless of format or scope of distribution;
- (d) to the public or other interested persons, directly or indirectly through information service providers or other market participants, for the purpose of providing market

- information from time to time relating to the status of the Loan or any related securitization or any interest therein, regardless of format or scope of distribution;
- (e) to any governmental authority having jurisdiction over the Lender or over any sale, syndication or securitization of the Loan or any trade of any interest therein;
  - (f) to any other person in connection with the sale, syndication or securitization of the Loan, including insurers and rating agencies; and
  - (g) to any other person in connection with the collection or enforcement proceedings taken under or in respect of the Loan.

Without limiting the foregoing, each Borrower and Covenantor hereby consents to the Lender obtaining all information as may be necessary from all available sources as to the creditworthiness of each Borrower or Covenantor and acknowledges that the Lender may collect or come into possession of personal information relating to certain individuals either comprising or otherwise connected with the Borrower or Covenantor which information may include contact information (mailing address, e-mail address, telephone number or fax number), financial information and status (bank account numbers, existing debts, personal net worth or credit history), date of birth, place of employment and social insurance number. Each Borrower and Covenantor acknowledges and agrees that such personal information may be used by Lender in connection with the processing, approving, funding, servicing and administering the Loan and any sale, syndication or securitization of the Loan, and in so doing the Lender may disclose and otherwise deal with personal information in the same manner and to the same persons as provided in the preceding paragraph without restriction, acting reasonably, and without notice to or the consent of any Borrower or Covenantor or any related individual. Each Borrower and Covenantor for itself and on behalf of its directors, officers, shareholders and principals, hereby consents to and authorizes such use and disclosure of all such personal information by the Lender and represents and warrants that it has full power and authority to give such consent and authorization.

#### **39. MATERIAL ADVERSE CHANGES**

In the event that at any time either before the advance of funds under the Loan or while any indebtedness remains outstanding pursuant to the Loan, the Lender discovers a discrepancy or inaccuracy in any written information, statements or representations made or furnished to the Lender by or on behalf of the Borrower or Covenantor or concerning the Properties, the Project, or the financial condition and responsibility of the Borrower or Covenantor or in the event that the Lender discovers any material adverse change in the value of the Properties or the financial status of the Borrower or Covenantor or any lessee on which the Lender relied in making any advances pursuant to the Loan, which material change, discrepancy or inaccuracy cannot be or is not rectified by the Borrower or Covenantor or lessee (as applicable) within 30 days after written notification thereof by the Lender to the Borrower or to Covenantor or lessee, the Lender shall be entitled to decline to advance any funds pursuant to the Loan and at its option terminate this Commitment or in the event that any funds have already been advanced, to declare any and all amounts advanced together with interest thereon and any costs incurred by the Lender to such date, to be forthwith due and payable.

#### **40. ENTIRE AGREEMENT**

This Commitment, together with its schedules and any agreements, instruments and other documents herein contemplated to be entered into between, by or including the parties hereto constitute the entire agreement between the parties hereto pertaining to the subject matter of this Commitment and supersede all prior agreements, understandings, negotiations and discussions,

whether oral or written, with respect thereto. There are no other warranties or representations and no other agreements between the parties hereto in connection with the Loan provided for herein except as specifically set forth in this Commitment and the Borrower's application relating thereto.

#### **41. JOINT AND SEVERAL OBLIGATIONS**

If there is more than one Borrower, all payment and performance obligations of the Borrower existing from time to time under this commitment, the Security and all other documents related or entered into pursuant hereto and thereto (collectively, the "Obligations"), shall constitute joint and several obligations of the all the Borrowers and each of them. Each Borrower expressly represents and acknowledges that it is part of a common enterprise with the other Borrowers and that any advances of the Loan made by the Lender to one or more persons who is a Borrower hereunder are and will be of direct and indirect interest, benefit and advantage to each of the Borrowers. Each Borrower acknowledges that any draw request or other notice or request given by one Borrower to the Lender shall bind each Borrower, and that any notice given by the Lender or its agent to any Borrower shall be effective with respect to all Borrowers. Each Borrower acknowledges and agrees that each Borrower shall be liable, on a joint and several basis, for the Loan and all other Obligations, regardless of which Borrower actually may have received the proceeds of the Loan or other extensions of credit or the amount of such loan received or the manner in which the Lender accounts among the Borrowers for the Loan advanced, or other extensions of credit on its books and records, and further acknowledges and agrees that Loan and other extensions of credit to any Borrower inure to the mutual benefit of all the Borrowers and that the Lender is relying on the joint and several liability of the Borrowers in extending the Loan hereunder.

#### **42. SCHEDULES**

The following documents marked "X" are attached as schedules to this Commitment and form a part hereof:

- |   |            |   |
|---|------------|---|
| X | Schedule A | Standard Construction Conditions  |
| X | Schedule B | Standard Charge Terms and Conditions  |
| X | Schedule C | Certificate of Identification   |
| X | Schedule D | Pre-authorized debit form for automatic deduction from bank account of Borrower to which must be attached a specimen cheque |
|   | Schedule E | Specimen of an irrevocable letter of credit to be remitted to the Lender for the Performance Deposit                        |
| X | Schedule F | Tenant Acknowledgment   |
| X | Schedule G | Certified Rent Roll (or a certified rent roll in a form acceptable to the Lender)   |
| X | Schedule H | Draw Request  |

X	Schedule I	Draw Certificate
X	Schedule J	Tax Waiver Side Letter
X	Schedule K	Subordination and Non-Disturbance Agreement
X	Schedule L	Insurance Requirements
	Schedule M	Certificate of Independent Legal Advice and/or Representation
X	Schedule N	Subordination and Standstill Agreement
X	Schedule O	Sample form of Architect's Certificate of Opinion
X	Schedule P	Deficiency and Completion Agreement

#### **43. DATES OF EXPIRY**

- 43.1 The Security documents shall be properly executed and delivered to the Lender's solicitors, where applicable, in registerable form no later than three (3) business days prior to the First Advance Date and the advance of funds must take place no later than the First Advance Date.
- 43.2 If on or before the date specified in Section 43.1 the security documents provided to the Borrower or its solicitors have not been so delivered or the first advance has not been made by the First Advance Date, the Lender may at any time thereafter, in its sole discretion, terminate its obligations under this Commitment and may retain the Standby Deposit as liquidated damages.
- 43.3 The Lender may, at its sole option from time to time, elect to extend the above-mentioned date by which the Security documents are to be executed and delivered or the date by which the Loan is to be advanced or any of the other time periods contained in this Commitment. Notwithstanding any such extension, time shall remain of the essence of this Commitment and all other terms and conditions shall remain unchanged.

#### **44. WAIVER**

The terms and conditions contained in this Commitment are inserted for the exclusive benefit of the Lender and may be waived in whole or in part by the Lender at any time. No advance, either singularly or collectively, shall constitute a waiver of any of the Borrower's or Covenantor's obligations nor obligate the Lender to make further advances.

The Lender's failure to insist upon a strict performance of any obligation or covenant of this Commitment by the Borrower or Covenantor or to exercise any option or right herein shall not be a waiver, or relinquishment for the future of such obligation or covenant, option or right, but the same shall remain in full force and effect and the Lender shall have the right to insist upon the strict

performance by the Borrower or Covenantor of any and all of the terms and provisions of this Commitment and the security documentation.

**45. COUNTERPARTS**

This Commitment may be executed in one or more counterparts, each of which so executed will constitute an original and all of which will constitute one and the same agreement. This Commitment may be executed by any party and transmitted to the other party or parties by facsimile or other electronic means and if so executed and transmitted this Commitment will be for all purposes as effective as if the party in question had delivered an executed original.

**ROMSPEN INVESTMENT CORPORATION**

By: 

Name:

MARK HILSON

Title:


MANAGING GENERAL PARTNER

I have authority to bind the corporation.

**ACCEPTANCE**

We hereby accept the terms and conditions set out in this Commitment and submit the Standby Deposit, on this 6 day of ~~May~~, 2013.  
**JUNE**

Dan White, on behalf of the general partners of the Borrower and Covenantor to be incorporated and formed.

  
\_\_\_\_\_  
Per: Dan White

Witness:  \_\_\_\_\_

**ADDITIONAL CONDITIONS OF BORROWER AND COVENANTOR**

Lender will not put in an offer for the acquisition of the Fort McMurray Property unless and until this commitment to fund the loan is unconditional.

Lender also acknowledges that at the whole and sole discretion of the Borrower and Covenantor this loan facility can be utilized for any other financing needs of the Borrower and Covenantor if the Fort McMurray acquisition transaction is not completed.



**SCHEDULE Q  
PROPERTIES*****Ft. Mac Property:***

Municipal Address:

Legal Description:

•

Borrower represented  
Value of the Property:Permitted Financial  
Encumbrances:

None.

***Edmonton Property:***

Municipal Address:

Legal Description:

•

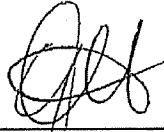
Borrower represented  
Value of the Property:

\$25,000,000

Permitted Financial  
Encumbrances:

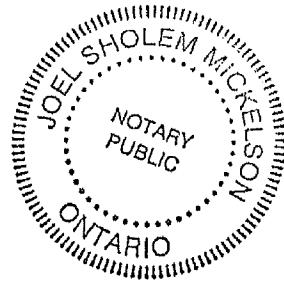
None.

This is Exhibit "2" referred to  
in the Affidavit of Wesley Roitman  
Sworn before me this 16<sup>th</sup> day of November, 2020



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A Notary Public in and for  
the Province of Ontario





R O M S P E N

Our File: 8212

July 30, 2015

Symmetry Asset Management Inc.  
1250 Hayter Road  
Edmonton, AB, T6S 1A2

Dear Sirs:

**Re: \$40 Million (Maximum) First Mortgage Credit Facility (the "Loan")  
Eco-Industrial Business Park (Lot 11), Edmonton, AB  
Various parcels, Lamont, AB**

---

We are pleased to inform you that, on the basis of the information and the documents supplied by you, Romspen Investment Corporation as trustee (the "**Lender**") hereby submits to you this offer of mortgage financing ("**Commitment**") in connection with the properties above mentioned and more fully described in Section 4 below.

**This Commitment must be accepted by the Borrower and received by the Lender, together with the Standby Deposit as hereinafter set out, no later than 5 days from the date hereof, failing which this Commitment shall become null and void without further notice.**

**This Commitment amends and restates in its entirety the mortgage loan commitment dated June 6, 2013 between the Lender and Dan White on behalf of the general partners of the Borrower and Covenantor (as defined therein).**

1. **BORROWER**

Lot 11 Limited Partnership, Eco Energy Limited Partnership, Eco Energy GP Ltd., on its own behalf, and Absolute Energy Resources Inc. (each, a "**Borrower**", and collectively, the "**Borrowers**"), which represent that they will be the legal and beneficial owner of all property and assets comprising the security required pursuant hereto.

2. **COVENANTOR**

Reserved.

3. **APPROVED LOAN AMOUNT**

The maximum approved loan amount is \$40,000,000 (the "**Loan Amount**"). The Loan is comprised of multiple tranches. The approved first tranche of the loan is approximately \$3,100,000. The amounts of future tranches will be at the Lender's sole discretion, acting reasonably.

#### 4. PROPERTIES

Those properties set out in Schedule Q (the "**Properties**", and each, a "**Property**", and, individually, the "**Lamont Properties**" and the "**Edmonton Property**").

#### 5. ADVANCE DATES

Subject to the terms of this Commitment, the first advance of the Loan ("**First Advance**") shall take place on or around July 31, 2015 ("**First Advance Date**"). Advances of future tranches of the Loan will be in the Lender's sole discretion, acting reasonably. Each advance of funds under the Loan is referred to as an "**Advance**".

#### 6. INTEREST RATE

The interest rate for Loan is 12% per annum, calculated and compounded monthly, in arrears, on the amounts advanced from time to time from each Advance date, as well after as before maturity, default or judgment.

During the first 12 months of the Loan Term, interest shall accrue. Commencing in the 13<sup>th</sup> month of the Loan Term, the Lender may require the borrower to make monthly interest payments of up to 75% of the interest accrued on the Loan Amount from the beginning of the 13<sup>th</sup> month, and any accrued and unpaid interest and costs thereon. The Lender will determine the amount of such monthly interest to be paid, in its sole discretion. The Lender will give the Borrower notice before the expiry of the 11<sup>th</sup> month of the Loan Term of its determination of the amount of such required interest payment.

#### 7. TERM

The term of the Loan is 2 years commencing from the Interest Adjustment Date (the "**Loan Term**"). The date on which the Loan Term expires is sometimes referred to herein as the "**Loan Maturity Date**". The Loan shall not be repaid prior to the Loan Maturity Date, unless a prepayment privilege is provided herein.

The "**Interest Adjustment Date**" will be either the 1st or the 15th (as chosen by the Lender) of the month following the First Advance Date.

#### 8. USE OF FUNDS

The proceeds of the first tranche of the Loan will be used to:

- (a) assist the Borrower in providing deposits required under the purchase agreements for the Lamont Properties (as to approximately \$3,000,000); and
- (b) pay fees and transaction costs.

#### 9. SECURITY

The following security for the Loan shall be granted in favour of the Lender, in form and content satisfactory to the Lender and its legal counsel (hereinafter collectively referred to as the "**Security**"):

- 9.1 a \$40,000,000 first-ranking mortgage of the Edmonton Property. The Borrowers acknowledge and agree that the mortgage registered on the Edmonton Property as instrument number 132335491 on October 18, 2013 stands as security for the Loan and all other obligations of the Borrowers to the Lender pursuant to this Commitment or the Security;
- 9.2 an assignment of the agreements of purchase and sale for the Lamont Properties;
- 9.3 a first-ranking general assignment of all present and future rents pursuant to leases and offers to lease (Offers to lease and leases affecting the Properties are herein collectively referred to as the "leases". That is, the word "lease" herein shall be deemed to include any offer to lease) affecting the Properties together with all insurance and indemnities covering the said rents and of all income and accounts derived from the Properties including all proceeds receivable from early termination of any of the leases and all other benefits and advantages to be derived therefrom. The Lender may in addition, in its absolute discretion, require attornment or attornment and subordination agreements to be entered into by the tenant under any of the leases. Any security interest granted by a tenant in favour of the Borrower shall be assigned and transferred to and in favour of the Lender under the terms of the assignment of rents granted to the Lender. The Borrowers acknowledge and agree that the Caveat re: Assignment of Rents and Leases registered on the Edmonton Property as instrument number 132335492 on October 18, 2013 stands as security for the Loan and all other obligations of the Borrowers to the Lender pursuant to this Commitment or the Security;
- 9.4 first-ranking specific assignments of all leases for tenants occupying or to occupy more than 5% of rentable area or generating more than 5% of total rental revenue, and of all rents payable under such leases, of all insurance indemnities covering the said rents and of all income and accounts derived therefrom, including all proceeds received from early termination of such leases, together with tenant acknowledgements for such tenants in the form set forth in Schedule "F" hereto and, if required by the Lender, attornment or attornment and subordination agreements in respect thereof. The Lender shall be entitled to register the specific assignments of such leases and to require notices of each such lease to be registered against title to the Properties by the Borrower in such order as requested by the Lender;
- 9.5 general security agreements charging all the personal property of the Borrowers and General Partners (defined below), including, without limitation, goods, chattel paper, documents, accounts, intangibles, securities, monies, books and records and all replacements of, substitutions for and increases, additions and accessories to the foregoing and proceeds thereof, present and future. The Borrowers and General Partners acknowledge and agree that the general security agreement dated September 25, 2013, between the Borrowers and the Lender and registered in the PPR under registration numbers 14010319931 and 14010319907 stands as security for the Loan and all other obligations of the Borrowers to the Lender pursuant to this Commitment or the Security;
- 9.6 a specific assignment of all the Borrowers' right, title and interest in, to and under all material contracts and agreements affecting or with respect to the Properties (the "**Material Contracts**"), as required by the Lender, with all necessary consents of the other parties thereto;

- 9.7 acknowledgment of the status and terms of any contracts affecting or with respect to the Properties including, without limitation, any pertaining to ownership, insurance, shared facilities, passageway agreements or other similar matters specifically, but without limitation, confirming the good standing of such contracts and the rights of the Lender under its security;
- 9.8 if any Property is a condominium, a specific assignment of all of the Borrower's right, title and interest in and to all purchase agreements, sales proceeds and purchaser deposits. In addition all condominium association voting rights shall be assigned to the Lender, or its nominee;
- 9.9 if any charge or security interest is to be registered with the Lender's prior written consent on title to any Property or against the Borrowers in subordinate priority to the Lender's security such subordinate charge or secured party shall provide to the Lender a subordination and standstill agreement in a form acceptable to the Lender;
- 9.10 assignment of all insurance policies with respect to the Properties and all proceeds and benefits therefrom in favour of the Lender;
- 9.11 assignment, postponement and subordination by the respective shareholders or partners of the Borrowers, and their general partners ("**General Partners**"), in favour of the Lender, of any and all loans, indebtedness, distributions of income and/or capital owing or due to them from time to time by the respective Borrowers;
- 9.12 an environmental indemnity from the Borrowers;
- 9.13 a pledge of all issued and outstanding partnership interests of the Borrowers;
- 9.14 a pledge of all shares of the General Partners;
- 9.15 such further and other security as legal counsel for the Lender may reasonably require.

**10. TRANSACTION FEES AND RELATED COSTS**

Administration Fee:	\$1,000
Lender's Fee:	\$3%**
Insurance Risk Management Fee:	\$1,500*
Lender's Basic Legal Fee (estimated):	\$30,000*
Lender's Advance Fee (per Advance):	\$1,000
Lender's Legal Fee (per Advance):	\$500*

\* plus disbursements and taxes, if applicable.

\*\*payable as to 2% upon each Advance, and 1% of the aggregate of all Advances, at the earlier of maturity, default or prepayment

In addition to the aforementioned, the Borrowers agree to pay all costs, fees and expenses in connection with the transaction contemplated by this Commitment, including, without limitation:

- 10.1 engineering, environmental assessment, appraisal, credit information, inspection, architectural, project monitoring, cost consultancy, survey and any and all other professional and advisory costs as may be reasonably incurred by the Lender;
- 10.2 registration, recording and filing fees, taxes and the like with regard to all documents required by the Lender's solicitors to be registered, recorded or filed.

Such fees and costs may, at the option of the Lender, be deducted from any advance of the Loan.

## **11. STANDBY DEPOSIT**

In consideration of the issuance of this Commitment and in recognition of the considerable effort that the Lender must immediately undertake in order to make funds available for closing, the Borrowers agree to submit to the Lender, together with this executed Commitment, \$250,000 ("Standby Deposit"), by way of a certified cheque, draft or wire payable to the Lender. The Lender hereby acknowledges receipt of the Standby Deposit.

The Standby Deposit shall bear no interest while in the possession of the Lender. Save as otherwise provided for herein, such Standby Deposit shall be credited to the Borrowers at the time of the first advance of the Loan.

## **12. ADVANCES AND CONDITIONS PRECEDENT**

### **12.1 General**

- 12.1.1 Subject to the other terms and conditions set forth in this Commitment, the Lender shall disburse the proceeds of the Loan to or on behalf of the Borrowers in the amounts and as specified in Section 3 herein.
- 12.1.2 The Borrowers shall be the legal and beneficial owners of a good and marketable freehold title to the Edmonton Property and all personal property associated therewith, which shall be free and clear of all security interests, claims or other encumbrances, with the exception of the Security provided for in this Commitment and encumbrances permitted by the Lender, the whole to the complete satisfaction of legal counsel for the Lender.
- 12.1.3 All taxes, assessments, utility charges and other charges affecting the Edmonton Property, other than those which are being appealed or contested in a diligent manner, shall have been paid prior to each Advance, failing which they shall be paid from the proceeds of any advance.
- 12.1.4 The Borrowers shall fulfill all their obligations under any laws entitling a creditor to exercise rights against the Edmonton Property. In this respect, they shall provide to every government office, utilities provider, and other authority named by the Lender, an authorization by which the Lender or any person authorized by it as its legal counsel, agent or manager, shall be able to obtain, confirmation that all payments, declarations and other filings of the such parties are up to date, whether the authority concerned has issued or will issue a default notice or demand for payment to any party and whether any such notice concerns

arrears. Each such authorization shall remain in effect and will be replaced as required by the Lender from time to time until the Loan has been fully repaid.

12.1.5 Within five (5) business days from acceptance of this Commitment, the Borrowers shall deliver to the Lender's legal counsel the following documents (where applicable):

12.1.5.1 copies of all contracts affecting the Properties or relating thereto, including, without limitation, executed offers to lease or leases, standard offer and lease agreements and all information related to such leases.

12.1.5.2 if any Property is a condominium, copies of all condominium documentation, including the condominium corporation's by-laws;

12.1.5.3 required insurance policies;

12.1.5.4 evidence that property taxes on the Edmonton Property have been paid or are being appealed or contested in a diligent manner;

12.1.5.5 certified copy of a resolution of the General Partners' boards of directors authorizing this transaction;

12.1.5.6 certified copies of the constating documents of the Borrowers and the General Partners;

12.1.5.7 an original up to date surveys of the Properties prepared by a duly qualified land surveyor showing the location of all improvements on the Properties accompanied by a certificate wherein the surveyor confirms that the location of the improvements comply with applicable municipal set-back requirements (or, if not, setting on details of the non-compliance); such survey must be in a form acceptable to the Lender's counsel; and

12.1.5.8 any other documents required hereunder and reasonably requested by legal counsel for the Lender.

## 12.2 Advance Requirements

The advance of the Loan is conditional upon the receipt by the Lender of the following documents, in form and substance satisfactory to the Lender and upon fulfillment by the Borrowers of the following conditions precedent as well as those set out in Schedule B hereto or elsewhere herein, to the entire satisfaction of the Lender:

12.2.1 the Security and any other documents relating to the Loan that are required or contemplated hereunder or which the Lender and its legal counsel may deem necessary, shall have been received and approved to the complete satisfaction of the Lender and its counsel and duly executed and registered and perfected, as the case may be and all approvals required by the Lender or its counsel shall have been given;



- 12.2.2 a lender's title insurance policy issued by an insurance company acceptable to the Lender and in form and content satisfactory to the Lender the premium for which will be paid by the Borrowers;
- 12.2.3 a favourable opinion of the Borrowers' and General Partners' counsel on the due formation, power and authority of the Borrowers, the due authorization, execution, delivery, validity and enforceability of this Commitment and the Security and such other matters as the Lender or its counsel may reasonably require;
- 12.2.4 a certificate of the Borrowers confirming the truth and survival of the representations and warranties contained herein;
- 12.2.5 receipt of a fully executed copy of each of the purchase and sale agreements and amendments thereto for the Lamont Properties for which deposits are being funded under the first tranche;
- 12.2.6 evidence that the Borrowers have complied with their obligations with respect to insurance requirements as more fully set out in Schedule "L", together with a favourable opinion of the Lender's insurance consultant on the adequacy of all insurance policies and or bonding required to be delivered or maintained hereunder;
- 12.2.7 evidence that all taxes, rates, assessments and charges which may be levied or imposed against the Properties or a Borrower's business, including all utilities charges and all amounts capable of forming a charge against the Properties, have been paid in full or are being appealed or contested in a diligent manner. Borrowers will provide full disclosure of the property tax appeal in respect of the Edmonton Property, and, depending on the results of the Lender's due diligence investigations, the Lender may, as a condition of the First Advance, require a holdback or payment into escrow of the disputed amount;
- 12.2.8 evidence that the Borrowers have complied with all statutory requirements for deduction at source and remittance to applicable fiscal authorities, including, without limitation, those under the *Income Tax Act* (Canada), the *Excise Tax Act* (Canada), the *Canada Pension Plan Act* (Canada) or the *Employment Insurance Act* (Canada);
- 12.2.9 evidence that the income generated from the Edmonton Property is at a level satisfactory to the Lender, in its sole and absolute discretion;
- 12.2.10 site inspections of the Properties have been completed on behalf of the Lender and the results of the inspections are satisfactory to the Lender;
- 12.2.11 satisfactory interviews with the Borrowers' principals have been conducted by the Lender;

- 12.2.12 satisfactory review of the proposed Lamont assembly;
- 12.2.13 an environmental report prepared, at the expense of the Borrowers, by qualified environmental consultants acceptable to the Lender, addressed to the Lender or, alternatively, accompanied by a letter of transmittal from the environmental consultants who prepared the report allowing the Lender to rely upon the same and to use it for mortgage purposes, disclosing no site contamination or hazardous substances and confirming, to the satisfaction of the Lender, that the Properties comply with Environmental Laws (as defined in Schedule B hereof). The Borrowers hereby agree to provide all available information with respect to environmental matters and to fully disclose to the Lender any relevant facts about environmental matters promptly as they come to light;
- 12.2.14 an appraisal and feasibility report about the Properties in form and substance satisfactory to the Lender, prepared at the expense of the Borrowers by a qualified appraiser acceptable to the Lender, addressed to the Lender or, alternatively, accompanied by a letter of transmittal from the appraiser allowing the Lender to rely upon it and to use it for mortgage purposes;
- 12.2.15 copies of all leases affecting the Properties, executed by the parties thereto, including, without limitation, those listed in Schedule "G" hereto, or a certified rent roll in a form acceptable to the Lender and reviewed by and found satisfactory to the Lender and its counsel. In addition, an estoppel certificate from each tenant occupying or to occupy 5% or more of the Properties; total rentable area or generating 5% or more of total rental revenue from the Properties and attornment and subordination agreements from tenants as required by the Lender, shall have been executed by the tenants as required and found satisfactory to the Lender;
- 12.2.16 if there are existing structures on the Edmonton Property, a report from a qualified structural engineer, addressed to the Lender, addressing the structural soundness of those existing improvements, the contents of which are acceptable to the Lender;
- 12.2.17 no event shall have occurred and be continuing or would result from making of any advance under the Loan, which constitutes an event of default or would constitute an event of default under any of the Borrowers' obligations, except when such default is cured by notice or elapsed time or both;
- 12.2.18 the Lender and its counsel shall have approved all Material Contracts ;
- 12.2.19 if a Property is a leasehold interest under a ground lease, a copy of the ground lease and, if applicable, insurance trust agreement and any other agreement entered into with the ground lessor;
- 12.2.20 any co-owners agreement or trust agreement in effect with respect to a Property;
- 12.2.21 compliance with Lender's anti-money laundering requirements;

- 12.2.22 approval by the Lender of the limited partnership agreements of the Borrowers;
- 12.2.23 notwithstanding anything contained herein, no advances shall be made by the Lender until such time as the Lender is in receipt of, and has reviewed, all due diligence material referred to in Schedule A of the letter agreement dated September 13, 2012, and not hereinbefore requested; and
- 12.2.24 notwithstanding anything contained herein, no advance shall be made by the Lender until the Lender is advised by its legal counsel that, having regard to all the circumstances, such advance should be made.

### 13. **REPRESENTATIONS AND WARRANTIES**

The Borrowers and the General Partners (the "**Credit Parties**", and each, a "**Credit Party**"), as applicable, represent and warrant to the Lender, which shall be true and correct for each Advance hereunder, as follows, and acknowledge that the Lender is relying on all such representations and warranties in entering into this commitment and making all Advances of the Loan hereunder.

- 13.1.1 The request for and use of proceeds of any Advance by the Borrowers will constitute an affirmation or re-affirmation by each Credit Party of the representations and warranties contained herein and in any document related hereto, including, without limitation, any Security delivered pursuant hereto;
- 13.1.2 Each Credit Party is an entity duly organized and validly existing and in good standing under the laws of the jurisdiction of formation/incorporation/amalgamation/continuance, as applicable, and registered to do business in each jurisdiction in which it carries on business;
- 13.1.3 Each Credit Party has full corporate power, right and authority to enter into and perform its obligations under each of the documents to which it is a party and has full corporate right, power and authority to own and operate its assets and property and to carry on its business;
- 13.1.4 The execution and delivery by each Credit Party of this Commitment and the applicable Security and the performance of its obligations thereunder do not and will not conflict with or result in a breach of any of the terms, conditions or provisions of its charter documents or bylaws;
- 13.1.5 The execution and delivery by each Credit Party of this Commitment and the applicable Security and the performance of its obligations thereunder have been duly authorized or will, prior to the First Advance Date, have been ratified by all necessary corporate or other action, and no authorization under any applicable law and no registration, qualification, approval, designation, declaration or filing with any government body, agency or authority having jurisdiction over any Credit Party is or was necessary therefore, except as contemplated herein;

- 13.1.6 Each Credit Party possesses all consents, approvals, permits and authorizations under any applicable law which are necessary in connection with the operation of their respective businesses. All such consents, approvals, permits and authorizations are in full force and effect and no Credit Party is in default in any respect thereunder which default would have a material adverse effect. No action exists, is pending or threatened which has as its object the revocation, amendment or qualification of any such consent or authorization and all applicable appeal periods in respect of such actions have expired;
- 13.1.7 No Credit Party is in default in any respect under any material indenture, mortgage, deed of trust, agreement or other instrument to which they are a party or by which they or any of their property may be bound and which default would have a material adverse effect on their property or their prospects;
- 13.1.8 Lot 11 Limited Partnership is the legal and beneficial owner of the applicable Property, and will have good and marketable title and possession thereto, free from all mortgages, charges, liens or other encumbrances whatsoever, except for the Security and Permitted Encumbrances, and no person other than Dan White has any direct or indirect interest in the Properties, other than has been disclosed to and agreed to by the Lender;
- 13.1.9 Each Credit Party has filed all tax returns which are required to be filed by each of them and has paid or remitted when due all taxes, assessment and government charges imposed upon them which if unpaid could result in any charge or other encumbrance on their properties except such tax, assessment or charge which is being contested in good faith and for which the applicable Credit Party has made adequate reserves;
- 13.1.10 The applicable Credit Party has obtained and is in compliance (i) with all terms and conditions of all authorizations which are required under any environmental law, the non-obtaining of which and the lack of compliance with which would have a material adverse effect, and (ii) with all environmental laws, non-compliance with which would have a material adverse effect. No Credit party generates hazardous materials or transports, treats or disposes of any hazardous materials nor is any Credit Party aware of any underground storage tanks or surface contaminants located on the Properties other than those that have been reported to the Lender. No Credit Party, to the best of their knowledge, has ever caused or permitted (i) a release of any contaminant from or on a Property or (ii) any hazardous materials to be placed, held, located or disposed of on or under a Property the effect of which could reasonably be anticipated to have a material adverse effect. No enforcement action, investigation or outstanding order from any official body in respect of any hazardous materials or release of contaminants is existing, threatened or impending;

- 13.1.11 The applicable Credit Party has complied and will, at all times during the operation of the Edmonton Property, comply with the requirements of the *Builder's Lien Act* (Alberta) and the regulations pursuant thereto;
- 13.1.12 All property taxes, levies, assessments, penalties or other costs payable to a municipality or other local government in respect of the Edmonton Property have been paid and no such amount is in arrears or is due and unpaid, other than amounts which are being appealed or contested in a diligent manner;
- 13.1.13 Each Credit Party has provided the Lender or its solicitors with true, complete and correct copies of all constating documents including registers of directors, partners and shareholders;
- 13.1.14 All information pertaining to the current and proposed uses of the Properties and the Credit Parties' financial condition have been fully disclosed to the Lender. There is no legal action instituted, threatened or pending against the any Credit Party or any Property which has not been disclosed to the Lender in writing in connection with the application for the Loan and the Borrower has no notice of any work orders, deficiency notices or notices of violation pertaining to any Property;
- 13.1.15 All financial and other information provided by the Credit Parties to the Lender, including but not limited to financial and other information provided in respect of the values and other matters pertaining to the Properties is true and accurate and may be relied upon by the Lender in executing this Commitment and making the Loan;

#### 14. **GENERAL COVENANTS**

Notwithstanding any other provision of this Commitment, each Credit Party, as applicable, covenants and agrees as follows.

- 14.1.1 Upon obtaining (i) knowledge of the occurrence of any default under any agreements to which any Credit Party is a party, (ii) notice of litigation, arbitration, or proceedings before any official body, or (iii) information respecting the business, operations or financial condition of such Credit Party as the Lender may from time to time reasonably request, promptly to give the Lender details of such occurrence or other matter including copies of relevant documents;
- 14.1.2 To preserve and maintain in full force and effect its qualifications to carry on business including, without limitation, all rights, consents and authorizations relating thereto and not cease to conduct its business as conducted at the date of this Commitment, and to conduct its business in a proper, efficient and businesslike manner and in accordance with good business practices;
- 14.1.3 To comply with all applicable laws and duly observe in all material respects all consents and authorizations and valid requirements of any governmental body, agency or authority having jurisdiction;
- 14.1.4 To keep proper books of account in accordance with sound accounting practice, and provide the Lender with such financial information in respect of the Properties that

the Lender may request, and to provide the Lender with access thereto during normal business hours;

- 14.1.5 To permit the Lender or any representative of the Lender on reasonable notice to visit and inspect the Properties in the presence of a representative of the Borrower;
- 14.1.6 To keep in force insurance in respect of the Edmonton Property which meets the Lender's requirements herein or in the Security;
- 14.1.7 To keep the Edmonton Property in good repair, working order and condition consistent with all consents, authorizations, and applicable laws and, from time to time, (i) to make and cause to be made all needful and proper repairs, renewals, replacements, additions and improvements thereto in accordance with prudent management practices, and (ii) not to permit to be terminated or suspended for any period of time any of its right, title or interest in or to any authorization or consent applicable to the Properties;
- 14.1.8 To maintain and cause to be maintained and to defend and take all action necessary or advisable at any time and, from time to time, to maintain, defend, exercise, or renew their right, title and interest to their respective properties and assets including, without limitation, the Properties;
- 14.1.9 To make full and timely payment of all obligations hereunder whether now existing or hereafter arising and duly comply with all the terms and covenants contained in this Commitment or in any other agreements entered into pursuant hereto;
- 14.1.10 To pay and discharge as they become due all payments due and owing under, or with respect to, any previous indebtedness created or security given by them to any person and will observe, perform and carry out all the terms, covenants, provisions and agreements relating thereto and any default in payment of any monies due and payable under or relating to any previous indebtedness or security or in the observance, performance or carrying out of any of the terms, covenants, provisions and agreements relating thereto will be deemed to be a default hereunder at the option of the Lender and any and all remedies available to the Lender hereunder by reason of any default hereunder or by law or otherwise will be forthwith available to the Lender;
- 14.1.11 To notify the Lender promptly upon obtaining knowledge of the institution or anticipated or threatened institution of any proceedings for the expropriation of any part of the Properties or of any other part of their respective property or assets. If any such property or assets are taken or damaged in or by any such expropriation proceedings or otherwise, the awards of compensation payable to any Credit Party as a result of such expropriation shall be and are hereby assigned to the Lender;
- 14.1.12 At the Borrowers' cost and expense, upon request of the Lender, duly execute and deliver, or cause to be duly executed and delivered, such further instruments and do and cause to be done such other acts as may be necessary

or proper in the reasonable opinion of the Lender to carry out more effectually the provisions and purposes of this Commitment or any other agreements entered into with the Lender;

14.1.13 If any Credit Party is in default in any covenant to be performed by them hereunder or under the Security, the Lender may perform any covenant capable of being performed by the Lender and if the Lender is put to any costs, charges, expenses or outlays to perform any such covenant, they will indemnify the Lender for such costs, charges, expenses or outlays and such costs, charges, expenses or outlays incurred by the Lender (including solicitors' fees and charges incurred by the Lender on a substantial indemnity basis) and will be secured by the Security;

14.1.14 That in any judicial proceedings taken to enforce this Commitment and the covenants hereunder or to enforce or redeem the Security or to foreclose the interest of the Borrowers in any property subject thereto, the Lender will be entitled to costs on a substantial indemnity basis.

## 15. NEGATIVE COVENANTS

The Credit Parties covenant with the Lender that they will not, without the consent in writing of the Lender:

- 15.1 make, give or create or attempt to make, give or create any mortgage, charge, lien, security interest or encumbrance upon any Property or any part or parts thereof, including personal property collateral subject to any of the Security, except as permitted by this Commitment;
- 15.2 make any payments to any person other than in the normal course of business;
- 15.3 make any payments of salaries, bonuses or other remuneration to:

- (a) any shareholder, partner, director or officer of a Borrower;
  - (b) any person related by blood or marriage to any of the persons described in (a) above;
  - (c) any corporation controlled by a Borrower or by a Borrower and its associates (within the meaning of the word "associate" as defined in the *Business Corporations Act* (Ontario)); or
  - (d) in any calendar year in aggregate in excess of the amount prescribed by the Lender from time to time in writing (and if no amount is prescribed the amount will be the amount paid in the calendar year prior to the calendar year in which the Security is executed);
- 15.4 make any payment (whether for principal, interest or otherwise) on account of indebtedness owing to, or when initially incurred was owing to, partners, shareholders or directors of a Borrower or related companies or individuals;
- 15.5 make loans or extend credit to any person (including specifically if it is a corporation, any partner, directors, officers or shareholders of a Borrower and any person related by blood or marriage to such persons or any corporation controlled by such person or relative or by a Borrower) except customers of a Borrower in the ordinary course of business;
- 15.6 purchase or redeem any of the shares or ownership interests or otherwise reduce the share or partnership capital of a Borrower;
- 15.7 in any way vary or alter the share or partnership ownership structure of a Borrower or permit the transfer of any shares or other ownership interests of a Borrower;
- 15.8 declare or provide for any dividends or other payments based upon share or partnership capital of a Borrower;
- 15.9 except for operating lines of credit maintained in the ordinary course of business, raise or borrow any money from any person other than the Lender, shareholders or owners of a Borrower and trade creditors of a Borrower in the ordinary course of business; or
- 15.10 guarantee, indemnify any person for, or endorse for accommodation, the obligations of any other person, directly or indirectly.

16. **EVENTS OF DEFAULT**



- 16.1 The whole of the outstanding balance of the Loan (including principal, interest, bonus and costs) will immediately become due and payable and the Security will become enforceable in each and every of the following events (each an "Event of Default"):
- 16.1.1 if any Credit Party fails to observe or perform something required to be done or some covenant or condition required to be observed or performed hereunder or pursuant to the Security, including but not limited to the payment of monies when due hereunder, whether principal, interest, fees, costs or other charges;
  - 16.1.2 if any Credit Party does, or permits to be done, anything which they have herein agreed not to do or permit to be done hereunder or pursuant to the Security or this Commitment;
  - 16.1.3 if any representation or warranty given by any Credit Party (or any director or officer thereof) hereunder or pursuant to the Security is untrue in any material respect;
  - 16.1.4 if an order is made or a resolution passed for the winding-up of any Credit Party, or if a petition is filed for the winding-up either of any Credit Party;
  - 16.1.5 if any Credit Party commits or threatens to commit any act of bankruptcy or becomes insolvent or makes an assignment or proposal under the *Bankruptcy and Insolvency Act* (Canada) or a general assignment in favour of its creditors or a bulk sale of its assets, or if a bankruptcy petition is filed or presented against any Credit Party;
  - 16.1.6 if any proceedings with respect to any Credit Party is commenced under the *Companies Creditors Arrangement Act* (Canada);
  - 16.1.7 if any execution, sequestration, extent or any other process of any Court become enforceable against any Credit Party or if a distress or analogous process is levied against the property of any Credit Party or any part thereof;
  - 16.1.8 if any Credit Party permits any sum which has been admitted as due by it or is not disputed to be due by it and which forms or is capable of being made a charge upon any Property or a Borrowers' interest therein or other properties and assets subject to the Security, in priority to the Security to remain unpaid after proceedings have been taken to enforce the same as a prior charge;
  - 16.1.9 if any Credit Party defaults in any material respect in observing or performing any term, covenant or condition of any debt instrument or similar obligation by which it is bound, whether secured or not;
  - 16.1.10 if, without the prior written consent of the Lender, any Credit Party sells, agrees to sell, sub-lease, or otherwise disposes or agrees to dispose of any Property or a Borrowers' interest therein or any part or parts thereof or any interest therein;
  - 16.1.11 if, without the prior written consent of the Lender, any Credit Party grants or agree to grant any further mortgage over the any Property or any part or parts thereof or any interest therein or otherwise permit any of any Property to be encumbered in any manner other than by encumbrances specifically permitted hereunder;

- 16.1.12 if any Credit Party defaults under any material contract entered into by them with respect to the Properties;
- 16.1.13 if, without the prior written consent of the Lender, there is, in the opinion of the Lender, a change of effective control of any Credit Party;
- 16.1.14 if a Borrower, either directly or indirectly, ceases or threatens to cease to carry on business;
- 16.1.15 if, in the sole opinion of the Lender, an adverse material change in risk occurs in respect of any Credit Party, any Property or the Security;
- 16.1.16 if the Lender in good faith and on commercially reasonable grounds believes that the ability of any Credit Party to repay the Loan to the Lender or to perform any of the covenants contained in this Commitment or the Security is impaired or is about to be impaired or in jeopardy; or
- 16.1.17 if an event of default occurs under any of the Security.
- 16.2 The Lender may waive any Event of Default, provided always that no waiver by the Lender or any failure to take any action to enforce its rights or to enforce any security will extend to or be taken in any manner whatsoever to affect any subsequent Event of Default or the rights resulting therefrom.
- 16.3 All remedies stipulated for by the Lender hereunder or in any of the Security will be deemed to be in addition to and not restrictive of the remedies which the Lender might be entitled to at law or in equity and the Lender may realize any of the Security or any part thereof in such order as it may be advised and any such realization by any means will not bar realization of any other security or any part or parts thereof nor will any single or partial exercise of any right or remedy preclude any other or further exercise thereof nor will the failure on the part of the Lender or any delay in exercising any rights under this Commitment or any of the Security operate as a waiver.
- 16.4 If an Event of Default has occurred and is continuing, in addition to and not in limitation of any rights now or hereafter granted under applicable law or the Security, the Lender may without notice to the Borrower and at any time and from time to time set-off, apply or transfer any or all sums owing from time to time by the Lender to the Borrowers towards the satisfaction of the outstanding balance of the Loan (including principal, interest and other amounts owing).

The Credit Parties agree to indemnify and save harmless the Lender and each of its directors, officers, employees and agents from and against all liabilities, claims, losses, damages, costs and expenses in any way caused by or arising directly or indirectly from or in consequence of the occurrence of any Event of Default under this Commitment or under the Security. The Credit Parties further agree to indemnify and save harmless the Lender and each of its directors, officers, employees and agents from and against all liabilities, claims, losses, damages, costs and expenses (including investigation costs, clean up costs, and any other actions necessary pursuant to any applicable environmental laws, and all reasonable legal fees, costs and expenses, on a solicitor and own client basis), asserted against or for the account of the Lender, in any way caused by or arising directly or indirectly from or in consequence of the occurrence of any material non-compliance by any Credit Party or any of

their agents or other representatives of applicable environmental laws. The indemnities provided for in this paragraph shall survive the termination of this Commitment and the repayment of the Loan.

## 17. TERMINATION

In the event a Borrower is in default for any reason whatsoever under the terms of this Commitment, or if it does not fulfill the conditions for disbursement of the Loan in accordance with the terms and conditions contained herein or in any other agreement or document relating to this Commitment, no later than five (5) business days prior to the First Advance Date, or if any information or document supplied by a Borrower is found to be incomplete or inaccurate in a material respect or if for any reason a Borrower does not accept all or a part of the proceeds of the Loan when the Lender makes them available, the parties to this Commitment hereby acknowledge that the Lender shall be entitled, at its discretion, to cancel its obligations under this Commitment and to retain the Standby Deposit as liquidated damages. In that event, this Commitment shall thereafter, subject as hereinafter provided, be void and of no further effect, without any further recourse by either party against the other except that, notwithstanding the forfeiture of the Standby Deposit, the Borrower and Covenantor shall remain liable and be required to pay and reimburse the Lender all fees, costs and expenses as set out in Section 10 whether or not the Loan is made. These agreements with respect to the Standby Deposit and the Borrowers' obligations to pay fees, costs and expenses are enforceable by the Lender notwithstanding the termination of this Commitment, each of such covenants and agreements having an independent existence from the other rights and obligations under this Commitment.

## 18. OTHER FINANCING TERMS

### 18.1 Repayment and Monthly Instalments

Subject to the provisions of Section 6, interest computed as provided in Section 6 shall be payable monthly in arrears on the same day of each and every month throughout the Loan Term. The Lender may, in its sole discretion, apply a portion of the proceeds from any Advance to pay the interest accrued to the date of the Advance..

With respect to any Advance, funds shall be deemed advanced on the earliest of:

- (i) the date that the funds are removed from the Lender's account and designated to a Borrower's account or as a Borrower may direct, or
- (ii) the date upon which a Borrower or its authorized representative has requested the funds to be advanced; or
- (iii) in the case of the first advance, the First Advance Date as herein set out or as amended pursuant to any written agreement between the Borrowers and the Lender.

Upon expiry of the Loan Term, the principal of the Loan, together with interest and all other amounts due and owing by the Borrowers to the Lender under the Security (as defined herein) shall become immediately due and payable.

It is hereby agreed that in case default shall be made in payment of any sum to become due for interest at any time appointed for payment thereof as aforesaid, compound interest shall be payable and the sum in arrears for interest from time to

time, as well after as before maturity, shall bear interest at the rate aforesaid. If the interest and compound interest are not paid within one (1) month from the time of default, a rest shall be made and interest at the rate aforesaid shall be calculated on the aggregate amount (including all unpaid interest) then due, as well after as before maturity, and so on each month. All such interest and compound interest shall be a charge upon the Property.

#### 18.2 Reserve Fund for Realty Taxes

The Borrowers shall maintain all tax accounts current. However, the Lender shall have the right to require the establishment of a reserve for payment of property taxes and payment of monthly payments based on the Lender's estimate of the annual taxes in accordance with the provisions of the standard mortgage terms set out in Schedule B hereto.

The Lender shall not be responsible for the payment of any taxes except as expressly provided for in the Commitment or the Security.

The Lender acknowledges that the owner of the Edmonton Property is appealing the property tax assessment thereon. Borrowers covenant and agree to keep the Lender informed as to the progress of such appeal and to pay all property taxes when due upon the conclusion of a final settlement or a final unappealable determination thereon.

#### 18.3 Method of Payment of Monthly Instalments of Interest

The Borrowers shall remit payments via an automatic debit service, by submitting the Authorization Form attached hereto as Schedule "D", together with a "void" cheque. If there are any changes to the Borrowers' regular payment, the Lender will provide notice at least ten (10) days in advance of the debit. The account information provided in this respect will be kept confidential.

#### 18.4 Condition upon Maturity

In the event that the Borrowers fail to repay the principal and interest outstanding on the Loan Maturity Date or any renewal thereof agreed to by the Lender, the Lender may, at its sole discretion, extend the mortgage for a period of one (1) month from the original Loan Maturity Date or any renewal thereof agreed to by the Lender, at an interest rate equal to the higher between the Interest Rate for the Loan and the then Royal Bank of Canada Prime Rate per annum plus five percent (5.00%) per annum, calculated and payable monthly. If the Lender does so elect to extend the term for one month but the Loan has not been repaid or renewal has not been finalized within this one (1) month period, then there will be no further extensions and the Lender may exercise its remedies under the Security.

The interest rate applicable will be determined by the Lender as of the first (1st) Banking Day of the month in which the Loan matures.

In this Commitment, "Royal Bank of Canada Prime Rate" means the rate of interest, expressed as a percentage per annum, published and quoted by Royal Bank of Canada or its successor at the bank's head office in Toronto, Ontario, as a reference rate then in effect for determining interest rates on commercial loans in Canadian Dollars in Canada and which is commonly known as the bank's prime lending rate.

"Banking Day" for the purposes of this clause, will mean a day on which the said head office in Toronto, Ontario, for the Royal Bank of Canada or its successor is open for business and which is not a Saturday, Sunday, civic or statutory holiday.

All other terms and covenants under the existing Security shall continue to apply after the term of the Loan is so extended.

The Loan may be paid in full at any time during the one (1) month extension period without notice, bonus or penalty, other than payment of the Extension Fee and any applicable discharge fees as hereafter set out.

An extension fee which is the greater of Five Thousand Dollars (\$5,000.00) or one percent (1.00%) of the outstanding balance shall be added to the principal balance if the Lender elects to extend the term of the Loan under this clause.

#### **19. LEGAL COUNSEL**

The title report, Security and all other documents relating to the Loan shall be prepared by the Lender's counsel who shall act on behalf of the Lender:

Witten LLP  
Attention: Cathy Farnell

The Borrowers shall be responsible for all legal costs involved in the preparation, settlement, execution and delivery of this Commitment, the Security and all other documentation related to the Loan.

#### **20. PREPAYMENT PRIVILEGE**

The Borrowers shall, when not in default, have the right to prepay all of the amount outstanding under the Loan prior to the Loan Maturity Date, on any payment date (i.e. each monthly anniversary of the Interest Adjustment Date), upon giving the Lender one (1) month written notice in advance of payment, or upon payment of a bonus equal to one (1) month's interest, in lieu of such notice.

#### **21. PARTIAL DISCHARGES**

Provided the Loan and Security are not in default and are in all respects in good standing, the Lender agrees to provide a partial discharge of its Security upon the closing of a sale of the Edmonton Property to a bona fide arm's-length purchaser, upon the fulfillment and satisfaction of each of the following conditions to the complete satisfaction of the Lender:

- (a) such partial discharge is permitted by law;

(b) the Lender receives:

- i. the Net Sales Proceeds from such sale; or
- ii. acceptable alternative security, to its complete satisfaction, in its sole discretion, acting reasonably;

(c) such partial discharge (if granted) will not impact the value or enforceability of the Lender's remaining Security, and the ratio of the Loan to the value of the Security remaining after the granting of such partial discharge, as determined by the Lender, is at a level acceptable to the Lender; and

(d) the Lender's is paid its reasonable legal fees and expenses for such partial discharge.

"Net Sales Proceeds" means the amount determined by subtracting from 100% of the gross sales proceeds from the sale of the Edmonton Property as approved by the Lender: (i) reasonable legal fees as approved by the Lender; (ii) reasonable (as compared to the sale of a similar property) real estate commissions, (iii) GST remittances to be paid by the Edmonton Property owner, (v) other adjustments on the statement of adjustments for the Edmonton Property as approved by the Lender.

## **22. SURVEY**

The Borrowers shall deliver to the Lender within five (5) business days prior to the first advance for its examination an up-to-date fully monumented survey of each Property prepared by a duly qualified Alberta land surveyor showing, inter alia:

- 22.1 boundaries and dimensions of the Property;
- 22.2 location of all buildings and other improvements (if any) on the Property and, if any structure offends municipal set-back requirements, the amount of the encroachment on the set-back area;
- 22.3 names of adjacent streets;
- 22.4 location of all registered easements, rights of way, etc.

The survey certificate shall be approved by the legal counsel for the Lender. If said survey is not an original signed and sealed survey, the Borrowers hereby undertake to deliver to the Lender, at least five (5) business days prior to the disbursement of the first advance of the Loan, three (3) original signed and sealed copies of the said survey. In addition, the Borrowers shall deliver to the Lender: (i) at least five (5) business days prior to the disbursement of the first advance of the Loan, a letter, in form satisfactory to the legal counsel of the Lender, from the land surveyor who has prepared the same addressed to the Lender confirming that the Lender may rely upon such survey; and (ii) immediately prior to each advance, a solemn declaration of a senior officer of the Borrowers certifying that, since the preparation of the said survey, no new easement has been created, no construction or modification of any building shown thereon has been effected and no new construction has been erected by a neighbor along the boundaries of the land described therein.

**23. REFINANCING**

- 23.1 The Lender shall have a right of first opportunity to finance or arrange any replacement financing for each Property, or for any further development of such Property or any improvements to be developed on such Property (herein collectively referred to as the "Permanent Financing").
- 23.2 In connection therewith the Borrowers shall provide to the Lender in writing as soon as same is applicable a request for Permanent Financing together with all information necessary for the Lender to process such request and within a reasonable time after delivery to the Lender of all reasonably required information, the Lender shall be given a first opportunity to provide an offer of Permanent Financing.
- 23.3 The Lender shall also be given a continuing right of first refusal to provide an offer of Permanent Financing to the Borrowers on terms substantially the same as any other written offer of financing received from a third party lender, which the Borrower is prepared to accept and copy of which the Borrower shall provide to the Lender.

**24. OWNERSHIP OF THE BORROWERS**

Reserved.

**25. SPECIAL PROVISIONS**

Reserved.

**26. CROSS-DEFAULT**

The Borrowers hereby acknowledge that any default with respect to this Loan will constitute a default with respect to any other debt owing by any of them to the Lender or to an affiliate of the Lender. Vice versa, a default in paying any other debt of a Borrower owing to the Lender or to an affiliate of the Lender will constitute a default with respect to this Loan. For the purpose of this clause, "affiliate" has the meaning given in the *Business Corporations Act* (Ontario).

**27. SIGNAGE**

Reserved.

**28. ADVERTISING BY LENDER**

The Lender may, in its advertising, describe and/or picture the Properties without identifying the Borrowers. The cost of any such advertising shall be paid by the Lender.

The Borrowers agree that Lender may advertise the availability of the within Loan to its potential investors by providing details of the Loan by any means whatsoever including but not limited to, letter, fax, e-mail and posting on the Lender's website.

**29. MAXIMUM RATE**

If the "interest" (as defined or determined by the statute establishing or defining illegal rates of interest) charged or chargeable ("Interest") under the offer of credit in this Commitment, on the credit advanced pursuant to this Commitment or pursuant to any Security (any of which Interest provision is referred to as the "Interest Provisions") would, except for this paragraph, constitute an illegal rate of interest, then the Interest on the credit so advanced or secured will be reduced such that the total Interest under the Interest Provisions will be that amount or rate which collectively equates to that rate of interest that is 1% per annum less than the minimum rate that would be an illegal rate of interest, calculated according to generally accepted actuarial practices and principles. Such reduction will be effected by reducing, or refunding to the Borrowers, such of the interest, charges, and expenses (or a combination thereof) constituting Interest payable as may be designated by the Lender in its sole discretion.

**30. FURTHER ASSURANCES**

The Credit Parties shall with reasonable diligence do all such things and provide all such reasonable assurances as may be required to consummate the transactions contemplated by the Commitment, and shall provide such further documents or instruments required by the Lender as it may deem necessary or desirable to effect the purpose of this Commitment and carry out its provisions.

**31. APPLICABLE LAW**

The terms and conditions of this Commitment as well as all other documents relating to the execution of the transactions provided for by this Commitment shall be governed by and interpreted in accordance with the laws of the Province of Alberta and the Borrowers hereby irrevocably attorn to the jurisdiction of the courts of the Province of Alberta.

**32. AMENDMENT**

The terms or requirements of this Commitment or any security may not be waived or varied orally, or by any course of conduct of any officer, employee or agent of the Lender. Any amendment to this Commitment must be in writing and signed by a duly authorized officer of the Lender and the Borrowers; provided, however, that the Lender may unilaterally extend the date for return of this Commitment or receipt of any documentation upon written notice to the Borrower.

**33. ASSIGNMENT BY BENEFICIAL OWNER AND/OR BORROWER**

No Borrower shall assign its rights or obligations pursuant to the Commitment or the Security, in whole or in part, without the Lender's prior written consent, which consent may be withheld in the Lender's sole and absolute discretion.

**34. NO OBLIGATION TO ADVANCE**

It is understood that neither the preparation nor the registration of any of the documents contemplated herein shall bind the Lender to advance the funds or any unadvanced portion thereof, it being agreed that the advance of funds or any part thereof from time to time shall be in the sole, absolute, unfettered and unqualified discretion of the Lender.



**35. ENUREMENT**

This Commitment shall enure to the benefit of the Lender and its successors and assigns and be binding upon the Borrowers and their respective heirs, personal representatives, successors and assigns.

**36. CONFIDENTIALITY**

The Borrowers acknowledge and agree that the terms and conditions recited herein are confidential between the Borrowers and the Lender. The Borrowers agree not to disclose the information contained herein to a third party without the express consent of the Lender.

**37. ASSIGNMENT AND SYNDICATION**

The Lender shall have the right from time to time, without the consent of the Borrowers, to assign, sell, pledge, convey, syndicate, grant participations or transfer all or any portion of the Loan and Security, whether directly or by way of securitization, and as part of any such transaction the Lender is hereby authorized to provide to prospective participants in such transactions all information received by the Lender regarding the Credit Parties, and the Properties. Borrower agrees to cooperate with Lender's efforts to do any of the foregoing and to execute all documents reasonably required by Lender in connection therewith which do not materially adversely affect Borrowers' rights under the Loan Documents.

**38. CREDIT AUTHORIZATION AND CONSENT TO DISCLOSURE**

The Lender may collect, retain, release, disclose, exchange, share, transfer and assign from time to time, as it may determine in its sole discretion, all information and materials (including financial statements and information concerning the status of the Loan, such as existing or potential Loan defaults, lease defaults or other facts or circumstances which might affect the performance of the Loan) provided to or obtained by it relating to the Borrowers, the General Partners, the Properties or the Loan (both before and after the disbursement of funds and/or default thereunder) without restriction and without notice to or the consent of any Borrower or General Partner (and such parties hereby irrevocably consents thereto):

- (a) to any person who has, who acquires, or who proposes to acquire an interest in the Loan;
- (b) to the respective third party advisors and agents (such as lawyers, accountants, auditors, consultants, appraisers and credit verification sources) of such persons;
- (c) to the public or any group in any offering memorandum, prospectus or other disclosure document relating to any sale, syndication or securitization of the Loan (including all initial and continuing disclosure requirements), regardless of format or scope of distribution;
- (d) to the public or other interested persons, directly or indirectly through information service providers or other market participants, for the purpose of providing market information from time to time relating to the status of the Loan or any related securitization or any interest therein, regardless of format or scope of distribution;
- (e) to any governmental authority having jurisdiction over the Lender or over any sale, syndication or securitization of the Loan or any trade of any interest therein;

- (f) to any other person in connection with the sale, syndication or securitization of the Loan, including insurers and rating agencies; and
- (g) to any other person in connection with the collection or enforcement proceedings taken under or in respect of the Loan.

Without limiting the foregoing, each Borrower hereby consents to the Lender obtaining all information as may be necessary from all available sources as to the creditworthiness of each Borrower and acknowledges that the Lender may collect or come into possession of personal information relating to certain individuals either comprising or otherwise connected with the Borrower which information may include contact information (mailing address, e-mail address, telephone number or fax number), financial information and status (bank account numbers, existing debts, personal net worth or credit history), date of birth, place of employment and social insurance number. Each Borrower acknowledges and agrees that such personal information may be used by Lender in connection with the processing, approving, funding, servicing and administering the Loan and any sale, syndication or securitization of the Loan, and in so doing the Lender may disclose and otherwise deal with personal information in the same manner and to the same persons as provided in the preceding paragraph without restriction, acting reasonably, and without notice to or the consent of any Borrower or any related individual. Each Borrower for itself and on behalf of its directors, officers, shareholders and principals, hereby consents to and authorizes such use and disclosure of all such personal information by the Lender and represents and warrants that it has full power and authority to give such consent and authorization.

#### **39. MATERIAL ADVERSE CHANGES**

In the event that at any time either before the advance of funds under the Loan or while any indebtedness remains outstanding pursuant to the Loan, the Lender discovers a discrepancy or inaccuracy in any written information, statements or representations made or furnished to the Lender by or on behalf of the Borrower or concerning the Properties, or the financial condition and responsibility of the Borrower or in the event that the Lender discovers any material adverse change in the value of the Properties or the financial status of the Borrower or any lessee on which the Lender relied in making any advances pursuant to the Loan, which material change, discrepancy or inaccuracy cannot be or is not rectified by the Borrower or lessee (as applicable) within 30 days after written notification thereof by the Lender to the Borrower or lessee, the Lender shall be entitled to decline to advance any funds pursuant to the Loan and at its option terminate this Commitment or in the event that any funds have already been advanced, to declare any and all amounts advanced together with interest thereon and any costs incurred by the Lender to such date, to be forthwith due and payable.

#### **40. ENTIRE AGREEMENT**

This Commitment, together with its schedules and any agreements, instruments and other documents herein contemplated to be entered into between, by or including the parties hereto constitute the entire agreement between the parties hereto pertaining to the subject matter of this Commitment and supersede all prior agreements, understandings, negotiations and discussions, whether oral or written, with respect thereto. There are no other warranties or representations and no other agreements between the parties hereto in connection with the Loan provided for herein except as specifically set forth in this Commitment and the Borrowers' application relating thereto.

**41. JOINT AND SEVERAL OBLIGATIONS**

If there is more than one Borrower, all payment and performance obligations of the Borrower existing from time to time under this commitment, the Security and all other documents related or entered into pursuant hereto and thereto (collectively, the "Obligations"), shall constitute joint and several obligations of the all the Borrowers and each of them. Each Borrower expressly represents and acknowledges that it is part of a common enterprise with the other Borrowers and that any advances of the Loan made by the Lender to one or more persons who is a Borrower hereunder are and will be of direct and indirect interest, benefit and advantage to each of the Borrowers. Each Borrower acknowledges that any draw request or other notice or request given by one Borrower to the Lender shall bind each Borrower, and that any notice given by the Lender or its agent to any Borrower shall be effective with respect to all Borrowers. Each Borrower acknowledges and agrees that each Borrower shall be liable, on a joint and several basis, for the Loan and all other Obligations, regardless of which Borrower actually may have received the proceeds of the Loan or other extensions of credit or the amount of such loan received or the manner in which the Lender accounts among the Borrowers for the Loan advanced, or other extensions of credit on its books and records, and further acknowledges and agrees that Loan and other extensions of credit to any Borrower inure to the mutual benefit of all the Borrowers and that the Lender is relying on the joint and several liability of the Borrowers in extending the Loan hereunder.

**42. SCHEDULES**

The following documents marked "X" are attached as schedules to this Commitment and form a part hereof:

	Schedule A	Standard Construction Conditions
X	Schedule B	Standard Charge Terms and Conditions
X	Schedule C	Certificate of Identification
X	Schedule D	Pre-authorized debit form for automatic deduction from bank account of Borrower to which must be attached a specimen cheque
	Schedule E	Specimen of an irrevocable letter of credit to be remitted to the Lender for the Performance Deposit
X	Schedule F	Tenant Acknowledgment
X	Schedule G	Certified Rent Roll (or a certified rent roll in a form acceptable to the Lender)
	Schedule H	Draw Request
	Schedule I	Draw Certificate
	Schedule J	Tax Waiver Side Letter

X	Schedule K	Subordination and Non-Disturbance Agreement
X	Schedule L	Insurance Requirements
	Schedule M	Certificate of Independent Legal Advice and/or Representation
	Schedule N	Subordination and Standstill Agreement
	Schedule O	Sample form of Architect's Certificate of Opinion
	Schedule P	Deficiency and Completion Agreement

#### **43. DATES OF EXPIRY**

- 43.1 The Security documents shall be properly executed and delivered to the Lender's solicitors, where applicable, in registerable form no later than three (3) business days prior to the First Advance Date and the advance of funds must take place no later than the First Advance Date.
- 43.2 If on or before the date specified in Section 43.1 the security documents provided to the Borrowers or their solicitors have not been so delivered or the first advance has not been made by the First Advance Date, the Lender may at any time thereafter, in its sole discretion, terminate its obligations under this Commitment and may retain the Standby Deposit as liquidated damages.
- 43.3 The Lender may, at its sole option from time to time, elect to extend the above-mentioned date by which the Security documents are to be executed and delivered or the date by which the Loan is to be advanced or any of the other time periods contained in this Commitment. Notwithstanding any such extension, time shall remain of the essence of this Commitment and all other terms and conditions shall remain unchanged.

#### **44. WAIVER**

The terms and conditions contained in this Commitment are inserted for the exclusive benefit of the Lender and may be waived in whole or in part by the Lender at any time. No advance, either singularly or collectively, shall constitute a waiver of any of the Borrowers' obligations nor obligate the Lender to make further advances.

The Lender's failure to insist upon a strict performance of any obligation or covenant of this Commitment by a Borrower or to exercise any option or right herein shall not be a waiver, or relinquishment for the future of such obligation or covenant, option or right, but the same shall remain in full force and effect and the Lender shall have the right to insist upon the strict performance by a Borrower of any and all of the terms and provisions of this Commitment and the security documentation.

**45. COUNTERPARTS**

This Commitment may be executed in one or more counterparts, each of which so executed will constitute an original and all of which will constitute one and the same agreement. This Commitment may be executed by any party and transmitted to the other party or parties by facsimile or other electronic means and if so executed and transmitted this Commitment will be for all purposes as effective as if the party in question had delivered an executed original.

**ROMSPEN INVESTMENT CORPORATION**

By: \_\_\_\_\_

Name:

JOEL MICKELSON

Title:


A.S.O.

I have authority to bind the corporation.

**ACCEPTANCE**

We hereby accept the terms and conditions set out in this Commitment on this 31<sup>st</sup> day of July 2015.

**Lot 11 Limited Partnership, by its general partner, Lot 11 GP Ltd.**

By:   
Name: MOHAMMED FAROOQ  
Title: VICE PRESIDENT


**I have authority to bind the corporation.**

**Eco Energy Limited Partnership, by its general partner, Eco Energy GP Ltd.,**

By:   
Name: MOHAMMED FAROOQ  
Title: VICE PRESIDENT

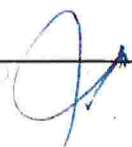
**I have authority to bind the corporation.**

**Eco Energy GP Ltd., on its own behalf**

By:   
Name: MOHAMMED FAROOQ  
Title: VICE PRESIDENT

**I have authority to bind the corporation.**

**Absolute Energy Resources Inc.**

By:   
Name: \_\_\_\_\_  
Title: \_\_\_\_\_

**I have authority to bind the corporation.**

**SCHEDULE Q  
PROPERTIES**

***Edmonton Property:***

Municipal Address: 1250 Hayter Road NW, Edmonton, AB

Legal Description:

**MERIDIAN 4 RANGE 23 TOWNSHIP 53  
SECTION 17  
ALL THAT PORTION OF THE NORTH WEST QUARTER  
WHICH LIES EAST OF THE RIGHT BANK OF THE NORTH  
SASKATCHEWAN RIVER AS SHOWN ON A PLAN OF SURVEY OF  
THE SAID TOWNSHIP SIGNED AT EDMONTON ON 25 APRIL, 1955  
CONTAINING 45.84 HCTARES (113.26 ACRES) MORE OR LESS  
EXCEPTING THEREOUT ALL MINES AND MINERALS**

Borrower represented  
Value of the Property: \$25,000,000

Permitted Financial  
Encumbrances: None.

***Lamont Properties:***

***See Appendix I***

AFFIDAVIT VERIFYING CORPORATE SIGNING AUTHORITY

I, Mohammed Farooq, of Edmonton, Alberta  
(name of person signing)

MAKE OATH AND SAY:

1. I am a director of Eco Energy GP Ltd. named in the within instrument.
2. I am authorized by the corporation to execute the instrument without affixing a corporate seal.

SWORN before me at Edmonton  
in the Province of Alberta  
this 31<sup>st</sup> day of July, 2015

)   
 ) \_\_\_\_\_  
 ) Mohammed Farooq

\_\_\_\_\_  
A COMMISSIONER FOR OATHS IN AND  
ALBERTA

**DONALD J. LUPUL**  
A Commissioner for Oaths and  
a Notary Public in and for Alberta  
being a Lawyer

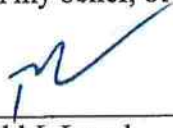
AFFIDAVIT OF EXECUTION

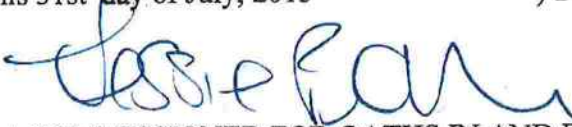
CANADA ) I, Donald J. Lupul  
 )  
 PROVINCE OF ALBERTA ) of the City of Edmonton  
 )  
 TO WIT: ) in the Province of Alberta

MAKE OATH AND SAY:

1. I WAS PERSONALLY present and did see Mohammed Farooq named in the within (or annexed) Instrument, who are personally known to me to be the persons named therein, duly sign and execute the same for the purposes named therein.
2. THAT THE SAME was executed at the City of Edmonton, in the Province of Alberta and that I am the subscribing witness thereto.
3. THAT I KNOW the said, person and he is, in my belief, of the full age of eighteen years.

SWORN before me at the City of  
Edmonton, in the Province of Alberta  
this 31<sup>st</sup> day of July, 2015

)   
 ) \_\_\_\_\_  
 ) Donald J. Lupul

  
 A COMMISSIONER FOR OATHS IN AND FOR  
 ALBERTA

**JESSIE ELIZABETH BAKKER**  
A Commissioner for Oaths  
in and for Alberta  
My Commission Expires September 19, 2015



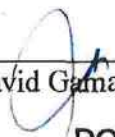
AFFIDAVIT VERIFYING CORPORATE SIGNING AUTHORITY

I, David Gamage, of Edmonton, Alberta  
(name of person signing)

MAKE OATH AND SAY:

1. I am a director of Absolute Energy Resources Inc. named in the within instrument.
2. I am authorized by the corporation to execute the instrument without affixing a corporate seal.

SWORN before me at Edmonton )  
in the Province of Alberta )  
this 31<sup>st</sup> day of July, 2015 )

  
\_\_\_\_\_  
David Gamage

\_\_\_\_\_  
A COMMISSIONER FOR OATHS IN AND  
ALBERTA

**DONALD J. LUPUL**  
A Commissioner for Oaths and  
a Notary Public in and for Alberta  
being a Lawyer

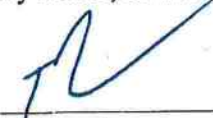
AFFIDAVIT OF EXECUTION

CANADA ) I, Donald J. Lupul  
)  
PROVINCE OF ALBERTA ) of the City of Edmonton  
)  
TO WIT: ) in the Province of Alberta

MAKE OATH AND SAY:

1. I WAS PERSONALLY present and did see David Gamage named in the within (or annexed) Instrument, who are personally known to me to be the persons named therein, duly sign and execute the same for the purposes named therein.
2. THAT THE SAME was executed at the City of Edmonton, in the Province of Alberta and that I am the subscribing witness thereto.
3. THAT I KNOW the said, person and he is, in my belief, of the full age of eighteen years.

SWORN before me at the City of )  
Edmonton, in the Province of Alberta )  
this 31<sup>st</sup> day of July, 2015 )

  
\_\_\_\_\_  
Donald J. Lupul



\_\_\_\_\_  
A COMMISSIONER FOR OATHS IN AND FOR  
ALBERTA

**JESSIE ELIZABETH BAKKER**  
A Commissioner for Oaths  
in and for Alberta  
My Commission Expires September 19, 2016

AFFIDAVIT VERIFYING CORPORATE SIGNING AUTHORITY

I, Mohammed Farooq, of Edmonton, Alberta  
(name of person signing)

MAKE OATH AND SAY:

1. I am a director of Lot 11 GP Ltd. named in the within instrument.
2. I am authorized by the corporation to execute the instrument without affixing a corporate seal.

SWORN before me at Edmonton  
in the Province of Alberta  
this 31<sup>st</sup> day of July, 2015

)   
 ) \_\_\_\_\_  
 ) Mohammed Farooq

\_\_\_\_\_ )  
A COMMISSIONER FOR OATHS IN AND  
ALBERTA

DONALD J. LUPUL  
A Commissioner for Oaths and  
a Notary Public in and for Alberta  
being a Lawyer

AFFIDAVIT OF EXECUTION

CANADA ) I, Donald J. Lupul  
 )  
 PROVINCE OF ALBERTA ) of the City of Edmonton  
 )  
 TO WIT: ) in the Province of Alberta

MAKE OATH AND SAY:

1. I WAS PERSONALLY present and did see Mohammed Farooq named in the within (or annexed) Instrument, who are personally known to me to be the persons named therein, duly sign and execute the same for the purposes named therein.
2. THAT THE SAME was executed at the City of Edmonton, in the Province of Alberta and that I am the subscribing witness thereto.
3. THAT I KNOW the said, person and he is, in my belief, of the full age of eighteen years.

SWORN before me at the City of  
Edmonton, in the Province of Alberta  
this 31<sup>st</sup> day of July, 2015

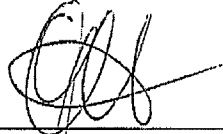
)   
 ) \_\_\_\_\_  
 ) Donald J. Lupul



A COMMISSIONER FOR OATHS IN AND FOR  
ALBERTA

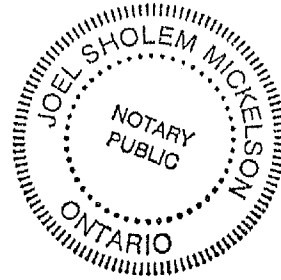
JESSIE ELIZABETH BAKKER  
A Commissioner for Oaths  
in and for Alberta  
My Commission Expires September 19, 2015

This is Exhibit "3" referred to  
in the Affidavit of Wesley Roitman  
Sworn before me this 16<sup>th</sup> day of November, 2020



---

A Notary Public in and for  
the Province of Ontario



June 17, 2016

Symmetry Asset Management Inc.  
1250 Hayter Road  
Edmonton, AB, T6S 1A2  
Attention: Dan White

Dear Sirs:

**Re: \$40 Million (Maximum) First Mortgage Credit Facility (the "Loan")  
Eco-Industrial Business Park (Lot 11), Edmonton, AB  
Various parcels, Lamont, AB  
3501 Ed Bluestein Blvd., Austin, TX**

Reference is made to the amended and restated commitment letter dated July 30, 2015, as amended by Supplement No. 1 made effective as of August 31, 2015, and Supplement No. 2 dated May 31, 2016 (the "**Commitment**"), among Romspen Investment Corporation, as trustee (the "**Lender**"), Lot 11 Limited Partnership, ~~Eco Energy GP Ltd., Eco Energy Limited Partnership, Absolute Energy Resources Inc., and Dan White~~ (the "**Borrowers**").

All capitalized words used herein, unless otherwise defined herein, shall have the meaning ascribed to them in the Commitment, as amended by this Supplement No. 3 (this "**Supplement**").

The parties hereto wish to further amend the Commitment and the Loan terms, and agree as follows:

**1. Amendments**

The Commitment is hereby amended as follows:

- (a) Section 1 "Borrowers" is amended by adding Symmetry Asset Management Inc. as a borrower. *until replaced by the purchasing entity*
- (b) Section 3 "Approved Loan Amount" is amended by inserting the following at the end thereof (and corresponding changes are made to Section 5 "Advance Date"):

"The approved seventh tranche of the Loan is the Canadian dollar equivalent of US\$~~1,470,000~~, plus fees and costs of the advance."  
*3,781,265.00*

- (c) Section 8 "Use of Funds" is amended by inserting the following at the end thereof

"The proceeds of the seventh tranche of the Loan will be used to (a) enable the Borrowers to purchase the remaining membership interests of the Texas GP and the remaining partnership interests of the Texas LP, or to assist the Borrowers in providing loans and/or capital contributions to

the Covenantors, to enable the Covenantors to purchase the remaining membership interests of the Texas GP and the remaining partnership interests of the Texas LP, and (b) to pay fees and transaction costs.”

**2. Bare Trustee**

The Borrowers, ~~Dan White~~ and the Covenantors <sup>have</sup> hereby appoint Richard Weldon as their bare trustee and nominee to, on their behalf:

- (a) Receive the proceeds of the seventh tranche of the Loan, upon a direction to pay to be executed and delivered to the Lender in such form as it may require;
- (b) Negotiate, execute and deliver any and all documentation or agreements required to acquire the membership interests of the Texas GP and partnership interests of the Texas GP, as bare trustee on behalf of the Borrowers, ~~Dan White~~ and the Covenantors, and any and all instruments, certificates and other documents necessary to give full effect to such acquisitions.

**3. Security Amendments**

If required by the Lender, the Security will be amended to reflect these Commitment amendments, to the satisfaction of the Lender and its solicitors. The Borrowers and ~~Dan White~~ and the Covenantors agree to execute and deliver, upon request by the Lender, such further agreements, documents, instruments and assurances as may be required by the Lender in order to confirm and give effect to the provisions of this Supplement.

**4. Representation and Warranty**

To induce the Lender to enter into this Supplement, each Borrower, as applicable, hereby reaffirms to the Lender that, as of the date hereof, its representations and warranties contained in the Commitment, as amended by this Supplement, and except to the extent such representations and warranties relate solely to an earlier date, are true and correct and additionally represents and warrants as follows:

- (a) the execution and delivery of this Supplement and the performance by it of its obligations under this Supplement: (i) are within its corporate powers, (ii) have been duly authorized by all necessary corporate action, (iii) have received all necessary governmental approval (if any were required), and (iv) do not and will not contravene or conflict with any provision of applicable law or any of its constating documents or of any material agreement, judgment, license, order or permit applicable to or binding upon it; and
- (b) each of the Commitment, as amended by this Supplement, and the Security is and will continue to be a legal, valid and binding obligations, enforceable in accordance with its terms.

## 5. Conditions

In addition to the conditions contained in the Commitment or the Security, the obligations of the Lender under this Supplement are subject to the satisfaction or waiver of the following conditions:

- (a) the parties other than the Lender shall have executed and delivered this Supplement, such other additional or amended security, confirmations of existing Security, documents, certificates, instruments and agreements, as are contemplated by this Supplement or as the Lender or its counsel may reasonably require, all in form and content satisfactory to the Lender, and registered if required by the Lender;
- (b) payment of the Lender's fees and out-of-pocket costs incurred in preparing, negotiating and executing this Supplement and the documents contemplated hereby, including without limitation, the fees and expenses of the Lender's consultants and outside counsel. Such costs may be deducted by the Lender from any Advance;
- (c) if necessary under the its loan documents, the consent of Service Lloyds Insurance Company to the transfer of the interests in the Texas LP and the Texas GP;
- (d) approval by the Lender of all documentation relating to the purchase of the interests in the Texas LP and Texas GP, and the termination of the relationship with the seller of such interests and any affiliates.

## 6. References

Each of the parties hereto acknowledges that all references to "this Commitment" in the Commitment shall mean the Commitment, as amended by this Supplement.

## 7. Miscellaneous

Nothing in this Supplement shall be construed or interpreted as novating any obligations, terms or conditions of the Commitment, the Security or any other document entered into pursuant thereto or contemplated thereby (the "**Loan Documents**"), all of which obligations, terms and conditions remain in full force and effect, without any amendment or modification thereto, save and except only as expressly amended or supplemented by this Supplement. The parties hereby ratify and confirm the Loan Documents.

The terms and conditions of this Supplement shall be governed by and interpreted in accordance with the laws of the Province of Alberta and the Borrower and each Covenantor hereby irrevocably attorn to the jurisdiction of the courts of the Province of Alberta.

In the event of any inconsistency between the terms and conditions of this Supplement and the terms and conditions of the Commitment, this Supplement shall prevail.

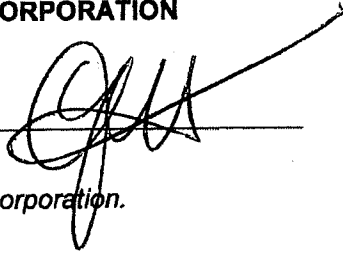
This Supplement may be executed in one or more counterparts, each of which so executed will constitute an original and all of which will constitute one and the same agreement. This Supplement may be executed by the parties and transmitted by

facsimile or other electronic means and if so executed and transmitted this Supplement will be for all purposes as effective as if the parties had delivered an executed original agreement.

Yours truly,

**ROMSPEN INVESTMENT CORPORATION**

By: \_\_\_\_\_

A handwritten signature in black ink, consisting of several loops and a long horizontal stroke extending to the right, positioned over a horizontal line.

*I have authority to bind the Corporation.*

The undersigned accept this Supplement as at June 23, 2016.

**BORROWERS:**

**LOT 11 GP LTD., IN ITS CAPACITY AS GENERAL PARTNER OF LOT 11 LIMITED PARTNERSHIP**

Per: \_\_\_\_\_  
Name: David GAWARB  
Title: CEO

Per: \_\_\_\_\_  
Name: \_\_\_\_\_  
Title: \_\_\_\_\_

*I/We have authority to bind the Corporation.*

~~**ECO ENERGY GP LTD., IN ITS CAPACITY AS GENERAL PARTNER OF ECO ENERGY LIMITED PARTNERSHIP**~~

~~Per: \_\_\_\_\_  
Name: \_\_\_\_\_  
Title: \_\_\_\_\_~~

~~Per: \_\_\_\_\_  
Name: \_\_\_\_\_  
Title: \_\_\_\_\_~~

~~*I/We have authority to bind the Corporation.*~~

**ABSOLUTE ENERGY RESOURCES INC.**

Per: \_\_\_\_\_  
Name: David GAWARB  
Title: CEO

Per: \_\_\_\_\_  
Name: \_\_\_\_\_  
Title: \_\_\_\_\_

*I/We have authority to bind the Corporation.*



**SYMMETRY ASSET MANAGEMENT INC.**

Per: \_\_\_\_\_  
Name: *Drew Starnes*  
Title: *CFO*

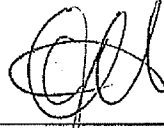
Per: \_\_\_\_\_  
Name: \_\_\_\_\_  
Title: \_\_\_\_\_

*I/We have authority to bind the Corporation.*

**DAN WHITE, on behalf of entities to be formed:**

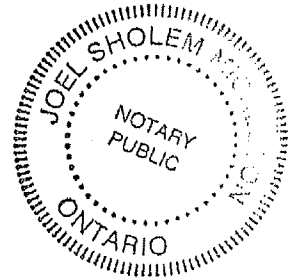
*Dan*  
Dan White \_\_\_\_\_

This is **Exhibit "4"** referred to  
in the Affidavit of Wesley Roitman  
Sworn before me this 16<sup>th</sup> day of November, 2020



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A Notary Public in and for  
the Province of Ontario



## LIMITED PARTNERSHIP AND MEMBERSHIP INTEREST PURCHASE AGREEMENT

THIS LIMITED PARTNERSHIP AND MEMBERSHIP INTEREST PURCHASE AGREEMENT (this "*Agreement*"), dated June 22, 2016 (the "*Closing Date*"), is made by and among Richard Weldon ("*Buyer*"), MOS8 Holdings LLC ("*MOS8 Holdings*"), International Development Management LLC ("*IDM*" and together with MOS8 Holdings, "*Sellers*"), MOS8 Partners Ltd, a Texas limited partnership (the "*Partnership*"), and MOS8 GP LLC, a Texas limited liability company (the "*General Partner*" and together with the Partnership, the "*Companies*"). Buyer and Sellers are individually referred to herein as a "*Party*" and collectively as the "*Parties*".

### RECITALS

A. MOS8 Holdings owns 20% of the Ownership Interest (the "*Class A Partnership Interests*") as a Class A Limited Partner of the Partnership, and IDM holds certain rights as a Class B Limited Partner of the Partnership (the "*Class B Partnership Interests*") granted under that certain Agreement of Limited Partnership of the Partnership, dated August 31, 2015 (the "*Partnership Agreement*").

B. MOS8 Holdings owns 1,000 Membership Units (the "*Company Units*" and together with the Class A Partnership Interests, the Class B Partnership Interests and all other interests or rights in the Companies held by Sellers, the "*Interests*") of the General Partner.

C. On even date herewith, the Partnership, IDM and Romspen Investment Corporation have entered into a certain Termination Agreement (the "*Termination Agreement*") with regard to a Co- Development Agreement, a Co-Management Agreement, a Co-Financing and Co-Sales Agreement, and a Co-Leasing Agreement (collectively, the "*Service Agreements*").

D. On April 11, 2016 (the "*Management Transfer Date*"), the Managers of the General Partner appointed Dan White as President of the General Partner and Christopher Milam ("*Milam*") agreed to cease taking actions on behalf of the Companies.

E. Buyer is an agent of and for Symmetry Asset Management, Inc. ("*Symmetry*").

F. Buyer has offered to purchase the Interests owned by Sellers for an aggregate purchase price of \$1,470,200.00.

### AGREEMENT

**NOW, THEREFORE**, in consideration of the mutual covenants and agreements hereinafter set forth and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the Parties agree as follows:

#### ARTICLE 1 PURCHASE AND SALE OF INTERESTS

**1.1 Purchase and Sale of Interests.** On the terms and subject to the conditions

described in this Agreement, MOS8 Holdings hereby sells, conveys, assigns, transfers and delivers to Buyer all of its interest in the Companies, including the Class A Partnership Interests and the Company Units, and Buyer hereby purchases and acquires from MOS8 Holdings such interests and all associated rights and powers. Additionally, on the terms and subject to the conditions described in this Agreement, IDM hereby sells, conveys, assigns, transfers and delivers to Buyer all of its interest in the Companies, including the Class B Partnership Interests, and Buyer hereby purchases and acquires from IDM such interests and all associated rights and powers.

1.2 **Purchase Price.** Buyer shall pay (i) \$1,470,000.00 in exchange for the Class A Partnership Interests, (ii) \$100 in exchange for the Class B Partnership Interests, and (iii) \$100 in exchange for the Company Units, such that the aggregate purchase price for the Interests is \$1,470,200.00, payable to Sellers simultaneously with the execution of this Agreement. Of the aggregate purchase price, \$1,470,100.00 shall be paid to MOS8 Holdings and \$100.00 shall be paid to IDM.

## ARTICLE 2 REPRESENTATIONS AND WARRANTIES OF SELLERS

Sellers represent and warrant to Buyer as of the Closing Date as follows:

2.1 **Authority.** Sellers have all requisite power and authority to execute and deliver this Agreement and to perform all obligations under this Agreement. The execution, delivery, and performance of this Agreement and the transactions contemplated hereby have been duly and validly authorized by all requisite action of Sellers.

2.2 **Enforceability.** This Agreement has been duly and validly executed and delivered by Sellers and constitutes a valid, legal and binding agreement of Sellers enforceable against them in accordance with its terms, subject to: (a) applicable bankruptcy, insolvency, reorganization, moratorium and other similar Laws (as defined below) of general application from time to time in effect that affect creditors' rights generally; (b) general principles of equity; and (c) the power of a court to deny enforcement of remedies generally based upon public policy.

2.3 **No Violation or Breach.** Neither the execution and delivery of this Agreement nor the consummation of the transactions and performance of the terms and conditions hereof by Sellers will (a) result in a violation or breach of any provision of the certificate of formation, limited liability company agreement, or other similar governing documents of Sellers or any material agreement, indenture or other instrument under which Sellers are bound or to which any of Sellers' properties or assets are subject or (b) violate any law (statutory, common or otherwise), constitution, ordinance, rule, regulation, executive order or other similar authority ("**Law**") applicable to Sellers or the properties or assets of Sellers.

2.4 **Consents.** No consent, approval, authorization, or permit of, or filing with or notification to, any individual, partnership, limited liability company, corporation, association, joint stock company, trust, entity, joint venture, labor organization, unincorporated organization, or governmental body (each, a "**Person**") is required for or in connection with the execution and delivery of this Agreement by Sellers or for or in connection with the consummation of the transactions and performance of Sellers' obligations contemplated herein.

2.5 **Actions.** There is no pending or threatened action, suit, arbitration, mediation, investigation or similar proceeding (an “*Action*”) against Sellers that could reasonably be expected to have a material adverse effect on Sellers’ ability to consummate the transactions contemplated hereby.

2.6 **Interests.** Immediately prior to the closing of the transactions contemplated hereby, Sellers hold of record and own beneficially the Interests, free and clear of any lien, claim or encumbrance (other than any restrictions on transfer under the Securities Act of 1933, as amended (the “*Securities Act*”), and state securities Laws). There are no voting trusts, interest holder agreements, proxies or other agreements or understandings in effect with respect to the voting or transfer of any of the Interests, except as provided in the Company Agreement of the General Partner, dated August 31, 2015 (the “*Company Agreement*”) or the Partnership Agreement, as applicable. All of the Interests have been duly authorized and validly issued and are fully paid. There are no outstanding subscriptions, options, convertible securities, warrants, calls, rights or agreements or commitments of any kind (issued or granted by, or binding upon, the Companies or Sellers) to purchase or otherwise acquire any interest in the Companies. Other than the Company Agreement and the Partnership Agreement, there are no contracts obligating the Companies to issue, deliver, sell, purchase, redeem or acquire, cause to be issued, delivered, sold, purchased, redeemed or acquired, any interests or obligating the Companies to grant, extend, or enter into any option, warrant, call, right, commitment or agreement of any kind to acquire any interests of the Companies. Upon the consummation of the transactions contemplated hereby, Buyer shall own the Interests free and clear of all liens.

2.7 **Brokerage Fees and Commissions.** Sellers have not incurred any obligation or entered into any agreement for any investment banking, brokerage, or finder’s fee or commission in respect of the transactions contemplated by this Agreement for which Buyer will incur any liability.

2.8 **Bankruptcy.** There are no bankruptcy or reorganization proceedings pending, or to the knowledge of Sellers, threatened, against Sellers.

2.9 **Return of Property.** Sellers do not possess or control any assets, accounts or other property of the Companies and shall promptly return to the Companies any assets, accounts or other property in the possession of Sellers if any such property is later discovered to be in the possession or control of the Sellers. Sellers have not received any payments or other consideration from the Companies that were not authorized by the Company Agreement.

2.10 **Disclosure of Liabilities.** There are no liabilities or obligations of the Companies incurred by Sellers or their representatives or agents (including, without limitation, Milam) relating to or arising from the period prior to the Management Transfer Date other than (i) liabilities under the contracts or other instruments disclosed in Schedule 2.10 attached to this Agreement and (ii) liabilities for property taxes and similar assessments. Sellers have no knowledge of any obligation or liability of the Companies other than (i) liabilities under the contracts or other instruments disclosed in Schedule 2.10 attached to this Agreement and (ii) liabilities for property taxes and similar assessments. Sellers have not executed or entered into any contract, instrument, agreement, or promissory note on behalf of the Companies or otherwise in connection with the Service Agreements except as disclosed on Schedule 2.10

attached to this Agreement. Sellers have not executed or entered into any contract, instrument, agreement, or promissory note on behalf of the Companies or otherwise taken any action or incurred liability on behalf of, the Companies or under the Services Agreements after the Management Transfer Date.

2.11 **Services Agreements.** None of the Sellers or their affiliates (including Milam) have received or collected any prior fees or payments under the Services Agreements. Sellers waive any and all rights to receive fees or payments under the Services Agreements.

### **ARTICLE 3 REPRESENTATIONS AND WARRANTIES OF BUYER**

Buyer represents and warrants to Sellers as of the Closing Date as follows:

3.1 **Authority.** Buyer has all requisite power and authority to execute and deliver this Agreement and to perform its obligations under this Agreement. The execution, delivery, and performance of this Agreement and the transactions contemplated hereby have been duly and validly authorized by all requisite action of Buyer.

3.2 **Enforceability.** This Agreement has been duly and validly executed and delivered by Buyer and constitutes a valid, legal and binding agreement of Buyer enforceable against it in accordance with its terms, subject to: (a) applicable bankruptcy, insolvency, reorganization, moratorium and other similar Laws of general application from time to time in effect that affect creditors' rights generally; (b) general principles of equity; and (c) the power of a court to deny enforcement of remedies generally based upon public policy.

3.3 **Consents; No Violation.** No consent, approval, authorization, or permit of, or filing with or notification to, any Person is required for or in connection with the execution and delivery of this Agreement by Buyer or for or in connection with the consummation of the transactions and performance of Buyer's obligations contemplated hereby by Buyer. Neither the execution and delivery of this Agreement nor the consummation of the transactions and performance of the terms and conditions hereof by Buyer will result in a violation or breach of any provision of any contract or agreement by which Buyer is bound.

3.4 **Actions.** There is no Action pending or to the knowledge of Buyer threatened in writing against Buyer that could reasonably be expected to have a material adverse effect on Buyer's ability to consummate the transactions contemplated hereby.

3.5 **Brokerage Fees and Commissions.** Buyer has not incurred any obligation or entered into any agreement for any investment banking, brokerage, or finder's fee or commission in respect of the transactions contemplated by this Agreement for which Sellers will incur any liability.

3.6 **Bankruptcy.** There are no bankruptcy or reorganization proceedings pending, or to the knowledge of Buyer, threatened against Buyer.

**ARTICLE 4**  
**ADDITIONAL COVENANTS AND AGREEMENTS**

4.1 **Release by Sellers.** Effective upon the Closing Date, each Seller does hereby unconditionally release and forever discharge, for itself and its affiliates, successors and assigns, the Companies and Buyer and their and its affiliates, direct and indirect partners, direct and indirect members, officers, and agents from any and all obligations, of any nature, including without limitation, from any and all obligations to pay or indemnify such Seller, guarantee or secure their obligations or otherwise hold them harmless pursuant to any agreement or other arrangement involving the Companies entered into prior to the Closing Date, and from any and all causes of action and claims of every nature involving the Companies that such Seller may have or ever have had against the Companies or Buyer based upon or by reason of any act, matter, cause or thing whatsoever, from the beginning of time to the Closing Date (other than the Buyer's Indemnity Obligations), whether now known or hereafter discovered, without any consideration or further liability to the Companies or Buyer and without the need for any further documentation. Notwithstanding anything to the contrary herein, nothing in this Section 4.1 shall release any obligations, causes of action or claims, or waive any rights, of any Seller arising under this Agreement or any other agreements or documents executed pursuant hereto or in connection herewith. **THIS RELEASE EXPRESSLY EXCLUDES THE BUYER'S INDEMNITY OBLIGATIONS. NOTWITHSTANDING ANYTHING TO THE CONTRARY, NOTHING IN THIS SECTION 4.1. SHALL RELEASE BUYER FROM BUYER'S INDEMNITY OBLIGATIONS AS DEFINED IN SECTION 4.5(B) BELOW AND BUYER AGREES THAT SELLERS RETAIN ALL RIGHTS, REMEDIES, AND CAUSES OF ACTION AVAILABLE IN LAW OR IN EQUITY TO ENFORCE THE BUYER'S INDEMNITY OBLIGATIONS.**

4.2 **Release by Buyer, the Partnership and the General Partner.** Effective upon the Closing Date, each of Buyer, the Partnership and the General Partner (each, a "*Buyer Releasing Party*" and collectively, the "*Buyer Releasing Parties*"), does hereby unconditionally release and forever discharge, for itself and its affiliates, successors and assigns, Seller, IDM, Milam, and their and its respective affiliates, direct and indirect partners, direct and indirect members, officers, and agents (collectively, the "*Seller Released Parties*") from any and all obligations, of any nature, including without limitation, from any and all obligations to pay or indemnify such Buyer Releasing Party, guarantee or secure their obligations or otherwise hold them harmless pursuant to any agreement or other arrangement involving the Companies entered into prior to the Closing Date (other than the Sellers' Indemnity Obligations), and from any and all causes of action and claims of every nature involving the Companies that such Buyer Releasing Party may have or ever have had against any or all of the Seller Released Parties based upon or by reason of any act, matter, cause or thing whatsoever from the beginning of time to the Closing Date, whether now known or hereafter discovered, without any consideration or further liability to the Seller Released Parties and without the need for any further documentation. Notwithstanding anything to the contrary herein, nothing in this Section 4.2 shall release any obligations, causes of action or claims, or waive any rights, of Buyer arising under this Agreement or any other agreements or documents executed pursuant hereto or in connection herewith. **THIS RELEASE EXPRESSLY EXCLUDES THE SELLERS' INDEMNITY OBLIGATIONS. NOTWITHSTANDING ANYTHING TO THE CONTRARY, NOTHING IN THIS SECTION 4.2. SHALL RELEASE THE SELLER RELEASED**

**PARTIES FROM SELLERS' INDEMNITY OBLIGATIONS AS DEFINED IN SECTION 4.5(A) BELOW AND SELLERS AGREE THAT BUYER RETAINS ALL RIGHTS, REMEDIES, AND CAUSES OF ACTION AVAILABLE IN LAW OR IN EQUITY TO ENFORCE THE SELLERS' INDEMNITY OBLIGATIONS.**

**4.3 Confidentiality.**

(a) "*Confidential Information*" as to any Party, means all confidential, nonpublic, or proprietary information, knowledge, materials or data concerning the business affairs, operations, trade secrets, dealings or finances of another Party or Parties furnished, directly or indirectly, by such other Party or Parties.

(b) All Confidential Information relating to Sellers that is or was provided to, or obtained by, Buyer shall be treated as confidential and not disclosed to any third party (other than Buyer's officers, directors, employees or agents or others with a need to know in connection with the transaction contemplated herein (the "*Transaction*") or its operation of the Companies following the closing of the Transaction). Buyer will treat and hold as such all of Sellers' Confidential Information, and refrain from using any of Sellers' Confidential Information except in connection with this Agreement. For clarification, the restriction herein governing Buyer shall not apply to any of the Companies' Confidential Information.

(c) All Confidential Information relating to the Companies or Buyer that is or was provided to, or maintained or obtained by, Sellers, including in connection with the Transaction, shall be treated as confidential and not disclosed to any third party (other than to Sellers' officers, directors, employees or agents or others with a need to know in connection with the Transaction). Sellers will treat and hold as such all of such Confidential Information, and refrain from using any of such Confidential Information except in connection with this Agreement.

(d) In the event that a Party is requested or required pursuant to written or oral question or request for information or documents in any legal proceeding, interrogatory, subpoena, civil investigative demand, or similar process to disclose any Confidential Information of the other Party, such Party will notify the other Party promptly of the request or requirement so that the other Party may seek an appropriate protective order or waive compliance with the provisions of this Section 4.3. If, in the absence of a protective order or the receipt of a waiver hereunder, a Party is, on the advice of counsel, compelled to disclose any of the other Party's Confidential Information to any tribunal or else stand liable for contempt, such Party may disclose such Confidential Information to the tribunal; provided, however, that such Party shall use its reasonable efforts to obtain, at the request of the other Party which Confidential Information is affected thereby, an order or other assurance that confidential treatment will be accorded to such portion of the Confidential Information required to be disclosed as the other Party shall designate. The foregoing provisions shall not apply to any information which is generally available to the public immediately prior to the time of disclosure unless such information is so available due to the actions of the restricted Party.

**4.4 Additional Waiver.** As of the Closing Date, Sellers waive any and all rights and powers granted to them as equity holders of the Companies including all rights and powers granted to Sellers under the Partnership Agreement and the Company Agreement, including but not limited to those certain rights granted by Section 10.6 of the Partnership Agreement and Section 11.5 of the Company Agreement.



#### 4.5 Indemnity.

(a) By executing this Agreement, each Seller hereby agrees to indemnify, defend and hold harmless Buyer from and against all demands, claims, actions, losses, damages, liabilities, costs and expenses, including, without limitation, reasonable attorneys' fees, asserted against or incurred by Buyer resulting from a breach of any covenant, agreement, representation or warranty of such Seller contained in this Agreement. By executing this Agreement, each of the Sellers hereby agrees to indemnify, defend and hold harmless Buyer and Symmetry and their and its respective affiliates, direct and indirect partners, direct and indirect members, officers, agents, successors and assigns (the "*Buyer Indemnified Parties*"), from and against all demands, claims, actions, losses, damages, liabilities, costs and expenses, including, without limitation, reasonable attorneys' fees, asserted against or incurred by any of the Seller Indemnified Parties resulting from (i) the "Bad Acts" of the Sellers occurring prior to the Closing Date, or (ii) a breach of any covenant, agreement, representation or warranty of any of the Sellers contained in this Agreement. The "Bad Acts" of the Sellers means a breach of the Company Agreement, the Partnership Agreement or the Services Agreement by any of the Sellers and/or Milam or any criminal, fraudulent, tortious, or grossly negligent conduct or willful misconduct of or by any of the Sellers and/or Milam. The indemnification obligations of Sellers described in this Section 4.5(a) are referred to as the "*Sellers' Indemnity Obligations.*" **THE SELLERS' INDEMNITY OBLIGATIONS SHALL SURVIVE THE EXECUTION OF THIS AGREEMENT AND CONTINUE IN EFFECT FOR A PERIOD OF TWO (2) YEARS FOLLOWING THE EXECUTION OF THIS AGREEMENT.**

(b) In connection with the purchase of Interests in the Partnership and the General Partner hereunder, Buyer hereby assumes that portion of the liabilities, obligations and responsibilities of the Partnership and the General Partner allocable to the Interests sold by Sellers to Buyer hereunder. By executing this Agreement, Buyer, the Partnership and the General Partner hereby agree to indemnify, defend and hold harmless Seller, IDM, Milam, and their and its respective affiliates, direct and indirect partners, direct and indirect members, officers, agents, successors and assigns (the "*Seller Indemnified Parties*"), from and against all demands, claims, actions, losses, damages, liabilities, costs and expenses, including, without limitation, reasonable attorneys' fees, asserted against or incurred by any of the Seller Indemnified Parties resulting from (i) the Bad Acts of the Buyer occurring after the Management Transfer Date, (ii) the operation of the Partnership after the Closing Date, or (iii) a breach of any covenant, agreement, representation or warranty of Buyer contained in this Agreement. The "Bad Acts" of the Buyer any criminal, fraudulent, tortious, or grossly negligent conduct or willful misconduct of Buyer occurring after the Management Transfer Date. The indemnification obligations of Buyer described in this Section 4.5(b) are referred to as the "*Buyer's Indemnity Obligations.*" **THE BUYER'S INDEMNITY OBLIGATIONS SHALL SURVIVE THE EXECUTION OF THIS AGREEMENT AND CONTINUE IN EFFECT FOR A PERIOD OF TWO (2) YEARS FOLLOWING THE EXECUTION OF THIS AGREEMENT.**

4.6 **No Further Rights.** Following the Closing Date, Sellers will have no rights as a limited partner, member, officer, manager, owner or in any other capacity concerning the Companies.

**ARTICLE 5  
TAX MATTERS**

5.1 **Allocation of Company Income and Loss.** Buyer shall cause the Companies to allocate all items of income, gain, loss, deduction or credit attributable to the Interests for this taxable year based on a closing of the Companies' books as of the Closing Date in accordance with Treasury Regulation Section 1.706-1(c)(2). In connection therewith, each Seller shall be entitled to review and approve the Companies' internal closing of the books prior to the date on which any federal income tax returns for the Companies for periods prior the Closing Date are filed.

**ARTICLE 6  
MISCELLANEOUS**

6.1 **Counterparts.** This Agreement may be executed in one or more counterparts, all of which shall be considered one and the same agreement, and shall become effective when one or more counterparts have been signed by all of the Parties and delivered to the other Parties.

6.2 **Governing Law.** This Agreement and the rights and obligations of the Parties hereunder and the transactions contemplated hereby shall be governed by, enforced, and interpreted in accordance with the laws of the State of Texas applicable to contracts entered into and to be performed entirely within the State of Texas, without regard to conflict of law principles thereof.

6.3 **Entire Agreement.** This Agreement contains the entire agreement between the Parties with respect to the subject matter hereof and there are no agreements, understandings, representations or warranties between the Parties other than those described or expressly referred to herein.

6.4 **Expenses.** All other costs and expenses incurred by each Party in connection with all things required to be done by it hereunder, including attorneys' fees and accountant fees, shall be borne by the Party incurring same.

6.5 **Notices.** All notices hereunder shall be sufficiently given for all purposes hereunder if in writing and delivered personally, sent by documented overnight delivery service or, to the extent receipt is confirmed, by United States Mail, telecopy, or other electronic transmission service to the appropriate address or number as set forth on the signature pages hereto or at such other address and to the attention of such other Person as Buyer may designate by written notice to Sellers.

6.6 **Amendments and Waivers.** This Agreement may not be modified or amended except by an instrument or instruments in writing signed by the Party against whom enforcement of any such modification or amendment is sought. Any Party may, only by an instrument in writing, waive compliance by another Party with any term or provision of this Agreement on the part of such other Party to be performed or complied with. The waiver by any Party of a breach of any term or provision of this Agreement shall not be construed as a waiver of any subsequent breach.

6.7 **Interpretation and Rules of Construction.** It is expressly agreed that this Agreement shall not be construed against any Party, and no consideration shall be given or

presumption made, on the basis of who drafted this Agreement or any particular provision hereof or who supplied the form of Agreement. In construing this Agreement:

(a) examples shall not be construed to limit, expressly or by implication, the matter they illustrate;

(b) the word "includes" and its derivatives means "includes, but is not limited to" and corresponding derivative expressions;

(c) a defined term has its defined meaning throughout this Agreement, regardless of whether it appears before or after the place where it is defined;

(d) the headings and titles herein are for convenience only and shall have no significance in the interpretation hereof; and

(e) the term "affiliate" as used herein shall have the meaning for such term set forth in the Partnership Agreement.

**6.8 Agreement for the Parties' Benefit Only.** Except as provided in the immediately succeeding sentence, this Agreement is not intended to confer upon any Person not a Party any rights or remedies hereunder, and no Person, other than the Parties, is entitled to rely on any representation, warranty, covenant or agreement contained herein. Symmetry is a third party beneficiary of this Agreement and may independently enforce all of the rights of Buyer under this Agreement.

**6.9 Severability.** If any term or other provision of this Agreement is invalid, illegal or incapable of being enforced by any rule of Law or public policy, all other conditions and provisions of this Agreement shall nevertheless remain in full force and effect so long as the economic or legal substance of the transactions contemplated hereby is not affected in any adverse manner to any Party. Upon such determination that any term or other provision is invalid, illegal or incapable of being enforced, the Parties shall negotiate in good faith to modify this Agreement so as to effect the original intent of the Parties as closely as possible in an acceptable manner to the end that the transactions contemplated hereby are fulfilled to the extent possible.

**6.10 Time of Essence.** Time is of the essence in this Agreement. If the date specified in this Agreement for giving any notice or taking any action is not a business day (or if the period during which any notice is required to be given or any action taken expires on a date which is not a business day), then the date for giving such notice or taking such action (and the expiration date of such period during which notice is required to be given or action taken) shall be the next day that is a business day.

**6.11 Further Assurances.** Following the Closing Date, each of the Parties shall execute such documents and perform such further acts as may be reasonably required to carry out the provisions hereof and the actions contemplated hereby or thereby. Sellers and Milam agree that if Buyer so requests during the first three (3) months after this Agreement is executed, each of the Sellers and Milam shall, at Buyer's sole cost and expense, do any of the following:

(i) correct any errors in any documents executed or provided by Sellers at the Closing or described in this Agreement;

(ii) locate and provide copies of any documents relating to the Companies or the operations of the Companies that have not previously been delivered to Buyer;

(iii) be available, and cause their owners, principals or executive management, to be available, to answer questions regarding (1) Sellers' operations with respect to the Companies prior to the Management Transfer Date and (2) Sellers' dealings with any third parties (including any governmental authorities) regarding the Companies prior to the Management Transfer Date; and


(iv) execute all such further instruments and documents and to take all such further actions as the Buyer may reasonably require in order to obtain the intended benefits of this Agreement.

**6.12 Legal Representation.** This Agreement has been jointly prepared by the parties hereto, their direct and indirect owners and affiliates, and their respective legal counsel. Buyer and its direct and indirect owners and Affiliates have been represented by Polsinelli, Symmetry has been represented by McGinnis, Lochridge and Kilgore LLP, and The Milam Family Limited Partnership, a member of MOS8 Holdings, and its affiliates (including Christopher Milam and IDM) have been represented by Metcalfe Wolff Stuart & Williams, L.L.P., and Jimmy Nassour and GrayRab 183 LLC, each a member of MOS8 Holdings have been represented by their own legal counsel. Each of the undersigned parties acknowledges that such party has carefully read this Agreement, has discussed it with and has been advised by such party's legal counsel of its expected consequences, and that such party fully understands the Agreement.

**[SIGNATURE PAGES FOLLOW]**

**IN WITNESS WHEREOF**, the Parties have caused this Limited Partnership and Membership Interest Purchase Agreement to be executed as of the Closing Date.

**BUYER:**

  
\_\_\_\_\_  
RICHARD WELDON

Address:

162 Cumberland St.  
Suite 300  
Toronto, Ontario M5R 3N5

**SELLERS:**

MOS8 HOLDINGS LLC

By: \_\_\_\_\_  
Name: Christopher Milam  
Its: Manager

Address:

Attn.: Christopher Milam  
2700 Barton Creek Boulevard, Suite 230  
Austin, Texas 78735

INTERNATIONAL DEVELOPMENT MANAGEMENT LLC

By: \_\_\_\_\_  
Name: Christopher Milam  
Its: Manager

Address:

Attn.: Christopher Milam  
2700 Barton Creek Boulevard, Suite 230  
Austin, Texas 78735

*Signature Page to Limited Partnership and Membership Interest Purchase Agreement*

53179080.2

53179080.3

IN WITNESS WHEREOF, the Parties have caused this Limited Partnership and Membership Interest Purchase Agreement to be executed as of the Closing Date.

**BUYER:**

\_\_\_\_\_  
RICHARD WELDON

Address:

162 Cumberland St.  
Suite 300  
Toronto, Ontario M5R 3N5

**SELLERS:**

MOS8 HOLDINGS LLC

  
By: \_\_\_\_\_

Name: Christopher Milam  
Its: Manager

Address:

Attn.: Christopher Milam  
2700 Barton Creek Boulevard, Suite 230  
Austin, Texas 78735

INTERNATIONAL DEVELOPMENT MANAGEMENT LLC

  
By: \_\_\_\_\_

Name: Christopher Milam  
Its: Manager

Address:

Attn.: Christopher Milam  
2700 Barton Creek Boulevard, Suite 230  
Austin, Texas 78735

**PARTNERSHIP:**

MOS8 PARTNERS LTD, a Texas limited partnership

By: MOS8 GP LLC, a Texas limited liability company, its general partner

By: \_\_\_\_\_  
Name: \_\_\_\_\_  
Title: \_\_\_\_\_

Address:  
162 Cumberland St.  
Suite 300  
Toronto, Ontario M5R 3N5

**GENERAL PARTNER:**

MOS8 GP LLC, a Texas limited liability company

By: \_\_\_\_\_  
Name: \_\_\_\_\_  
Title: \_\_\_\_\_

Address:  
162 Cumberland St.  
Suite 300  
Toronto, Ontario M5R 3N5

~~Acknowledged and Agreed Solely for  
Purposes of Sections 4.2 and 4.5 hereof.~~

~~ROMSPEN MORTGAGE LIMITED PARTNERSHIP,  
an Ontario limited partnership~~

~~By: Romspen Fund GP Inc.,  
an Ontario corporation, its general partner~~

~~By: \_\_\_\_\_  
Name: \_\_\_\_\_  
Title: \_\_\_\_\_~~

*Signature Page to Limited Partnership and Membership Interest Purchase Agreement*

53179080.2  
53179080.3

## Schedule 2.10

Standard Form of Agreement between Owner and Architect, dated November 10, 2015, made by and between GSC Architects, WSP and their sub-consultants and the Partnership.

Standard Form of Agreement between Owner and Architect, dated October 1, 2015, made by and between GSC Architects, WSP and their sub-consultants and the Partnership.

Project Development Agreement, dated November 16, 2015, by and between PACE Equity, LLC and the Partnership.

Texas Exclusive Authorization of Lease, dated December 14, 2015, by and between Newmark Real Estate of Houston, LLC, dba Newmark Grubb Knight Frank and the Partnership.

Property Tax Services Agreement, dated February 10, 2016, by and between Morrison & Head, LP and the Partnership.

Accepted Proposal, dated November 17, 2015, by and between White Construction Company and the Partnership.

Insurance Binder, dated September 30, 2015, by and between Mt Hawley Insurance Company and the Partnership.

Possession and Use Agreement, dated November 12, 2015 for Transportation Services between the State of Texas through the Central Texas Regional Mobility Authority

Professional Services Agreement, dated July 1, 2015, made by and between Digital 724 and the Partnership

### Relationships with No Formal Contracts:

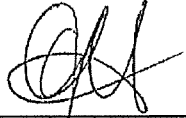
Metcalf Wolff Stuart & Williams -- land use legal

Barron & Adler -- TxDOT and CTRMA legal

Javier Olivera -- land mowing

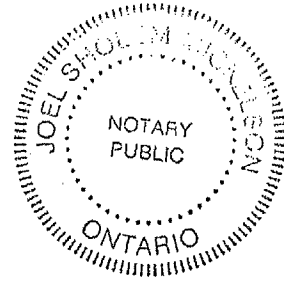


This is Exhibit "5" referred to  
in the Affidavit of Wesley Roitman  
Sworn before me this 16<sup>th</sup> day of November, 2020



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A Notary Public in and for  
the Province of Ontario



August 19th, 2016

Symmetry Asset Management Inc.  
1250 Hayter Road  
Edmonton, AB, T6S 1A2  
Attention: Dan White

Dear Sirs:

**Re:           \$40 Million (Maximum) First Mortgage Credit Facility (the "Loan")  
Eco-Industrial Business Park (Lot 11), Edmonton, AB  
Various parcels, Lamont, AB  
3501 Ed Bluestein Blvd., Austin, TX**

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Reference is made to the amended and restated commitment letter dated July 30, 2015, as amended by Supplement No. 1 made effective as of August 31, 2015, Supplement No. 2 dated May 31, 2016, and Supplement No. 3 dated June 17, 2016 (the "**Commitment**"), among Romspen Investment Corporation, as trustee (the "**Lender**"), Lot 11 Limited Partnership, Absolute Energy Resources Inc. and Symmetry Asset Management Inc. (the "**Borrowers**").

All capitalized words used herein, unless otherwise defined herein, shall have the meaning ascribed to them in the Commitment, as amended by this Supplement No. 3 (this "**Supplement**").

The parties hereto wish to further amend the Commitment and the Loan terms, and agree as follows:

**1.    Amendments**

The Commitment is hereby amended as follows:

- (a)    Section 1 "Borrowers" is amended by deleting Symmetry Asset Management Inc. as a Borrower.
- (b)    Section 2 "Covenantors" is amended by adding Zen Garden Limited Partnership and 3443 Zen Garden Limited Partnership as Covenantors.
- (c)    For the purposes of the Commitment, the "Texas LP" means 3443 Zen Garden Limited Partnership, the "Texas GP" means 3443 Zen Garden LLC, the "Alberta LP" means Zen Garden Limited Partnership, the "Alberta GP" means Zen Garden GP Ltd.
- (d)    The following additional security (Section 9) shall be given to the Lender:
  - (i)    A second-ranking deed of trust, assignment of leases and rents, security agreement and fixture filing over the Austin Property from the Texas LP in the

amount of the Loan (the "**Austin Mortgage**"). The Austin Mortgage will be executed and delivered to the Lender by the Texas LP. The Lender will hold the Austin Mortgage in escrow, and will record the Austin Mortgage in the applicable recording office upon the occurrence of an Event of Default under the Commitment or the Security;

- (ii) An environmental indemnity from the Texas LP and Alberta LP;
- (iii) Pledges of ownership interests (and proxies) from:
  - A. Alberta GP (ownership in Alberta LP and Texas GP);
  - B. Alberta LP (ownership in Texas LP); and
  - C. Texas GP (ownership in Texas LP).
- (iv) (collectively, the "**Pledges**"). The Lender agrees that, upon the recording of the Austin Mortgage to the Lender's satisfaction, with no intervening liens recorded between the date hereof and the recording date, it will release the Pledges and return any certificated securities subject to such pledges. Guarantees of all indebtedness and obligations in respect of the Loan from:
  - A. Alberta LP; and
  - B. Texas LP;
- (v) General Security Agreement from Alberta LP;
- (vi) Assignment of Agreements, Licenses, Permits and Contracts from Texas LP.

## **2. Security Amendments**

If required by the Lender, the Security will be amended to reflect these Commitment amendments, to the satisfaction of the Lender and its solicitors. The Borrowers and the Covenantors agree to execute and deliver, upon request by the Lender, such further agreements, documents, instruments and assurances as may be required by the Lender in order to confirm and give effect to the provisions of this Supplement.

## **3. Representation and Warranty**

To induce the Lender to enter into this Supplement, Borrower hereby reaffirms to the Lender that, as of the date hereof, its representations and warranties contained in the Commitment, as amended by this Supplement, and except to the extent such representations and warranties relate solely to an earlier date, are true and correct and additionally represents and warrants as follows:

- (a) the execution and delivery of this Supplement and the performance by it of its obligations under this Supplement: (i) are within its corporate powers, (ii) have been duly authorized by all necessary corporate action, (iii) have received all necessary governmental approval (if any were required), and (iv) do not and will not contravene or conflict with any provision of applicable law or any of its constating documents or of any material

agreement, judgment, license, order or permit applicable to or binding upon it; and

- (b) each of the Commitment, as amended by this Supplement, and the Security is and will continue to be a legal, valid and binding obligations, enforceable in accordance with its terms.

#### **4. Conditions**

In addition to the conditions contained in the Commitment or the Security, the obligations of the Lender under this Supplement are subject to the satisfaction or waiver of the following conditions:

- (a) the parties other than the Lender shall have executed and delivered this Supplement, such other additional or amended security, confirmations of existing Security, documents, certificates, instruments and agreements, as are contemplated by this Supplement or as the Lender or its counsel may reasonably require, all in form and content satisfactory to the Lender, and registered if required by the Lender;
- (b) payment of the Lender's fees and out-of-pocket costs incurred in preparing, negotiating and executing this Supplement and the documents contemplated hereby, including without limitation, the fees and expenses of the Lender's consultants and outside counsel. Such costs may be deducted by the Lender from any Advance;
- (c) approval by the Lender of all documentation relating to the transfer of the Austin Property and the assumption by the Texas LP of various obligations in respect thereof.

#### **5. References**

Each of the parties hereto acknowledges that all references to "this Commitment" in the Commitment shall mean the Commitment, as amended by this Supplement.

#### **6. Miscellaneous**

Nothing in this Supplement shall be construed or interpreted as novating any obligations, terms or conditions of the Commitment, the Security or any other document entered into pursuant thereto or contemplated thereby (the "**Loan Documents**"), all of which obligations, terms and conditions remain in full force and effect, without any amendment or modification thereto, save and except only as expressly amended or supplemented by this Supplement. The parties hereby ratify and confirm the Loan Documents.

The terms and conditions of this Supplement shall be governed by and interpreted in accordance with the laws of the Province of Alberta and the Borrower and each Covenantor hereby irrevocably attorn to the jurisdiction of the courts of the Province of Alberta.

In the event of any inconsistency between the terms and conditions of this Supplement and the terms and conditions of the Commitment, this Supplement shall prevail.

This Supplement may be executed in one or more counterparts, each of which so executed will constitute an original and all of which will constitute one and the same agreement. This Supplement may be executed by the parties and transmitted by facsimile or other electronic means and if so executed and transmitted this Supplement will be for all purposes as effective as if the parties had delivered an executed original agreement.

Yours truly,

**ROMSPEN INVESTMENT CORPORATION**

By: \_\_\_\_\_

*I have authority to bind the Corporation.*

The undersigned accept this Supplement as at August 19<sup>th</sup>, 2016.

**BORROWERS:**

**LOT 11 GP LTD., IN ITS CAPACITY AS GENERAL PARTNER OF LOT 11 LIMITED PARTNERSHIP**

Per: \_\_\_\_\_  
Name: DAVID GARAGE  
Title: CEO

Per: \_\_\_\_\_  
Name:  
Title:

*I/We have authority to bind the corporation.*

**ABSOLUTE ENERGY RESOURCES INC.**

Per: \_\_\_\_\_  
Name: DAVID GARAGE  
Title: CEO

Per: \_\_\_\_\_  
Name:  
Title:

*I/We have authority to bind the corporation.*



**GUARANTORS:**

**ZEN GARDEN LIMITED PARTNERSHIP, BY ITS GENERAL PARTNER, ZEN GARDEN GP LTD.**

Per: \_\_\_\_\_  
Name: DAVID GARDNER  
Title: CEO

Per: \_\_\_\_\_  
Name: \_\_\_\_\_  
Title: \_\_\_\_\_

*I/We have authority to bind the corporation.*

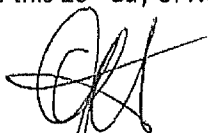
**3443 ZEN GARDEN LIMITED PARTNERSHIP, BY ITS GENERAL PARTNER, 3443 ZEN GARDEN GP LLC**

Per: \_\_\_\_\_  
Name: DAVID GARDNER  
Title: CEO

Per: \_\_\_\_\_  
Name: \_\_\_\_\_  
Title: \_\_\_\_\_

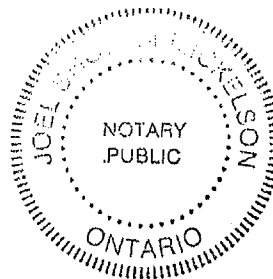
*I/We have authority to bind the company.*

This is **Exhibit "6"** referred to  
in the Affidavit of Wesley Roitman  
Sworn before me this 16<sup>th</sup> day of November, 2020



---

A Notary Public in and for  
the Province of Ontario





November 9, 2016

Symmetry Asset Management Inc.  
1250 Hayter Road  
Edmonton, AB, T6S 1A2  
Attention: Dan White

Dear Sirs:

**Re: CAD\$40,000,000 (Maximum) First Mortgage Credit Facility (the "Loan")  
Eco-Industrial Business Park (Lot 11), Edmonton, AB  
Various parcels, Lamont, AB  
3501 Ed Bluestein Blvd., Austin, TX**

---

Reference is made to the amended and restated commitment letter dated July 30, 2015, as amended by Supplement No. 1 made effective as of August 31, 2015, Supplement No. 2 dated May 31, 2016, Supplement No. 3 dated June 17, 2016, and Supplement No. 4 dated July 29, 2016 (the "**Commitment**"), among Romspen Investment Corporation, as trustee (the "**Lender**"), Lot 11 Limited Partnership, Absolute Energy Resources Inc. (the "**Borrowers**"), and Zen Garden Limited Partnership and 3443 Zen Garden Limited Partnership (the "**Covenantors**").

All capitalized words used herein, unless otherwise defined herein, shall have the meaning ascribed to them in the Commitment, as amended by this Supplement No. 5 (this "**Supplement**").

The parties hereto wish to further amend the Commitment and the Loan terms, and agree as follows:

**1. Amendments**

The Commitment is hereby amended as follows:

- (a) Section 2 "Covenantors" is amended to include Eightfold Developments LLC as a Covenantor.
- (b) Section 3 "Approved Loan Amount" is deleted and replaced with the following:

**"The current maximum approved loan amount is CAD\$25,750,000"**. The Borrowers and Covenantors acknowledge and agree that the principal amount of the Loan previously advanced by the Lender and received by the Borrowers is as follows:

<b>Advance</b>	<b>Amount (\$CAD)</b>
First	\$ 2,905,070.53

Second	\$ 544,204.08
Third	\$ 136,193.88
Fourth	\$ 7,080,720.57
Fifth	\$ 61,171.33
Sixth	\$ 59,303.75
Seventh	\$ 1,949,865.70
<b>Total:</b>	<b>\$ 12,736,529.74</b>

The Borrowers and Covenantors acknowledge and agree that they are indebted to the Lender in the above-principal amount, plus all accrued and unpaid interest, fees and costs (the "Indebtedness"), and none of them has any defences, set-offs, or counterclaims against the Lender pursuant to the Commitment or the Security or otherwise which would entitle them to dispute the Indebtedness.

The eighth tranche of the Loan will be approximately CAD\$10,425,000, and will be advanced on or around November 7, 2016.

(c) Section 6 "Interest Rate" is deleted and replaced with the following:

"The interest rate for the Loan is 12% per annum until September 30, 2015, and 10% per annum thereafter, in each case calculated and compounded monthly, in arrears, on the amounts advanced from time to time, as well after as before maturity, default or judgment.

(d) Section 8 "Use of Funds" is amended by adding the following:

"The proceeds of the eighth tranche of the Loan will be used by the Borrowers and/or Covenantors:

- (i) to repay the indebtedness owing under the loan to the Texas LP from Service Lloyds Insurance Company (approximately CAD\$8,900,000);
- (ii) to pay property taxes due and payable in respect of the Austin Property (\$335,701.15);
- (iii) to provide the Borrowers with working capital (approximately CAD\$830,000);
- (iv) to pay fees and transaction costs.

Future Advances of the Loan, up to the maximum current approved Loan amount of CAD\$25,750,000, will be made from time to time by the Lender to (a) pay accrued and unpaid interest on the Loan (currently estimated to be approximately \$1,650,000), which the Lender may do at any time without notice to or consent of the Borrower; and, in respect of any balance remaining in the Loan after the payment contemplated in (a), to (b) to reimburse Borrowers or Covenantors for costs incurred in respect of the Austin Property, upon presentation to the Lender of requests for Advances, accompanied by acceptable supporting documentation, in amounts of not less than CAD\$250,000 per Advance."

- (e) Section 9 (Security) is amended as follows:
- (i) The Austin Mortgage will be first-ranking, and will be recorded immediately;
  - (ii) The Pledges will not be required.
  - (iii) The following Security is added:
    - A. An assignment and subordination agreement between the Lender and Eightfold Developments LLC.

## 2. Security Amendments

If required by the Lender, the Security will be amended to reflect these Commitment amendments, to the satisfaction of the Lender and its solicitors. The Borrowers and the Covenantors agree to execute and deliver, upon request by the Lender, such further agreements, documents, instruments and assurances as may be required by the Lender in order to confirm and give effect to the provisions of this Supplement.

## 3. Representation and Warranty

To induce the Lender to enter into this Supplement, each Borrower and Covenantor hereby reaffirms to the Lender that, as of the date hereof, its representations and warranties contained in the Commitment, as amended by this Supplement, and in the Security, except to the extent such representations and warranties relate solely to an earlier date, are true and correct, and additionally represents and warrants as follows:

- (a) the execution and delivery of this Supplement and the performance by it of its obligations under this Supplement: (i) are within its corporate powers, (ii) have been duly authorized by all necessary corporate action, (iii) have received all necessary governmental approval (if any were required), and (iv) do not and will not contravene or conflict with any provision of applicable law or any of its constating documents or of any material agreement, judgment, license, order or permit applicable to or binding upon it; and
- (b) each of the Commitment, as amended by this Supplement, and the Security is and will continue to be a legal, valid and binding obligations, enforceable in accordance with its terms.

#### **4. Conditions**

In addition to the conditions contained in the Commitment or the Security, the obligations of the Lender under this Supplement are subject to the satisfaction or waiver of the following conditions:

- (a) the parties other than the Lender shall have executed and delivered this Supplement, such other additional or amended security, confirmations of existing Security, documents, certificates, instruments and agreements, as are contemplated by this Supplement or as the Lender or its counsel may reasonably require, all in form and content satisfactory to the Lender, and registered if required by the Lender;
- (b) payment of the Lender's fees and out-of-pocket costs incurred in preparing, negotiating and executing this Supplement and the documents contemplated hereby, including without limitation, the fees and expenses of the Lender's consultants and outside counsel. Such costs may be deducted by the Lender from any Advance. The Lender's fees for the Eighth Tranche of the Loan and any future Advances thereafter are equal to 3% of the amount of the Advance, payable as to 2% on the Advance Date and 1% at the earlier of the Loan Maturity Date, Loan prepayment date or any acceleration of the Loan;
- (c) approval by the Lender of all documentation relating to the transfer of the Austin Property and the assumption by the Texas LP of various obligations in respect thereof.

#### **5. References**

Each of the parties hereto acknowledges that all references to "this Commitment" in the Commitment shall mean the Commitment, as amended by this Supplement.

#### **6. Release**

Borrowers and Covenantors, for themselves and their respective successors and assigns, hereby release and waive all claims and/or defenses they now may have against Lender and its successors and assigns on account of any occurrence relating to the Loan, the Commitment, the Security or the Properties that accrued prior to the date hereof. This release and waiver is effective as of the date of this Supplement and is binding on each Borrower and Covenantor and each of their respective successors and assigns and will enure to the benefit of the Lender and its successors and assigns. The term "Lender" includes, but is not limited to, its present and former officers, directors, shareholders, partners, employees, agents and attorneys.

#### **7. Miscellaneous**

Nothing in this Supplement shall be construed or interpreted as novating any obligations, terms or conditions of the Commitment, the Security or any other document entered into pursuant thereto or contemplated thereby (the "Loan Documents"), all of which obligations, terms and conditions remain in full force and effect, without any amendment or modification thereto, save and except only as expressly amended or supplemented by this Supplement. The parties hereby ratify and confirm the Loan Documents.

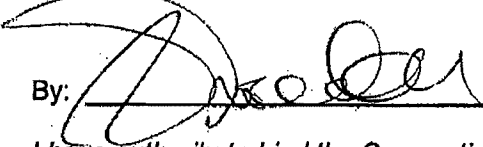
The terms and conditions of this Supplement shall be governed by and interpreted in accordance with the laws of the Province of Alberta and each Borrower and Covenantor hereby irrevocably attorns to the jurisdiction of the courts of the Province of Alberta.

In the event of any inconsistency between the terms and conditions of this Supplement and the terms and conditions of the Commitment, this Supplement shall prevail.

This Supplement may be executed in one or more counterparts, each of which so executed will constitute an original and all of which will constitute one and the same agreement. This Supplement may be executed by the parties and transmitted by facsimile or other electronic means and if so executed and transmitted this Supplement will be for all purposes as effective as if the parties had delivered an executed original agreement.

Yours truly,

**ROMSPEN INVESTMENT CORPORATION**


By:  \_\_\_\_\_

*I have authority to bind the Corporation.*

The undersigned accept this Supplement as at November 16<sup>th</sup>, 2016.


**BORROWERS:**

**LOT 11 GP LTD., IN ITS CAPACITY AS GENERAL PARTNER OF LOT 11 LIMITED PARTNERSHIP**

Per:  \_\_\_\_\_  
Name: Dan White  
Title: Manager

*We have authority to bind the corporation.*


**ABSOLUTE ENERGY RESOURCES INC.**

Per:  \_\_\_\_\_  
Name: Dan White  
Title: manager

*We have authority to bind the corporation.*


**COVENANTORS:**

**ZEN GARDEN LIMITED PARTNERSHIP, BY ITS GENERAL PARTNER, ZEN GARDEN GP LTD.**

Per:   
Name: Dan White  
Title: manager

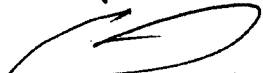
*/We have authority to bind the corporation.*

**3443 ZEN GARDEN LIMITED PARTNERSHIP, BY ITS GENERAL PARTNER, 3443 ZEN GARDEN GP LLC**

Per:   
Name: Dan White  
Title: manager

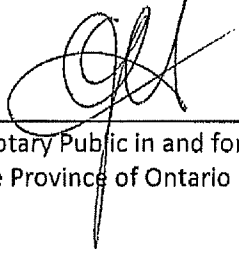
*/We have authority to bind the company.*

**EIGHTFOLD DEVELOPMENTS LLC**

Per:   
Name: Dan white  
Title: manager

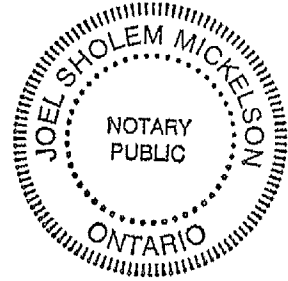
*/We have authority to bind the company.*

This is **Exhibit "7"** referred to  
in the Affidavit of Wesley Roitman  
Sworn before me this 16<sup>th</sup> day of November, 2020



---

A Notary Public in and for  
the Province of Ontario



August 1, 2017

Symmetry Asset Management Inc.  
1250 Hayter Road  
Edmonton, AB, T6S 1A2  
Attention: Dan White

Dear Sirs:

Re: CAD\$40,000,000 (Maximum) First Mortgage Credit Facility (the  
"Loan")  
Eco-Industrial Business Park (Lot 11), Edmonton, AB  
Various parcels, Lamont, AB  
3501 Ed Bluestein Blvd., Austin, TX

---

Reference is made to the amended and restated commitment letter dated July 30, 2015, as amended by Supplement No. 1 made effective as of August 31, 2015, Supplement No. 2 dated May 31, 2016, Supplement No. 3 dated June 17, 2016, Supplement No. 4 dated July 29, 2016, and Supplement No. 5 dated November 9, 2016 (collectively, the "Commitment"), among Romspen Investment Corporation, as trustee (the "Lender"), Lot 11 Limited Partnership and Absolute Energy Resources Inc. (collectively, the "Borrowers"), and Zen Garden Limited Partnership, 3443 Zen Garden Limited Partnership, and Eightfold Developments, LLC (collectively, the "Covenantors").

All capitalized words used herein, unless otherwise defined herein, shall have the meaning ascribed to them in the Commitment, as amended by this Supplement No. 6 (this "Supplement").

The parties hereto wish to further amend the Commitment and the Loan terms, and agree as follows:

**1. Amendments**

The Commitment is hereby amended as follows:

(a) Section 3 "Approved Loan Amount" is deleted and replaced with the following:

"The maximum approved loan amount is increased from CAD\$25,750,000 to CAD\$31,750,000. The Borrowers and Covenantors acknowledge and agree that the principal amount of the Loan previously advanced by the Lender and received by the Borrowers (representing tranches 1 to 11) is CAD\$25,500,000.

The Borrowers and Covenantors acknowledge and agree that they are indebted to the Lender in the above-principal amount, plus all accrued and unpaid interest, fees and costs (the "Indebtedness"), and none of them has any defences, set-offs, or counterclaims against the Lender pursuant to the Commitment or the Security or otherwise which would entitle them to dispute the Indebtedness.



- (b) Section 7 "Term" is amended to change to the Loan Maturity Date to July 31, 2018.
- (c) Section 8 "Use of Funds" is amended by adding the following:

Future Advances of the Loan, up to the maximum of \$28,950,000, will be made from time to time by the Lender to (a) pay accrued and unpaid interest on the Loan, which the Lender may do at any time without notice to or consent of the Borrower, (b) to pay fees and transaction costs, including the Lender's extension fee of \$255,000, and, in respect of any balance remaining in the Loan after the payment contemplated in (a) or (b), to (c) to reimburse Borrowers or Covenantors for costs incurred in respect of the Austin Property, upon presentation to the Lender of requests for Advances, accompanied by acceptable supporting documentation, in amounts of not less than CAD\$250,000 per Advance. Thereafter, any Advances of the remaining unadvanced principal amount of \$2,800,000 (up to the approved Loan amount of \$31,750,000), will be at the Lender's sole discretion, and will be subject to, among the other conditions contained in the Commitment or the Loan Documents, the Lender's satisfaction with the plans for the development of the Austin Property."

## **2. Security Amendments**

If required by the Lender, the Security will be amended to reflect these Commitment amendments, to the satisfaction of the Lender and its solicitors. The Borrowers and the Covenantors agree to execute and deliver, upon request by the Lender, such further agreements, documents, instruments and assurances as may be required by the Lender in order to confirm and give effect to the provisions of this Supplement.

## **3. Representation and Warranty**

To induce the Lender to enter into this Supplement, each Borrower and Covenantor hereby reaffirms to the Lender that, as of the date hereof, its representations and warranties contained in the Commitment, as amended by this Supplement, and in the Security, except to the extent such representations and warranties relate solely to an earlier date, are true and correct, and additionally represents and warrants as follows:

- (a) the execution and delivery of this Supplement and the performance by it of its obligations under this Supplement: (i) are within its corporate powers, (ii) have been duly authorized by all necessary corporate action, (iii) have received all necessary governmental approval (if any were required), and (iv) do not and will not contravene or conflict with any provision of applicable law or any of its constating documents or of any material agreement, judgment, license, order or permit applicable to or binding upon it; and
- (b) each of the Commitment, as amended by this Supplement, and the Security is and will continue to be a legal, valid and binding obligations, enforceable in accordance with its terms.

#### **4. Conditions**

In addition to the conditions contained in the Commitment or the Security, the obligations of the Lender under this Supplement are subject to the satisfaction or waiver of the following conditions:

- (a) the parties other than the Lender shall have executed and delivered this Supplement, such other additional or amended security, confirmations of existing Security, documents, certificates, instruments and agreements, as are contemplated by this Supplement or as the Lender or its counsel may reasonably require, all in form and content satisfactory to the Lender, and registered if required by the Lender;
- (b) payment of the Lender's fees and out-of-pocket costs incurred in preparing, negotiating and executing this Supplement and the documents contemplated hereby, including without limitation, the fees and expenses of the Lender's consultants and outside counsel. Such costs may be deducted by the Lender from any Advance.

#### **5. References**

Each of the parties hereto acknowledges that all references to "this Commitment" in the Commitment shall mean the Commitment, as amended by this Supplement.

#### **6. Release**

Borrowers and Covenantors, for themselves and their respective successors and assigns, hereby release and waive all claims and/or defenses they now may have against Lender and its successors and assigns on account of any occurrence relating to the Loan, the Commitment, the Security or the Properties that accrued prior to the date hereof. This release and waiver is effective as of the date of this Supplement and is binding on each Borrower and Covenantor and each of their respective successors and assigns and will enure to the benefit of the Lender and its successors and assigns. The term "Lender" includes, but is not limited to, its present and former officers, directors, shareholders, partners, employees, agents and attorneys.

#### **7. Miscellaneous**

Nothing in this Supplement shall be construed or interpreted as novating any obligations, terms or conditions of the Commitment, the Security or any other document entered into pursuant thereto or contemplated thereby (the "Loan Documents"), all of which obligations, terms and conditions remain in full force and effect, without any amendment or modification thereto, save and except only as expressly amended or supplemented by this Supplement. The parties hereby ratify and confirm the Loan Documents.

The terms and conditions of this Supplement shall be governed by and interpreted in accordance with the laws of the Province of Alberta and each Borrower and Covenantor hereby irrevocably attorns to the jurisdiction of the courts of the Province of Alberta.

In the event of any inconsistency between the terms and conditions of this Supplement and the terms and conditions of the Commitment, this Supplement shall prevail.

This Supplement may be executed in one or more counterparts, each of which so executed will constitute an original and all of which will constitute one and the same agreement. This Supplement may be executed by the parties and transmitted by facsimile or other electronic means and if so executed and transmitted this Supplement will be for all purposes as effective as if the parties had delivered an executed original agreement.

Yours truly,

**ROMSPEN INVESTMENT CORPORATION**

By: \_\_\_\_\_

A handwritten signature in blue ink, appearing to be 'C. H. H.', is written over a horizontal line. The signature is stylized and cursive.

*I have authority to bind the Corporation.*

The undersigned accept this Supplement as at August \_\_\_\_\_, 2017.

**BORROWERS:**

**LOT 11 GP LTD., IN ITS CAPACITY AS GENERAL PARTNER OF LOT 11 LIMITED PARTNERSHIP**

Per:   
Name: \_\_\_\_\_  
Title: \_\_\_\_\_

*I/We have authority to bind the corporation.*

**ABSOLUTE ENERGY RESOURCES INC.**

Per:   
Name: \_\_\_\_\_  
Title: \_\_\_\_\_

*I/We have authority to bind the corporation.*

**COVENANTORS:**

**ZEN GARDEN LIMITED PARTNERSHIP, BY ITS GENERAL PARTNER, ZEN GARDEN GP LTD.**

Per:   
Name: \_\_\_\_\_  
Title: \_\_\_\_\_


*I/We have authority to bind the corporation.*

**3443 ZEN GARDEN LIMITED PARTNERSHIP, BY ITS GENERAL PARTNER, 3443 ZEN GARDEN GP LLC**

Per:   
Name: \_\_\_\_\_  
Title: \_\_\_\_\_

*I/We have authority to bind the company.*

**EIGHTFOLD DEVELOPMENTS LLC**

Per:   
Name: \_\_\_\_\_  
Title: \_\_\_\_\_

*I/We have authority to bind the company.*

**REAFFIRMATION AND RATIFICATION  
OF LOAN DOCUMENTS**

This REAFFIRMATION AND RATIFICATION OF LOAN DOCUMENTS (this "*Agreement*") is entered into as of August 1, 2017, by LOT 11 LIMITED PARTNERSHIP, LOT 11 GP LTD., ABSOLUTE ENERGY RESOURCES INC. (each of the foregoing a "*Borrower*", and collectively, the "*Borrowers*"), 3443 ZEN GARDEN LIMITED PARTNERSHIP, a Texas limited partnership, 3443 ZEN GARDEN GP LLC, a Texas limited liability company, ZEN GARDEN GP LTD., an Alberta corporation, and ZEN GARDEN LIMITED PARTNERSHIP, an Alberta limited Partnership, and EIGHTFOLD DEVELOPMENTS LLC, a Texas limited liability company (each of the foregoing, a "*Guarantor*", and collectively, "*Guarantors*"), for the benefit of ROMSPEN INVESTMENT CORPORATION (the "*Lender*").

- A. In connection with a loan ("*Loan*") given by the Lender to the Borrowers pursuant to an amended and restated commitment letter dated July 30, 2015 (as has been and may be further amended, modified, restated or extended, the "*Loan Agreement*"), Borrowers and Guarantors (each, a "*Credit Party*" and collectively, the "*Credit Parties*") gave certain security to the Lender and executed certain instruments and agreements in favour of Lender as contemplated in the Loan Agreement and/or in connection with the Loan, as set out in Schedule A (such security, instruments and agreements, in addition to all other agreements entered into or given by any Credit Party in connection with the Loan, together with the Loan Agreement, are referred to as the "*Loan Documents*", and each, a "*Loan Document*").
- B. The Credit Parties and the Lender have agreed to extend the Loan and modify certain terms of the Loan Agreement (the "*Extension and Modification Agreement*").
- C. As a condition to the effectiveness of the Extension and Modification Agreement, the Lender has required that the Credit Parties reaffirm and ratify their respective obligations under the Loan Documents.

NOW, THEREFORE, for good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the parties hereto hereby agree as follows:

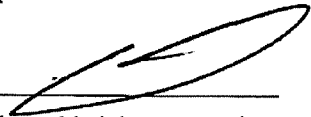
1. **Effect of Modification Agreement.** Except as expressly set forth in the Modification Agreement, the Modification Agreement shall not be deemed (a) to be a waiver of, or consent to, a modification or amendment of, any other term or condition of the Loan Agreement or any other Loan Document, (b) to prejudice any other right or rights which the Lender may now have or may have in the future under or in connection with the Loan Agreement or the other Loan Documents or any of the instruments or agreements referred to therein, as the same may be amended, restated, supplemented or otherwise modified from time to time, (c) to be a commitment or any other undertaking or expression of any willingness to engage in any further discussion with any Credit Party with respect to any waiver, amendment, modification or any other change to the Loan Agreement or the Loan Documents or any rights or remedies arising in favor of the Lender under or with respect to any such documents or (d) to be a waiver of, or consent to or a modification or amendment of, any other term or condition of any other agreement by and among any Credit Party, on the one hand, and the Lender, on the other hand.
2. **Reaffirmation and Ratification.** Each Credit Party:

- (a) agrees that the transactions contemplated by the Modification Agreement do not limit or diminish the obligations of any Credit Party under, or release any Credit Party from any obligations under, any Loan Document to which it is a party.
  - (b) confirms and reaffirms its obligations under each Loan Document to which it is a party.
  - (c) agrees that each Loan Document to which it is a party is ratified and confirmed, and remains unmodified, in full force and effect, and valid, binding and enforceable in accordance with its terms. No Credit Party will contest the enforcement of any rights under the Loan Document nor the validity or perfection of any security for the Loan granted in any Loan Document.
  - (d) agrees that each Loan Document to which it is a party stands as security for its obligations in respect of the Loan, and will not be discharged or released until all applicable obligations in respect of the Loan have been fulfilled to the satisfaction of the Lender in its sole and complete discretion.
3. **Credit Party Representations.** Each Credit Party hereby represents and warrants to Lender as of the date hereof as follows:
- (a) *Valid and Binding Obligations.* This Agreement constitutes legal, valid and binding obligations of each Credit Party enforceable in accordance with its terms.
  - (b) *No Offsets; Defenses.* There are no existing claims by any Credit Party against Lender and there are no offsets, counterclaims or defenses by any Credit Party to the payment of any amounts or performance of any obligations required under any Loan Document or otherwise to the enforcement by Lender of any Loan Document.
  - (c) *Authority.* No consent, approval, authorization or order of any court or governmental authority or any third party is required in connection with its execution and delivery of this Agreement or the Modification Agreement.
  - (d) *No Default.* No default or event of default under any Loan Document has occurred and is continuing as of the date hereof, or would result after giving effect to the transactions contemplated in the Modification Agreement.
4. **Successors and Assigns.** This Agreement shall be binding upon and shall inure to the benefit of each of the parties hereto and their respective successors and assigns.
5. **Headings.** Section headings are for convenience of reference only and shall in no way affect the interpretation of this Agreement.
6. **Recitals.** The recitals and introductory paragraphs hereof are a part hereof, form a basis for this Agreement and shall be considered *prima facie* evidence of the facts and documents referred to therein.
7. **Counterparts.** This Agreement may be executed in multiple counterparts, and may be delivered by electronic means, and each counterpart will constitute an original, but all of which shall constitute one and the same instrument.


[Remainder of Page Intentionally Left Blank]

IN WITNESS WHEREOF, each Credit Party has executed this Agreement as of the date first above written.

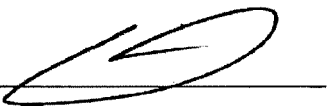
**LOT 11 GP LTD., in its own capacity and in its capacity as general partner of LOT 11 LIMITED PARTNERSHIP**

By:   
I have the authority to bind the corporation

**ABSOLUTE ENERGY RESOURCES INC.**

By:   
I have the authority to bind the corporation

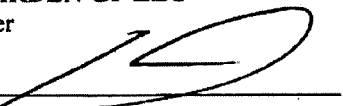
**ZEN GARDEN GP LTD., in its own capacity and in its capacity as general partner of ZEN GARDEN LIMITED PARTNERSHIP**

By:   
I have the authority to bind the corporation


**3443 ZEN GARDEN GP LLC**

By:   
Name:  
Its: Manager

**3443 ZEN GARDEN LIMITED PARTNERSHIP**

By: **3443 ZEN GARDEN GP LLC**  
Its: **General Partner**  
By:   
Name:  
Its: Manager

**EIGHTFOLD DEVELOPMENTS LLC**

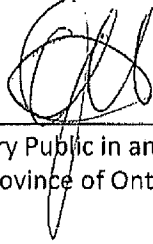
By:   
Name:  
Its:

**SCHEDULE A**  
**LOAN DOCUMENTS**

1. Mortgage from Lot 11 Limited Partnership by its general partner Lot 11 GP Ltd. in the original principal amount of \$40,000,000.00 registered at the Alberta Land Titles Office as instrument number 132 335 491 against the lands described therein (the "Lands");
2. Assignment of Leases and Rents registered by Caveat at the Alberta Land Titles Office against the Lands as instrument number 132 335 492;
3. General Security Agreement registered at the Alberta Personal Property Registry as number 14010319907 and a land charge registered as number 14010319931;
4. Assignment of Material Contracts dated September 25, 2013;
5. Assignment of Insurance Interest dated September 25, 2013;
6. Completion Guarantee dated September 25, 2013;
7. Environmental Agreement and Indemnity dated September 25, 2013 (the "2013 Environmental Agreement");
8. Hypothecation and Pledge Agreements dated September 25, 2013;
9. Demand Note dated July 31, 2015;
10. Assignment of Purchase Contracts dated July 31, 2015;
11. Assignment of Management Agreement and Subordination of Management Fees dated November 14, 2016;
12. Guarantee dated August 19, 2016;
13. Hazardous Materials Indemnity Agreement dated as of August 19, 2016;
14. Joinder, Reaffirmation and Ratification of Guarantee and Hazardous Materials Indemnity Agreement entered into as of November 4, 2016;
15. Deed of Trust, Assignment of Leases and Rents, Security Agreement and Fixture filing dated November 14, 2016;
16. All other security, documents or other instruments given to the Lender in connection with the Loan.

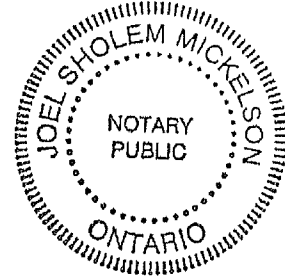


This is Exhibit "8" referred to  
in the Affidavit of Wesley Roitman.  
Sworn before me this 16<sup>th</sup> day of November, 2020



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A Notary Public in and for  
the Province of Ontario



February 1, 2018

Symmetry Asset Management Inc.  
1250 Hayter Road  
Edmonton, AB, T6S 1A2  
Attention: Dan White

Dear Sirs:

**Re: CAD\$40,000,000 (Maximum) First Mortgage Credit Facility (the "Loan")  
Eco-Industrial Business Park (Lot 11), Edmonton, AB  
Various parcels, Lamont, AB  
3501 Ed Bluestein Blvd., Austin, TX**

---

Reference is made to the amended and restated commitment letter dated July 30, 2015, as amended by Supplement No. 1 made effective as of August 31, 2015, Supplement No. 2 dated May 31, 2016, Supplement No. 3 dated June 17, 2016, Supplement No. 4 dated July 29, 2016, Supplement No. 5 dated November 9, 2016, and Supplement No. 6 dated July 21, 2017 (collectively, the "**Commitment**"), among Romspen Investment Corporation, as trustee (the "**Lender**"), Lot 11 Limited Partnership and Absolute Energy Resources Inc. (collectively, the "**Borrowers**"), and Zen Garden Limited Partnership, 3443 Zen Garden Limited Partnership, and Eightfold Developments, LLC (collectively, the "**Covenantors**").

All capitalized words used herein, unless otherwise defined herein, shall have the meaning ascribed to them in the Commitment, as amended by this Supplement No. 7 (this "**Supplement**").

The parties hereto wish to further amend the Commitment and the Loan terms, and agree as follows:

**1. Amendments**

The Commitment is hereby amended as follows:

- (a) Section 3 "Approved Loan Amount" is deleted and replaced with the following:

"The maximum approved loan amount is increased from CAD\$31,750,000 to CAD\$34,250,000. The Borrowers and Covenantors acknowledge and agree that the principal amount of the Loan previously advanced by the Lender and received by the Borrowers is CAD\$31,710,171.25.

The Borrowers and Covenantors acknowledge and agree that they are indebted to the Lender in the above-principal amount, plus all accrued and unpaid interest, fees and costs (the "**Indebtedness**"), and none of them has any defences,

set-offs, or counterclaims against the Lender pursuant to the Commitment or the Security or otherwise which would entitle them to dispute the Indebtedness.

- (b) Section 8 "Use of Funds" is amended by adding the following:

Subject to the satisfaction of the conditions in the Commitment and the Loan Documents, the Lender agrees to make a 14<sup>th</sup> Advance of CAD\$2,500,000.

**2. Security Amendments**

If required by the Lender, the Security will be amended to reflect these Commitment amendments, to the satisfaction of the Lender and its solicitors. The Borrowers and the Covenantors agree to execute and deliver, upon request by the Lender, such further agreements, documents, instruments and assurances as may be required by the Lender in order to confirm and give effect to the provisions of this Supplement.

**3. Representation and Warranty**

To induce the Lender to enter into this Supplement, each Borrower and Covenantor hereby reaffirms to the Lender that, as of the date hereof, its representations and warranties contained in the Commitment, as amended by this Supplement, and in the Security, except to the extent such representations and warranties relate solely to an earlier date, are true and correct, and additionally represents and warrants as follows:

- (a) the execution and delivery of this Supplement and the performance by it of its obligations under this Supplement: (i) are within its corporate powers, (ii) have been duly authorized by all necessary corporate action, (iii) have received all necessary governmental approval (if any were required), and (iv) do not and will not contravene or conflict with any provision of applicable law or any of its constating documents or of any material agreement, judgment, license, order or permit applicable to or binding upon it; and
- (b) each of the Commitment, as amended by this Supplement, and the Security is and will continue to be a legal, valid and binding obligations, enforceable in accordance with its terms.

**4. Conditions**

In addition to the conditions contained in the Commitment or the Security, the obligations of the Lender under this Supplement are subject to the satisfaction or waiver of the following conditions:

- (a) the parties other than the Lender shall have executed and delivered this Supplement, such other additional or amended security, confirmations of existing Security, documents, certificates, instruments and agreements, as are contemplated by this Supplement or as the Lender or its counsel may reasonably require, all in form and content satisfactory to the Lender, and registered if required by the Lender;

- (b) payment of the Lender's fees and out-of-pocket costs incurred in preparing, negotiating and executing this Supplement and the documents contemplated hereby, including without limitation, the fees and expenses of the Lender's consultants and outside counsel. Such costs may be deducted by the Lender from any Advance.

**5. References**

Each of the parties hereto acknowledges that all references to "this Commitment" in the Commitment shall mean the Commitment, as amended by this Supplement.

**6. Release**

Borrowers and Covenantors, for themselves and their respective successors and assigns, hereby release and waive all claims and/or defenses they now may have against Lender and its successors and assigns on account of any occurrence relating to the Loan, the Commitment, the Security or the Properties that accrued prior to the date hereof. This release and waiver is effective as of the date of this Supplement and is binding on each Borrower and Covenantor and each of their respective successors and assigns and will enure to the benefit of the Lender and its successors and assigns. The term "Lender" includes, but is not limited to, its present and former officers, directors, shareholders, partners, employees, agents and attorneys.

**7. Miscellaneous**

Nothing in this Supplement shall be construed or interpreted as novating any obligations, terms or conditions of the Commitment, the Security or any other document entered into pursuant thereto or contemplated thereby (the "Loan Documents"), all of which obligations, terms and conditions remain in full force and effect, without any amendment or modification thereto, save and except only as expressly amended or supplemented by this Supplement. The parties hereby ratify and confirm the Loan Documents.

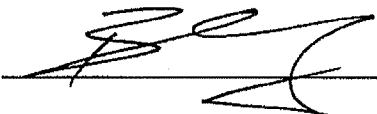
The terms and conditions of this Supplement shall be governed by and interpreted in accordance with the laws of the Province of Alberta and each Borrower and Covenantor hereby irrevocably attorns to the jurisdiction of the courts of the Province of Alberta.

In the event of any inconsistency between the terms and conditions of this Supplement and the terms and conditions of the Commitment, this Supplement shall prevail.

This Supplement may be executed in one or more counterparts, each of which so executed will constitute an original and all of which will constitute one and the same agreement. This Supplement may be executed by the parties and transmitted by facsimile or other electronic means and if so executed and transmitted this Supplement will be for all purposes as effective as if the parties had delivered an executed original agreement.

Yours truly,

**ROMSPEN INVESTMENT CORPORATION**

By:  \_\_\_\_\_

4  
February 1st, 2018  
PV

The undersigned accept this Supplement as at August 1st, 2018

**BORROWERS:**

**LOT 11 GP LTD., IN ITS CAPACITY AS GENERAL PARTNER OF LOT 11 LIMITED PARTNERSHIP**

Per: \_\_\_\_\_  
Name: \_\_\_\_\_  
Title: \_\_\_\_\_

*I/We have authority to bind the corporation.*

**ABSOLUTE ENERGY RESOURCES INC.**

Per: \_\_\_\_\_  
Name: \_\_\_\_\_  
Title: \_\_\_\_\_

*I/We have authority to bind the corporation.*

**COVENANTORS:**

**ZEN GARDEN LIMITED PARTNERSHIP, BY ITS GENERAL PARTNER, ZEN GARDEN GP LTD.**

Per: \_\_\_\_\_  
Name: \_\_\_\_\_  
Title: \_\_\_\_\_

*I/We have authority to bind the corporation.*

**3443 ZEN GARDEN LIMITED PARTNERSHIP, BY ITS GENERAL PARTNER, 3443 ZEN GARDEN GP LLC**

Per: \_\_\_\_\_  
Name: \_\_\_\_\_  
Title: \_\_\_\_\_

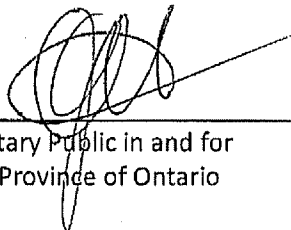
*I/We have authority to bind the company.*

**EIGHTFOLD DEVELOPMENTS LLC**

Per: \_\_\_\_\_  
Name: \_\_\_\_\_  
Title: \_\_\_\_\_

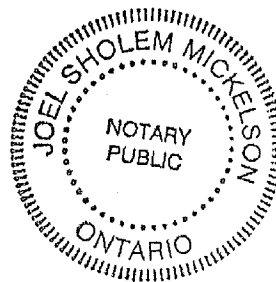
*I/We have authority to bind the company.*

This is Exhibit "9" referred to  
in the Affidavit of Wesley Roitman  
Sworn before me this 16<sup>th</sup> day of November, 2020



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## II GENERAL TERMS

### Section 2.1 Acquisition Loan.

(a) Acquisition Loan. Romspen Investment Corporation, an Ontario corporation and an Affiliate of Lender ("RIC"), previously made a loan ("Acquisition Loan") to Lot 11 Limited Partnership, an Alberta limited partnership and Absolute Energy Resources, Inc., an Alberta corporation (the "Edmonton Owners"), pursuant to that certain Amended and Restated Commitment Letter dated as of July 30, 2015 by and between RIC and Lot 11 and AER, as amended by: (i) Supplement No. 1, dated as of August 31, 2015; (ii) Supplement No. 2, dated as of May 31, 2016; (iii) Supplement No. 3, dated as of June 17, 2016; (iv) Supplement No. 4, dated as of July 29, 2016; (v) Supplement No. 5, dated as of November 9, 2016; and (vi) Supplement No. 6, dated as of July 21, 2017; (as amended from time to time and as modified and supplemented hereby, the "Acquisition Loan Agreement"), and guaranteed by (among others) Borrower pursuant to that certain guarantee dated as of August 19, 2016 from Borrower to RIC (together with any amendment, reaffirmation, ratification or modification thereto, "Acquisition Guaranty"), and secured by, among other things: (x) that certain mortgage dated September 25, 2013 and registered as Instrument No. 132335491 in the Alberta Land Title Offices (together with any amendment or modification thereto, "Prior Acquisition Security Instrument"); and (y) that certain Deed of Trust, Assignment of Leases and Rents, Security Agreement and Fixture Filing dated as of November 14, 2016, recorded on November 14, 2016 under Document No. 2016189773 in the Official Property Records of Travis County, Texas (together with any amendment or modification thereto, "Prior Austin Security Instrument," and together with the Acquisition Loan Agreement, the Acquisition Note, the Acquisition Guaranty, the Prior Acquisition Security Instrument, and each other document evidencing or securing the Acquisition Loan, each as may be amended or modified from time to time, the "Acquisition Loan Documents"). The current outstanding principal amount of the Acquisition Loan is CAD \$35,479,831.72 as of April 17, 2018, accruing at a per diem amount thereafter (until the end of April 2018) of CAD \$9,811.56.

(b) Payoff of Acquisition Loan. As set forth in Section 2.2.2 below, the Term Tranche (as reflected on Sources of Uses and Funds) shall be used for the repayment in full of the Acquisition Loan on the Closing Date. Upon the funding of the Term Tranche and repayment of the Acquisition Loan to RIC, Lender shall cause RIC to execute releases and/or discharges of the Acquisition Loan Documents (as necessary) and deliver same to the Title Company or such other Person for recording and/or registration (as applicable) and/or Borrower.

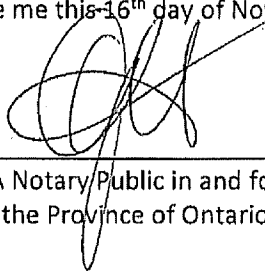
(c) RELEASE. AS A MATERIAL PART OF THE CONSIDERATION FOR EACH PARTY'S EXECUTION OF THIS AGREEMENT, BORROWER PARTIES AND RIC, LENDER AND ALL OF THEIR RESPECTIVE DIRECTORS, OFFICERS, EMPLOYEES, AGENTS, LOAN SERVICING AGENTS, ATTORNEYS, AFFILIATES AND SUBSIDIARIES ("LENDER PARTIES") HEREBY EACH UNCONDITIONALLY AND IRREVOCABLY JOINTLY AND SEVERALLY RELEASE AND FOREVER DISCHARGE THE OTHER FROM ANY AND ALL LIABILITIES, OBLIGATIONS, ACTIONS, CLAIMS, CAUSES OF ACTION, SUITS, PROCEEDINGS, DEMANDS, DAMAGES, COSTS AND EXPENSES OF EVERY KIND WHATSOEVER, INCLUDING, WITHOUT LIMITATION, ATTORNEYS' FEES, ARISING FROM OR RELATING TO ANY ALLEGED ACT, OCCURRENCE, OMISSION OR TRANSACTION OF WHATSOEVER NATURE OCCURRING OR HAPPENING WITH RESPECT TO OR ARISING OUT OF THE ACQUISITION LOAN AND THE ACQUISITION LOAN DOCUMENTS.

### Section 2.2 Loan Commitment; Disbursement to Borrower.

Section 2.2.1 Loan Commitment. Subject to the terms and conditions set forth herein, including satisfaction of the Conditions Precedent set forth in Schedule 2.2 hereof and the requirements of Section 2.2, Lender agrees to make the Loan available to Borrower in multiple advances from time to time during the Availability Period in a maximum aggregate principal amount ("Maximum Loan Principal Amount") not to exceed at any time the lesser of: (i) sixty-five percent (65%) of the value of the Property as determined by the most recent appraisal received by Lender (at Borrower's cost) performed by an appraiser

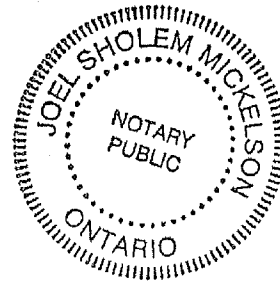
KCSB

This is Exhibit "10" referred to  
in the Affidavit of Wesley Roltman  
Sworn before me this 16<sup>th</sup> day of November, 2020



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certain first priority Assignment of Agreements, Licenses, Permit and Contracts dated as of the date hereof, from Lot 2 Owner, Lot 3 Owner, Lot 11 Owner and Lot 12 Owner, as assignor, to Lender, as assignee, assigning to Lender, subject to the terms thereof, all of such parties' interest in and to contracts, Licenses, permits and approvals necessary for the use and operation and development of the Edmonton Property as security for the Loan, as the same may be amended, restated, replaced, supplemented or otherwise modified from time to time.

**"Assignment of Leases"** shall mean, with respect to the Austin Property, that certain Assignment of Leases and Rents dated even date herewith and from Borrower to Lender.

**"Assignment of Management Agreement"** shall mean that an assignment of any Management Agreement for the Austin Property as may be entered into by Borrower. As of the Closing Date, the Austin Property will be managed by Borrower.

**"Austin Land"** shall mean the real property legally described in the Austin Security Instrument.

**"Austin Property"** shall mean the "Property" described in the Austin Security Instrument.

**"Austin Security Instrument"** shall mean that certain first priority Deed of Trust, Assignment of Leases and Rents, Security Agreement and Fixture Filing, dated as of the date hereof, executed and delivered by Borrower as security for the Loan made to Lender and encumbering the Austin Property, as the same may be amended, restated, replaced, supplemented or otherwise modified from time to time.

**"Authorized Representative"** shall mean a Person at the time designated and authorized to act on behalf of Borrower by a written certificate furnished to Lender containing the specimen signature of such Person and signed by Borrower.

**"Availability Period"** means the period from and including the Closing Date to but excluding the Maturity Date.

**"Award"** shall have the meaning set forth in Section 6.1.3(b).

**"Balancing Event"** shall mean that Lender shall have determined that the sum of the amount of unfunded Additional Advances available to Borrower hereunder for the payment of all of the work comprising the Infrastructure Work, the Building F Work, the Building H Work or the Building J Work, as applicable, that has not been completed is less than the amount actually necessary (as reasonably determined by Lender) to pay for the cost of all such work comprising the Infrastructure Work, the Building F Work, the Building H Work or the Building J Work, as applicable, that has not been completed through the completion thereof.

**"Bankruptcy Code"** shall mean Title 11 of the United States Code, as amended from time to time.

**"Bankruptcy Laws"** shall mean the Bankruptcy Code together with any existing or future law of Canada relating to bankruptcy, insolvency, reorganization, conservatorship, arrangement, adjustment, winding-up, liquidation, dissolution, composition or other relief with respect to its debts or debtors.

**"Board of Directors"** shall mean the "Board" or "Board of Directors" as defined in the Declaration, which shall refer to the board of directors of the Zen Garden Commercial Condominium Association Inc.

**"Book Transaction"** shall have the meaning set forth in Section 2.3(ix).

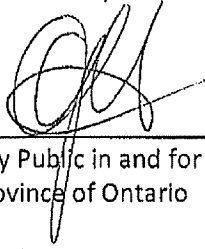
**"Borrower"** has the meaning in the recitals hereto.

**"Borrower Parties"** shall mean the collective reference to Borrower, each Guarantor, Lot 2 Owner, Lot 3 Owner, Lot 4 Owner, Lot 11 Owner, Lot 12 Owner, any other guarantor, indemnitor or surety of any of the Obligations and any other Person (other than Lender) that is a party to any of the Loan Documents, other than any Manager that is not an Affiliate of Borrower. Individually, each of the Borrower Parties may be referred to herein as a **"Borrower Party"**.

**"Building F"** shall mean that portion of the Austin Property designated on the Survey (or to be designated in the Declaration) as "Building F".

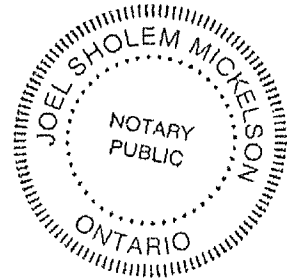
**"Building F Budget"** shall mean the budget of costs and expenses to be incurred in connection with the Completion of the Building F Work as approved by Lender in writing, which shall include fees and costs,

This is Exhibit "11" referred to  
in the Affidavit of Wesley Roitman  
Sworn before me this 16<sup>th</sup> day of November, 2020



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## XI WAIVERS

**Section 11.1 Waiver of Counterclaim.** All amounts due under this Agreement or the other Loan Documents shall be payable without setoff, counterclaim or any deduction whatsoever. Borrower hereby waives the right to assert a counterclaim, other than a compulsory counterclaim, in any action or proceeding brought against Borrower by Lender or its agents, or otherwise offset any obligations to make payments required under the Loan Documents. Any Investor or assignee of Lender's interest in and to the Loan Documents shall take the same free and clear of all offsets, counterclaims or defenses which Borrower may otherwise have against any assignor of the Loan Documents, and no such unrelated offset, counterclaim or defense shall be interposed or asserted by Borrower in any action or proceeding brought by any such assignee upon the Loan Documents, and any such right to interpose or assert any such offset, counterclaim or defense in any such action or proceeding is hereby expressly waived by Borrower. If Borrower is indebted to Lender pursuant to more than one note or pursuant to any subordinate loan documents, (i) the preceding provisions shall apply to any note or other loan documents assigned or transferred by Lender, even if one or more notes are retained by Lender, and (ii) Borrower waives and releases any right to assert any claim, cause of action, offset or defense against Lender with respect to the Loan or the Loan Documents which is any way related to such other note or subordinate loan documents.

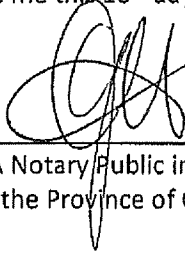
**Section 11.2 Marshalling and Other Matters.** Borrower and the Borrower Parties hereby waive, to the extent permitted by law, the benefit of all appraisal, valuation, stay, extension, reinstatement and redemption laws now or hereafter in force and all rights of marshalling in the event of any sale hereunder of the Property or any part thereof or any interest therein and the pleading of any statute of limitations as a defense to payment of the Debt or performance of the Obligations. Further, Borrower and the Borrower Parties hereby expressly waive any and all rights of redemption from sale under any order or decree of foreclosure of the Security Instruments on behalf of Borrower or the Borrower Parties, and on behalf of each and every Person acquiring any interest in or title to the Property subsequent to the date of this Agreement and on behalf of all Persons to the extent permitted by applicable law. Borrower and the Borrower Parties hereby waive and renounces all homestead and exemption rights provided by the Constitution and the laws of the United States, Canada, and of any state, province, in and to the Property as against the collection of the Debt, or any part thereof. The interests and rights of Lender under the Note, the Security Instruments or in any of the other Loan Documents shall not be impaired by any indulgence, including (i) any renewal, extension or modification which Lender may grant with respect to any of the Debt, (ii) any surrender, compromise, release, renewal, extension, exchange or substitution which Lender may grant with respect to the Property or any portion thereof; or (iii) any release or indulgence granted to any maker, endorser, Borrower Party or surety of any of the Debt.

**Section 11.3 Waiver of Notice.** Borrower shall not be entitled to, and hereby waives the right to receive, any notices of any nature whatsoever from Lender except with respect to matters for which this Agreement or the other Loan Documents specifically and expressly provide for the giving of notice by Lender to Borrower and except with respect to matters for which Borrower is not, pursuant to applicable Legal Requirements, permitted to waive the giving of notice.

**Section 11.4 Trial by Jury. BORROWER HEREBY AGREES NOT TO ELECT A TRIAL BY JURY OF ANY ISSUE TRIABLE OF RIGHT BY JURY, AND WAIVES ANY RIGHT TO TRIAL BY JURY FULLY TO THE EXTENT THAT ANY SUCH RIGHT SHALL NOW OR HEREAFTER EXIST WITH REGARD TO THE LOAN DOCUMENTS, OR ANY CLAIM, COUNTERCLAIM OR OTHER ACTION ARISING IN CONNECTION THEREWITH. THIS WAIVER OF RIGHT TO TRIAL BY JURY IS GIVEN KNOWINGLY AND VOLUNTARILY BY BORROWER, AND IS INTENDED TO ENCOMPASS INDIVIDUALLY EACH INSTANCE AND EACH ISSUE AS TO WHICH THE RIGHT TO A TRIAL BY JURY WOULD OTHERWISE ACCRUE. LENDER IS HEREBY AUTHORIZED TO FILE A COPY OF THIS PARAGRAPH IN ANY PROCEEDING AS CONCLUSIVE EVIDENCE OF THIS WAIVER BY BORROWER.**

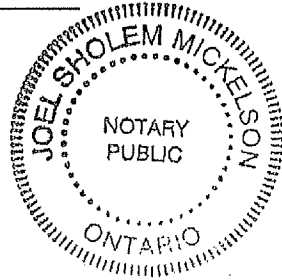
**Section 11.5 Credit Authorization and Consent to Disclosure.** Lender may collect, retain, release, disclose, exchange, share, transfer and assign from time to time, as it may determine in its sole discretion, all information and materials (including financial statements and information concerning the status of the Loan,

This is Exhibit "12" referred to  
in the Affidavit of Wesley Roitman  
Sworn before me this 16<sup>th</sup> day of November, 2020



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the Province of Ontario



any of the following: (i) any right of subrogation, reimbursement, exoneration, contribution, or indemnification; or (ii) any right to participate in any claim or remedy of Lender against any other Borrower Party or any collateral security therefor, whether or not such claim, remedy or right arises in equity or under contract, statute or common law.

## XII MISCELLANEOUS

**Section 12.1 Survival.** This Agreement and all covenants, agreements, representations and warranties made herein and in the certificates delivered pursuant to any of the Loan Documents, including the Sources and Uses of Funds and the Loan Term Sheet, shall survive the making by Lender of the Loan and the execution and delivery to Lender of the Note, and shall continue in full force and effect so long as all or any of the Debt is outstanding and unpaid unless a longer period is expressly set forth herein or in the other Loan Documents. Whenever in this Agreement any of the parties hereto is referred to, such reference shall be deemed to include the legal representatives, successors and assigns of such party. All covenants, promises and agreements in this Agreement, by or on behalf of Borrower, shall inure to the benefit of the legal representatives, successors and assigns of Lender.

**Section 12.2 Governing Law.** Except as otherwise expressly set forth herein, this Agreement shall be governed, construed, applied and enforced in accordance with the laws of the state where the Austin Property is located without regard to the conflicts of law provisions thereof ("**Governing State**"). Borrower, the Borrower Parties hereby consent to personal jurisdiction in the Governing State. JURISDICTION AND VENUE OF ANY ACTION BROUGHT TO ENFORCE THIS AGREEMENT OR ANY OTHER LOAN DOCUMENT OR ANY ACTION RELATING TO THE LOAN OR THE RELATIONSHIPS CREATED BY OR UNDER THE LOAN DOCUMENTS ("**ACTION**") SHALL, AT THE ELECTION OF LENDER, BE IN (AND IF ANY ACTION IS ORIGINALLY BROUGHT IN ANOTHER VENUE, THE ACTION SHALL AT THE ELECTION OF LENDER BE TRANSFERRED TO) A STATE OR FEDERAL COURT OF APPROPRIATE JURISDICTION LOCATED IN THE GOVERNING STATE. BORROWER HEREBY CONSENTS AND SUBMITS TO THE PERSONAL JURISDICTION OF THE STATE COURTS OF THE GOVERNING STATE AND OF FEDERAL COURTS LOCATED IN THE GOVERNING STATE IN CONNECTION WITH ANY ACTION AND HEREBY WAIVES ANY AND ALL PERSONAL RIGHTS UNDER THE LAWS OF ANY OTHER STATE TO OBJECT TO JURISDICTION WITHIN SUCH GOVERNING STATE FOR PURPOSES OF ANY ACTION. GUARANTOR HEREBY IRREVOCABLY SUBMITS TO THE JURISDICTION OF ANY SUCH STATE OR FEDERAL COURTS IN ANY SUIT, ACTION OR PROCEEDING, AND EACH GUARANTOR DOES HEREBY DESIGNATE AND APPOINT.

Nicholas Legato, Esquire  
Hinshaw & Culbertson LLP  
222 North LaSalle Street  
Suite 300  
Chicago, Illinois 60601

AS ITS AUTHORIZED AGENT TO ACCEPT ON ITS BEHALF SERVICE OF ANY AND ALL PROCESS WHICH MAY BE SERVED IN ANY SUCH SUIT, ACTION OR PROCEEDING, AND AGREES THAT SERVICE OF PROCESS UPON SAID AGENT AT SAID ADDRESS AND WRITTEN NOTICE OF SAID SERVICE MAILED OR DELIVERED TO GUARANTOR IN THE MANNER PROVIDED HEREIN SHALL BE DEEMED IN EVERY RESPECT EFFECTIVE SERVICE OF PROCESS UPON GUARANTOR IN ANY SUCH SUIT, ACTION OR PROCEEDING. GUARANTOR (I) SHALL GIVE PROMPT NOTICE TO LENDER OF ANY CHANGED ADDRESS OF ITS AUTHORIZED AGENT HEREUNDER, (II) MAY AT ANY TIME AND FROM TIME TO TIME DESIGNATE A SUBSTITUTE AUTHORIZED AGENT WITH AN OFFICE IN THE STATE OF TEXAS (WHICH SUBSTITUTE AGENT AND OFFICE SHALL BE DESIGNATED AS THE PERSON AND ADDRESS FOR SERVICE OF PROCESS, AND (III) SHALL PROMPTLY DESIGNATE SUCH A SUBSTITUTE IF ITS AUTHORIZED AGENT CEASES TO HAVE AN OFFICE IN THE STATE OF TEXAS, OR IS DISSOLVED WITHOUT LEAVING A SUCCESSOR. NOTHING CONTAINED HEREIN SHALL AFFECT THE RIGHT OF LENDER TO SERVE PROCESS IN

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ANY OTHER MANNER PERMITTED BY LAW OR TO COMMENCE LEGAL PROCEEDINGS OR OTHERWISE PROCEED AGAINST BORROWER IN ANY OTHER JURISDICTIONS.

Borrower and the Borrower Parties hereby waive and agrees not to assert, as a defense to any Action or a motion to transfer venue of any Action, (i) any claim that it is not subject to such jurisdiction, (ii) any claim that any Action may not be brought against it or is not maintainable in those courts or that this Agreement may not be enforced in or by those courts, or that it is exempt or immune from execution, (iii) that the Action is brought in an inconvenient forum, or (iv) that the venue for the Action is in any way improper.

**Section 12.3 Modification; Waiver in Writing.** No modification, amendment, extension, discharge, termination or waiver of any provision of this Agreement, or of any other Loan Document, nor consent by Lender to any departure by any Borrower Party from the Obligations, shall in any event be effective unless the same shall be in a writing signed by the Person against whom enforcement is sought, and then such waiver or consent shall be effective only in the specific instance, and for the purpose, for which given. Except as otherwise expressly provided herein, no notice to, or demand on any Borrower Party shall entitle any Borrower Party to any other or future notice or demand in the same, similar or other circumstances.

**Section 12.4 Delay Not a Waiver.** Neither any failure nor any delay on the part of Lender in insisting upon strict performance or compliance of any term, condition, covenant or agreement, or Lender's delay in exercising any right, power, remedy or privilege hereunder, or under the Note or under any other Loan Document, or any other instrument given as security therefor, shall operate as or constitute a waiver thereof, nor shall a single or partial exercise thereof preclude any other future exercise, or the exercise of any other right, power, remedy or privilege. In particular, and not by way of limitation, by accepting payment after the due date of any amount payable under this Agreement, or any other Loan Document, Lender shall not be deemed to have waived any right either to require prompt payment when due of all other amounts due under this Agreement, or the other Loan Documents, or to declare a default for failure to effect prompt payment of any such other amount. Lender shall have the right, in its complete and sole discretion, to waive or reduce any time periods to which Lender is entitled under the Loan Documents.

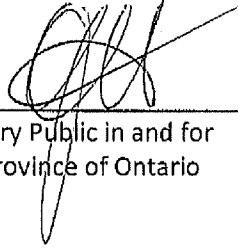
**Section 12.5 Notices.** All notices, consents, approvals and requests required or permitted hereunder or under any other Loan Document shall be given in writing (including by facsimile) and shall be effective for all purposes if hand delivered or sent by (a) certified or registered United States mail, postage prepaid, (b) expedited prepaid delivery service, either commercial or United States Postal Service, with proof of attempted delivery, or (c) by facsimile (with a copy sent contemporaneously by certified or registered United States mail, postage prepaid) answer back acknowledged), addressed as follows:

If to Borrower: 3443 Zen Garden Limited Partnership  
4210 Spicewood Springs Road Suite 205  
Austin, Texas 78759  
Telephone: 512-345-7000  
Email: adam@panachehomes.com

with a copy to: Nicholas Legatos, Esquire  
Hinshaw & Culbertson LLP  
222 North LaSalle Street Suite 300  
Chicago, Illinois 60601  
Telephone: 312-704-3051  
Email: nlegatos@hinshawlaw.com

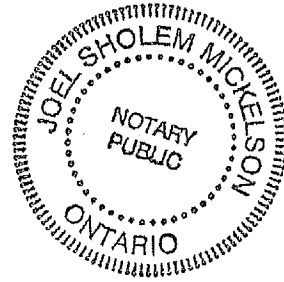
If to Borrower Parties: 2833 Broadmoor Boulevard  
Suite 260  
Sherwood Park, Alberta, Canada T8H 2H3  
Telephone: 780-237-9560  
Email: dwhite@symmetryinc.com

This is Exhibit "13" referred to  
in the Affidavit of Wesley Roitman  
Sworn before me this 16<sup>th</sup> day of November, 2020



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A Notary Public in and for  
the Province of Ontario



**Section 12.9 Expenses.** Borrower covenants and agrees to pay to Lender upon receipt of written notice from Lender for all costs and expenses (including attorneys' fees and disbursements) incurred by Lender in connection with (i) the preparation, negotiation, execution and delivery of this Agreement and the other Loan Documents and the consummation of the transactions contemplated hereby and thereby and all the costs of furnishing all opinions by counsel for the Borrower Parties (including any opinions requested by Lender as to any legal matters arising under this Agreement or the other Loan Documents with respect to the Property); (ii) the ongoing performance of and compliance with the respective agreements and covenants of the Borrower Parties contained in this Agreement and the other Loan Documents; (iii) Lender's ongoing performance and compliance with all agreements and conditions contained in this Agreement and the other Loan Documents, including Lender's administration and servicing of the Loan; (iv) the negotiation, preparation, execution, delivery and administration of any consents, amendments, waivers or other modifications to this Agreement and the other Loan Documents and any other documents or matters requested by Lender; (v) securing compliance with any requests made by any Borrower Party pursuant to any provision of any of the Loan Documents; (vi) the filing and recording of the Loan Documents, title insurance and reasonable fees and expenses of counsel for providing to Lender all required legal opinions, and other similar expenses incurred in creating and perfecting the Liens in favor of Lender pursuant to this Agreement and the other Loan Documents; (vii) enforcing or preserving any rights, in response to third party claims or the prosecuting or defending of any action or proceeding or other litigation, in each case against, under or affecting any Borrower Party, this Agreement, the other Loan Documents, the Property, or any other security given for the Loan; (viii) costs incurred by Lender in the review of easements, lot line agreements or similar matters, the review and approval of or consent to Leases and the negotiation of subordination, non-disturbance and attornment agreements, and other similar items required by Borrower or a Borrower Party in connection with Borrower's or a Borrower Party's use and enjoyment of the Property; (ix) costs incurred by Lender in responding to any subpoena or participating in, observing or preparing for any deposition or other legal or quasi-legal process; and (x) the amounts described in Section 7.4. Any cost and expenses due and payable to Lender shall be payable within five (5) Business Days of demand, shall be secured by the Loan Documents, and if not paid when due, shall bear interest at the Default Rate until paid. Borrower hereby agrees that Lender, in its sole discretion, may make advances under the Loan to pay any costs and expenses due and payable to Lender under the Loan Documents.

**Section 12.10 Relationship of Borrower and Lender.** The relationship between Borrower and Lender is solely that of debtor and creditor, and Lender has no fiduciary or other special relationship with Borrower, and no term or condition of any of the Note, the Security Instruments, this Agreement and the other Loan Documents shall be construed so as to deem the relationship between Borrower and Lender to be other than that of the debtor and creditor relationship established pursuant to the Loan Documents. The relationship of Borrower and Lender is created and governed solely by the Loan Documents.

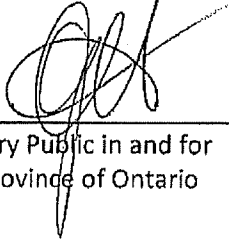
**Section 12.11 No Joint Venture or Partnership; No Third Party Beneficiaries.**

(a) Any provision herein or in any of the other Loan Documents to the contrary notwithstanding, Lender, by virtue of its acceptance of this Agreement and the making of the Loan or any approval rights Lender may have herein or in any of the Loan Documents shall not be deemed to constitute Lender a mortgagee-in-possession, tenant-in-common, or in control of, or a partner or joint venturer with, or insider (within the meaning of Section 101(31) of the Bankruptcy Code) of, any Borrower Party or any other Person; and Borrower shall indemnify Lender against, shall hold Lender harmless from, and shall reimburse Lender for, any and all claims, demands, judgments, penalties, fines, liabilities, costs, damages and expenses, including court costs and reasonable attorneys' fees incurred by Lender (whether incurred in connection with nonjudicial action, prior to trial, at trial, or on appeal or review) in any action against or involving Lender resulting from such a construction of the Loan Documents.

(b) Any inspection of the Property, any review or approval of any plans, contracts, subcontracts (including environmental reviews, audits, assessments and/or reports relating to the Property), and review or approval of budgets, expenses or obligations or any analysis of the Property made by Lender or any of its agents, architects or consultants is intended solely for the benefit of Lender and shall not be deemed to create

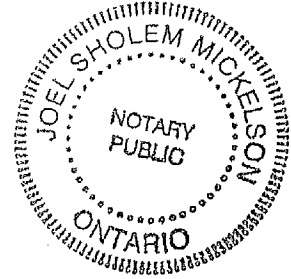


This is Exhibit "14" referred to  
in the Affidavit of Wesley Roitman  
Sworn before me this 16<sup>th</sup> day of November, 2020



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the Province of Ontario



or form the basis of any warranty, representation, covenant, implied promise or liability to Borrower or any of its employees or agents, any guest or invitee upon the Property, or any other Person.

(c) Except as otherwise provided in Article VIII hereof, this Agreement and the other Loan Documents are solely for the benefit of Lender and Borrower and nothing contained in this Agreement or the other Loan Documents shall be deemed to confer upon anyone other than Lender and Borrower any right to insist upon or to enforce the performance or observance of any of the obligations contained in the Loan Documents. Except as otherwise provided in Article VIII hereof, all conditions to the obligations of Lender to make the Loan hereunder are imposed solely and exclusively for the benefit of Lender and no other Person shall have standing to require satisfaction of such conditions in accordance with their terms or be entitled to assume that Lender will refuse to make the Loan in the absence of strict compliance with any or all thereof and no other Person shall under any circumstances be deemed to be a beneficiary of such conditions, any or all of which may be freely waived in whole or in part by Lender if, in Lender's sole discretion, Lender deems it advisable or desirable to do so.

**Section 12.12 Publicity.** All news releases, publicity or advertising by the Borrower Parties or their Affiliates through any media intended to reach the general public which refers to the Loan Documents or the financing evidenced by the Loan Documents or to Lender, or any of their Affiliates shall be subject to the prior written approval of Lender, which approval shall not be unreasonably withheld.

**Section 12.13 Subrogation.** If any or all of the proceeds of the Note have been used to extinguish, extend or renew any Indebtedness heretofore existing against the Property, then, to the extent of the funds so used, Lender shall be subrogated to all of the rights, claims, Liens, titles, and interests existing against the Property heretofore held by, or in favor of, the holder of such Indebtedness and such former rights, claims, Liens, titles, and interests, if any, are not waived but rather are continued in full force and effect in favor of Lender and are merged with the Lien and security interest created herein as cumulative security for the repayment of the Debt, the performance and discharge of the Obligations.

**Section 12.14 Duplicate Originals; Counterparts.** For the purpose of facilitating the execution of this Agreement and for other purposes, this Agreement may be executed simultaneously in any number of counterparts, each of which counterparts shall be deemed to be an original, and such counterparts shall constitute but one and the same instrument. A signature of a party by facsimile or other electronic transmission (including a .pdf copy sent by e-mail) shall be deemed to constitute an original and fully effective signature of such party. The failure of any party hereto to execute this Agreement, or any counterpart hereof, shall not relieve the other signatories from their obligations hereunder.

**Section 12.15 Liability.** If Borrower consists of more than one Person, the obligations and liabilities of each such Person hereunder shall be joint and several. This Agreement shall be binding upon and inure to the benefit of Borrower and Lender and their respective successors and assigns forever.

**Section 12.16 Prior Agreements.** This Agreement and the other Loan Documents contain the entire agreement of the parties hereto and thereto in respect of the transactions contemplated hereby and thereby, and all prior agreements among or between such parties, whether oral or written, including any term sheets, discussion outlines or commitment letters (as same may be amended) between any of the Borrower Parties and Lender are superseded by the terms of this Agreement and the other Loan Documents. In the event of any conflict between the terms of this Agreement and the Loan Term Sheet, the terms of this Agreement shall govern.

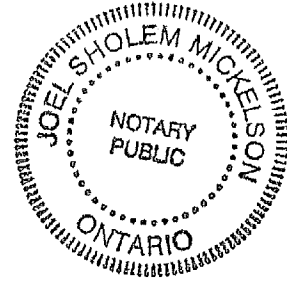
**Section 12.17 No Usury.** Any provision herein, in any Loan Document or any other document executed or delivered in connection with the Loan, or in any other agreement or commitment, whether written or oral, expressed or implied, to the contrary notwithstanding, Lender shall not in any event be entitled to receive or collect, nor shall or may amounts received hereunder be credited, so that Lender shall be paid, as interest, a sum greater than the maximum amount permitted by applicable law to be charged to the Person primarily obligated to pay the Debt and the Obligations at the time in question. If any construction of this Agreement, any

This is **Exhibit "15"** referred to  
in the Affidavit of Wesley Roitman  
Sworn before me this 16<sup>th</sup> day of November, 2020



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approval or discretion is required under this Agreement or any other Loan Document for any matter or thing or Lender shall have an option, election, or right of determination or any other power to decide any matter relating to the terms and conditions of this Agreement, including any right to determine that something is satisfactory or not ("**Decision Power**"), such Decision Power shall be exercised in the sole and absolute discretion of Lender unless otherwise expressly stated to be reasonably exercised. Such Decision Power and each other power granted to Lender upon this Agreement may be exercised by Lender or by any authorized agent of Lender (including any servicer and/or attorney-in-fact), and Borrower hereby expressly agrees to recognize the exercise of such Decision Power by such authorized agent.

**Section 12.20 Lender.** The rights of Lender pursuant to this Agreement and the other Loan Documents are in addition to all of the rights of Lender or any Affiliate of Lender may now or hereafter have by virtue of any ownership, directly or indirectly, in Borrower or any Affiliate of Borrower. In acting as Lender pursuant to this Agreement or the Loan Documents, Borrower acknowledges that Lender shall owe no duties of any kind to Borrower or any other Person (other than those specifically stated in the Loan Documents) on account of such role of Lender or any Affiliate of Lender or by virtue of any ownership interest in Borrower or such Affiliates (directly or indirectly) or otherwise, and there shall be no limitations on Lender's rights or remedies or Lender's ability to act solely in Lender's best interests or in Lender's discretion, notwithstanding the role Lender or any such Affiliate of Lender may have by virtue of any ownership interest in Borrower or any Affiliate of Borrower. Lender shall not be subject to any limitation whatsoever in the exercise of any rights or remedies available to Lender under any of the Loan Documents or any other agreements or instruments which govern the Loan by virtue of the ownership by Lender or any parent, subsidiary or Affiliate of Lender of any equity interest any of them may acquire (directly or indirectly) in Borrower, and Borrower hereby irrevocably waives the right to raise any defense or take any action on the basis of the foregoing with respect to Lender's exercise of any such rights or remedies. No assignee of any of Lender's rights with respect to the Loan or the Loan Documents shall be prejudiced or affected by any actions taken or not taken by Lender or its Affiliates prior to the assignment to the then current Lender and upon any such assignment, such assignee shall be in the same position as if such assignee had originated the Loan itself as of the date of such assignment and shall not be subject to any offsets, counterclaims or defenses to which Lender, any other Person which may from time to time be the "Lender" hereunder or their respective Affiliates might be subject. Borrower acknowledges that Lender and its Affiliates engage in the business of real estate financings and other real estate transactions and investments, which may be viewed as adverse to or competitive with the business of Borrower or its Affiliates.

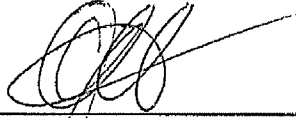
**Section 12.21 Limitation on Liability.** Notwithstanding anything contained herein to the contrary, Borrower agrees that none of Lender, or its agents or employees shall be liable to Borrower for any monetary damages (including any special, consequential or punitive damages whatsoever), whether in contract, tort (including negligence and strict liability) or any other legal or equitable principle and Borrower's sole remedies shall be limited to commencing an action for specific performance under the Loan Documents.

**Section 12.22 Appointment of Servicer and Delegation of Lender Rights.** Borrower acknowledges and agrees that at the option of Lender, the Loan may be serviced by a servicer/trustee (the "Servicer") selected by Lender and Lender may delegate all or any portion of its responsibilities under this Agreement and the other Loan Documents to the Servicer pursuant to a servicing agreement between Lender and Servicer; provided, however, such delegation will not release Lender from any of its obligations under the Loan Documents. Borrower shall not be responsible for any servicing fees payable to Servicer; provided, however that Borrower shall be responsible for the payment of all out-of-pocket costs and expenses incurred by Servicer in connection with the Loan (including the negotiation of subordination, non-disturbance and attornment agreements, property inspections, casualty or condemnation matters or in connection with any Declaration of Default). Any action or inaction taken by the Servicer pursuant to this Agreement and the Loan Documents shall be binding to the same extent as if taken by Lender, and Borrower shall be entitled to rely on all actions and directions given by Servicer with respect to all matters concerning the Loan and Loan Documents unless and until Borrower receives contrary written instructions from the Lender.

**Section 12.23 Intentionally Deleted.**

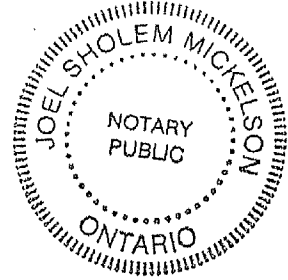
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This is Exhibit "16" referred to  
in the Affidavit of Wesley Roitman  
Sworn before me this 16<sup>th</sup> day of November, 2020



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**Section 12.24 Advertising.** Borrower hereby agrees Lender (together with its Affiliates, "Romspen") may publicly identify details of the Loan in Romspen's advertising and public communications of all kinds, including, but not limited to, press releases, direct mail, newspapers, magazines, journals, e-mail, or internet advertising or communications. Such details may include the name of the Austin Property, the address of the Austin Property, the amount of the Loan, the date of the closing and a description of the size/location of the Austin Property.

**Section 12.25 Delay Outside Lender's Control.** Lender shall not be liable in any way to Borrower or any third party for Lender's failure to perform or delay in performing under the Loan Documents (and Lender may suspend all or any portion of Lender's obligations under the Loan Documents for up to sixty days) if such failure to perform or delay in performing results directly or indirectly from, or is based upon, any Force Majeure Event. At the conclusion of such suspension of Lender's performance, if Lender still is unable to perform, Lender shall give Borrower thirty (30) days' notice and Borrower shall have the right to purchase or satisfy the Loan during such thirty (30) day period. Interest shall continue to be payable at the non-default interest rate during any such Force Majeure suspension. If Borrower does not purchase or satisfy the Loan, Lender may thereafter terminate the Loan, which termination shall not be deemed to have resulted from an Event of Default, but from the Force Majeure event.

**Section 12.26 Signage.** Lender shall be entitled to place on the Property signage indicating Lender's participation in the funding of the Property.

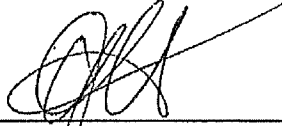
**Section 12.27 Modification, Waiver in Writing.** No modification, amendment, extension, discharge, termination or waiver of any provision of any Loan Document, nor consent to any departure by Borrower therefrom, shall in any event be effective unless the same shall be in a writing signed by the party or parties against whom enforcement is sought, and then such waiver or consent shall be effective only in the specific instance, and for the specific purpose, for which given. Except as otherwise expressly provided herein, no notice to, or demand on Borrower, shall entitle Borrower to any other or future notice or demand in the same, similar or other circumstances.

**Section 12.28 Set-Off.** In addition to any rights and remedies of Lender provided by this Agreement and by law, Lender shall have the right, without prior notice to Borrower, any such notice being expressly waived by Borrower to the extent permitted by Legal Requirements, upon any amount becoming due and payable by Borrower hereunder (whether at the stated maturity, by acceleration or otherwise), to set-off and appropriate and apply against such amount any and all deposits (general or special, time or demand, provisional or final), in accordance with Legal Requirements, in any currency, and any other credits, indebtedness or claims, in any currency, in each case whether direct or indirect, absolute or contingent, matured or unmatured, at any time held or owing by Lender or any Affiliate thereof to or for the credit or the account of Borrower. Lender agrees promptly to notify Borrower after any such set-off and application made by Lender; provided that the failure to give such notice shall not affect the validity of such set-off and application.

[SIGNATURE PAGE FOLLOWS]

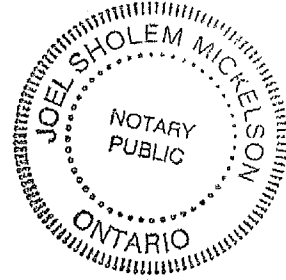
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This is Exhibit "17" referred to  
in the Affidavit of Wesley Roitman  
Sworn before me this 16<sup>th</sup> day of November, 2020



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- (g) "Moneys" means the indebtedness and all other sums due, owing or payable or which may become due, owing or payable under the Loan Agreement, any of the Security, this Mortgage or otherwise;
  - (h) Intentionally Deleted
  - (i) "Security" means any documents other than this Mortgage now held or hereafter held by the Mortgagee, as security relating to the Moneys or any other liabilities or obligations of the Mortgagor to the Mortgagee.
  - (j) Intentionally Deleted
2. That save as hereinafter described, the Mortgagor will pay when and as same fall due, all taxes, rates, liens, charges, encumbrances or claims (hereinafter sometimes referred to as "taxes") which are or may be or become charges or claims against the mortgaged premises, on or in respect of this mortgage. The Mortgagor shall pay to the Mortgagee on each date on which a payment is due hereunder an additional amount estimated by the Mortgagee required to pay the full amount of taxes when they next become due. The Mortgagor further covenants and agrees to transmit to the Mortgagee the tax bills and other notices affecting the imposition of taxes forthwith after the receipt of same by him and to provide evidence of payment within thirty (30) days of the due date for payment.
- Should the Mortgagor become in default of its obligation in this Paragraph 2, the Mortgagee shall have the right itself to pay the taxes and the amount so paid, as aforesaid, by the Mortgagee shall be secured hereby and shall (together with interest thereon at the Interest Rate) be a charge on the mortgaged premises, and shall bear interest at the Interest Rate until paid, all such monies to be repayable to the Mortgagee on demand, or if not demanded repayable on the next ensuing instalment (whether principal or interest).
3. That the Mortgagee may, without further authority and from time to time as the Mortgagee may desire, make advances of principal monies to be secured under this mortgage in:
- (a) An amount or amounts, which when added at the date next ensuing upon which taxes become due and payable to those portions of the then paid up monthly instalments under Paragraph 2, will be sufficient to pay and discharge the taxes;
  - (b) An amount or amounts sufficient to defray interest accrued hereunder and unpaid from time to time; and
  - (c) An amount or amounts equal to estimated interest on account of the principal sum hereunder including an initial interest reserve pursuant to the Loan Agreement;
- and upon making such advances, will have the right to apply such advances for the purpose described in this Paragraph 3 for which they were advanced. Nothing herein shall obligate the Mortgagee to make the advances in this Paragraph 3 described.
4. That the Mortgagor shall pay to the Mortgagee interest as aforesaid and all interest on becoming overdue shall be forthwith treated, as to payment of interest thereon, as principal and shall bear interest thereon at the aforesaid rate computed with rests and compounded at each interest date as well after as before maturity of this mortgage and all such interest shall be a charge on the mortgaged premises; and in the event of non-payment of any of the monies hereby secured at the time herein set for payment thereof the Mortgagor will, so long as any part thereof remains unpaid, pay interest at the said rate from day to day on the same.
5. That the Mortgagor shall forthwith insure and keep insured during the continuance of this security the mortgaged property together with such other insurance required by the Mortgagee, all as more particularly set out in section 13 of the Schedule of Additional Provisions.

All such insurance shall:

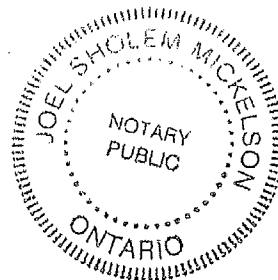


This is **Exhibit "18** referred to  
in the Affidavit of Wesley Roitman  
Sworn before me this 16<sup>th</sup> day of November, 2020



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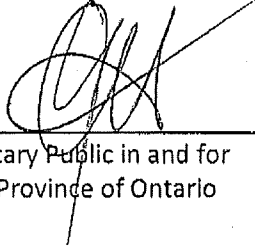
- (iii) There are no outstanding orders or decisions made by the Province of Alberta or any board or commission with respect to the mortgaged property or any residential rental unit or units on the mortgaged property.
- (b) The Mortgagor agrees to comply with the terms of the *Residential Tenancies Act (Alberta)* as amended from time to time, and any legislation enacted in substitution thereof. In the event of breach of this covenant or in the event that any of the representations or warranties contained in this provision are false, the same shall constitute an Event of Default.

18. EVENTS OF DEFAULT

- (a) The Mortgagor covenants and agrees that notwithstanding any other provision in this Mortgage, the Mortgagee may deem this Mortgage to be in default in the event that the Mortgagor does or becomes subject to any of the following which is deemed to be an Event of Default:
  - (i) the Borrower fails to make a payment in accordance with Loan Agreement;
  - (ii) the Mortgagor fails to make any other payment required to be made under the Mortgage;
  - (iii) permits any other amount which is secured by this Mortgage, or any taxes, public utilities accounts or insurance premiums which are due and payable under this Mortgage, or otherwise due and payable by the Mortgagor and not in dispute, to remain unpaid after the Mortgagee has made written demand for payment thereof;
  - (iv) fails to insure the mortgaged property in accordance with the Mortgage;
  - (v) fails to observe or perform any covenant or agreement contained in this Mortgage;
  - (vi) makes any warranty or representation to the Mortgagee which is untrue in any material respect;
  - (vii) permits any lien, encumbrance or other claim capable of ranking in priority to the security created in favour of the Mortgagee to be recorded or registered against the mortgaged property which is not removed or satisfied in full within thirty (30) days of such recording or registration;
  - (viii) causes or permits any order to be made or any resolution to be passed or adopted, or any petition to be filed for the winding-up of the Mortgagor;
  - (ix) becomes insolvent, commits an act of bankruptcy, or if a petition in bankruptcy is filed against the Mortgagor which is not being disputed in good faith by the Mortgagor, or a proposal made by the Mortgagor under the *Bankruptcy and Insolvency Act (Canada)* is rejected by creditors;
  - (x) causes or permits a "stay order" to be issued pursuant to the *Companies Creditors Arrangement Act (Canada)* which prohibits the Mortgagee from enforcing this Mortgage;
  - (xi) is the subject of any execution, sequestration or any other judicial process, or any distress or similar process levied on the mortgaged property or against the Mortgagee which is not, in good faith, being disputed by the Mortgagor;
  - (xii) fails or refuses to comply with any term, condition or proviso of the Mortgage or any other security required pursuant to it;
  - (xiii) has made any material misrepresentation to the Mortgagee in any environmental proviso contained in the Mortgage or if there is any

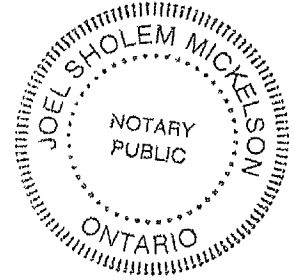
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This is **Exhibit "19"** referred to  
in the Affidavit of Wesley Roitman  
Sworn before me this 16<sup>th</sup> day of November, 2020



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the Province of Ontario



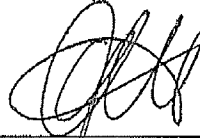
any way, as landlord or otherwise, for the performance or any covenants, obligations or liabilities under any lease, agreement to lease, letting or tenancy agreement.

11. APPOINTMENT OF RECEIVER

(a) Any time after default hereunder the Mortgagee may in writing from time to time appoint a Receiver of the mortgaged property and may from time to time remove the said Receiver and appoint another in its stead, and any such Receiver appointed hereunder shall have the following powers:

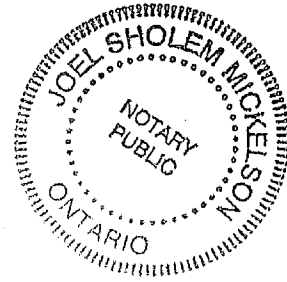
- (i) To take possession of the mortgaged property and to collect revenues from the same and for such purpose to enter onto or into the mortgaged property and for such purpose to do any act and take any proceedings in the name of the Mortgagor or otherwise as it shall deem necessary.
- (ii) To carry on or concur in carrying on the business of the Mortgagor, and to employ and discharge agents, workers, accountants and others upon such terms and with such salaries, wages or remuneration as it shall think proper, and to repair and keep in repair the mortgaged property and to do any acts it deems appropriate for the carrying on of the business of the Mortgagor and the protection of the said mortgaged property.
- (iii) To sell or lease or concur in the selling or the leasing of the mortgaged property, or any part thereof, and to carry any such sale or lease into effect by conveying in the name of or on behalf of the Mortgagor or otherwise; and any such sale may be made either at public auction or private sale as seen fit by the Receiver and any such sale may be made from time to time as to the whole or any part of parts of the mortgaged property; and the Receiver may make any stipulations as to matters of title or conveyance or the commencement of title or otherwise, as it shall deem proper; and it may buy or rescind or vary any contract for the sale of any part of the mortgaged property and it may resell the same; and it may sell any of the mortgaged property on such terms as to credit or part cash and part credit or otherwise as shall appear in its sole option to be most advantageous and at such prices as can reasonably be obtained therefor and in the event of a sale on credit neither it nor the Mortgagee shall be accountable for or charged with any monies until actually received by them.
- (iv) To make any arrangement or compromise which the Receiver may think expedient or otherwise in the interest of the Mortgagee and to consent to any modification or change in or omission from the provisions of this Mortgage and to exchange any part or parts of the mortgaged property for any other property suitable for the purposes of the Mortgagee and upon such terms as may seem expedient and either with or without payment or exchange of money or with or without regard to the equality of the exchange or otherwise.
- (v) To borrow money to carry on the business of the Mortgagor and to charge the whole or any part of the mortgaged property in such amounts as the Receiver may from time to time deem necessary and in so doing the Receiver may issue certificates that may be payable when the Receiver thinks expedient and shall bear interest as stated therein and the amounts from time to time payable under such certificates shall charge the mortgaged property in priority to this Mortgage.
- (vi) To execute and prosecute all suits, proceedings and actions which the Receiver in its discretion considers necessary for the protection of the mortgaged property, to defend all suits, proceedings and actions against

This is Exhibit "20" referred to  
in the Affidavit of Wesley Roitman  
Sworn before me this 16<sup>th</sup> day of November, 2020



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knowledge of Debtor is there any law, or any judgment, decree or order of any Court or agency binding on Debtor which would be contravened by the execution and delivery of this Agreement, or by the performance of any provision, condition, covenant or other term hereof and in all circumstances where consent is required, such consent has been duly obtained;

- (7) there is no unsatisfied judgment, litigation, tax claim, proceeding or dispute pending, or, to the knowledge of Debtor, threatened, against or affecting Debtor or its property, the adverse determination of which might materially and adversely affect Debtor's financial condition or operations or impair Debtor's ability to perform its obligations hereunder or under any other instrument or agreement required hereunder;
- (8) the corporate records and minute book of Debtor contain complete and accurate minutes of all meetings of the directors and shareholders of Debtor held since its incorporation and all such meetings were duly called and held and the share certificate register, register of shareholders, register of transfers and register of directors of Debtor is substantially complete and accurate;
- (9) Debtor has duly filed in a timely manner all tax returns required to be filed by it and has paid all taxes as shown on such returns as being due and payable, including all assessments, re-assessments and other charges, penalties, interest or fines applicable to such returns, and Debtor has made adequate provision for the taxes which are payable during the current fiscal period for which tax returns are not yet required to be filed;

3.2 Debtor agrees to indemnify Creditor against and hold Creditor harmless from any and all claims, losses, damages or costs, including legal costs as between a solicitor and his own client, to which Creditor may be put or suffer by or as a result of any representation or warranty contained in Section 3.1 hereof being incorrect or breached.

#### 4. COVENANTS OF DEBTOR

4.1 So long as this Agreement remains in effect, Debtor covenants and agrees:

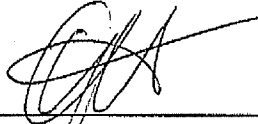
- (1) to defend the Collateral against the claims and demands of all other persons claiming the same or an interest therein; to keep the Collateral Free and Clear and not to, except to the extent permitted under Section 5 hereof, sell, exchange, transfer, assign, lease or otherwise dispose of Collateral or any interest therein without the prior written consent of Creditor; and, subject to Section 7 hereof, use monies, available to Debtor;
- (2) to forthwith notify Creditor of:
  - (a) any change in the information contained herein or in the Schedules hereto relating to Debtor (including without limitation any change in the name of Debtor or any trade name or partnership under which Debtor may operate and in the case of a partnership any change therein), its business or Collateral;
  - (b) the details of any material acquisition of Collateral;
  - (c) the details of any claims or litigation affecting the Debtor or Collateral;
  - (d) any loss of or damage to Collateral;
  - (e) any default by any Account Debtor in payment or other performance of Account Debtor's obligations with respect to Collateral; and
  - (f) the return to or repossession by Debtor of Collateral;
- (3) to keep the Collateral in good order, condition and repair, to provide adequate storage facilities to protect the Collateral, not to permit the value of the Collateral to be impaired and in particular not to use Collateral in violation of the provisions of this Agreement or

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- any other agreement relating to Collateral or any policy insuring Collateral or any applicable law;
- (4) to pay all taxes, rates, levies, assessments and other charges of every nature which may be lawfully levied, assessed or imposed against or in respect of Debtor or Collateral as and when the same becomes due and payable;
  - (5) to insure and keep insured the Collateral for such periods, in such amounts, on such terms, with such companies and against loss or damage by fire (including so-called extended coverage) and such other risks as Creditor shall direct with loss payable to Creditor as its interests hereunder may appear, and to pay all premiums and other sums required to maintain such insurance;
  - (6) to insure itself against public liability in such amounts, on such terms, with such companies as Creditor shall require having regard to the nature of the business carried on from time to time by Debtor;
  - (7) to prevent Collateral, (save inventory sold or leased as permitted hereby), from being or becoming an accession or fixture to other property not covered by this Agreement;
  - (8) to carry on and conduct the business of Debtor in a proper and efficient manner and so as to protect and preserve the Collateral and to keep, in accordance with generally accepted accounting principles, consistently applied, proper books of account for Debtor's business as well as accurate and complete records concerning Collateral, and mark any and all such records and Collateral at Creditor's request so as to indicate the Security Interest;
  - (9) to deliver to Creditor from time to time promptly upon request:
    - (a) any Documents of Title, Instruments, Securities and Chattel Paper constituting, representing or relating to Collateral;
    - (b) all books of account and all records, ledgers, reports, correspondence, schedules, documents, statements, lists and other writings relating to Collateral for the purpose of inspecting, auditing or copying the same;
    - (c) all financial statements prepared by or for Debtor regarding Debtor's business;
    - (d) all policies and certificates of insurance or other evidence satisfactory to Creditor of compliance with the obligations of Debtor to insure hereunder relating to Collateral; and
    - (e) such information concerning Collateral, Debtor and Debtor's business and affairs as Creditor may reasonably request including information respecting real property upon which the Collateral is to be affixed.
  - (10) Except with the consent of Creditor, not to:
    - (a) grant, create, assume or permit to exist any security interest, mortgage, pledge, charge, assignment, lien, lease or other security, whether fixed or floating, upon any of the Collateral other than the Security Interest and the Encumbrance;
    - (b) amalgamate or consolidate with any person;
    - (c) incorporate any subsidiary or affiliate corporation, whether wholly or partially owned by Debtor unless security agreements; in a form satisfactory to Creditor, are executed by such subsidiary or affiliate in favour of Creditor;
    - (d) permit any change to be made to the capital structure, management, ownership or business of Debtor which, in the opinion of Creditor, has or is reasonably likely to have a material adverse effect upon the position of Creditor under this Agreement.

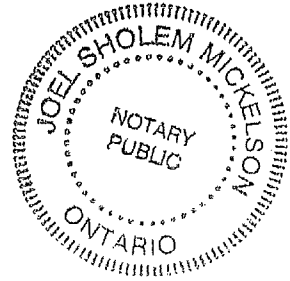
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This is Exhibit "21" referred to  
in the Affidavit of Wesley Roitman  
Sworn before me this 16<sup>th</sup> day of November, 2020



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9.2 If Debtor receives any such increase in or profits on Collateral (other than money) or payments or distributions, Debtor shall deliver the same promptly to Creditor to be held by Creditor as herein provided.

10. **DISPOSITION OF MONIES**

10.1 Subject to any applicable requirements of the Act, all monies collected or received by Creditor pursuant to or in exercise of any right it possesses with respect to Collateral shall be applied on account of Indebtedness in such manner as Creditor deems best or, at the option of Creditor, may be held unappropriated in a collateral account or released to Debtor, all without prejudice to the liability of Debtor or the rights of Creditor hereunder, and any surplus shall be accounted for as required by law, and in the event of a deficiency Debtor shall remain liable for such deficiency.

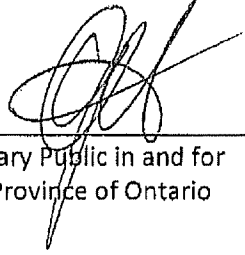
11. **EVENTS OF DEFAULT**

11.1 The occurrence of any of the following events or conditions shall constitute Default under this Agreement:

- (1) the nonpayment when due, whether by acceleration or otherwise, of any principal or interest or other monies forming part of Indebtedness or the failure of Debtor to observe or perform any obligation, covenant, term, provision or condition contained in this Agreement or any other agreement, deed, indenture or arrangement between Debtor and Creditor;
- (2) the death of or declaration of incompetence by a Court with respect to Debtor, if an individual;
- (3) the bankruptcy or insolvency of Debtor; the filing against Debtor of a petition in bankruptcy, the making of an assignment for the benefit of creditors by Debtor; the appointment of a receiver, a receiver-manager or trustee for Debtor or for any assets of Debtor or the institution by or against Debtor of any other type of insolvency proceeding under the Bankruptcy and Insolvency Act or otherwise;
- (4) the institution by or against Debtor of any formal or informal proceeding for the dissolution or liquidation of, settlement of claims or winding up of affairs of Debtor;
- (5) if any Encumbrance affecting Collateral or any part thereof becomes enforceable against Collateral;
- (6) if Debtor ceases or threatens to cease to carry on business or makes or agrees to make a bulk sale of assets or a transfer, sale or lease of all or substantially all Collateral without the prior written consent of Creditor and without complying with applicable laws or commits or threatens to commit an act of bankruptcy;
- (7) if Debtor changes its name without the prior written consent of Creditor (such consent not to be unreasonably withheld);
- (8) if any execution, sequestration or other process of any Court becomes enforceable against Debtor or if a distress or analogous process is levied upon the assets of Debtor or any part thereof;
- (9) if any certificate, statement, representation, warranty or audit report heretofore or hereafter furnished by or on behalf of Debtor pursuant to or in connection with this Agreement or otherwise (including, without limitation, the representations and warranties contained herein) or as an inducement to Creditor to extend any credit to or to enter into this or any other agreement with Debtor, proves to have been false in any respect at the time as of which the facts therein set forth were stated or certified, or proves to have omitted any substantial contingent or unliquidated liability or claim against Debtor; or if upon the date of execution of this Agreement, there shall have been any material adverse change in any of the facts disclosed by any such certificate, representation, statement,

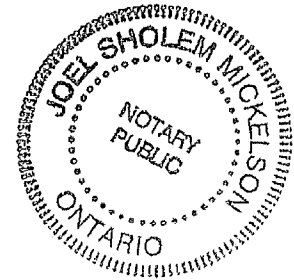
1502

This is Exhibit "22" referred to  
in the Affidavit of Wesley Roitman  
Sworn before me this 16<sup>th</sup> day of November, 2020



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A Notary Public in and for  
the Province of Ontario



warranty or audit report, which change has not been disclosed to Creditor at or prior to the time of such execution.

12. ACCELERATION

- 12.1 Creditor, in its sole discretion, may declare all or any part of Indebtedness (which is not by its terms payable on demand) to be immediately due and payable, without demand or notice of any kind, in the event of Default, or, if Creditor in good faith believes that the prospect of payment of all or any part of Indebtedness or performance of Debtor's obligations under this Agreement or any other agreement now or hereafter in effect between Debtor and Creditor is impaired.
- 12.2 The provisions of Section 12.1 are not intended in any way to affect any rights of Creditor with respect to Indebtedness which may now or hereafter be payable on demand.

13. REMEDIES

- 13.1 Creditor may take possession of, collect, demand, sue on, enforce and receive Collateral and give valid and binding receipts and discharges therefor and in respect thereof, and upon Default Creditor may appoint or re-appoint any person(s), whether an officer or officers or an employee or employees of Creditor or not, to be a receiver or receivers (a "Receiver", which term when used herein shall include a receiver and manager) of Collateral (including any interest, income or profits therefrom) and may remove any Receiver so appointed and appoint another in his stead. Any such Receiver shall, so far as concerns responsibility for his acts, be deemed the agent of Debtor and not Creditor, and Creditor shall not be in any way responsible for any misconduct, negligence, or nonfeasance on the part of any such Receiver, his servants, agents or employees.
- 13.2 Creditor shall have in addition to any other rights available to it, the right to provide in the instrument appointing the Receiver, all of the powers which can be given to a Receiver by the Court; provided however that unless otherwise specifically provided for in the instrument appointing a Receiver such Receiver shall have power to take possession of Collateral, to preserve Collateral or its value, to carry on or concur in carrying on all or any part of the business of Debtor and to sell, lease or otherwise dispose of or concur in selling, leasing or otherwise disposing of the Collateral and to give valid and binding receipts and discharges therefor and in respect thereof.
- 13.3 To facilitate the foregoing powers, any such Receiver may, to the exclusion of all others, including Debtor, enter upon, use and occupy all premises owned or occupied by Debtor wherein Collateral may be situated, maintain Collateral upon such premises, borrow money on a secured or unsecured basis and use Collateral directly in carrying on Debtor's business or as security for loans or advances to him or otherwise, as such Receiver shall, in his own discretion, determine. Except as may be otherwise directed by Creditor, all monies received from time to time by such Receiver in carrying out his appointment shall be received in trust for and paid over to Creditor. Every such Receiver may, in the discretion of Creditor, be vested with all or any of the rights and powers of Creditor.
- Any sale, lease or other disposition of Collateral hereunder may take place in such manner, at such time(s) and place(s), for such consideration and upon such terms and conditions as to credit or otherwise and as to upset or reserve bid or price, as Creditor or Receiver, as the case may be, and in particular and without limiting the foregoing any such sale, lease or other disposition of Collateral may take place whether or not Receiver or Creditor, as the case may be, has taken possession of Collateral and may be made by public auction, public tender or private contract with or without notice or advertising or any other formality all of which subject to the Act are waived by Debtor.
- 13.4 Debtor acknowledges that Creditor or any Receiver appointed by it may take possession of Collateral wherever it may be located and by any method permitted by law and Debtor agrees

KCP

This is Exhibit "23" referred to  
in the Affidavit of Wesley Roitman  
Sworn before me this 16<sup>th</sup> day of November, 2020



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A Notary Public in and for  
the Province of Ontario



## GUARANTEE

### RECITALS

#### WHEREAS:

- A. 3443 ZEN GARDEN LIMITED PARTNERSHIP (the "Borrower") has applied to ROMSPEN MORTGAGE LIMITED PARTNERSHIP ("RMLP") for a loan of up to ONE HUNDRED TWENTY FIVE MILLION US DOLLARS (US\$125,000,000.00) (the "Principal Sum") with interest thereon ("Interest") as defined and provided for and on the terms, covenants, conditions and provisos contained in that certain Loan Agreement between RMLP and the Borrower dated the 27 day of April, 2018 as it may be amended from time to time (collectively the "Loan Agreement");
- B. The Loan Agreement and any other documents or securities now held or hereafter held by RMLP or Romspen Investment Corporation (collectively, RMLP and Romspen Investment Corporation are referred to herein as the "Lender"), in respect of the payment of the Principal Sum and Interest thereon and all other monies ("Other Monies") secured, payable, due or owing or which may become secured, due, payable or owing thereunder (said Principal Sum, Interest and Other Monies hereinafter sometimes collectively referred to as "Moneys") are hereinafter sometimes collectively referred to as the "Security", the "Securities" or the "Security Documents";
- C. The Guarantor (as hereinafter defined) has agreed to execute these presents in consideration of the Lender agreeing to loan the Principal Sum to the Borrower.

NOW THEREFORE WITNESSETH that in consideration of the Lender agreeing to advance monies to the Borrower, and in consideration of the sum of \$2.00 paid by the Lender to the undersigned, and other good and valuable consideration, (the receipt and sufficiency whereof is hereby acknowledged by LOT 11 LIMITED PARTNERSHIP, by its general partner LOT 11 GP LTD. and LOT 11 GP LTD. in its own capacity (collectively, the "Guarantor"), the Guarantor covenants, promises and agrees in favour of and with the Lender that:

#### 1. OBLIGATIONS OF GUARANTOR

##### 1.1 Unconditional Guarantee

The Guarantor unconditionally and irrevocably guarantees to the Lender:

- (1) the due and punctual payment of all Moneys when the same become due, owing or payable; and
- (2) the due performance and observance of all covenants, obligations, conditions, stipulations and provisos of the Borrower and every guarantor or other person (other than the Lender) contained in the Security Documents.

##### 1.2 Continuing and Absolute

- (1) The obligations of the Guarantor hereunder shall be continuing, binding and absolute obligations and shall be direct, unconditional, irrevocable and independent of all past, present or future obligations of the Borrower to the Lender and a fresh cause of action shall be deemed to arise in respect of each default hereunder or under the Security Documents or any one or more of them, and a separate action or actions may be brought or enforced against the Guarantor whether action is brought against the Borrower or whether the Borrower be joined in any such action or actions and without the necessity of joining or proceeding against or exhausting any remedy against the Borrower or any other person or one or more Securities or otherwise howsoever held by the Lender in respect of the Moneys or the obligations of the Guarantor hereunder or otherwise howsoever;
- (2) As between the Lender and the Guarantor, the Guarantor is and shall continue to be liable hereunder and under all the covenants (other than the Lender's) contained in the Security Documents notwithstanding the bankruptcy, insolvency or going into liquidation of the Borrower or any other party to the Security Documents, voluntarily or otherwise, and notwithstanding any transaction or dealing whatsoever which may take place between the

KSR

the Lender shall not affect the liability of the Guarantor (or any of them, if more than one), not so released, which liability shall remain unimpaired and still in full force and effect as if the Guarantor(s) or any other person so released had not been a Guarantor of the Moneys or obligations of the Borrower or any part thereof, under any one or more of the Security Documents.

**3.4 Action on Default**

If default shall occur under any one or more of the Security Documents, the Lender shall in its sole discretion be at liberty to proceed against the Guarantor without any demand for payment being made by the Lender upon the Guarantor for payment, or payment of all or any portion of the Moneys owing or payable by virtue of this Guarantee or any one of the Security Documents and whether default or notice of default shall have occurred or shall have been given or not as to the Moneys or any portion thereof or under any one or more of the Security Documents and the Guarantor hereby waives any and all rights that it may have to any such notice or demand.

**3.5 Not Affected by Change**

This Guarantee and the obligations and liabilities of the Guarantor hereunder shall not be affected by the death or loss or diminution of capacity of the Guarantor or by any change in the name of the Borrower or, if applicable, in the membership of the Borrower's firm through the death or retirement of any one or more partners or the introduction of one or more partners, or otherwise howsoever, or by the acquisition of the Borrower's business by any person, or by any change whatsoever in the objects, capital structure or constitution of the Borrower, or by amalgamation, merger or otherwise howsoever.

**3.6 Lien**

In addition to all liens upon and right of set off against the monies, securities or other property of the Guarantor given to the Lender by law, the Lender shall have a lien upon and a right of set off against all monies, securities and other property of the Guarantor now or hereafter in the possession of the Lender; and every such lien or right of set off may be exercised without demand. No lien or right of set off shall be deemed to have been waived by any act or conduct on the part of the Lender or by any neglect to exercise such right of set off or to enforce such lien or by any delay in so doing, and every right of set off shall continue in full force and effect until such right of set off or lien is specifically waived or released by an instrument in writing executed by the Lender upon final satisfaction of the Moneys.

**3.7 No Obligation Re Insurance**

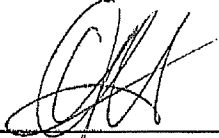
Notwithstanding anything set out in any of the Security Documents, the Lender shall not in any way be responsible for either the holding or the supervision of any insurance policies required to be maintained under any covenants to insure contained therein, or the verification of the compliance with respect to any such covenants to insure and that the Lender's permissive power to place insurance on the assets mortgaged to it is in its sole and absolute discretion. The Guarantor acknowledges that the Lender's action or lack of action in such holding, supervision, verification or in its permissive powers shall in no way diminish the Guarantor's liability hereunder.

**3.8 Accounts**

Any accounts settled or stated by or between the Lender and the Borrower or admitted by or on behalf of the Borrower may be adduced by the Lender and shall in that case be accepted by the Guarantor as conclusive evidence that the balance or amount thereof appearing is due by the Borrower to the Lender and if no account has been so settled, any account stated by the Lender shall be accepted by the Guarantor as conclusive evidence of the amount which at the date of the account so stated is due by the Borrower to the Lender or remains unpaid by the Borrower to the Lender.

**3.9 Costs and Expenses**

This is Exhibit "24" referred to  
in the Affidavit of Wesley Roitman  
Sworn before me this 16<sup>th</sup> day of November, 2020



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A Notary Public in and for  
the Province of Ontario





# Property Tax Search

Date: February 13, 2020

Account: 10274073

The information displayed below is the most recent information for the tax year indicated at the time of this request.

Property Address: 1050 HAYTER ROAD NW EDMONTON AB T6S 1A2

Legal Description: SW 17-53-23-4

Assessed Parcel Description:

Mortgage Company Billed: No

Monthly Payment Plan:

Valuation Group: INDUSTRIAL

Community Revitalization Levy Area:

Owner Name:

Owners Address:

Remarks:

Assessment Year: 2020

Assessment: 6,270,000

Year Built: 1953

Land Use Description

Tax Class

Taxable Status

251 Small warehouse

COMMERCIAL

100 %

251: (100%): FULLY TAXABLE JAN-2020 TO DEC-2020

Property Tax		Account Status	
<b>Prior Year:</b>	<b>2019</b>		
Taxes:	\$117,758.40	Tax Arrears:	\$351,492.85
Annual Local Improvements:	\$31,566.87	Penalty:	\$8,787.32
Total Prior Year Taxes:	\$149,325.27	Arrears Sub-Total:	\$360,280.17
<b>Tax Year:</b>	<b>2020</b>	Current Taxes:	\$ .00
Taxes:	\$ .00	Penalty:	\$ .00
Annual Local Improvements:**	\$ .00	Current Sub-Total:	\$ .00
Total Current Year Taxes:	\$ .00	Other Charges:	\$ .00
		Penalty:	\$ .00
		Other Charges Sub-Total:	\$ .00
		<b>Total Balance Owing on February 13, 2020</b>	<b>\$360,280.17</b>

Disclaimer: The balance on this report is conditional upon all payments clearing the City's and the payer's bank. In the event that any such payment is rejected or is not completed, or additional charges are incurred in the clearing of a payment, the amount of the payment and any additional charges incurred will be added to the account without further notice. The City of Edmonton accepts no liability from the reliance of any party on the contents of this report. Individuals who require certification of the current amount of taxes imposed, or the total amount of taxes owing should request a Tax Certificate from the City of Edmonton. (Errors and Omissions excepted).

\*\* For information on newly constructed or proposed local improvements that may affect the property, contact 311 (780-442-5311 if outside Edmonton).





# Property Tax Search

Date: February 13, 2020

Account: 1340637

The information displayed below is the most recent information for the tax year indicated at the time of this request.

Property Address: 550 HAYTER ROAD NW EDMONTON AB

Legal Description: Plan: 8323217 Lot: 3

Assessed Parcel Description:

Mortgage Company Billed: No Monthly Payment Plan:

Valuation Group: SPECIAL PURPOSE

Community Revitalization Levy Area:

Owner Name:

Owners Address:

Remarks:

Assessment Year: 2020

Assessment: 2,997,500

Year Built: 1981

Land Use Description

Tax Class

Taxable Status

350 Manufacturing plant

COMMERCIAL

100 %

350: (100%): FULLY TAXABLE JAN-2020 TO DEC-2020

Property Tax		Account Status	
<b>Prior Year: 2019</b>			
Taxes:	\$.00	Tax Arrears:	\$24,680.59
Annual Local Improvements:	\$21,461.38	Penalty:	\$617.02
Total Prior Year Taxes:	\$21,461.38	Arrears Sub-Total:	\$25,297.61
<b>Tax Year: 2020</b>			
Taxes:	\$.00	Current Taxes:	\$.00
Annual Local Improvements:**	\$.00	Penalty:	\$.00
Total Current Year Taxes:	\$.00	Current Sub-Total:	\$.00
		Other Charges:	\$.00
		Penalty:	\$.00
		Other Charges Sub-Total:	\$.00
		<b>Total Balance Owning on February 13, 2020</b>	<b>\$25,297.61</b>

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\*\* For information on newly constructed or proposed local improvements that may affect the property, contact 311 (780-442-5311 if outside Edmonton).



# Property Tax Search

Date: February 13, 2020

Account: 10150274

The information displayed below is the most recent information for the tax year indicated at the time of this request.

Property Address: 590 HAYTER ROAD NW EDMONTON AB

Legal Description: Plan: 8323217 Lot: 2

Assessed Parcel Description:

Mortgage Company Billed: No Monthly Payment Plan:

Valuation Group: LAND

Community Revitalization Levy Area:

Owner Name:

Owners Address:

Remarks:

Assessment Year: 2020 Assessment: 519,500 Year Built:

<b>Land Use Description</b>	<b>Tax Class</b>	<b>Taxable Status</b>
900 Undeveloped non-residential land	COMMERCIAL	900: (100%); FULLY TAXABLE JAN-2020 TO DEC-2020

Property Tax		Account Status	
<b>Prior Year:</b>	<b>2019</b>		
Taxes:	<b>\$10,378.55</b>	Tax Arrears:	<b>\$13,219.91</b>
Annual Local Improvements:	<b>\$646.49</b>	Penalty:	<b>\$330.50</b>
Total Prior Year Taxes:	<b>\$11,025.04</b>	Arrears Sub-Total:	<b>\$13,550.41</b>
<b>Tax Year:</b>	<b>2020</b>	Current Taxes:	<b>\$ .00</b>
Taxes:	<b>\$ .00</b>	Penalty:	<b>\$ .00</b>
Annual Local Improvements:**	<b>\$ .00</b>	Current Sub-Total:	<b>\$ .00</b>
Total Current Year Taxes:	<b>\$ .00</b>	Other Charges:	<b>\$ .00</b>
		Penalty:	<b>\$ .00</b>
		Other Charges Sub-Total:	<b>\$ .00</b>
		<b>Total Balance Owing on February 13, 2020</b>	<b>\$13,550.41</b>

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\*\* For information on newly constructed or proposed local improvements that may affect the property, contact 311 (780-442-5311 if outside Edmonton).

Date: February 13, 2020

Account: 10150275

The information displayed below is the most recent information for the tax year indicated at the time of this request.

Property Address: 630 HAYTER ROAD NW EDMONTON AB

Legal Description: NE 17-53-23-4

Assessed Parcel Description:

Mortgage Company Billed: No

Monthly Payment Plan:

Valuation Group: LAND

Community Revitalization Levy Area:

Owner Name:

Owners Address:

Remarks:

Assessment Year: 2020

Assessment: 1,071,000

Year Built:

Land Use Description

Tax Class

Taxable Status

900 Undeveloped non-residential land

COMMERCIAL

100 %

900: (100%): FULLY TAXABLE JAN-2020 TO DEC-2020

Property Tax		Account Status	
<b>Prior Year:</b>	<b>2019</b>		
Taxes:	<b>\$19,249.48</b>	Tax Arrears:	<b>\$38,835.67</b>
Annual Local Improvements:	<b>\$12,896.99</b>	Penalty:	<b>\$970.90</b>
Total Prior Year Taxes:	<b>\$32,146.47</b>	Arrears Sub-Total:	<b>\$39,806.57</b>
<b>Tax Year:</b>	<b>2020</b>	Current Taxes:	<b>\$ .00</b>
Taxes:	<b>\$ .00</b>	Penalty:	<b>\$ .00</b>
Annual Local Improvements:**	<b>\$ .00</b>	Current Sub-Total:	<b>\$ .00</b>
Total Current Year Taxes:	<b>\$ .00</b>	Other Charges:	<b>\$ .00</b>
		Penalty:	<b>\$ .00</b>
		Other Charges Sub-Total:	<b>\$ .00</b>
		<b>Total Balance Owing on February 13, 2020</b>	<b>\$39,806.57</b>

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\*\* For information on newly constructed or proposed local improvements that may affect the property, contact 311 (780-442-5311 if outside Edmonton).



# Property Tax Search

Date: February 13, 2020

Account: 10274072

The information displayed below is the most recent information for the tax year indicated at the time of this request.

Property Address: 12225 17 STREET NW EDMONTON AB

Legal Description: NW 17-53-23-4

Assessed Parcel Description:

Mortgage Company Billed: No Monthly Payment Plan:

Valuation Group: LAND

Community Revitalization Levy Area:

Owner Name:

Owners Address:

Remarks:

Assessment Year: 2020 Assessment: 4,021,000 Year Built:

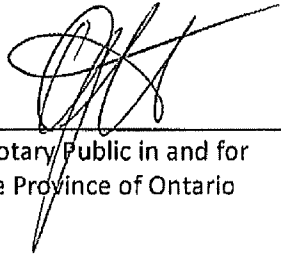
<b>Land Use Description</b>	<b>Tax Class</b>	<b>Taxable Status</b>
900 Undeveloped non-residential land	COMMERCIAL	100 % 900: (100%): FULLY TAXABLE JAN-2020 TO DEC-2020

Property Tax		Account Status	
<b>Prior Year: 2019</b>			
Taxes:	\$88,698.44	Tax Arrears:	\$358,794.49
Annual Local Improvements:	\$67,758.46	Penalty:	\$8,969.86
Total Prior Year Taxes:	\$156,456.90	Arrears Sub-Total:	\$367,764.35
<b>Tax Year: 2020</b>			
Taxes:	\$0.00	Current Taxes:	\$0.00
Annual Local Improvements:**	\$0.00	Penalty:	\$0.00
Total Current Year Taxes:	\$0.00	Current Sub-Total:	\$0.00
		Other Charges:	\$0.00
		Penalty:	\$0.00
		Other Charges Sub-Total:	\$0.00
		<b>Total Balance Owing on February 13, 2020</b>	<b>\$367,764.35</b>

Disclaimer: The balance on this report is conditional upon all payments clearing the City's and the payer's bank. In the event that any such payment is rejected or is not completed, or additional charges are incurred in the clearing of a payment, the amount of the payment and any additional charges incurred will be added to the account without further notice. The City of Edmonton accepts no liability from the reliance of any party on the contents of this report. Individuals who require certification of the current amount of taxes imposed, or the total amount of taxes owing should request a Tax Certificate from the City of Edmonton. (Errors and Omissions excepted).

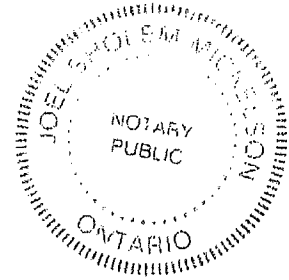
\*\* For information on newly constructed or proposed local improvements that may affect the property, contact 311 (780-442-5311 if outside Edmonton).

This is Exhibit "25" referred to  
in the Affidavit of Wesley Roitman  
Sworn before me this 16<sup>th</sup> day of November, 2020



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A Notary Public in and for  
the Province of Ontario





# Property Tax Search

Date: November 10, 2020

Account: 1340637

The information displayed below is the most recent information for the tax year indicated at the time of this request.

Property Address: 550 HAYTER ROAD NW EDMONTON AB

Legal Description: Plan: 8323217 Lot: 3

Assessed Parcel Description:

Mortgage Company Billed: No

Monthly Payment Plan:

Valuation Group: SPECIAL PURPOSE

Community Revitalization Levy Area:

Owner Name:

Owners Address:

Remarks:

Assessment Year: 2020

Assessment: 2,997,500

Year Built: 1981

Land Use Description

Tax Class

Taxable Status

350 Manufacturing plant

COMMERCIAL

100 %

350: (100%): FULLY TAXABLE JAN-2020 TO DEC-2020

Property Tax		Account Status	
<b>Prior Year:</b>	<b>2019</b>		
Taxes:	<b>\$ .00</b>	Tax Arrears:	<b>\$24,680.59</b>
Annual Local Improvements:	<b>\$21,461.38</b>	Penalty:	<b>\$2,776.59</b>
Total Prior Year Taxes:	<b>\$21,461.38</b>	Arrears Sub-Total:	<b>\$27,457.18</b>
		Current Taxes:	<b>\$88,058.02</b>
<b>Tax Year:</b>	<b>2020</b>	Penalty:	<b>\$8,805.80</b>
Taxes:	<b>\$66,596.64</b>	Current Sub-Total:	<b>\$96,863.82</b>
Annual Local Improvements:**	<b>\$21,461.38</b>	Other Charges:	<b>\$ .00</b>
Total Current Year Taxes:	<b>\$88,058.02</b>	Penalty:	<b>\$ .00</b>
		Other Charges Sub-Total:	<b>\$ .00</b>
		<b>Total Balance Owning on November 10, 2020</b>	<b>\$124,321.00</b>

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\*\* For information on newly constructed or proposed local improvements that may affect the property, contact 311 (780-442-5311 if outside Edmonton).



# Property Tax Search

Date: November 10, 2020

Account: 10150274

The information displayed below is the most recent information for the tax year indicated at the time of this request.

Property Address: 590 HAYTER ROAD NW EDMONTON AB

Legal Description: Plan: 8323217 Lot: 2

Assessed Parcel Description:

Mortgage Company Billed: No Monthly Payment Plan:

Valuation Group: LAND

Community Revitalization Levy Area:

Owner Name:

Owners Address:

Remarks:

Assessment Year: 2020 Assessment: 519,500

Year Built:

Land Use Description

Tax Class

Taxable Status

900 Undeveloped non-residential land

COMMERCIAL

100 %

900: (100%): FULLY TAXABLE JAN-2020 TO DEC-2020

Property Tax		Account Status	
<b>Prior Year:</b>	<b>2019</b>		
Taxes:	\$10,378.55	Tax Arrears:	\$13,219.91
Annual Local Improvements:	\$646.49	Penalty:	\$1,487.25
Total Prior Year Taxes:	\$11,025.04	Arrears Sub-Total:	\$14,707.16
<b>Tax Year:</b>	<b>2020</b>	Current Taxes:	\$12,188.42
Taxes:	\$11,541.93	Penalty:	\$1,218.84
Annual Local Improvements:**	\$646.49	Current Sub-Total:	\$13,407.26
Total Current Year Taxes:	\$12,188.42	Other Charges:	\$100.00
		Penalty:	\$5.00
		Other Charges Sub-Total:	\$105.00
		<b>Total Balance Owning on November 10, 2020</b>	<b>\$28,219.42</b>

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\*\* For information on newly constructed or proposed local improvements that may affect the property, contact 311 (780-442-5311 if outside Edmonton).

Date: November 10, 2020

Account: 10274072

The information displayed below is the most recent information for the tax year indicated at the time of this request.

Property Address: 12225 17 STREET NW EDMONTON AB

Legal Description: NW 17-53-23-4

Assessed Parcel Description:

Mortgage Company Billed: No

Monthly Payment Plan:

Valuation Group: LAND

Community Revitalization Levy Area:

Owner Name:

Owners Address:

Remarks:

Assessment Year: 2020

Assessment: 4,021,000

Year Built:

Land Use Description

Tax Class

Taxable Status

900 Undeveloped non-residential land

COMMERCIAL

100 %

900: (100%); FULLY TAXABLE JAN-2020 TO DEC-2020

Property Tax		Account Status	
<b>Prior Year:</b>	<b>2019</b>		
Taxes:	<b>\$88,698.44</b>	Tax Arrears:	<b>\$358,794.49</b>
Annual Local Improvements:	<b>\$67,758.46</b>	Penalty:	<b>\$40,364.37</b>
Total Prior Year Taxes:	<b>\$156,456.90</b>	Arrears Sub-Total:	<b>\$399,158.86</b>
<b>Tax Year:</b>	<b>2020</b>	Current Taxes:	<b>\$157,094.61</b>
Taxes:	<b>\$89,336.15</b>	Penalty:	<b>\$15,709.46</b>
Annual Local Improvements:**	<b>\$67,758.46</b>	Current Sub-Total:	<b>\$172,804.07</b>
Total Current Year Taxes:	<b>\$157,094.61</b>	Other Charges:	<b>\$100.00</b>
		Penalty:	<b>\$5.00</b>
		Other Charges Sub-Total:	<b>\$105.00</b>
		<b>Total Balance Owing on November 10, 2020</b>	<b>\$572,067.93</b>

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\*\* For information on newly constructed or proposed local improvements that may affect the property, contact 311 (780-442-5311 if outside Edmonton).





# Property Tax Search

Date: November 10, 2020

Account: 10274073

The information displayed below is the most recent information for the tax year indicated at the time of this request.

Property Address: 1050 HAYTER ROAD NW EDMONTON AB T6S 1A2

Legal Description: SW 17-53-23-4

Assessed Parcel Description:

Mortgage Company Billed: No

Monthly Payment Plan:

Valuation Group: INDUSTRIAL

Community Revitalization Levy Area:

Owner Name:

Owners Address:

Remarks:

Assessment Year: 2020

Assessment: 6,270,000

Year Built: 1953

Land Use Description

Tax Class

Taxable Status

251 Small warehouse

COMMERCIAL

100 %

251: (100%): FULLY TAXABLE JAN-2020 TO DEC-2020

Property Tax		Account Status	
<b>Prior Year:</b>	<b>2019</b>		
Taxes:	\$117,758.40	Tax Arrears:	\$351,492.85
Annual Local Improvements:	\$31,566.87	Penalty:	\$39,542.94
Total Prior Year Taxes:	\$149,325.27	Arrears Sub-Total:	\$391,035.79
<b>Tax Year:</b>	<b>2020</b>	Current Taxes:	\$170,869.95
Taxes:	\$139,303.08	Penalty:	\$17,087.00
Annual Local Improvements:**	\$31,566.87	Current Sub-Total:	\$187,956.95
Total Current Year Taxes:	\$170,869.95	Other Charges:	\$100.00
		Penalty:	\$5.00
		Other Charges Sub-Total:	\$105.00
		<b>Total Balance Owing on November 10, 2020</b>	<b>\$579,097.74</b>

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\*\* For information on newly constructed or proposed local improvements that may affect the property, contact 311 (780-442-5311 if outside Edmonton).



# Property Tax Search

Date: November 10, 2020

Account: 10150275

The information displayed below is the most recent information for the tax year indicated at the time of this request.

Property Address: 630 HAYTER ROAD NW EDMONTON AB

Legal Description: NE 17-53-23-4

Assessed Parcel Description:

Mortgage Company Billed: No Monthly Payment Plan:

Valuation Group: LAND

Community Revitalization Levy Area:

Owner Name:

Owners Address:

Remarks:

Assessment Year: 2020 Assessment: 1,071,000 Year Built:

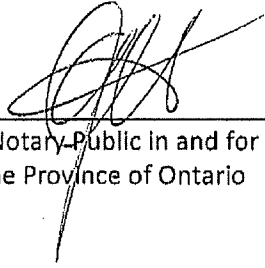
<b>Land Use Description</b>	<b>Tax Class</b>	<b>Taxable Status</b>
900 Undeveloped non-residential land	COMMERCIAL	100 % 900: (100%): FULLY TAXABLE JAN-2020 TO DEC-2020

Property Tax		Account Status	
<b>Prior Year:</b>	<b>2019</b>		
Taxes:	\$19,249.48	Tax Arrears:	\$38,835.67
Annual Local Improvements:	\$12,896.99	Penalty:	\$4,369.05
Total Prior Year Taxes:	\$32,146.47	Arrears Sub-Total:	\$43,204.72
<b>Tax Year:</b>	<b>2020</b>	Current Taxes:	\$36,691.81
Taxes:	\$23,794.82	Penalty:	\$3,669.18
Annual Local Improvements:**	\$12,896.99	Current Sub-Total:	\$40,360.99
Total Current Year Taxes:	\$36,691.81	Other Charges:	\$100.00
		Penalty:	\$5.00
		Other Charges Sub-Total:	\$105.00
		<b>Total Balance Owning on November 10, 2020</b>	<b>\$83,670.71</b>

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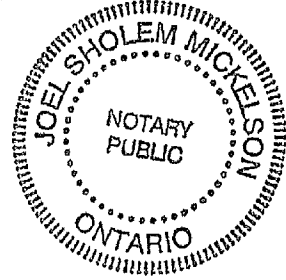
\*\* For information on newly constructed or proposed local improvements that may affect the property, contact 311 (780-442-5311 if outside Edmonton).

This is Exhibit "26" referred to  
in the Affidavit of Wesley Roitman  
Sworn before me this 16<sup>th</sup> day of November, 2020



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A Notary Public in and for  
the Province of Ontario



IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE WESTERN DISTRICT OF TEXAS  
AUSTIN DIVISION

IN RE:

3443 ZEN GARDEN, L.P.

DEBTOR.

§  
§  
§  
§  
§

CASE NO. 1:20-10410-HCM

Chapter 11

CHAPTER 11 TRUSTEE'S LIQUIDATING PLAN

WICK PHILLIPS GOULD & MARTIN, LLP

*/s/ Jason M. Rudd*

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COUNSEL FOR GREGORY S. MILLIGAN,  
CH. 11 TRUSTEE FOR 3443 ZEN GARDEN, L.P.

Dated: October 19, 2020

## SUMMARY OF PLAN

The Chapter 11 Trustee's Plan provides for the settlement of all the Debtor's, the Reorganized Debtor's, the Chapter 11 Trustee's, the bankruptcy Estate's and any of their respective successors' and assigns' potential claims and causes of action against the Debtor's largest creditor, Romspen Mortgage Limited Partnership, in exchange for:

1. \$600,000.00 to provide a recovery to non-priority general unsecured creditors with allowed claims (the "***Settlement Carve-Out***") through a creditor trust;
2. Romspen's subordination of its \$56 million unsecured deficiency claim to prevent dilution of and to maximize the recovery to general unsecured creditors;
3. Romspen's obligations to obtain the subordination of the Panache deficiency and other General Unsecured Claims to prevent dilution of and to maximize the recovery to Non-Insider general unsecured creditors; and
4. Romspen's agreement to the Chapter 11 Trustee's continued use of cash collateral on hand to fund the Estate's, the Plan's, and the creditor trust's administrative expenses, provided that any excess funds that remain on hand for unused surplus will be returned to Romspen upon the termination of the creditor trust.

The Plan places the Settlement Carve-Out, Romspen's remaining cash collateral and all the Debtor's remaining assets into a creditor trust which will liquidate the assets and distribute the proceeds to holders of allowed claims in the priority governed by the Bankruptcy Code, subject to the voluntary subordinations set forth in the Plan. The creditor trust will distribute the Settlement Carve-Out to holders of allowed non-priority unsecured claims. For the settlement consideration, the Plan provides Romspen and its affiliates a full release of liability, including a release on behalf of the Debtor's creditors, parties in interest and all third parties that do not opt out.

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## TABLE OF CONTENTS

<b>ARTICLE I. DEFINITIONS AND INTERPRETATION .....</b>	<b>1</b>
1.1 Definitions .....	1
1.2 Rules of Interpretation and Construction .....	9
<b>ARTICLE II. TREATMENT OF UNCLASSIFIED CLAIMS .....</b>	<b>9</b>
2.1 Administrative Expense Claims.....	9
2.2 Fee Claims.....	10
2.3 Chapter 11 Trustee Fees and Expenses.....	11
2.4 U.S. Trustee Fees.....	11
2.5 Priority Tax Claims.....	11
<b>ARTICLE III. CLASSIFICATION OF CLAIMS AND EQUITY INTERESTS.....</b>	<b>12</b>
<b>ARTICLE IV. TREATMENT OF CLAIMS AND EQUITY INTERESTS.....</b>	<b>12</b>
4.1 Class 1 – Priority Non-Tax Claims.....	12
4.2 Class 2 – Lender’s Secured Claim .....	12
4.3 Class 3 – M&M Plaintiff Secured Claims. ....	13
4.4 Class 4 – Panache Secured Claims. ....	13
4.5 Class 5 – Other Secured Claims.....	13
4.6 Class 6 – General Unsecured Claims.....	13
4.7 Class 7 – Lender’s Deficiency and Unsecured Claims .....	14
4.8 Class 8 – Panache Deficiency and Unsecured Claims .....	14
4.9 Class 9 – Subordinated Claims .....	14
4.10 Class 10 – Equity Interests.....	14
<b>ARTICLE V. IMPAIRMENT; ACCEPTANCE OR REJECTION OF THE PLAN; EFFECT OF REJECTION BY ONE OR MORE CLASSES .....</b>	<b>15</b>
5.1 Classes Entitled to Vote.....	15
5.2 Class Acceptance Requirement.....	15
5.3 Cramdown. ....	15
5.4 Elimination of Classes. ....	15
<b>ARTICLE VI. MEANS OF IMPLEMENTATION.....</b>	<b>15</b>
6.1 The Lender Settlement.....	15
6.2 The Creditor Trust. ....	16
6.3 General Settlement of Claims. ....	22
6.4 Issuance of Creditor Trust Interests. ....	22
6.5 Section 1145 Exemption.....	22
6.6 Restructuring Transactions. ....	23
6.7 Corporate Action. ....	23
6.8 Vesting of Assets. ....	23
6.9 Preservation of Rights of Action; Settlement of Litigation Claims. ....	23
6.10 Effectuating Documents; Further Transactions. ....	24
6.11 Exemption from Certain Transfer Taxes. ....	24
6.12 Management and Winddown of the Reorganized Debtor.....	24
6.13 Cooperation with the Creditor Trustee. ....	24
<b>ARTICLE VII. DISTRIBUTIONS.....</b>	<b>25</b>
7.1 Date of Distributions.....	25
7.2 Sources of Cash for Plan Distributions.....	25
7.3 Creditor Trustee.....	25
7.4 Record Date for Distributions.....	25
7.5 Recipients of Distributions. ....	26
7.6 Delivery of Distributions; Unclaimed Property. ....	26
7.7 Means of Payment. ....	26
7.8 Setoffs and Recoupment. ....	26

7.9	Distributions After Effective Date .....	26
7.10	Withholding and Reporting Requirements .....	27
7.11	No Postpetition Interest .....	27
7.12	Time Bar to Payments.....	27
7.13	De Minimis Distributions. ....	27
<b>ARTICLE VIII. PROCEDURES FOR RESOLVING AND TREATING DISPUTED CLAIMS.....</b>		<b>28</b>
8.1	Objections to Claims.....	28
8.2	Post-Sale Closing Date Reporting on Payments on Account of Claims. ....	28
8.3	No Distributions Pending Allowance. ....	28
8.4	Distributions After Allowance.....	28
8.5	Disallowance of Late Filed Claims.....	29
<b>ARTICLE IX. TREATMENT OF EXECUTORY CONTRACTS AND UNEXPIRED LEASES .....</b>		<b>29</b>
9.1	Rejection of Contracts and Leases.....	29
9.2	Inclusiveness.....	29
9.3	Claims Based on Rejection of Executory Contracts or Unexpired Leases. ....	29
9.4	No Effect on Insurance .....	29
<b>ARTICLE X. CONDITIONS PRECEDENT TO CONFIRMATION AND EFFECTIVENESS OF THE PLAN.....</b>		<b>30</b>
10.1	Conditions to Confirmation of Plan.....	30
10.2	Conditions to Effective Date of Plan. ....	30
10.3	Waiver of Conditions Precedent. ....	31
10.4	Effect of Failure of Conditions. ....	31
10.5	Reservation of Rights.....	31
<b>ARTICLE XI. EFFECT OF CONSUMMATION.....</b>		<b>31</b>
11.1	Vesting of Assets. ....	31
11.2	Discharge of Claims and Interests in the Debtor. ....	31
11.3	Injunction against Interference with Plan. ....	32
11.4	Exculpation.....	32
11.5	Debtor and Estate Releases.....	32
11.6	Releases by Holders of Claims and Interests .....	33
11.7	Injunction and Stay.....	34
11.8	Preservation of Claims.....	35
11.9	Compromise of Controversies. ....	36
<b>ARTICLE XII. RETENTION OF JURISDICTION.....</b>		<b>36</b>
<b>ARTICLE XIII. MISCELLANEOUS.....</b>		<b>37</b>
13.1	Payment of Statutory Fees. ....	37
13.2	Filing of Additional Documents. ....	37
13.3	Schedules, Exhibits and Plan Supplement Incorporated .....	37
13.4	Amendment or Modification of the Plan. ....	37
13.5	Inconsistency. ....	38
13.6	Exemption from Certain Transfer Taxes. ....	38
13.7	Expedited Tax Determination .....	38
13.8	Binding Effect.....	38
13.9	Severability.....	39
13.10	No Admissions.....	39
13.11	No Payment of Attorneys' Fees.....	39
13.12	Notices.....	39
13.13	Governing Law. ....	40

Gregory S. Milligan, Chapter 11 Trustee for the Bankruptcy Estate of 3443 Zen Garden, L.P., hereby proposes the following Liquidating Chapter 11 Plan pursuant to section 1121(a) of the Bankruptcy Code.

## ARTICLE I. DEFINITIONS AND INTERPRETATION

### 1.1 Definitions

For the purpose of this Plan, the following terms shall have the respective meanings set forth below:

**Action** means any claim, action, cause of action, demand, lawsuit, arbitration, notice of violation, proceeding, litigation, citation, or summons, whether civil, criminal, administrative, regulatory, or otherwise, whether at law or in equity.

**Administrative Expense Claim** means any right to payment constituting a cost or expense of administration of the Chapter 11 Case that is Allowed pursuant to sections 503(b) or 507 of the Bankruptcy Code, including, without limitation, (i) any fees or charges assessed against the Estate under 28 U.S.C. § 1930, (ii) Fee Claims, (iii) any “gap period” claims under Bankruptcy Code section 502(f), and (iv) other Administrative Expense Claims as may be ordered and Allowed by the Bankruptcy Court.

**Allowed** means, with reference to any Claim or Equity Interest, any Claim or Equity Interest (i) for which a proof of claim or proof of interest has been filed and as to which no objection has been interposed on or before the Objection Deadline or such other applicable period of limitation fixed by this Plan, the Bankruptcy Code, the Bankruptcy Rules, or the Bankruptcy Court, (ii) which appears in the Debtor’s Schedules and is not listed as contingent, liquidated or disputed, (iii) which is allowed by Final Order of the Bankruptcy Court, or (iv) which is expressly allowed under this Plan.

**Avoidance Actions** means Actions arising under sections 502, 510, 541, 542, 543, 544, 545, 547 through and including 553 of the Bankruptcy Code, or under similar or related state or federal statutes and common law, including fraudulent transfer laws, whether or not litigation is commenced to prosecute such Actions, and which may be recovered pursuant to section 550 of the Bankruptcy Code.

**Ballot** means the ballot provided to holders of Claims to indicate their votes to accept or reject the Plan.

**Bankruptcy Code** means title 11 of the United States Code, as amended from time to time.

**Bankruptcy Court** means the United States Bankruptcy Court for the Western District of Texas, Austin Division, or any other court of the United States having jurisdiction over the Chapter 11 Case.



**Bankruptcy Rules** means the Federal Rules of Bankruptcy Procedure as promulgated by the United States Supreme Court under section 2075 of title 28 of the United States Code, as amended and in effect from time to time.

**Bar Date** means the last date to file proofs of claim against the Debtor, which was or will be (i) August 10, 2020 for all creditors except Governmental Units and (ii) October 5, 2020 for Governmental Units.

**Business Day** means any day other than a Saturday, Sunday, or "legal holiday" as defined in Bankruptcy Rule 9006(a).

**Cash** means legal tender of the United States of America.

**Cash Collateral** means Cash in the Estate's possession on the Effective Date on which the Lender has a Lien, including amounts the Lender funded under the Postpetition Financing Order.

**Causes of Action** is defined in Section 11.8 hereof.

**Chapter 11 Case** means the above-captioned chapter 11 bankruptcy case.

**Chapter 11 Trustee** means Gregory S. Milligan, Chapter 11 Trustee of the Estate.

**Claim** means a claim against the Debtor or the Estate within the meaning of section 101(5) of the Bankruptcy Code.

**Class** means any group of Claims or Equity Interests classified by this Plan pursuant to sections 1122 and 1123(a)(1) of the Bankruptcy Code.

**Class A Interests** is defined in Section 6.2(g) hereof.

**Class B Interests** is defined in Section 6.2(g) hereof.

**Class C Interests** is defined in Section 6.2(g) hereof.

**Collateral** means any property or interest in property of the Estate subject to a Lien, charge, or other encumbrance to secure the payment or performance of a Claim, which Lien, charge or other encumbrance is not subject to avoidance or otherwise invalid under the Bankruptcy Code or applicable state or federal law.

**Compensation Order** means that certain Order Establishing Procedures for Interim Compensation and Reimbursement of Expenses for Professionals (ECF No. 135).

**Confirmation Date** means the date on which the clerk of the Bankruptcy Court enters the Confirmation Order on the docket.

**Confirmation Hearing** means the hearing conducted by the Bankruptcy Court pursuant to sections 1128(a) and 1129 of the Bankruptcy Code to consider confirmation of the Plan, as such hearing may be adjourned or continued from time to time.

**Confirmation Order** means the order of the Bankruptcy Court confirming this Plan pursuant to section 1129 of the Bankruptcy Code.

**Credit Agreement** means that certain superpriority secured Loan Agreement and Promissory Note dated as of April 27, 2018 by and among the Debtor and the Lender.

**Credit Bid Stipulation** means that certain Stipulation and Order to Deposit Funds Between Gregory S. Milligan, Chapter 11 Trustee and Romspen Mortgage Limited Partnership Resolving Credit Bid Challenge (ECF No. 238).

**Credit Bid Escrow** means the \$7,000,000.00 the Lender placed in escrow with the Chapter 11 Trustee pursuant to the Credit Bid Stipulation.

**Creditor Trust** means that certain trust that will come into existence on the Effective Date of the Plan, which trust shall be formed pursuant to, and governed by, the provisions of the Plan and the Creditor Trust Agreement.

**Creditor Trust Agreement** means the agreement governing the Creditor Trust dated as of the Effective Date, substantially in the form included in the Plan Supplement.

**Creditor Trust Assets** means (i) all Causes of Action owned by the Debtor or the Estate, except as the same may be dismissed, settled or released pursuant to the Plan; (ii) all proceeds of any of the Debtor's insurance policies; and (iii) any other property of the Estate not otherwise distributed pursuant to the terms of this Plan. For the sake of clarity, the TxDOT Condemnation Proceeding and PDA Proceeding are transferred to Lender under the Sale Order and are NOT included in the Creditor Trust Assets and as of the Sale Closing Date are exclusively the Lender's property pursuant to the terms of the Sale Order, as confirmed by this Plan.

**Creditor Trust Interests** means the Class A Interests, Class B Interests, and the Class C Interests, together.

**Creditor Trustee** means the trustee of the Creditor Trust, Gregory S. Milligan, and any successor Creditor Trustee.

**Debtor** means 3443 Zen Garden, L.P. in its capacity as chapter 11 debtor.

**Disallowed Claim or Equity Interest** means any Claim or Equity Interest, or portion thereof that is not an Allowed Claim, an Allowed Equity Interest, or a Disputed Claim or Disputed Equity Interest.

**Disclosure Statement** means that certain disclosure statement relating to the Plan, including all exhibits and schedules thereto, as the same may be amended, supplemented, or otherwise modified from time to time, as approved by the Bankruptcy Court pursuant to sections 1125 and 1126 of the Bankruptcy Code.

**Disputed Claim** means, with respect to a Claim, such Claim (a) to the extent neither Allowed nor disallowed under the Plan or a Final Order nor deemed Allowed under section 502, 503 or 1111 of the Bankruptcy Code, or (b) with respect to which the Debtor or any party in interest has

interposed a timely objection (as a contested matter, adversary proceeding, or otherwise) or request for estimation prior to the Objection Deadline in accordance with the Plan or the Bankruptcy Rules, which objection or request for estimation has not been withdrawn or determined by a Final Order as of the Effective Date.

***Disputed Equity Interest*** means, with respect to an Equity Interest, such Equity Interest (a) to the extent neither Allowed nor disallowed under the Plan or a Final Order nor deemed Allowed under section 502, 503 or 1111 of the Bankruptcy Code, or (b) for which a proof of interest for payment has been timely filed with the Bankruptcy Court or a written request for payment has been made, to the extent the Chapter 11 Trustee or any party in interest has interposed a timely objection or request for estimation prior to the Objection Deadline in accordance with the Plan, or the Bankruptcy Rules, which objection or request for estimation has not been withdrawn or determined by a Final Order.

***Distribution Date*** means the date, occurring on or as soon as practicable after the Effective Date, on which the Creditor Trustee first makes distributions to holders of Allowed Claims and Allowed Equity Interests as provided in the Plan.

***Distribution Record Date*** means the record date for purposes of receiving distributions under the Plan on account of Allowed Claims and Allowed Equity Interests, which shall be the Confirmation Date.

***Effective Date*** means the first Business Day on which all the conditions precedent to the effectiveness of the Plan specified in Section 10.2 hereof shall have been satisfied or waived as provided in Section 10.3 hereof; *provided, however*, that if a stay, injunction or similar prohibition of the Confirmation Order is in effect, the Effective Date shall be the first Business Day after such stay, injunction or similar prohibition is no longer in effect.

***Equity Interest*** means any "equity security" of the Debtor, as that term is defined in section 101(16) of the Bankruptcy Code.

***Estate*** means the estate of the Debtor as created under section 541 of the Bankruptcy Code.

***Exculpated Parties*** means the Chapter 11 Trustee, the Creditor Trustee, HMP Advisory Holdings, LLC d/b/a Harney Partners, and Wick Phillips Gould & Martin, LLP.

***Fee Claim*** means any Claim by a Professional Person under sections 330, 331 or 503 of the Bankruptcy Code for allowance of compensation and/or reimbursement of expenses in the Chapter 11 Case.

***Final Order*** means an order or judgment of a court of competent jurisdiction that has been entered on the docket maintained by the clerk of such court and has not been reversed, vacated or stayed and as to which (a) the time to appeal, petition for *certiorari*, or move for a stay, new trial, reargument, or rehearing has expired and as to which no appeal, petition for *certiorari* or other proceedings for a stay, new trial, reargument or rehearing shall then be pending or (b) if an appeal, writ of *certiorari*, stay, new trial, reargument or rehearing thereof has been sought, (i) such order or judgment shall have been affirmed by the highest court to which such order was appealed, *certiorari* shall have been denied or a stay, new trial, reargument or rehearing shall have been

denied or resulted in no modification of such order and (ii) the time to take any further appeal, petition for *certiorari*, or move for a stay, new trial, reargument or rehearing shall have expired; *provided, however*, that no order or judgment shall fail to be a “Final Order” solely because of the possibility that a motion pursuant to section 502(j) or 1144 of the Bankruptcy Code or under Rule 60 of the Federal Rules of Civil Procedure, or Bankruptcy Rule 9024 has been or may be filed with respect to such order or judgment.

**General Unsecured Claim** means any Claim against the Debtor that is not an Administrative Expense Claim, a Priority Tax Claim, a Priority Non-Tax Claim, a Lender Secured Claim, an M&M Plaintiff Secured Claim, a Panache Secured Claim, a Subordinated Claim, an Other Secured Claim, a Lender Deficiency Claim or an Equity Interest. General Unsecured Claim includes any unsecured claim held by the M&M Plaintiffs or an Other Secured Claim as a result of the operation of section 506(a)(1) of the Bankruptcy Code.

**Governmental Unit** has the meaning ascribed to such term in section 101(27) of the Bankruptcy Code.

**Insider** means any Person who is an “insider” as such term is defined in section 101(31) of the Bankruptcy Code, or who may otherwise be determined to be an “insider” under section 101(31) of the Bankruptcy Code by a court of competent jurisdiction.

**Lender** means Romspen Mortgage Limited Partnership (“*Romspen*”), in its capacities as prepetition and postpetition lender to the Debtor. Romspen and Lender may be used interchangeably throughout this Plan to refer to Romspen Mortgage Limited Partnership.

**Lender’s Contribution** means the Cash Collateral remaining in the Estate on the Effective Date to be used for the payment of Administrative Expense Claims that are Allowed but unpaid on the Effective Date, with the remaining Cash Collateral transferred to the Creditor Trust to be held separate from other Creditor Trust Assets and used for the specific and separate purpose of funding the Creditor Trust’s reasonable and necessary costs and expenses and, upon the dissolution of the Creditor Trust and after payment of all the Creditor Trust’s reasonable and necessary costs and expenses, to be returned to the Lender.

**Lender’s Deficiency Claim** means the unsecured claim held by the Lender as a result of the operation of section 506(a)(1) of the Bankruptcy Code in the amount of \$56,511,950.72, subject to a final calculation by the Lender satisfactory to the Chapter 11 Trustee.

**Lender’s Secured Claim** means the Secured Claim held by the Lender secured by a Lien on the Property in the Allowed amount of \$45,000,000.00, satisfied through the Sale Order.

**Lender Settlement** is defined in Section 6.1 hereof.

**Lien** has the meaning set forth in section 101(37) of the Bankruptcy Code.

**Local Rules** means the Bankruptcy Local Rules of the United States Bankruptcy Court for the Western District of Texas, as the same may be amended or modified from time to time.

**M&M Plaintiffs** means, together, ACM Services, LLC' Koetter Fire Protection of Austin, LLC, Capital Industries, LLC, Hill Country Electric Supply, LP, Lyle America, Inc. d/b/a Glass.com of Illinois, Summer Legacy, LLC, Texas Air, LLC, Ferguson Enterprises, LLC, and American Builders and Contractors Supply Co., Inc. d/b/a ABC Supply.

**M&M Plaintiff Secured Claim** means a Secured Claim asserted by an M&M Plaintiff that is Allowed by the Bankruptcy Court pursuant to the M&M Plaintiff Stipulation.

**M&M Plaintiff Stipulation** means the Stipulation and Order to Deposit Funds in the Registry of the Court Between the M&M Plaintiffs and Romspen Mortgage Limited Partnership Resolving Credit Bid Challenge (ECF No. 221).

**Non-Insider** means a Person who is not an Insider.

**Objection Deadline** means the later of (a) one hundred twenty (120) days after the Effective Date and (b) such later as may be ordered by the Bankruptcy Court prior to the expiration of such one hundred twenty (120) day period, upon motion.

**Opt-Out Form** means the provision on the ballot or other applicable Bankruptcy Court-approved form providing notice of the Third-Party Releases and ability to opt-out of such Third-Party Releases.

**Opt-Out Parties** means any holder of a Claim or Interest that timely completes and returns an Opt-Out Form, affirmatively opting out of the Third-Party Releases in Section 11.6 hereof; however, the Debtor and the Estate, cannot be Opt-Out Parties.

**Other Secured Claim** means a Secured Claim that is not a Lender Secured Claim, an M&M Plaintiff Secured Claim or a Panache Secured Claim.

**Panache** means Panache Development and Construction, Inc., Adam Zarafshani, and any of their insiders, affiliates, subcontractors, successors or assigns.

**Panache Secured Claim** means a Secured Claim asserted by, through or related to Panache that is Allowed by the Bankruptcy Court pursuant to the Panache Stipulation.

**Panache Stipulation** means that certain Stipulation and Order to Deposit Funds in the Registry of the Court Between Adam Zarafshani, Panache Development & Construction, Inc., and Romspen Mortgage Limited Partnership Resolving Credit Bid Challenge (ECF No. 222).

**PDA Proceeding** means all the Debtor's and Estate's rights and interests in the Debtor's Planned Development Agreement ("**PDA**") pending before the Austin City Council seeking to maximize the Property's permissible use.

**Petition Date** means March 22, 2020, the date on which Lyle America, Inc. d/b/a Glass.com of Illinois, Austin Glass & Mirror, Inc, and ACM Services, LLC filed an involuntary petition for relief against the Debtor under chapter 11 of the Bankruptcy Code.

**Person** means an individual, partnership, corporation, limited liability company, cooperative, trust, unincorporated organization, association, joint venture, government or agency or political subdivision thereof or any other form of legal entity.

**Plan** means this Liquidating Chapter 11 Plan, as the same may be amended, supplemented or otherwise modified from time to time, including any exhibits and schedules hereto.

**Plan Interest Rate** means simple interest at the rate of 3% per annum.

**Plan Supplement** means the compilation of documents and forms of documents, schedules and exhibits to be filed in one or more parts or volumes, no later ten (10) Business Days prior to the Confirmation Hearing, as amended, supplemented or otherwise modified from time to time in accordance with the terms hereof and in accordance with the Bankruptcy Code and the Bankruptcy Rules, containing the form of Creditor Trust Agreement and any other documents necessary for the execution and implementation of the Plan.

**Postpetition Financing Order** means that certain Amended Final Order Granting Chapter 11 Trustee's Motion to Obtain Secured Credit on an Interim and Final Basis (ECF No. 144).

**Priority Non-Tax Claim** means any Claim that is entitled to priority in payment pursuant to sections 507(a)(4), (5), (6) or (7) of the Bankruptcy Code and that is not an Administrative Expense Claim or a Priority Tax Claim.

**Priority Tax Claim** means any Claim of a governmental unit of the kind entitled to priority in payment as specified in sections 502(i) and 507(a)(8) of the Bankruptcy Code.

**Professional Person** means any Person retained or to be compensated by the Chapter 11 Trustee pursuant to sections 327, 328, 330, 331, 503(b) or 1103 of the Bankruptcy Code.

**Property** means the real property located at 3443 Ed Bluestein Boulevard, Austin, TX 78721.

**Pro Rata** means the proportion that the amount of an Allowed Claim or Allowed Equity Interest in a particular Class bears to the aggregate amount of all Allowed Claims or Allowed Equity Interests in such Class.

**Released Parties** means, collectively, the Lender and its predecessors, successors, assigns, subsidiaries, affiliates, current and former officers and directors, principals, shareholders, members, partners, managers, employees, subcontractors, agents, advisory board members, financial advisors, attorneys, investment bankers, consultants, representatives, management companies, fund advisors, and other professionals, and such entities' respective heirs, executors, estates, servants, and nominees. For the avoidance of doubt, none of the Debtor's past or current officers, agents, employees, directors, insurers, or insiders shall constitute Released Parties or be deemed to be released by any provision of this Plan, Plan Document, or Confirmation Order.

**Releasing Parties** means the Debtor, the Reorganized Debtor, the Chapter 11 Trustee, the Creditor Trustee, the Creditor Trust and the Estate on behalf of themselves and their respective

successors, assigns, and representatives and any and all other entities that may purport to assert any cause of action derivatively, by or through the foregoing entities, as defined in Section 11.5.

**Relief Order Entry Date** means April 8, 2020, the date on which the Bankruptcy Court entered its *Consent Order for Entry of Relief* (ECF No. 11).

**Reorganized Debtor** means the 3443 Zen Garden Limited Partnership entity following the Effective Date of this Plan.

**Sale Order** means that certain Order Authorizing and Approving the Sale of Certain of Debtor's Assets Free and Clear of Liens, Claims, Interests, and Encumbrances and Granting Related Relief entered by the Bankruptcy Court on October 7, 2020 (ECF No. 278).

**Sale Closing Date** means October 15, 2020, the date the Chapter 11 Trustee closed on the sale of the Property to the Lender pursuant to the Sale Order.

**Schedules** means, collectively, Schedules A through J and the Statement of Financial Affairs, as filed by the Debtor in the Chapter 11 Case, as the same may have been or may be amended from time to time.

**Secured Claim** means a Claim, other than the Lender's Secured Claim, secured by a Lien that is valid, perfected and enforceable, and not avoidable, upon property in which a Debtor has an interest, to the extent of the value, as of the Effective Date, of such interest or Lien as determined by a Final Order of the Bankruptcy Court pursuant to section 506 of the Bankruptcy Code, or as otherwise agreed to in writing by the Chapter 11 Trustee and the holder of such Claim.

**Settlement Carve-Out** means \$600,000.00 the Chapter 11 Trustee will pay from the Credit Bid Escrow to the Creditor Trust on the Effective Date.

**Subordinated Claim** means any Claim that is subject to (a) subordination under section 510 of the Bankruptcy Code or any other statute, (b) contractual subordination, (c) equitable subordination as determined by the Bankruptcy Court in a Final Order, including, without limitation, any Claim (i) for or arising from the rescission of a purchase, sale, issuance, or offer of a Security of the Debtor; (ii) for damages arising from the purchase or sale of such a Security; or (iii) for reimbursement, indemnification, or contribution allowed under section 502 of the Bankruptcy Code on account of such Claim, (d) a Claim that is subordinated by agreement of the holder, or (e) any Claim acquired by a holder of a Claim that is subordinated under this Plan. Subordinated Claim also means any Claim which appears in the Debtor's Schedules as contingent, unliquidated or disputed for with the holder of the Claim failed to timely file a proof of claim.

**Third-Party Releases** means the releases provided by the Lender Settlement.

**Third-Party Releasing Parties** means the holders of all Claims and Interests and their successors and assigns, other than the Opt-Out Parties, as defined in Section 11.6 hereof.

**Trustee and Professional Fee Escrow** means all funds the Lender paid to the Chapter 11 Trustee to fund the payment of the Chapter 11 Trustee's and his Professional Persons' fees and expenses pursuant to the terms of the Postpetition Financing Order.

*Trust Claims Reserve* is defined in Section 6.2(p)(iii) hereof.

*TxDOT Condemnation Proceeding* means all the Debtor's and Estate's rights, claims and interests in the Texas Department of Transportation ("*TxDOT*") initiated condemnation proceeding related to the Property and any settlement, disposition or resolution of the same.

*Voting Deadline* means November [●], 2020, the date set by the Bankruptcy Court by which Ballots for accepting or rejecting the Plan must be received.

## **1.2 Rules of Interpretation and Construction.**

(a) Interpretation. Unless otherwise specified herein, all section, article, and exhibit references in the Plan are to the respective section in, article of, and exhibit to, the Plan, as the same may be amended, waived or modified from time to time. All headings in this Plan are for convenience of reference only and shall not limit or otherwise affect the provisions of the Plan.

(b) Construction and Application of Bankruptcy Code Definitions. Unless otherwise defined herein, words and terms defined in section 101 of the Bankruptcy Code shall have the same meanings when used in the Plan. Words or terms used but not defined herein shall have the meanings ascribed to such terms or words, if any, in the Bankruptcy Code. The rules of construction contained in section 102 of the Bankruptcy Code shall apply to the construction of the Plan.

(c) Other Terms. The words "herein," "hereof," "hereto," "hereunder," and other words of similar import refer to the Plan as a whole and not to any particular article, section, subsection, or clause contained in the Plan.

(d) Time. In computing any period of time prescribed or allowed by the Plan, the provisions of Bankruptcy Rule 9006(a) shall apply.

## **ARTICLE II. TREATMENT OF UNCLASSIFIED CLAIMS**

### **2.1 Administrative Expense Claims.**

All Administrative Expense Claims against the Estate, other than Fee Claims, shall be treated as follows:

(a) Time for Filing. All holders of Administrative Expense Claims, other than Professional Persons holding Fee Claims, shall file with the Bankruptcy Court a request for payment of such Claims within thirty (30) days after the Effective Date. Any such request must be served on the Chapter 11 Trustee and his counsel, and must, at a minimum, set forth (i) the name of the holder of the Administrative Expense Claim; (ii) the amount of the Administrative Expense Claim; and (iii) the basis for the Administrative Expense Claim. A failure to file any such request in a timely fashion will result in the Administrative Expense Claim in question being discharged and its holder forever barred from asserting such Administrative Expense Claim against the Estate or any other Person.



(b) Allowance. An Administrative Expense Claim for which a request for payment has been properly filed shall become an Allowed Administrative Expense Claim unless an objection is filed by the date that is thirty (30) days after a request for payment of such Administrative Expense Claim is filed. If an objection is timely filed, the Administrative Expense Claim in question shall become an Allowed Administrative Expense Claim only to the extent so Allowed by Final Order of the Bankruptcy Court.

(c) Payment. Except to the extent that a holder of an Allowed Administrative Expense Claim agrees to a different treatment of such Claim, each holder of an Allowed Administrative Expense Claim shall receive, on account of and in full satisfaction of such Claim, Cash in an amount equal to the Allowed amount of such Administrative Expense Claim on (or as soon as reasonably practicable after) the later of (A) the Effective Date or (B) ten (10) days after entry of an order by the Bankruptcy Court allowing such Administrative Expense Claim. The Chapter 11 Trustee and the Creditor Trustee, as applicable, shall pay Allowed Administrative Expense Claims from the Lender's Contribution or as otherwise agreed by the holder of the Allowed Fee Claim and the Chapter 11 Trustee or the Creditor Trustee, as applicable.

(d) Lender Exception. Lender is excepted from the obligations of this Section 2.1. The terms of this Section 2.1 shall not apply to Lender. Lender is not obligated to file an application for allowance of an Administrative Expense Claim. Lender is deemed to hold an Allowed Administrative Expense Claim pursuant to the terms of the Postpetition Financing Order. Lender's Allowed Administrative Expense Claim shall be satisfied in full by the Lender's credit bid approved by and pursuant to the terms of the Sale Order.

(e) Gap Period Claims. Since the Chapter 11 Case commenced as an involuntary bankruptcy case under Bankruptcy Code section 303, to the extent the Bankruptcy Court Allows any Claim as a "gap period" claim under Bankruptcy Code section 502(f), the Plan treats these Allowed "gap claims" as Allowed Administrative Expenses Claims under Bankruptcy Code section 507(a)(3) and pays them in full with all other Allowed Administrative Expense Claims from the Lender's Contribution.

## **2.2 Fee Claims.**

Every Professional Person holding a Fee Claim that has not previously been the subject of a final fee application and accompanying Bankruptcy Court order approving the same shall file a final application for payment of fees and reimbursement of expenses no later than the date that is thirty (30) days after the Effective Date. Any such final fee application shall conform to and comply with all applicable provisions of the Bankruptcy Code, the Bankruptcy Rules, and the Local Rules. All final fee applications shall be set for hearing on the same day, as the Bankruptcy Court's calendar permits, after consultation with counsel to the Chapter 11 Trustee. Allowed Fee Claims subject to the Trustee and Professional Fee Escrow shall be paid by the Chapter 11 Trustee from the Trustee and Professional Fee Escrow pursuant to the terms of the Postpetition Financing

Order. To the extent an Allowed Fee Claims is not covered by the Trustee and Professional Fee Escrow, then such Allowed Fee Claims shall be paid by the Chapter 11 Trustee or the Creditor Trustee, as applicable, from the Lender's Contribution or as otherwise agreed by the holder of the Allowed Fee Claim and the Chapter 11 Trustee or the Creditor Trustee.

### **2.3 Chapter 11 Trustee Fees and Expenses.**

The Chapter 11 Trustee shall file a final application for payment of fees and reimbursement of expenses under Bankruptcy Code section 330 no later than the date that is thirty (30) days after the Effective Date. Allowed Chapter 11 Trustee fees and expenses shall be paid by the Chapter 11 Trustee from the Trustee and Professional Fee Escrow pursuant to the terms of the Postpetition Financing Order. To the extent any Allowed Chapter 11 Trustee fees and expenses are not covered by the Trustee and Professional Fee Escrow, then such Allowed fees and expenses shall be paid by the Chapter 11 Trustee from the Lender's Contribution. As previously provided by the Postpetition Financing Order and the Sale Order the satisfaction of the Postpetition Indebtedness in the amount of \$4,061,444.30<sup>1</sup> shall constitute "moneys disbursed or turned over in the case" by the Chapter 11 Trustee "to parties in interest" for purposes of Bankruptcy Code section 326(a) in determining the Allowed amount of the Chapter 11 Trustee's fees. As previously provided by the M&M Plaintiff Stipulation and the Panache Stipulation any funds distributed by the Court or the Lender on account of the M&M Plaintiff Secured Claims or the Panache Secured Claims shall constitute "moneys disbursed or turned over in the case" by the Chapter 11 Trustee "to parties in interest" for purposes of Bankruptcy Code section 326(a) in determining the Allowed amount of the Chapter 11 Trustee's fees. Pursuant to the Sale Order, all disbursements made by the Lender or any other party on account of 2020 ad valorem taxes secured by the Property shall constitute "moneys disbursed or turned over in the case" by the Chapter 11 Trustee "to parties in interest" for purposes of Bankruptcy Code section 326(a) in determining the Allowed amount of the Chapter 11 Trustee's fees.

### **2.4 U.S. Trustee Fees.**

All fees payable under section 1930 of title 28 of the United States Code shall be paid on or before the Effective Date. All such fees that arise after the Effective Date but before the closing of the Chapter 11 Case shall be paid by the Creditor Trust from the Lender's Contribution.

### **2.5 Priority Tax Claims.**

Except to the extent that a holder of an Allowed Priority Tax Claim has agreed or agrees to a different treatment of such Claim, each holder of an Allowed Priority Tax Claim shall receive on (or as soon as reasonably practicable after) the Effective Date, Cash in an amount equal to the Allowed amount of such Claim. To the extent the holder of an Allowed Priority Tax Claim has a Lien on Estate property, such Lien shall remain in place until such Allowed Priority Tax Claim has been paid in full. Pursuant to the Sale Order, Allowed Priority Tax Claims, including ad valorem taxes for 2020, shall be paid by the Lender, and will retain their Lien on the Property until paid in full.

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<sup>1</sup> Subject to a final calculation by Lender.

### ARTICLE III. CLASSIFICATION OF CLAIMS AND EQUITY INTERESTS

All Claims against, and Equity Interests in, the Debtor are classified for all purposes, including voting, confirmation, and distribution, as follows:

Class	Designation	Impairment	Entitled to Vote
Class 1	Priority Non-Tax Claims	No	No (deemed to accept)
Class 2	Lender's Secured Claim	Yes	Yes
Class 3	M&M Plaintiff Secured Claims	Yes	Yes
Class 4	Panache Secured Claims	Yes	Yes
Class 5	Other Secured Claims	No	No (deemed to accept)
Class 6	General Unsecured Claims	Yes	Yes
Class 7	Lender's Deficiency and Unsecured Claims	Yes	Yes
Class 8	Panache Deficiency and Unsecured Claims	Yes	Yes
Class 9	Subordinated Claims	Yes	Yes
Class 10	Equity Interests	Yes	Yes

Administrative Expense Claims and Priority Tax Claims are not classified for purposes of voting or receiving distributions under the Plan, pursuant to section 1123(a)(1) of the Bankruptcy Code. Instead, all such Claims shall be treated separately as unclassified claims on the terms previously set forth in Article II of this Plan.

### ARTICLE IV. TREATMENT OF CLAIMS AND EQUITY INTERESTS

#### 4.1 Class 1 – Priority Non-Tax Claims.

Except to the extent that a holder of an Allowed Priority Non-Tax Claim against the Estate agrees to a less favorable treatment, each such holder shall receive, in full satisfaction of such Claim, payment in full in Cash from the Lender's Contribution by the Chapter 11 Trustee or the Creditor Trustee, as applicable, on (or as soon as reasonably practicable after) the later of (A) the Effective Date or (B) ten (10) days after such Priority Non-Tax Claim becomes Allowed.

#### 4.2 Class 2 – Lender's Secured Claim.

Pursuant to the Sale Order, in full and final satisfaction of the Lender's Secured Claim, the Chapter 11 Trustee transferred title for the Property to the Lender on the Sale Closing Date.

#### **4.3 Class 3 – M&M Plaintiff Secured Claims.**

On the Effective Date (or as soon as reasonably practicable thereafter), except to the extent that a holder of an Allowed M&M Plaintiff Secured Claim against the Estate agrees to less favorable treatment, each holder of an Allowed M&M Plaintiff Secured Claim shall receive the recovery and treatment provided for in the M&M Plaintiff Stipulation, with all the Liens associated with the M&M Plaintiff Secured Claims, to the extent Allowed, attaching to the funds deposited in the Court's registry pursuant to the M&M Plaintiff Stipulation. Nothing herein shall prevent Lender, any M&M Plaintiff or any other party from settling, resolving or otherwise agreeing to modified treatment on or after the Effective Date. The Bankruptcy Court shall enter any appropriate order and/or judgment (whether agreed or otherwise) releasing to Lender, any M&M Plaintiff or any other party any portion of the funds deposited in the Court's registry pursuant to the M&M Plaintiff Stipulation.

#### **4.4 Class 4 – Panache Secured Claims.**

On the Effective Date (or as soon as reasonably practicable thereafter), except to the extent that a holder of an Allowed Panache Secured Claim against the Estate agrees to less favorable treatment, the holder of an Allowed Panache Secured Claim shall receive the recovery and treatment provided for in the Panache Stipulation, with all the Liens associated with the Panache Secured Claims, to the extent Allowed, attaching to the funds deposited in the Court's registry pursuant to the Panache Stipulation. Nothing herein shall prevent Lender, Panache or any other party from settling, resolving or otherwise agreeing to modified treatment on or after the Effective Date. The Bankruptcy Court shall enter any appropriate order and/or judgment (whether agreed or otherwise) releasing to Lender, Panache or any other party any portion of the funds deposited in the Bankruptcy Court's registry pursuant to the Panache Stipulation.

#### **4.5 Class 5 – Other Secured Claims.**

On the Effective Date (or as soon as reasonably practicable thereafter), except to the extent that a holder of an Allowed Other Secured Claim against the Estate agrees to less favorable treatment, each holder of an Allowed Other Secured Claim shall, at the Chapter 11 Trustee's option, receive one of the following treatments: (i) the Collateral securing such Allowed Secured Claim; or (ii) other treatment that renders such Allowed Other Secured Claim unimpaired in accordance with section 1124 of the Bankruptcy Code.

#### **4.6 Class 6 – General Unsecured Claims.**

Except to the extent that a holder of an Allowed General Unsecured Claim against the Estate agrees to a different treatment, each holder of an Allowed General Unsecured Claim shall receive a Class A Interest in the Creditor Trust and thereafter receive Cash distributions from the assets of the Creditor Trust, including the Settlement Carve-Out and the Creditor Trust Assets. Distributions to holders of Allowed General Unsecured Claims who receive a Class A Interest shall be on a Pro Rata basis with all other Class A Interest holders, until the Allowed amount of General Unsecured Claims are paid in full with interest at the Plan Interest Rate.

#### **4.7 Class 7 – Lender’s Deficiency and Unsecured Claims**

On the Effective Date, the Lender shall receive on account of the Lender’s Deficiency Claims and any other Allowed General Unsecured Claim held by the Lender, a Class B Interest in the Creditor Trust. Distributions to holders of Class B Interests shall be on a Pro Rata basis, after payment in full with interest at the Plan Interest Rate of all Class A Interests; however, holders of claims in Class 7 shall not receive any portion of the Settlement Carve-Out.

#### **4.8 Class 8 – Panache Deficiency and Unsecured Claims**

On the Effective Date, Panache shall receive on account of any Allowed General Unsecured Claim it held, holds or acquires, including any Allowed Claim constituting an unsecured deficiency portion of the Panache Secured Claims and any Allowed Claim from the rejection of any executory contract or unexpired lease, a Class B Interest in the Creditor Trust. Distributions to holders of Class B Interests shall be on a Pro Rata basis, after payment in full with interest at the Plan Interest Rate of all Class A Interests; however, holders of claims in Class 8 shall not receive any portion of the Settlement Carve-Out.

#### **4.9 Class 9 – Subordinated Claims**

Subordinated Claims may be Allowed by Order of the Bankruptcy Court or stipulation with the Chapter 11 Trustee or the Creditor Trustee. Further, this Plan provides that any Claim which appears in the Debtor’s Schedules as contingent, unliquidated or disputed for which the holder of the Claim failed to timely file a proof of claim by the Bar Date is a Subordinated Claim and entitled to treatment as a Class 9 Claim. On the Effective Date, the holder of any Allowed Subordinated Claims shall receive a Class B Interest in the Creditor Trust. Distributions to holders of Class B Interests shall be on a Pro Rata basis, after payment in full with interest at the Plan Interest Rate of all Class A Interests. Class 9 shall also receive distributions from the Settlement Carve-Out, after payment in full with interest at the Plan Interest Rate of all Class A Interests.

#### **4.10 Class 10 – Equity Interests**

Except to the extent that a holder of an Allowed Equity Interest in the Debtor agrees to a different treatment, each holder of an Allowed Equity Interest shall receive a Class C Interest in the Creditor Trust and thereafter receive Cash distributions from the Creditor Trust Assets. Distributions to holders of Allowed Equity Interests who receive a Class C Interest shall be on a Pro Rata basis with all other Class C Interest holders, after payment in full with interest at the Plan Interest Rate of all Class B Interests. On the Effective Date, the holders of Allowed Equity Interest shall be revested with their ownership interests in the Reorganized Debtor, in the same proportion as each held in the Debtor on the day before the Petition Date, without further corporate action or Bankruptcy Court order.

**ARTICLE V. IMPAIRMENT; ACCEPTANCE OR REJECTION OF THE PLAN;  
EFFECT OF REJECTION BY ONE OR MORE CLASSES**

**5.1 Classes Entitled to Vote.**

The holders of Claims in Classes 1 and 5 are unimpaired, conclusively deemed to have accepted the Plan and are not entitled to vote to accept or reject the Plan. The holders of claims in Classes 2, 3, 4, 6, 7, 8, 9 and 10 are impaired and entitled to vote to accept or reject the Plan.

**5.2 Class Acceptance Requirement.**

A Class of impaired Claims shall have accepted the Plan if the holders of at least two-thirds (2/3) in amount and more than one-half (1/2) in number of Claims in such Class who have voted on the Plan have voted to accept the Plan. A Class of impaired Equity Interests shall have accepted the Plan if at least two-thirds (2/3) in amount of Equity Interests in such Class who have voted on the Plan have voted to accept the Plan.

**5.3 Cramdown.**

To the extent that any Class is impaired under the Plan and such Class fails to accept the Plan in accordance with section 1126(c) or (d) of the Bankruptcy Code, the Chapter 11 Trustee hereby requests that the Bankruptcy Court confirm the Plan in accordance with section 1129(b) of the Bankruptcy Code.

**5.4 Elimination of Classes.**

Any Class that does not contain any Allowed Claims or any Claims temporarily Allowed for voting purposes under Bankruptcy Rule 3018, as of the date of the commencement of the Confirmation Hearing, shall be deemed not included in this Plan for purposes of (i) voting to accept or reject this Plan and (ii) determining whether such Class has accepted or rejected this Plan under section 1129(a)(8) of the Bankruptcy Code.

**ARTICLE VI. MEANS OF IMPLEMENTATION**

**6.1 The Lender Settlement.**

This Plan constitutes a settlement under Bankruptcy Rule 9019 and section 1123 of the Bankruptcy Code between the Releasing Parties and the Third-Party Releasing Parties on the one hand and the Released Parties on the other hand in complete and final resolution of all claims the Releasing Parties and the Third-Party Releasing Parties may have against the Released Parties (the "Lender Settlement"). Alleged claims which are being settled include, without limitation, all claims, objections, avoidance actions and other causes of action with respect to (i) the claims and causes of action alleged in that certain Chapter 11 Trustee's Emergency Motion to Limit Romspen Mortgage Limited Partnership's Credit Bid (ECF No. 209), (ii) the Lender's involvement in the Debtor's management (if any), funding and operations; (iii) the Lender's proposals to provide and provision of prepetition and postpetition financing; (iv) the Lender's involvement with the collateral pledged to secure the Lender's loans to the Debtor; (v) the Debtor, the Chapter 11 Case or any Claim or Interest; (vi) the Lender's Allowed Secured Claim, the Lender's Allowed

Deficiency Claim and Unsecured Claim, and the Lender's Allowed Administrative Expense Claim, and (vii) any and all claims and causes of action in existence as of the Effective Date, whether known or unknown, in existence or not in existence, contingent or non-contingent, liquidated or unliquidated, disputed or undisputed, held by the Releasing Parties and the Third-Party Release Parties against the Released Parties. The Lender disputes that any such claims are or would be valid or have any merit and would contest them. The Lender Settlement resolves such claims. The Lender Settlement is not and shall not be deemed to be an admission of liability of any kind on such claims, and all of the Lender's rights are expressly reserved and preserved on any of such claims, with the Lender Settlement carrying no preclusive effect of any kind whatsoever in any action or proceeding arising from or related in any way to the scope of the claims resolved and settled by the Lender Settlement. Only holders of Claims entitled to vote that agree, by not opting out, to release the Released Parties shall be bound by the Third-Party Releases under this Plan and the Lender Settlement. The Disclosure Statement shall include notification to all holders of Claims entitled to vote of their option to opt-out of the Lender Settlement by completing an Opt-Out Form and become an Opt-Out Party on no less than twenty-one (21) calendar days' notice. Any holders of Claims entitled to vote that do not opt-out of the Lender Settlement by returning a properly completed Opt-Out Form to the balloting agent designated by the Bankruptcy Court on or before the Voting Deadline shall be bound by the Lender Settlement, including the Third-Party Releases. Any portion of the cash proceeds comprising or included in the Lender's Contribution that remain on-hand and held by the Creditor Trustee on behalf of the Creditor Trust that are excess, surplus funds leftover after satisfaction of the obligations set forth in this Plan will be returned to the Lender upon the termination of the Creditor Trust. The Chapter 11 Trustee shall transfer any portion of the funds comprising the Credit Bid Escrow in excess of the Settlement Carve-Out to Lender on the Effective Date of the Plan. To the extent not already covered by the Sale Order, any and all aspects of the TxDOT Proceeding and the PDA Proceeding are not included in the Causes of Action preserved by the Estate and transferred to the Creditor Trust under this Plan. The Debtor's and Estate's rights and interests in the TxDOT Proceeding and the PDA Proceeding are exclusively owned by the Lender as of the Sale Closing Date pursuant to the terms of the Sale Order and this Plan. Further, the Lender shall be responsible for all direction of the TxDOT Proceeding and the PDA Proceeding as of the Sale Closing Date and for the payment of all fees, costs and expenses related to the TxDOT Proceeding and the PDA Proceeding incurred on or after the Sale Closing Date.

## **6.2 The Creditor Trust.**

- (a) Establishment of the Creditor Trust. The Creditor Trust shall be established for the benefit of the holders of Allowed General Unsecured Claims and the Lender's Deficiency Claims. This Section 6.2(a) sets forth the general terms of the Creditor Trust and certain of the rights, duties, and obligations of the Creditor Trustee. In the event of any conflict between the terms of this Section 6.2(a) and the terms of the Creditor Trust Agreement, the terms of the Creditor Trust Agreement shall govern.
- (b) Execution of Creditor Trust Agreement. On the Effective Date, the Creditor Trust Agreement shall be executed, and all other necessary steps shall be taken to establish the Creditor Trust and the beneficial interests therein, which shall be for the benefit of the holders of Allowed General Unsecured Claims, the Lender's Unsecured and Deficiency Claims, Panache's Unsecured and Deficiency Claims,

Subordinated Claims, and Equity Interests. The form of the Creditor Trust Agreement and related ancillary documents are subject to Bankruptcy Court approval at the Confirmation Hearing.

(c) Purpose of the Creditor Trust. The Creditor Trust shall be established for the sole purpose of liquidating and distributing its assets to the holders of interests in the Creditor Trust, in accordance with Treasury Regulation section 301.7701-4(d), with no objective to continue or to engage in the conduct of a trade or business. The Creditor Trust, through the Creditor Trustee, shall (i) collect and reduce the assets of the Creditor Trust to Cash, (ii) prosecute, settle and otherwise administer the Causes of Action as more fully set forth in Section 6.9 and Section 11.8 hereof, (iii) make distributions to the beneficiaries of the Creditors Trust in accordance with the Plan and the Creditor Trust Agreement and (iv) take all such actions as are reasonably necessary to accomplish the purpose hereof, as more fully provided in the Creditor Trust Agreement.

(d) Creditor Trust Assets. The Creditor Trust shall receive (1) the Lender's Contribution (to be segregated), (2) the Settlement Carve-Out (to be segregated), and (3) the Creditor Trust Assets. Any Cash or other property received from third parties from the prosecution, settlement, or compromise of any Cause of Action shall constitute Creditor Trust Assets for purposes of distributions under the Creditor Trust. On the Effective Date, the Lender's Contribution, the Settlement Carve-Out and Creditor Trust Assets shall automatically vest in the Creditor Trust, free and clear of all Liens, Claims and encumbrances, except to the extent otherwise provided in the Plan.

(e) Governance of the Creditor Trust. The Creditor Trust shall be governed by the Creditor Trustee in accordance with the Creditor Trust Agreement and consistent with the Plan.

(f) The Creditor Trustee. The Chapter 11 Trustee shall serve as the Creditor Trustee, subject to Bankruptcy Court approval at the Confirmation Hearing. With respect to the Creditor Trust Assets, the Creditor Trustee shall be a representative of the Estate pursuant to section 1123(a)(5)(B) and 1123(b)(3)(B) of the Bankruptcy Code. The Creditor Trustee may prosecute, settle and otherwise administer the Causes of Action on behalf of the Creditor Trust, without the need for Bankruptcy Court approval or any other notice or approval, except as set forth in the Creditor Trust Agreement, and shall also be responsible for objecting to Claims filed against the Estate that purport to qualify as General Unsecured Claims under the terms of the Plan, including, without limitation, pursuant to section 502(d) of the Bankruptcy Code. The Creditor Trustee shall be exempt from giving any bond or other security in any jurisdiction.

(g) Classes of Creditor Trust Interests; Nontransferability. There shall be three (3) classes of beneficial interests in the Creditor Trust: Class A beneficial interests for the Allowed General Unsecured Claims (the "Class A Interests"), Class B beneficial interests for all Lender's Unsecured and Deficiency Claims, Panache



Unsecured and Deficiency Claims, and Subordinated Claims (the “Class B Interests”), and Class C beneficial interests for holders of Equity Interests in the Debtor (the “Class C Interests”). The beneficial interests in the Creditor Trust shall not be transferable (except as otherwise provided in the Creditor Trust Agreement).

(h) Cash. Pending distribution, the Creditor Trustee may invest Creditor Trust Assets only in Cash and Government securities (as defined in section 2(a)(16) of the Investment Company Act of 1940, as amended); *provided, however*, that such investments are investments permitted to be made by a liquidating trust within the meaning of Treasury Regulation section 301.7701-4(d), as reflected therein, or under applicable Internal Revenue Service guidelines, rulings, or other controlling authorities.

(i) Costs and Expenses of the Creditor Trustee. The costs and expenses of the Creditor Trust, including the fees and expenses of the Creditor Trustee and his or her retained professionals, shall be paid first out of the Lender’s Contribution, then the Creditor Trust Assets, and finally, only to the extent needed, from the Settlement Carve-Out.

(j) Compensation of the Creditor Trustee. The Creditor Trustee shall be entitled to reasonable compensation at the Creditor Trustee’s reasonable and ordinary hourly rate paid from the Lender’s Contribution and the Creditor Trust Assets, plus a commission on specific distributions as detailed below and provided for in prior Bankruptcy Court orders. Pursuant to the Panache Stipulation and the M&M Plaintiff Stipulation, respectively, the Creditor Trustee shall additionally be entitled to a fee of three percent (3%) of all disbursements made on account of any Allowed Claims held by Panache and the M&M Plaintiffs from the registry of the Court or by the Lender. Pursuant to the Sale Order, the Creditor Trustee shall additionally be entitled to a fee of three percent (3%) of all disbursements made on account of any 2020 ad valorem taxes secured by the Property. For avoidance of doubt, the Creditor Trustee shall be entitled to a fee of three percent (3%) of any payment made by the Lender, Panache or any other party on account of or to reduce or satisfy any Claim against the Estate. Any portion of funds returned to the Lender (but not then distributed to any other holder of a Claim or on account of a Claim against the Estate) from (1) the Lender Contribution, (2) the Credit Bid Escrow, (3) the funds deposited in the Bankruptcy Court’s registry pursuant to the M&M Plaintiff Stipulation or (4) the funds deposited in the Bankruptcy Court’s registry pursuant to the Panache Stipulation, shall not qualify the Creditor Trustee to an additional fee of three percent (3%) on such funds refunded to the Lender, provided the Lender does not otherwise satisfy Claims against the Estate on account of such refunds.

(k) Distribution of the Settlement Carve-Out. The Creditor Trustee shall distribute the Settlement Carve-Out to the Class A Interests on a Pro Rata basis in accordance with the Creditor Trust Agreement, beginning as soon as practicable after the Effective Date. The Creditor Trustee shall not make any distributions to holders of Disputed Claims unless and until such Claims are Allowed. The Creditor Trustee shall ensure that sufficient funds are reserved, as determined by the Creditor

Trustee in his or her sole discretion, to pay Disputed Claims upon Allowance. Upon payment in full of the Class A Interests with interest at the Plan Rate, the Creditor Trustee shall distribute the remaining Settlement Carve-Out, if any, to Class B Interests help by holders of Claims Allowed in Class 9 on a Pro Rata basis.

(l) Distribution of Creditor Trust Assets. The Creditor Trustee shall distribute Cash to the Creditor Trust beneficiaries in accordance with the Creditor Trust Agreement, beginning on the Effective Date or as soon thereafter as is practicable, from the liquidated Creditor Trust Assets on hand as follows: First to any unpaid portion of the Class A Interests after distribution of the Settlement Carve-Out, on a Pro Rata basis; second to Class B Interests; and third to Class C Interests. The Creditor Trustee shall not make any distributions to holders of Disputed Claims unless and until such Claims are Allowed. The Creditor Trustee shall ensure that sufficient funds are reserved, as determined by the Creditor Trustee in his or her sole discretion, to pay Disputed Claims upon Allowance. The Creditor Trustee shall be permitted to distribute amounts that (i) are reasonably necessary to meet contingent liabilities and to maintain the value of the Creditor Trust Assets, (ii) are necessary to pay reasonable expenses (including, but not limited to, any taxes imposed on the Creditor Trust or in respect of the Creditor Trust Assets), and (iii) are required to satisfy other liabilities incurred by the Creditor Trust in accordance with this Plan or the Creditor Trust Agreement.

(m) Creditor Trust Certificates. Beneficial interests in the Creditor Trust shall not be represented by certificates, receipts, or in any other form or manner, except as maintained on the books and records of the Creditor Trust by the Creditor Trustee, as set forth in the Creditor Trust Agreement.

(n) Retention of Professionals by the Creditor Trustee. The Creditor Trustee may retain and reasonably compensate counsel and other professionals out of the Creditor Trust Assets to assist in its duties as Creditor Trustee on such terms as the Creditor Trustee deems appropriate without Bankruptcy Court approval. The Creditor Trustee may retain any professional who represented parties in interest, including the Chapter 11 Trustee, in the Chapter 11 Case.

(o) Federal Income Tax Treatment of the Creditor Trust; Creditor Trust Assets Treated as Owned by General Unsecured Creditors. For all federal income tax purposes, all parties (including, without limitation, the Debtor, Chapter 11 Trustee, the Creditor Trustee, and the holders of beneficial interests in the Creditor Trust) shall treat the transfer of the Creditor Trust Assets to the Creditor Trust for the benefit of the beneficiaries thereof, whether Allowed on or after the Effective Date, as (A) a transfer of the Creditor Trust Assets directly to the holders in satisfaction of General Unsecured Claims and Lender's Deficiency Claims (other than to the extent allocable to Disputed General Unsecured Claims), followed by (B) the transfer by such holders to the Creditor Trust of the Creditor Trust Assets in exchange for, beneficial interests in the Creditor Trust. Accordingly, the holders of such General Unsecured Claims and Lender's Deficiency Claims, as applicable,

shall be treated for federal income tax purposes as the grantors and owners of their respective shares of the Creditor Trust Assets.

(p) Tax Reporting.

(i) The Creditor Trustee shall file income tax returns for the Creditor Trust as a grantor trust pursuant to Treasury Regulation section 1.671-4(a) and in accordance with this Section 6.2(p)(i). The Creditor Trustee shall annually send to each record holder of a beneficial interest a separate statement setting forth the holder's share of items of income, gain, loss, deduction, or credit and will instruct all such holders to report such items on their federal income tax returns or to forward the appropriate information to the beneficial holders with instructions to report such items on their federal income tax returns. The Creditor Trust's taxable income, gain, loss, deduction, or credit will be allocated among the beneficial holders of the interests in the Creditor Trust in accordance with each holder's relative beneficial interests in the Creditor Trust.

(ii) As soon as possible after the Effective Date, but in no event later than ninety (90) days after the Effective Date, the Creditor Trustee shall make a good faith valuation of the Creditor Trust Assets. Such valuation shall be made available from time to time, to the extent relevant, and used consistently by all parties (including, without limitation the, Debtor, the Chapter 11 Trustee, the Creditor Trustee, and the holders of beneficial interests in the Creditor Trust, as applicable) for all federal income tax purposes. The Creditor Trustee shall also file (or cause to be filed) any other statements, returns, or disclosures relating to the Creditor Trust that are required by any governmental unit.

(iii) Subject to definitive guidance from the Internal Revenue Service or a court of competent jurisdiction to the contrary (including the receipt by the Creditor Trustee of a private letter ruling if the Creditor Trustee so requests one, or the receipt of an adverse determination by the Internal Revenue Service upon audit if not contested by the Creditor Trustee), the Creditor Trustee shall (i) treat any Creditor Trust Assets allocable to, or retained on account of, Disputed General Unsecured Claims as held by one or more discrete trusts for federal income tax purposes (the "Trust Claims Reserve"), consisting of separate and independent shares to be established in respect of each Disputed General Unsecured Claim, in accordance with the trust provisions of the Tax Code (section 641 *et seq.*), (ii) treat as taxable income or loss of the Trust Claims Reserve, with respect to any given taxable year, the portion of the taxable income or loss of the Creditor Trust that would have been allocated to the Holders of Disputed General Unsecured Claims had such Claims been Allowed on the Effective Date (but only for the portion of the taxable year with respect to which such Claims are unresolved), (iii) treat as a Distribution from the Trust Claims Reserve any increased amounts distributed by the Creditor Trust as a result of any Disputed General Unsecured Claims resolved earlier in the taxable year, to the extent such Distributions relate to taxable income or loss of the Trust Claims Reserve determined in accordance with the provisions hereof, and (iv) to the extent permitted by applicable laws report consistent with the

foregoing for state and local income tax purposes. All Creditor Trust beneficiaries shall report, for tax purposes, consistent with the foregoing.

(iv) The Creditor Trustee shall be responsible for payments, out of the Creditor Trust Assets, of any taxes imposed on the Creditor Trust or the Creditor Trust Assets, including the Trust Claims Reserve. In the event, and to the extent, any Cash retained on account of Disputed General Unsecured Claims in the Trust Claims Reserve is insufficient to pay the portion of any such taxes attributable to the taxable income arising from the assets allocable to, or retained on account of, Disputed General Unsecured Claims, such taxes shall be (i) reimbursed from any subsequent Cash amounts retained on account of Disputed General Unsecured Claims, or (ii) to the extent such Disputed General Unsecured Claims have subsequently been resolved, deducted from any amounts distributable by the Creditor Trustee as a result of the resolutions of such Disputed General Unsecured Claims.

(v) The Creditor Trustee may request an expedited determination of taxes of the Creditor Trust, including the Trust Claims Reserve, under section 505(b) of the Bankruptcy Code for all returns filed for, or on behalf of, the Creditor Trust for all taxable periods through the dissolution of the Creditor Trust.

(q) Dissolution. The Creditor Trust and the Creditor Trustee shall be discharged or dissolved, as the case may be, no later than the fifth (5<sup>th</sup>) anniversary of the Effective Date; *provided, however*, that, on or prior to the date that is ninety (90) days prior to such termination, the Bankruptcy Court, upon motion by a party in interest, may extend the term of the Creditor Trust if it is necessary to the liquidation of the Creditor Trust Assets. Notwithstanding the foregoing, multiple extensions may be obtained so long as Bankruptcy Court approval is obtained not less than ninety (90) days prior to the expiration of each extended term; *provided, however*, that in no event shall the term of the Creditor Trust extend past the tenth (10<sup>th</sup>) anniversary of the Effective Date. The Creditor Trust may be terminated earlier than its scheduled termination if (i) the Bankruptcy Court has entered a Final Order closing the Chapter 11 Case pursuant to section 350(a) of the Bankruptcy Code and (ii) the Creditor Trustee has administered all Creditor Trust Assets and performed all other duties required by the Plan, the Confirmation Order, the Creditor Trust Agreement and the Creditor Trust. The Creditor Trustee shall not unduly prolong the duration of the Creditor Trust and shall at all times endeavor to resolve, settle or otherwise dispose of all claims that constitute Creditor Trust Assets and to effect the Distribution of the Creditor Trust Assets in accordance with the terms hereof and terminate the Creditor Trust as soon as practicable. Prior to and upon termination of the Creditor Trust, the Creditor Trust Assets will be distributed to the beneficiaries of Creditor Trust, pursuant to the provisions set forth in the Trust Agreement. If at any time the Creditor Trustee determines that the expense of administering the Creditor Trust is likely to exceed the value of the Creditor Trust Assets, the Creditor Trustee shall have the authority to (i) distribute to the beneficiaries of the Creditor Trust any Cash balance remaining in excess of necessary costs to pay outstanding expenses of the Creditor Trust, including any fees

and expenses of the Creditor Trustee and his/her professionals, (ii) donate any Creditor Trust Assets remaining in the Creditor Trust to the Anthony H.N. Schnelling Endowment Fund maintained by the American Bankruptcy Institute, a non-religious charitable organization exempt from federal income tax under section 501(c)(3) of the Tax Code that is unrelated to the Debtor and any insider of the Debtor and (iii) dissolve the Creditor Trust.

(r) Indemnification of Creditor Trustee. The Creditor Trustee or the individuals comprising the Creditor Trustee, as the case may be, and the Creditor Trustee's agents and professionals, shall not be liable for actions taken or omitted in its capacity as, or on behalf of, the Creditor Trustee, except those acts arising out of its or their own willful misconduct, gross negligence, bad faith, self-dealing, breach of fiduciary duty, or ultra vires acts, and each shall be entitled to indemnification and reimbursement for fees and expenses in defending any and all of its actions or inactions in its capacity as, or on behalf of, the Creditor Trustee, except for any actions or inactions involving willful misconduct, gross negligence, bad faith, self-dealing, breach of fiduciary duty, or ultra vires acts. Any indemnification claim of the Creditor Trustee shall be satisfied exclusively from the Creditor Trust Assets. The Creditor Trustee shall be entitled to rely, in good faith, on the advice of its retained professionals.

### **6.3 General Settlement of Claims.**

The Plan constitutes and evidences a compromise and settlement pursuant to section 1123 of the Bankruptcy Code and Bankruptcy Rule 9019. In consideration for the classification, distributions, releases, and other benefits provided under the Plan, upon the Effective Date, the provisions of the Plan shall constitute a good faith compromise and settlement of all Claims and controversies resolved pursuant to the Plan.

### **6.4 Issuance of Creditor Trust Interests.**

The issuance and distribution of Creditor Trust Interests pursuant to the terms of the Creditor Trust Agreement is authorized without the need for any further corporate action or without any further action by the holders of any claims. All of the Creditor Trust Interests issued pursuant to the Plan shall be duly authorized, validly issued, fully paid, and non-assessable. On the Distribution Date, the Creditor Trustee shall issue the Creditor Trust Interests for distribution pursuant to the provisions hereof and the Creditor Trust Agreement. All Creditor Trust Interests to be issued shall be deemed issued as of the Effective Date regardless of the date on which they are actually distributed.

### **6.5 Section 1145 Exemption.**

Section 1145 of the Bankruptcy Code shall be applicable to the issuance of the Creditor Trust Interests, if any. To the maximum extent permitted by section 1145 of the Bankruptcy Code and applicable non-bankruptcy law, if appropriate, the Creditor Trust Interests, issued pursuant to this Plan and their transfer will be exempt from registration under the Securities Act and all rules

and regulations promulgated thereunder, and any and all applicable state and local laws, rules, and regulations.

#### **6.6 Restructuring Transactions.**

On or prior to the Effective Date, the Creditor Trust Agreement shall be executed, and on the Effective Date, the Chapter 11 Trustee shall contribute the Creditor Trust Assets to the Creditor Trust free and clear of all Liens, Claims, charges, or other encumbrances. On the Effective Date, the Debtor shall exit chapter 11 as the Reorganized Debtor and the ownership of the Reorganized Debtor shall revert with the holders of Allowed Equity Interests in Class 10.

#### **6.7 Corporate Action.**

Upon the Effective Date, all actions contemplated under the Plan shall be deemed authorized and approved in all respects. All matters provided for in the Plan involving the corporate structure of the Debtor, and any corporate action required by or in connection with the Plan, shall be deemed to have occurred and shall be in effect, without any requirement of further action by any Equity Interest holders, directors or officers of the Debtor. The authorizations and approvals contemplated by this Section 6.7 shall be effective notwithstanding any requirements under non-bankruptcy law.

#### **6.8 Vesting of Assets.**

Except as otherwise provided in the Plan, on the Effective Date, the Creditor Trust Assets shall be automatically transferred to and vest in the Creditor Trust free and clear of all Liens, Claims, charges, or other encumbrances. On the Effective Date, the ownership and management of the Reorganized Debtor shall revert with the holders of Allowed Equity Interests in Class 10. The Creditor Trustee shall be permitted to abandon any asset to the Reorganized Debtor without further order of the Bankruptcy Court.

#### **6.9 Preservation of Rights of Action; Settlement of Litigation Claims.**

Except as otherwise provided herein or in the Confirmation Order, or in any contract, instrument, release, indenture, or other agreement entered into in connection with this Plan, in accordance with section 1123(b) of the Bankruptcy Code, all Causes of Action shall be transferred to the Creditor Trust as provided by the Plan, and may be initiated, filed, enforced, abandoned, settled, compromised, released, withdrawn or litigated to judgment without the consent or approval of any third party or further notice to or action, order, or approval of the Bankruptcy Court, except as may otherwise be set forth in the Creditor Trust Agreement. The Creditor Trustee shall have the exclusive right, authority, and discretion to determine and to initiate, file, prosecute, enforce, abandon, settle, compromise, release, withdraw, or litigate to judgment any such Causes of Action and to decline to do any of the foregoing without the consent or approval of any third party or further notice to or action, order, or approval of the Bankruptcy Court. **No Person may rely on the absence of a specific reference in the Plan, or the Disclosure Statement to any Cause of Action against it as any indication that the Chapter 11 Trustee or the Creditor Trustee, as applicable, will not pursue any and all available Causes of Action against it. All rights to prosecute any and all Causes of Action against any Person are expressly preserved, except as otherwise provided in the Plan.** Unless any Causes of Action against a Person are expressly

waived, relinquished, exculpated, released, compromised, or settled in the Plan or a Bankruptcy Court order, the Creditor Trust expressly reserves all Causes of Action, for later adjudication, and, therefore, no preclusion doctrine, including the doctrines of res judicata, collateral estoppel, issue preclusion, claim preclusion, estoppel (judicial, equitable, or otherwise), or laches, shall apply to such Causes of Action upon, after, or as a consequence of the Confirmation or consummation of the Plan. For the sake of clarity, the TxDOT Proceeding and the PDA Proceeding are not included in the Causes of Action preserved by the Estate and transferred to the Creditor Trust under this Plan. The Debtor's and Estate's rights and interests in the TxDOT Proceeding and the PDA Proceeding are exclusively owned by the Lender as of the Sale Closing Date pursuant to the terms of the Sale Order and this Plan.

#### **6.10 Effectuating Documents; Further Transactions.**

On and after the Effective Date, the Chapter 11 Trustee is authorized to and may issue, execute, deliver, file, or record such contracts, securities, instruments, releases, and other agreements or documents and take such actions as may be necessary or appropriate to effectuate, implement, and further evidence the terms and conditions of the Plan in the name of and on behalf of the Debtor, without the need for any approvals, authorization, or consents except for those expressly required pursuant to the Plan.

#### **6.11 Exemption from Certain Transfer Taxes.**

Pursuant to section 1146(a) of the Bankruptcy Code, the following will not be subject to any document recording tax, stamp tax, conveyance fee, intangibles or similar tax, sales or use tax, mortgage tax, real estate transfer tax, mortgage recording tax, or other similar tax or governmental assessment, and upon entry of the Confirmation Order, the appropriate state or local governmental officials or agents shall forego the collection of any such tax or governmental assessment and accept for filing and recordation any of the foregoing instruments or other documents without the payment of any such tax or governmental assessment: (a) the creation of any mortgage, deed of trust, lien or other security interest under or pursuant to this Plan; (b) the release or assignment of liens; (c) the transfer of any assets of the Estate to the Creditor Trust; or (d) the making or delivery of any deed or other instrument of transfer under, in furtherance of, in connection with or pursuant to this Plan, including any restructuring, disposition, liquidation or dissolution, deeds, bills of sale or assignments executed in connection with any of the foregoing.

#### **6.12 Management and Winddown of the Reorganized Debtor.**

As provided by the treatment of Class 10 Allowed Equity Interests, the Debtor's existing equity owners will own, manage and control the Reorganized Debtor as of the Effective Date and may proceed to operate, winddown or dissolve the Reorganized Debtor subject to their business judgment. The Chapter 11 Trustee and the Creditor Trustee shall have no obligation to manage, winddown or dissolve the Reorganized Debtor.

#### **6.13 Cooperation with the Creditor Trustee.**

All holders of Claims and Equity Interests, the Reorganized Debtor, the Lender, Panache, the White Parties, and any owner or assignee of the Property shall fully cooperate with the Creditor Trustee in the administration of the Creditor Trust, including the prosecution of the Causes of

Action and objections to any Claims. The Bankruptcy Court retains jurisdiction to order appropriate relief under this Plan provision.

## **ARTICLE VII. DISTRIBUTIONS**

### **7.1 Date of Distributions.**

Unless otherwise provided in this Plan, any distributions or deliveries to be made under this Plan shall be made on the Effective Date or as soon as practicable thereafter in accordance with the Creditor Trust Agreement. In the event that any payment or act under this Plan is required to be made or performed on a date that is not a Business Day, then the making of such payment or the performance of such act shall be completed on the next succeeding Business Day, but shall be deemed to have been completed as of the required date.

### **7.2 Sources of Cash for Plan Distributions.**

All distributions made by the Creditor Trustee to beneficiaries of the Creditor Trust shall be obtained from the Settlement Carve-Out (only to Allowed Class 6 Claims and then Class 9 Claims) and Creditor Trust Assets. All payments made by the Creditor Trustee to fund the Creditor Trust's fees and expenses shall be obtained first, from the Lender's Contribution, second, from the Creditor Trust Assets, and third, only to the extent needed, from the Settlement Carve-Out. No portion of the Lender's Contribution shall be used to fund the payment of Allowed General Unsecured Claims.

### **7.3 Creditor Trustee.**

All distributions under the Plan shall be made by the Creditor Trustee. The Creditor Trustee shall not be required to post any bond, surety or other security for the performance of its duties hereunder unless otherwise ordered by the Bankruptcy Court. The Creditor Trustee shall be empowered to (a) effect all actions and execute all agreements, instruments and other documents necessary to perform its duties under the Plan, (b) make all distributions contemplated hereby, (c) employ professionals to represent it with respect to its responsibilities and (d) exercise such other powers as may be vested in the Creditor Trustee by order of the Bankruptcy Court, pursuant to the Plan or as deemed by the Creditor Trustee to be necessary and proper to implement the provisions hereof.

### **7.4 Record Date for Distributions.**

At the close of business on the Distribution Record Date, the transfer ledgers or registers for Claims against and Equity Interests in the Debtor shall be closed, and there shall be no further changes in the record holders of such Claims and Equity Interests. Neither the Chapter 11 Trustee nor the Creditor Trustee shall have any obligation to recognize any transfer of any of the foregoing occurring after the Distribution Record Date, and shall be entitled instead to recognize for all purposes hereunder, including to effect distributions hereunder, only those record holders stated on the transfer ledgers or registers maintained by the Chapter 11 Trustee as of the close of business on the Distribution Record Date.



#### **7.5 Recipients of Distributions.**

All distributions to holders of Allowed Claims and Allowed Equity Interests under the Plan shall be made to the holder of the Claim or Equity Interest as of the Distribution Record Date. Changes as to the holder of a Claim or Equity Interest after the Distribution Record Date shall only be valid and recognized for distribution if notice of such change is filed with the Bankruptcy Court, in accordance with Bankruptcy Rule 3001 (if applicable) and served upon the Chapter 11 Trustee and his counsel and, if applicable, the Creditor Trustee.

#### **7.6 Delivery of Distributions; Unclaimed Property.**

Subject to Bankruptcy Rule 9010, all distributions under the Plan shall be made at the address of each holder of an Allowed Claim or Allowed Equity Interest as set forth in the books and records of the Debtor, Chapter 11 Trustee or the Creditor Trustee, as applicable, unless the applicable trustee has been notified in writing of a change of address. If any distribution to the holder of an Allowed Claim or Allowed Equity Interest is returned as undeliverable, no further distributions to such holder shall be made unless and until the Chapter 11 Trustee or Creditor Trustee, as applicable, is notified of such holder's then-current address, at which time all missed distributions shall be made to such holder without interest; *provided, however*, that such distributions shall be deemed unclaimed property under section 347(b) of the Bankruptcy Code at the expiration of ninety (90) days after the date of the distribution in question. After such 90<sup>th</sup> day, and notwithstanding any applicable federal or state escheat, abandoned, or unclaimed property laws to the contrary (i) all unclaimed property or interest in property in respect of the distribution in question shall revert to the Creditor Trust, and thereafter be distributed Pro Rata to the holders of Allowed Claims and Allowed Equity Interests in accordance with the terms of this Plan, and (ii) the Claim or Equity Interest of any holder with respect to such unclaimed property or interest in property shall be discharged and forever barred. If, at the time the Creditor Trust terminates there is unclaimed property remaining in the Creditor Trust, such property shall be donated to the Anthony H.N. Schnellling Endowment Fund maintained by the American Bankruptcy Institute, to assist in the provision of resources for research and education.

#### **7.7 Means of Payment.**

All distributions made pursuant to the Plan shall be in Cash.

#### **7.8 Setoffs and Recoupment.**

The Chapter 11 Trustee or the Creditor Trust, as applicable, may, but shall not be required to, setoff against or recoup from any Claim or Equity Interest any rights to payment that the Estate may have against the holder of such Claim or Equity Interest. Neither the failure of the Chapter 11 Trustee nor the Creditor Trust, as applicable, to setoff or recoup, nor the Allowance of any Claim or Equity Interest shall constitute a waiver or release by the Estate or the Creditor Trust of any right to payment, or right of setoff or recoupment.

#### **7.9 Distributions After Effective Date.**

Distributions made pursuant to this Plan after the Effective Date to holders of Disputed Claims and Disputed Equity Interests that are not Allowed as of the Effective Date, shall be deemed

to have been made on the Effective Date. After the initial distribution, the Creditor Trustee shall make additional interim distributions to holders of Allowed Claims and Allowed Equity Interests at such time as the Creditor Trustee may deem appropriate, in accordance with the terms of this Plan.

#### **7.10 Withholding and Reporting Requirements.**

In connection with this Plan and all instruments issued under this Plan, any party issuing any instrument or making any such distribution under this Plan shall comply with all applicable withholding and reporting requirements imposed by any federal, state or local taxing authority, and all distributions under the Plan shall be subject to any such withholding or reporting requirements. Notwithstanding the above, each holder of an Allowed Claim or Allowed Equity Interest that is entitled to receive a distribution under the Plan shall have the sole and exclusive responsibility for the satisfaction and payment of any applicable tax obligations, including income, withholding and other tax obligations, on account of such distribution. Any party issuing any instrument or making any distribution under this Plan to any holder of any Allowed Claim or Allowed Equity Interest has the right, but not the obligation, to not issue such instrument or make a distribution until such holder has made arrangements satisfactory to such issuing or disbursing party for payment of any such tax obligations.

#### **7.11 No Postpetition Interest.**

Unless otherwise specifically provided for in this Plan or in the Confirmation Order, or required by applicable bankruptcy law, postpetition interest shall not accrue or be paid on any Claims or Equity Interests, and no holder of a Claim or Equity Interest shall be entitled to interest accruing on or after the Petition Date. Notwithstanding the foregoing, the Lender's Allowed Administrative Expense Claim accruing and arising under and pursuant to the Postpetition Financing Order shall be permitted to accrue postpetition interest pursuant to the terms of the Postpetition Financing Order.

#### **7.12 Time Bar to Payments.**

Checks issued by the Creditor Trustee under this Plan shall be null and void if not negotiated within ninety (90) days after the date of issuance. Requests for reissuance of any check shall be made in writing directly to the Creditor Trustee by the person to whom such check was originally issued. Any request for re-issuance of a voided check must be made on or before the end of the 90-day period referenced in this Section 7.12. After such 90-day period, if no request for re-issuance of a voided check was timely made, such amounts shall constitute unclaimed property and be treated in accordance with Section 7.6 of this Plan, and all Claims or Equity Interests in respect of such void checks shall be discharged and forever barred.

#### **7.13 De Minimis Distributions.**

Neither the Chapter 11 Trustee nor the Creditor Trustee shall have any obligation to make a distribution that is less than Ten Dollars (\$10) in Cash. If an interim distribution to the holder of an Allowed Claim or Equity interest is less than \$10, such distribution shall be held for future distributions. If the final distribution to any holder of an Allowed Claim or Equity Interest is less

than \$10, such amount shall become and constitute unclaimed property and be treated in accordance with Section 7.6 of the Plan.

## **ARTICLE VIII. PROCEDURES FOR RESOLVING AND TREATING DISPUTED CLAIMS**

### **8.1 Objections to Claims.**

Except insofar as a Claim or Equity Interest is Allowed under the Plan or pursuant to Final Order of the Bankruptcy Court, the Creditor Trustee, the Chapter 11 Trustee or any other party in interest with standing, shall be entitled to object to Claims and Equity Interests, including objections seeking reclassification or subordination of Claims. Any objections to Claims and Equity Interests shall be served and filed by the Objection Deadline. Any Claim or Equity Interest as to which an objection is timely filed shall be a Disputed Claim or Disputed Equity Interest, respectively. Notwithstanding the foregoing, included within the Lender Settlement, the Releasing Parties and Third Party Releasing Parties waive and release any and all objections to any Claims held by or in favor of the Lender, including, without limitation, Lender's Allowed Administrative Expense Claim pursuant to the Postpetition Financing Order, Lender's Allowed Secured Claim and Lender's Allowed Deficiency Claim.

### **8.2 Post-Sale Closing Date Reporting on Payments on Account of Claims.**

Beginning on November 10, 2020, on or before the tenth (10<sup>th</sup>) calendar day of each month, the Lender, Panache, and any of their successors or assigns, including any assignee or subsequent owner of the Property, shall provide the Chapter 11 Trustee and the Creditor Trustee and his or her counsel, respectively, by email, a detailed accounting of all payments, settlements or other transfers of value of any kind to any holder of a Claim against the Estate. The receipt of any payment, settlement, or transfer of value on account of any Claim against the Estate shall be the basis for the reduction or disallowance of the Claim against the Estate. The Creditor Trustee may waive this reporting requirement if, in his business judgment, the reports are no longer necessary to administer the Creditor Trust. The Lender, Panache, and any of their successors or assigns, including any assignee or subsequent owner of the Property, are obligated to make reports under this Section 8.2 until the Creditor Trust is dissolved.

### **8.3 No Distributions Pending Allowance.**

If a timely objection is made with respect to any Claim or Equity Interest, no payment or distribution under the Plan shall be made on account of such Claim or Equity Interest unless and until such Disputed Claim or Disputed Equity Interest becomes Allowed.

### **8.4 Distributions After Allowance.**

To the extent that a Disputed Claim or Disputed Equity Interest ultimately becomes an Allowed Claim or Allowed Equity Interest, distributions (if any) shall be made to the holder of such Allowed Claim or Allowed Equity Interest, in accordance with the provisions of the Plan. As soon as reasonably practicable after the date that the order or judgment of the Bankruptcy Court allowing any Disputed Claim or Disputed Equity Interest becomes a Final Order, the Creditor

Trustee shall provide to the holder of such Claim or Equity Interest the distribution (if any) to which such holder is entitled under this Plan as of the Effective Date, without any interest.

#### **8.5 Disallowance of Late Filed Claims.**

Unless otherwise provided in a Final Order of the Bankruptcy Court, any Claim for which a proof of claim is filed after the applicable Bar Date shall be deemed disallowed. The holder of a Claim that is disallowed pursuant to this Section 8.5 shall not receive any distribution on account of such Claim, and neither the Chapter 11 Trustee nor the Distribution Agent shall need to take any affirmative action for such Claim to be deemed disallowed.

### **ARTICLE IX. TREATMENT OF EXECUTORY CONTRACTS AND UNEXPIRED LEASES**

#### **9.1 Rejection of Contracts and Leases.**

Except as otherwise provided herein, or in any contract, instrument, release, indenture, or other agreement or document entered into in connection with the Plan, as of the Effective Date, Debtor shall be deemed to have rejected each executory contract and unexpired lease to which it is a party, unless such contract or lease (i) was previously assumed, assumed and assigned or rejected by the Chapter 11 Trustee, (ii) previously expired or terminated pursuant to its own terms, or (iii) is the subject of a motion to assume, assume and assign, or reject filed by the Chapter 11 Trustee on or before the Confirmation Date. The Confirmation Order shall constitute an order of the Bankruptcy Court under sections 365 and 1123(b) of the Bankruptcy Code approving the contract and lease assumptions or rejections described above, as of the Effective Date.

#### **9.2 Inclusiveness.**

Unless otherwise specified, each executory contract and unexpired lease shall include any and all modifications, amendments, supplements, restatements or other agreements made directly or indirectly by any agreement, instrument or other document that in any manner affects such executory contract or unexpired lease.

#### **9.3 Claims Based on Rejection of Executory Contracts or Unexpired Leases.**

All Claims arising out of the rejection of executory contracts and unexpired leases (if any) must be served upon the Chapter 11 Trustee and his counsel within thirty (30) days after the earlier of (i) the date of entry of an order of the Bankruptcy Court approving such rejection or (ii) the Effective Date. Any Claims not filed within such time shall be forever barred from assertion against the Debtor, the Estate, its property and the Creditor Trust.

#### **9.4 No Effect on Insurance**

The rejection of executory contracts shall not apply to, and shall have no effect upon, any insurance policy which the Debtor owns or pursuant to which the Debtor is an insured party, beneficiary, claimant or in which the Debtor has any interest, including any directors and officers' insurance policies (together, the "Insurance Policies"). All Insurance Policies to which the Debtor or the Estate is a party as of the Effective Date shall be deemed to be and treated as executory

contracts and shall be assumed by the Debtor, assigned to the Creditor Trust and shall continue in full force and effect thereafter in accordance with their respective terms. All Insurance Policies shall vest in the Creditor Trust as of the Effective Date, including the right to (a) control any Insurance Policy that provides or may provide coverage for the Causes of Action or may become available to provide such coverage; (b) pursue and receive the benefits and proceeds of the Insurance Policies; (c) pursue and receive recovery from or as a result of any Causes of Action, including consequential, contractual, extracontractual and/or statutory damages, or other proceeds, distributions, awards or benefits; and (d) pursue and receive any other recovery related to the Causes of Action, including negotiations relating thereto and settlements thereof. Nothing in this paragraph nor the Plan limits, excuses or in any way affects or impairs any coverage to which the Debtor's or the Estate's current and/or former officers and directors are entitled to with respect to any and all insurance or other applicable Insurance Policies of the Debtor.

## **ARTICLE X. CONDITIONS PRECEDENT TO CONFIRMATION AND EFFECTIVENESS OF THE PLAN**

### **10.1 Conditions to Confirmation of Plan.**

Confirmation of the Plan shall not occur, and the Confirmation Order shall not be entered, until an order, finding that the Disclosure Statement contains adequate information pursuant to section 1125 of the Bankruptcy Code shall have been entered.

### **10.2 Conditions to Effective Date of Plan.**

The Effective Date of the Plan shall not occur until each of the following conditions precedent have been satisfied or waived:

- (a) The clerk of the Bankruptcy Court shall have entered the Confirmation Order in the Chapter 11 Case and there shall not be a stay or injunction (or similar prohibition) in effect with respect thereto;
- (b) The Chapter 11 Trustee shall have received the Lender's Contribution and the Settlement Carve-Out;
- (c) The Creditor Trust Agreement shall have been fully executed;
- (d) The Creditor Trustee shall have been appointed, accepted the appointment, and performed any other appropriate duties prior to accepting the Creditor Trust Assets; and
- (e) All other actions and all agreements, instruments or other documents necessary to implement the terms and provisions of the Plan shall have been executed and delivered by the parties thereto, and, in each case, all conditions to their effectiveness shall have been satisfied or waived as provided therein.

Within five (5) Business Days of the Effective Date, the Chapter 11 Trustee shall file a notice of the occurrence of the Effective Date.

### **10.3 Waiver of Conditions Precedent.**

Any of the foregoing conditions (with the exception of the conditions set forth in Sections 0 and 10.2(a) may be waived by the Chapter 11 Trustee without notice to or order of the Bankruptcy Court. The Chapter 11 Trustee may assert a failure to satisfy or waiver of any condition regardless of the circumstances giving rise to the failure of such condition to be satisfied. The failure of the Chapter 11 Trustee to exercise any of the foregoing rights shall not be deemed a waiver of any other rights and each such right will be deemed an on-going right that may be asserted at any time.

### **10.4 Effect of Failure of Conditions.**

If the foregoing conditions have not been satisfied or waived in the manner provided in Sections 10.1, 10.2 and 10.3 hereof, then (i) the Confirmation Order shall be of no further force or effect; (ii) no distributions under the Plan shall be made; (iii) the Estate and all holders of Claims against and Equity Interests in the Debtor shall be restored to the *status quo ante* as of the day immediately preceding the Confirmation Date as though the Confirmation Date had never occurred; (iv) all of the Estate's obligations with respect to Claims and Equity Interests shall remain unaffected by the Plan; (v) nothing contained in this Plan shall be deemed to constitute a waiver or release of any Claims by or against the Estate or any other Person or to prejudice in any manner the rights of the Estate or any Person in any further proceedings involving the Debtor or the Estate; and (vi) this Plan shall be deemed withdrawn. Upon such occurrence, the Chapter 11 Trustee shall file a written notification with the Bankruptcy Court and serve it on the parties appearing on the service list maintained in the Chapter 11 Case.

### **10.5 Reservation of Rights.**

The Plan shall have no force or effect unless and until the Effective Date occurs. Prior to the Effective Date, none of the filing of the Plan, any statement or provision contained in the Plan, or action taken by the Chapter 11 Trustee with respect to the Plan shall be, or shall be deemed to be, an admission or waiver of any rights of the Estate or any other party with respect to any Claims or Equity Interests or any other matter.

## **ARTICLE XI. EFFECT OF CONSUMMATION**

### **11.1 Vesting of Assets.**

Upon the Confirmation Date, pursuant to sections 1141(b) and (c) of the Bankruptcy Code, the Creditor Trust Assets shall vest in the Creditor Trust, free and clear of all Claims, Liens, encumbrances, charges and other interests, except as otherwise provided in this Plan.

### **11.2 Discharge of Claims and Interests in the Debtor.**

Upon the Effective Date and in consideration of the distributions to be made under this Plan, except as otherwise provided in this Plan or in the Confirmation Order, each holder (as well as any trustee or agent on behalf of such holder) of a Claim or Interest, where such Claim or Interest has been fully paid or otherwise satisfied in accordance with this Plan, and any affiliate of such holder shall be deemed to have forever waived, released, and discharged the Debtor, to the fullest extent permitted under § 1141 of the Bankruptcy Code, of and from any and all Claims, Interests,

rights, and liabilities that arose prior to the Effective Date. Except as otherwise provided in this Plan, all such holders of Claims and Interests, and their affiliates shall be forever precluded and enjoined, pursuant to §§ 105, 525, and 1141 of the Bankruptcy Code, from prosecuting or asserting any such discharged Claim against or terminated Interest in the Debtor.

### **11.3 Injunction against Interference with Plan.**

Upon the entry of the Confirmation Order, all holders of Claims and Interests and all other parties in interest, along with their respective present and former affiliates, employees, agents, officers, directors, and principals, shall be enjoined from taking any action to interfere with the implementation or the occurrence of the Effective Date.

### **11.4 Exculpation.**

Neither the Exculpated Parties nor any of their respective present or former members, managers, officers, directors, employees, equity holders, partners, affiliates, funds, advisors, attorneys or agents, or any of their predecessors, successors or assigns, shall have or incur any liability to any holder of a Claim or an Equity Interest, or any other party-in-interest, or any of their respective agents, employees, equity holders, partners, members, affiliates, funds, advisors, attorneys or agents, or any of their successors or assigns, for any act or omission in connection with, relating to, or arising out of the administration of the Chapter 11 Case, the negotiation and pursuit of approval of the Disclosure Statement, the preparation of the Plan, the solicitation of acceptances of the Plan, the pursuit of confirmation of the Plan, the funding of the Plan, the consummation of the Plan, or the administration of the Plan or the property to be distributed under the Plan, and shall be deemed to have acted in good faith in connection therewith and entitled to the protections of section 1125(e) of the Bankruptcy Code. Notwithstanding anything to the contrary contained in this Plan, this Section 11.4 shall not exculpate any party from any liability based upon gross negligence or willful misconduct.

### **11.5 Debtor and Estate Releases**

As of the Effective Date, except for the rights and remedies that remain in effect from and after the Effective Date to enforce this Plan, for good and valuable consideration, the adequacy of which is hereby confirmed, the service of the Released Parties to facilitate the administration of the Estate, a substantial recovery for holders of Allowed Claims, and the implementation of this Plan, and except as otherwise provided in this Plan or in the Confirmation Order, the Released Parties are deemed forever released and discharged by the Debtor, the Reorganized Debtor, the Chapter 11 Trustee, the Creditor Trustee, the Creditor Trust and the Estate on behalf of themselves and their respective successors, assigns, and representatives and any and all other entities that may purport to assert any cause of action derivatively, by or through the foregoing entities (together, the "**Releasing Parties**"), from any and all claims, interests, obligations, suits, judgments, damages, demands, debts, rights, causes of action, losses, remedies, or liabilities, whatsoever, including any derivative claims, asserted or assertable on behalf of the Releasing Parties, whether known or unknown, foreseen or unforeseen, existing or hereinafter arising, in law, equity, or otherwise, that the Releasing Parties would have been legally entitled to assert in their own right, or on behalf of the holder of any Claim or Interest or other entity, based on or relating to, or in any manner arising from, in whole or in part, the Debtor, the Estate, the Chapter 11 Case, the Lender

Settlement, the subject matter of, or the loans or other transactions or events giving rise to, any Claim or Interest (including without limitation any collateral pledged to the Lender in connection with any such transactions or loans), the business or contractual arrangements between the Debtor and any Released Party, the restructuring of any Claim or Interest before or during the Chapter 11 Case, the restructuring transactions, the negotiation, formulation, or preparation of the Disclosure Statement and this Plan and related agreements, instruments, and other documents, the solicitation of votes with respect to this Plan, or any other act or omission, transaction, agreement, event, or other occurrence, other than claims or causes of action arising out of or related to any act or omission of a Released Party that is a criminal act or constitutes intentional fraud, gross negligence, and willful misconduct.

#### **11.6 Releases by Holders of Claims and Interests**

**As of the Effective Date, except for the rights and remedies that remain in effect from and after the Effective Date to enforce this Plan, for good and valuable consideration, the adequacy of which is hereby confirmed, the service of the Released Parties to facilitate the administration of the Estate, a substantial recovery for holders of Claims and Interests, and the implementation of this Plan, and except as otherwise provided in this Plan or in the Confirmation Order, the Released Parties are deemed forever released and discharged by the holders of all Claims and Interests and the successors and assigns (other than the Opt-Out Parties, the “Third-Party Releasing Parties”) from any and all claims, interests, obligations, suits, judgments, damages, demands, debts, rights, causes of action, losses, remedies, and liabilities whatsoever, including any derivative claims, asserted or assertable on behalf of the holder of the Claim or Interest, or the Debtor or Estate, whether known or unknown, foreseen or unforeseen, existing or hereinafter arising, in law, equity, or otherwise, that such holders or their affiliates would have been legally entitled to assert in their own right (whether individually or collectively) or on behalf of the holder of any Claim or Interest or other entity, based on or relating to, or in any manner arising from, in whole or in part, the Debtor, the Chapter 11 Case, the purchase, sale, or rescission of the purchase or sale of any security of or investment or interest in the Debtor, the Lender Settlement, the subject matter or, or the transactions or events giving rise to, any Claim or Interest that is treated in this Plan (including without limitation any collateral pledged to the Lender in connection with any such transactions or loans with the Debtor), the business or contractual arrangements between any holder of a Claim or Interest, and the Debtor or any Released Party, the restructuring of any Claim or Interest before or during the Chapter 11 Case, the negotiation, formulation, or preparation of the Disclosure Statement, this Plan, related agreements, instruments, and other documents, the solicitation of votes with respect to this Plan, or any other act or omission (the “Third-Party Releases”),**



**other than the claims or causes of action arising out of or related to any act or omission of a Released Party that is a criminal act or constitutes intentional fraud, gross negligence, or willful misconduct.**

**With regard to holders of Claims or Interests that are Unimpaired under this Plan and holders of Claims or Interests whose vote to accept or reject this Plan was solicited or who were deemed to reject the Plan but who did not return a ballot or Opt-Out Form (and thus did not opt-out of this release), if such holder of Claims or Interests wishes to pursue a claim or cause of action against any Released Party, such holder must first petition the Bankruptcy Court for a determination of whether this release applies to such holder. If the Bankruptcy Court determines that such holder's claim is not released by this provision, such holder must bring any claim or cause of action in the United States Bankruptcy Court for the Western District of Texas or must obtain leave of this Bankruptcy Court to bring such claim or cause of action before a court of another jurisdiction.**

#### **11.7 Injunction and Stay.**

(a) Except as otherwise expressly provided in this Plan, all Persons or entities who have held, hold, or may hold Claims or causes of action against the Debtor or any Released Party or Equity Interests in the Debtor are permanently enjoined, from and after the Effective Date, from (i) commencing or continuing in any manner any action or other proceeding of any kind on any such Claim, cause of action or Equity Interest against the Estate, the Creditor Trust or other entity released, discharged or exculpated hereunder, (ii) the enforcement, attachment, collection or recovery by any manner or means of any judgment, award, decree or order against any Estate or the Creditor Trust with respect to any such Claim or Equity Interest, (iii) creating, perfecting or enforcing any encumbrance of any kind against any Estate, the Creditor Trust, or against the property or interests in property of any Estate or the Creditor Trust, as applicable with respect to any such Claim or Equity Interest, (iv) asserting any right of setoff, subrogation or recoupment of any kind against any obligation due from any Estate or the Creditor Trust, or against the property or interests in property of any Estate or the Creditor Trust with respect to any such Claim or Equity Interest, or (v) pursuing any Claim or causes of action released under the Plan.

(b) Unless otherwise provided, all injunctions or stays arising under or entered during the Chapter 11 Case under sections 105 or 362 of the Bankruptcy Code, or otherwise, and in existence on the Confirmation Date, shall remain in full force and effect until the Effective Date.

(c) The Confirmation Order shall permanently enjoin the commencement or prosecution by any Person, whether directly, derivatively, or otherwise, of any claims, obligations, suits, judgments, damages, demands, debts, rights, causes of

action, losses, or liabilities released pursuant to this Plan, including, without limitation, the claims, obligations, suits, judgments, damages, demands, debts, rights, causes of action, and liabilities released or exculpated in this Plan.

#### 11.8 Preservation of Claims.

(a) Except as otherwise provided herein, as of the Confirmation Date, pursuant to sections 1123(b)(3)(B) of the Bankruptcy Code, any action, cause of action, claim, liability, obligation, right, suit, debt, sum of money, damage, judgment, Claim, and demand whatsoever, whether known or unknown, at law, in equity, or otherwise, including causes of action under Chapter 5 of the Bankruptcy Code, but not including any causes of action against the Exculpated Parties, and specifically excluding the TxDOT Proceeding and PDA Proceeding exclusively owned by the Lender pursuant to the Sale Order and this Plan (collectively, "*Causes of Action*") owned by or otherwise accruing to the Debtor or the Estate shall constitute assets of, and shall immediately be transferred to and vest in, the Creditor Trust. Thereafter, the Creditor Trustee, as a representative of the Debtor and the Estate pursuant to section 1123(b)(3)(B) of the Bankruptcy Code, shall have sole and full authority to commence and prosecute Causes of Action for the benefit of the holders of Allowed General Unsecured Claims. For the avoidance of doubt, the Causes of Action include, but are not limited to, (a) all of the Debtor's commercial tort claims (as such term is defined in the Uniform Commercial Code as in effect in the State of Texas) arising on or before the Effective Date, including without limitation, all causes of action against (i) present and former directors and officers of the Debtor, and (ii) direct and indirect equity holders of the Debtor, and the proceeds of all of the foregoing; (b) all Actions or Claims (i) against the Debtor's contract counterparties (other than counterparties to Assigned Contracts) and the proceeds thereof, (ii) against any of the Debtor's agents, employees, or contractors, , and any of their affiliates, professionals, owners, managers, members, officers, directors, employees, agents, insurers, successors or assigns, (iii) against any insurance carrier, policy, or coverage of the Debtor; and (c) the Estate's Avoidance Actions.

(b) Reservation of White Parties' Litigation. The releases and injunctions in favor of the Lender contained in this Plan do not extend to or otherwise apply to the claims and causes of action asserted against the Lender in Adversary Case Number 20-1047, currently pending before the Bankruptcy Court ("*White Adversary*"). All parties' rights, claims, liabilities, defenses, affirmative defenses, causes of action and other interests asserted in the White Adversary are expressly reserved and preserved by this Plan.

(c) Reservation of M&M Lien Claimants Litigation. The releases and injunctions in favor of the Lender contained in this Plan do not extend to or otherwise apply to the claims and causes of action asserted against the Lender in Adversary Case Number 20-1048, currently pending before the Bankruptcy Court ("*M&M Lien Claimant Adversary*"). All parties' rights, claims, liabilities, defenses, affirmative defenses, causes of action and other interests asserted in the M&M Lien Claimant Adversary are expressly reserved and preserved by this Plan.

### **11.9 Compromise of Controversies.**

In consideration for the distributions and other benefits provided under the Plan, the provisions of the Plan constitute a good faith compromise and settlement of all Claims and controversies resolved under the Plan, and the entry of the Confirmation Order shall constitute the Bankruptcy Court's approval of such compromise and settlement under Bankruptcy Rule 9019 and section 1123(b)(3)(A).

### **ARTICLE XII. RETENTION OF JURISDICTION**

(a) The Bankruptcy Court shall have exclusive jurisdiction of all matters arising out of, or related to, the Chapter 11 Case and the Plan pursuant to, and for the purposes of, sections 105(a) and 1142 of the Bankruptcy Code and for, among other things, the following purposes:

(i) To hear and determine pending applications for the assumption, assignment or rejection of executory contracts or unexpired leases and the allowance of Claims resulting therefrom;

(ii) To determine any and all adversary proceedings, applications, and contested matters in the Chapter 11 Case and grant or deny any application involving the Debtor or the Estate that may be pending on the Effective Date or that are retained and preserved by the Chapter 11 Trustee herein;

(iii) To ensure that distributions to holders of Allowed Claims and Allowed Equity Interests are effected as provided in the Plan;

(iv) To hear and determine any timely objections to Administrative Expense Claims or to proofs of Claim and Equity Interests, including any objections to the classification of any Claim or Equity Interest, and to allow or disallow any Disputed Claim or Disputed Equity Interest, in whole or in part;

(v) To enter and implement such orders as may be appropriate in the event the Confirmation Order is for any reason stayed, revoked, modified, or vacated;

(vi) To take any action and issue such orders as may be necessary to construe, enforce, implement, execute, and consummate the Plan or maintain the integrity of the Plan following consummation;

(vii) To take any action and issue such orders as may be necessary to construe, enforce, implement, execute, and consummate the Trust Agreement or maintain the integrity of the Trust Agreement following the Effective Date;

(viii) To consider any amendments to or modifications of the Plan, or to cure any defect or omission, or to reconcile any inconsistency in any order of the Bankruptcy Court, including the Confirmation Order;

- (ix) To hear and determine all requests for payment of Fee Claims;
- (x) To hear and determine disputes arising in connection with the interpretation, implementation, or enforcement of the Plan, the Confirmation Order, the documents that are ancillary to and aid in effectuating the Plan or any agreement, instrument, or other document governing or relating to any of the foregoing;
- (xi) To hear and determine matters concerning state, local, and federal taxes in accordance with sections 346, 505, and 1146 of the Bankruptcy Code (including the expedited determination of taxes under section 505(b) of the Bankruptcy Code);
- (xii) To hear any other matter not inconsistent with the Bankruptcy Code;
- (xiii) To hear and determine all disputes involving the existence, scope, and nature of the exculpations and releases granted hereunder;
- (xiv) To issue injunctions and effect any other actions that may be necessary or desirable to restrain interference by any entity with the consummation or implementation of the Plan; and
- (xv) To enter a final decree(s) closing the Chapter 11 Case.

### **ARTICLE XIII. MISCELLANEOUS**

#### **13.1 Payment of Statutory Fees.**

All fees payable under 28 U.S.C. § 1930 shall be paid on the Effective Date and thereafter, as appropriate.

#### **13.2 Filing of Additional Documents.**

The Chapter 11 Trustee or Creditor Trustee may file such agreements and other documents as may be necessary or appropriate to effectuate and further evidence the terms and conditions of the Plan.

#### **13.3 Schedules, Exhibits and Plan Supplement Incorporated.**

All exhibits and schedules to the Plan, and the documents contained in the Plan Supplement, are incorporated into and are a part of the Plan as if fully set forth herein.

#### **13.4 Amendment or Modification of the Plan.**

Subject to section 1127 of the Bankruptcy Code and, to the extent applicable, sections 1122, 1123, and 1125 of the Bankruptcy Code, alterations, amendments or modifications of the Plan may be proposed in writing by the Chapter 11 Trustee at any time prior to or after the Confirmation Date. Holders of Claims and Equity Interests that have accepted the Plan shall be

deemed to have accepted the Plan, as altered, amended, or modified; *provided, however*, that any holders of Claims and Equity Interests who were deemed to accept the Plan because such Claims and Equity Interests were unimpaired shall continue to be deemed to accept the Plan only if, after giving effect to such amendment or modification, such Claims and Equity Interests continue to be unimpaired.

### **13.5 Inconsistency.**

In the event of any inconsistency among the Plan, the Disclosure Statement, and any exhibit or schedule to the Disclosure Statement, the provisions of the Plan shall govern. In the event of any inconsistency between the Plan and the Confirmation Order, the Confirmation Order shall govern.

### **13.6 Exemption from Certain Transfer Taxes.**

Pursuant to section 1146(a) of the Bankruptcy Code, the issuance, transfer, or exchange of notes or equity securities under or in connection with the Plan, the creation of any mortgage, deed of trust or other security interest, the making or assignment of any lease or sublease, or the making or delivery of any deed or other instrument of transfer under, in furtherance of, or in connection with the Plan, including any merger agreements or agreements of consolidation, deeds, bills of sale, or assignments executed in connection with any of the transactions contemplated under the Plan shall not be subject to any stamp, real estate transfer, mortgage recording or other similar tax. All sale transactions consummated by the Chapter 11 Trustee and the Estate and approved by the Bankruptcy Court on and after the Petition Date through and including the Effective Date, including the transfers effectuated under the Plan, the sale by the Chapter 11 Trustee of owned property pursuant to section 363(b) of the Bankruptcy Code, and the assumption, assignment, and sale by the Estate of unexpired leases of non-residential real property pursuant to section 365(a) of the Bankruptcy Code, if any, shall be deemed to have been made under, in furtherance of, or in connection with the Plan, and thus, shall not be subject to any stamp, real estate transfer, mortgage recording, or other similar tax.

### **13.7 Expedited Tax Determination.**

The Chapter 11 Trustee or the Creditor Trustee, as successor to the Chapter 11 Trustee, may request an expedited determination of taxes under section 505(b) of the Bankruptcy Code for all returns filed for, or on behalf of, the Debtor for any and all taxable periods ending after the Petition Date through, and including, the Effective Date.

### **13.8 Binding Effect.**

Except as otherwise provided in § 1141(d)(3) of the Bankruptcy Code, and subject to the occurrence of the Effective Date, on and after entry of the Confirmation Order, the provisions of this Plan and Confirmation Order shall be binding upon and inure to the benefit of the Debtor, the Estate, the Released Parties, the Releasing Parties, the Third-Party Releasing Parties, any holder of any Claim or Interest, or any Person named or referred to in this Plan, and each of their respective heirs, executors, administrators, representatives, predecessors, successors, assigns, agents, officers and directors, and, as to the binding effect, to the fullest extent permitted under the Bankruptcy Code and other applicable law, each other Person affected by this Plan and Confirmation Order.

**13.9 Severability.**

If the Bankruptcy Court determines that any provision of this Plan is unenforceable either on its face or as applied to any Claim or Equity Interest, the Chapter 11 Trustee may modify this Plan in accordance with Section 13.4 hereof so that such provision shall not be applicable to the holder of any Claim or Equity Interest. Any determination of unenforceability shall not (i) limit or affect the enforceability and operative effect of any other provisions of this Plan; or (ii) require the re-solicitation of any acceptance or rejection of this Plan unless otherwise ordered by the Bankruptcy Court.

**13.10 No Admissions.**

If the Effective Date does not occur, the Plan shall be null and void in all respects, and nothing contained in the Plan shall (a) constitute a waiver or release of any claims by or against, or any interests in, the Debtor, (b) prejudice in any manner the rights of the Chapter 11 Trustee, the Estate or the Debtor or any other party in interest, or (c) constitute an admission of any sort by the Chapter 11 Trustee, the Estate or the Debtor or other party in interest.

**13.11 No Payment of Attorneys' Fees.**

Except for the fees of Professional Persons, no attorneys' fees shall be paid by the Estate with respect to any Claim or Equity Interest unless otherwise specified in this Plan or a Final Order of the Bankruptcy Court.

**13.12 Notices.**

All notices, requests, and demands to or upon the Estate to be effective shall be in writing (including by facsimile transmission) and, unless otherwise expressly provided herein, shall be deemed to have been duly given or made when actually delivered or, in the case of notice by facsimile transmission, when received and telephonically confirmed, addressed as follows:

**GREGORY S. MILLIGAN**  
Chapter 11 Trustee, *3443 Zen Garden, L.P.*  
Harney Partners  
P.O. Box 90099  
Austin, TX 78709-0099  
gmilligan@harneypartners.com

with a copy to:

**WICK PHILLIPS GOULD & MARTIN, LLP**  
Attention: Jason M. Rudd  
3131 McKinney Ave, Suite 100  
Dallas, Texas 75204  
Telephone: 214-740-4038  
jason.rudd@wickphillips.com

**13.13 Governing Law.**

Except to the extent that the Bankruptcy Code or other federal law is applicable, or to the extent an exhibit to the Plan provides otherwise (in which case the governing law specified therein shall be applicable to such exhibit), the rights, duties and obligations arising under the Plan shall be governed by, and construed and enforced in accordance with, the laws of the State of Texas, without giving effect to the principles of conflict of laws that would require application of the laws of another jurisdiction.

**3443 ZEN GARDEN, L.P.**

By: 

Gregory S. Milligan, Chapter 11 Trustee

**WICK PHILLIPS GOULD & MARTIN, LLP**

*/s/ Jason M. Rudd*

Jason M. Rudd

State Bar No. 24028786

Scott D. Lawrence

State Bar No. 24087896

Lauren K. Drawhorn

State Bar No. 24074528

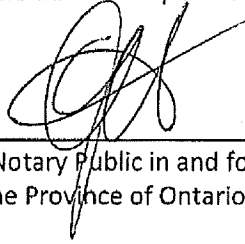
Daniella G. Heringer

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[daniella.heringer@wickphillips.com](mailto:daniella.heringer@wickphillips.com)

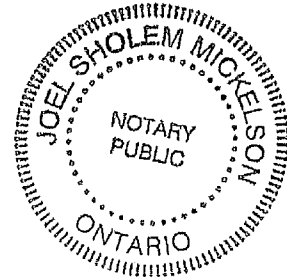
**COUNSEL FOR GREGORY S. MILLIGAN,  
CH. 11 TRUSTEE FOR 3443 ZEN GARDEN, L.P.**

This is **Exhibit "27"** referred to  
in the Affidavit of Wesley Roitman  
Sworn before me this 16<sup>th</sup> day of November, 2020



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A Notary Public in and for  
the Province of Ontario





IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE WESTERN DISTRICT OF TEXAS  
AUSTIN DIVISION

IN RE: §  
3443 ZEN GARDEN, L.P. § CASE NO. 1:20-10410-HCM  
DEBTOR. § Chapter 11  
§

**CHAPTER 11 TRUSTEE’S EMERGENCY MOTION  
TO LIMIT ROMSPEN MORTGAGE LIMITED PARTNERSHIP’S CREDIT BID**

**This pleading requests relief that may be adverse to your interests.**

**The Chapter 11 Trustee is requesting emergency consideration of this Motion.**

**If you oppose the relief requested herein, you should file a response immediately.**

Gregory S. Milligan, Chapter 11 Trustee (the “Trustee”) of the bankruptcy estate (the “Estate”) of 3443 Zen Garden L.P. (the “Debtor”) in the above-captioned chapter 11 case (the “Case”) files this *Emergency Motion* (the “Motion”) to *Limit Romspen Mortgage Limited Partnership’s Credit Bid*.

**I. INTRODUCTION**

1. Romspen Mortgage Limited Partnership’s (“Romspen”) prepetition inequitable conduct in systematically starving the Debtor of crucial – and contractually agreed to – funding, damaged the Debtor, halted redevelopment the Debtor’s real estate project, and prevented the Debtor’s payment of its creditors. In advance of the Trustee’s Court-approved auction of the Debtor’s real estate development, the Trustee will file an adversary proceeding seeking, among other relief, to equitably subordinate Romspen’s asserted secured claims and liens on the sale assets, similar to creditor actions already pending. With Romspen’s liens subject to potential

subordination and its claims otherwise disputed, Bankruptcy Code § 363(k) authorizes the Court “for cause” to prevent or condition Romspen’s credit bid of contested secured claims in the auction. As detailed below, the Trustee requests the Court to condition any Romspen credit bid on Romspen’s escrow of a \$7.7 million cash deposit (equal to less than eight percent (8%) of Romspen’s asserted \$96.5 million secured claim) with the Trustee to ensure payment of all non-Romspen non-priority creditors upon the Trustee’s successful subordination of Romspen’s liens and claims.

2. The Trustee presents this limited relief, consistent with Romspen’s voluntary agreements in the existing Credit Bid Stipulations (defined below), leaves Romspen’s credit bid rights well in tack, to the tune of almost \$90 million in available non-cash consideration, and permits the Trustee to complete the auction of the Estate’s assets in a timely fashion. In the alternative, absent such a deposit, the Trustee requests the Court deny Romspen’s credit bid of its contested secured claims and permit only cash bids at the auction.

3. The Trustee requests the Court rule on this Motion on September 23, 2020, in advance of September 29, 2020 auction and related deadlines.

## **II. JURISDICTION AND VENUE**

4. This Court has jurisdiction over these cases and this matter pursuant to 28 U.S.C. §§ 157 and 1334. This is a core proceeding within the meaning of 28 U.S.C. § 157(b)(2)(A), (B), (C), (K), (M), (N) and (O). Venue of these chapter 11 cases in this district is proper pursuant to 28 U.S.C. §§ 1408 and 1409. The statutory predicates for the relief requested in this Motion are Bankruptcy Code §§ 105, 363, 506, 507, 510 and 1129(b)(2)(A)(ii).

### III. BACKGROUND

5. The Debtor is the developer of the former Motorola campus located in Austin, Texas (the "Campus"). Prepetition, the Debtor formulated and initiated the redevelopment of the Campus into a visionary 110-acre mixed use project to consist of offices, hotels, and retail spaces using renewable energy resources, energy-efficient technologies, and sustainable design (hereinafter, the "Project").

6. In early 2018, Romspen committed to extend a \$125 million construction loan (the "Loan") to the Debtor. Critically, in connection with the Romspen Loan, Romspen specifically consented to the Debtor obtaining a separate, supplemental loan under the Property Assessed Clean Energy Act<sup>1</sup> from another lender (the "PACE Loan"), which would fund key environmental and energy saving components of the Project. The Debtor planned, budgeted, and undertook redevelopment of the Project based on this total available funding, including both the Loan and the PACE Loan.

#### **The Bankruptcy Case**

7. Certain petitioning creditors, all unpaid vendors and contractors that performed work and provided materials to the Debtor and Project (the "Petitioning Creditors"), initiated the Case by filing an involuntary chapter 11 petition on March 22, 2020 (the "Petition Date").

8. This Court entered its Consent Order for Entry of Relief (ECF No. 11, the "Relief Order") on April 8, 2020.

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<sup>1</sup> The Property Assessed Clean Energy (PACE) program provides low-cost, long-term financing for water and energy efficiency and conservation improvements to commercial and industrial properties under Chapter 399 of the Texas Local Government Code. Additional PACE information is available at: <https://comptroller.texas.gov/programs/seco/funding/pace.php>

9. On April 9, 2020, the Petitioning Creditors filed their Expedited Motion for Order Requiring Appointment of a Chapter 11 Trustee. *See* ECF No. 14. This Court entered its Order Requiring Appointment of a Chapter 11 Trustee on April 15, 2020. *See* ECF No. 27. The United States Trustee filed its Application for Order Approving Appointment of the Trustee and the Court granted it on April 22, 2020 (the “Appointment Date”), appointing the Trustee. *See* ECF Nos. 35 & 36.

### **Funding the Estate**

10. Upon appointment, the Trustee performed an assessment of the status and condition of the Campus and Project consulting with all key stakeholders and brokers and professionals familiar with the Campus and Austin commercial real estate market. The Trustee determined an orderly sale process will maximize the value and minimize the risk to the Estate. Consistent with this assessment, the Trustee commenced a marketing process.

11. As the Campus and related Project remain incomplete, the Estate generates no cash flow to fund maintenance of the Campus, administration of the Estate, or otherwise to preserve value to permit the sales process to advance. Accordingly, the Trustee required access to cash to avoid immediate and irreparable harm to the Estate that will result if the Trustee is unable to fund the chapter 11 process.

12. Given the exigencies of this Case, the impact of the COVID-19 pandemic on the economy, and the Romspen’s preexisting interest in the Property, after extensive consultations with parties in interest in the Case, the Trustee negotiated post-petition financing with Romspen.

13. On May 18, 2020, the Trustee filed a motion for interim and final orders approving the Romspen post-petition financing, which the Court approved on an interim and then final basis. On June 30, 2020, the Court entered the Amended Final Order Granting Chapter 11 Trustee’s

Motion to Obtain Secured Credit on an Interim and Final Basis (the "Financing Order", ECF No. 144).

**The Trustee's Sale and Auction Process**

14. While securing funding, the Trustee, with the assistance of his Court-approved brokers, Cushman and Wakefield and other professionals, advanced marketing of the Campus, communicating with prospective purchasers, populating a due diligence data room, signing parties to confidentiality and nondisclosure agreements, and providing parties with due diligence materials and arranging for site visits as necessary for such parties to decide whether to make purchase offers.

15. The Trustee formalized the sale's process with proposed bid and auction sale procedures. On August 24, 2020, the Court entered its Order (I) Authorizing and Approving (a) Bid Procedures, and (b) Form and Manner of Notices for the Bid Procedures and Resulting Sale, (II) Scheduling an Auction to Determine the Highest and Best Offer; (III) Scheduling a Hearing to: (a) Approve the Sale of Assets to the Successful Bidder Free and Clear of Liens, Claims and Encumbrances, and (b) Authorize the Debtor to Assume and Assign Executory Contracts and Unexpired Leases in Connection with the Sale; and (IV) Granting Related Relief (the "Bid Procedures Order", ECF No. 194).

16. Pursuant to the Bid Procedures Order, potential bidders must serve a qualifying bid to the Trustee by September 25, 2020 (the "Bid Deadline"), with the Trustee conducting an auction on September 29, 2020 (the "Auction").

17. To date, the Trustee and his professionals have sent over 2,500 emails to potential bidders, with almost 1,200 email views. The Trustee has executed seventy-three confidentiality agreements with potential bidders to facilitate due diligence and guided numerous Campus tours

with serious buyer candidates. In sum, the Trustee and his professionals advanced a robust sale and auction process.

### **Credit Bid Challenges and Deadlines**

18. In addition to cash bids, the Financing Order and Bid Procedures Order reserves the potential for Romspen to elect to submit a credit bid, subject to the Trustee's and other parties' rights to object to such credit bid. Romspen represents it intends to submit a credit bid under the Bid Procedures Order.

19. Romspen filed Proof of Claim No. 14 asserting a secured claim in the amount of not less than \$96,495,021.72 (the "Romspen Claim").

20. The Financing Order provided deadlines, including a "Challenge Period" by which the Trustee may assert any adversary proceeding or contested matter against Romspen challenging Romspen's liens and claims, and a deadline to adjudicate any "Credit Bid Challenge" by which any action to impede Romspen's credit bid rights must be decided by the Court. Financing Order at pp. 14, ¶ 11(c) and 21-22, ¶ 18.

21. Pursuant to the Financing Order and related extension stipulations, on August 20, 2020, Austin Glass & Mirror, Inc., ACM Services, LLC, Koetter Fire Protection of Austin, LLC, Capital Industries, LLC, Hill Country Electric Supply, LP, Lyle America, Inc. d/b/a Glass.com of Illinois, Summer Legacy, LLC, Texas Air Industries, LLC, Ferguson Enterprises, LLC, American Builders & Contractors Supply Co., Inc. d/b/a ABC Supply Co., Inc. (together, the "M&M Lien Plaintiffs"), and Panache Development & Construction, Inc. ("Panache") filed an adversary complaint against Romspen in this Court, objecting to Romspen's proof of claim, seeking a determination of the priority of Romspen's liens, seeking to subordinate Romspen's claims and

liens and challenging Romspen's ability to credit bid at the Auction ("Creditor Challenge Adversary", ECF No. 192).

22. Similarly, Dan White (an equity holder in the Debtor) and related entities filed a separate adversary complaint against Romspen, Romspen affiliates, Panache and Adam Zarafshani, including counts objecting to Romspen's proof of claim, seeking a determination of the priority of Romspen's liens, seeking to subordinate Romspen's claims and liens, and challenging Romspen's ability to credit bid at the Auction ("White Adversary", ECF No. 191).

23. After filing the Creditor Challenge Adversary, on September 10, 2020, the M&M Lien Plaintiffs and Romspen filed a stipulation (ECF No. 204) proposing to resolve the M&M Lien Plaintiffs' opposition to Romspen's submission of a credit bid at the Auction in exchange for Romspen depositing almost \$3.8 million in the registry of the Court for the benefit of the M&M Lien Plaintiffs to be released upon later adjudication or resolution of the Creditor Challenge Adversary (the "M&M Credit Bid Stipulation"). Since the M&M Credit Bid Stipulation provides for Romspen to support its bid with actual cash deposits sufficient to satisfy the M&M Lien Plaintiffs' claims in full, in essence, the M&M Credit Bid Stipulation resolves the M&M Lien Plaintiffs' credit bid challenge through Romspen submitting a dedicated cash bid for the sole benefit of the M&M Lien Plaintiffs.

24. On September 14, 2020, Panache and Romspen filed a substantially similar stipulation (ECF No. 208) resolving Panache's opposition to Romspen's submission of a credit bid at the Auction in exchange for Romspen depositing almost \$1.4 million in the registry of the Court for Panache's benefit to be released upon later adjudication or resolution of the Creditor Challenge Adversary (the "Panache Credit Bid Stipulation", together with the M&M Lien Credit Bid Stipulation, the "Credit Bid Stipulations"). Again, the Panache Credit Bid Stipulation

essentially resolves a credit bid challenge through Romspen submitting a dedicated cash bid for the sole benefit of Panache.

25. Together, the M&M Lien Plaintiffs and Panache hold approximately \$15.6 million of the estimated \$17.3 million of the prepetition Non-Romspen claims against the Estate - *over ninety percent (90%) of the Non-Romspen creditor pool*. Thus, the Credit Bid Stipulations, if approved by the Court, result in the impact of any Romspen credit bid falling entirely on the remaining prepetition unpaid claims held by creditors that are not a party to a Credit Bid Stipulation. None of the Credit Bid Stipulations account for or protect the remaining creditors.

#### **The Threat of Romspen's Credit Bid**

26. The Credit Bid Stipulations and the Creditor Challenge Adversary acknowledge (i) serious allegations against Romspen, (ii) the need for the Court to adjudicate these allegations, including the alleged harm Romspen inflicted on the Estate and creditors, and (iii) the resulting urgency to protect the creditors with proper deposits or similar limits on any Romspen credit bid to ensure available cash to compensate the Estate's non-Romspen creditors upon adjudication of the pending disputes.

27. In fact, the Trustee's own investigation confirms facts supporting serious allegations against Romspen, as detailed below. As the Court-appointed representative of the Estate and fiduciary for all creditors with allowable claims, the Trustee owns the Estate's and Debtor's causes of action against Romspen and must protect the Estate's and all its creditors' options to recover on these claims from the Estate's assets, including the sale of the Campus, in the face of a Romspen credit bid that could total over \$96 million and otherwise leave no cash proceeds to fund this recovery.



28. In an effort to avoid this Motion, the Trustee and Romspen negotiated extensions of the Trustee's Challenge Period and the Trustee's Credit Bid Challenge deadlines to September 21, 2020 and October 1, 2020, respectively. *See* Second Notice and Stipulation Extending Challenge Period (the "Second Stipulation", ECF No. 178). The Financing Order also included Romspen's consent "to adjudication of all Credit Bid Challenges through a contested motion practice on such expedited schedule a[s] necessary to effectuate compliance with this provision." Financing Order at p.14, ¶ 11(c).

29. To date, the Trustee has been unable to resolve this Motion with Romspen. Accordingly, the Trustee files this Motion timely and pursuant to the Financing Order's procedures. Further, Romspen previously consented to the Court's expedited consideration of this Motion. Financing Order at p.14, ¶ 11(c).

#### **The Trustee's Investigation**

30. Since appointment, the Trustee and his professionals advanced a detailed investigation into Romspen's prepetition actions, liens, and claims, including obtaining thousands of pages of documents, interviewing witnesses, and serving subpoenas and turnover orders. This investigation culminated in the preparation of an adversary complaint against Romspen which seeks:

- a. Disallowance of the Romspen Claim;
- b. Equitable subordination of the Romspen Claim and assignment of Romspen's lien to the Estate pursuant to Bankruptcy Code § 510 (c); and
- c. Actual damages, punitive damages, and exemplary damages for numerous state law causes of action.

31. In justifying this relief, the Trustee's investigation supports the accusations against Romspen summarized below, among many other similar accusations.

**Romspen's Inequitable Conduct**

32. Romspen's conduct with respect to the Loan strongly suggests Romspen never intended to perform its funding obligations to the Debtor.

33. Instead, Romspen delayed funding the Debtor's draws under the Loan beginning with the second draw, refused to consent to an already authorized PACE Loan required to fund critical environmental components of the Project, and manufacture a series of pretextual allegations of default against the Debtor. Romspen ignored its own professionals' warnings and pleas, improperly starved the Debtor of the funding needed to successfully redevelop the Project, and forced defaults that lead the Debtor into foreclosure, litigation, receivership, and involuntary bankruptcy, leaving millions of dollars in creditor claims unpaid.

**Romspen's Improper Control of the Project**

34. To advance this scheme, Romspen imposed itself upon the Debtor acting as a co-developer exercising direct control over the Project – not to protect its security interest and the repayment of the Loan, but instead to wrest ownership of the Campus. Specifically,

- a. Romspen itself negotiated the construction contract with Panache, the Debtor's general contractor, dictating the Debtor's principal business relation in developing the Project.
- b. Romspen conditioned funding the Debtor's draw requests upon Panache and the Debtor complying with unpredictable, invasive, extraordinary, and impractical record access and production demands.

- c. Romspen placed its own separate general contractor on-site at the Project on nearly a full-time basis to police the Project hour by hour.
- d. Romspen and its agents directly coopted the Debtor's decision making at critical points - negotiating with the Debtor's suppliers and subcontractors, attempting to dictate leasing efforts, and influencing detailed zoning and regulatory matters.

35. Romspen's assertion of such control deviates significantly from the lender/borrower relationship, providing Romspen improper influence of the Debtor's pre-bankruptcy decision making and operations. These facts suggest Romspen acted as a non-statutory insider of the Debtor, warranting heightened insider scrutiny of Romspen's transactions, dealings and claims. Further, this relationship imposes potential fiduciary duties on Romspen in its dealings with the Debtor. Romspen's aggressive interference extended well beyond day to day control of the Project, culminating in blocking the Debtors' third-party funding required to advance the Project.

#### **Romspen Deprives the Debtor of Critical PACE Funding**

36. The Trustee's investigation developed compelling evidence of Romspen intentionally depriving the Debtor of necessary third-party funding in violation of Romspen's own loan documents. This third-party funding made up a significant portion of the Project's planned budget, knocking an unexpected hole in the Debtor's promised funding during construction. No redevelopment with the complexity of the Project could reasonably survive such a shock. Predictably, neither did the Debtor.

37. Specifically, the Debtor obtained a commitment for a \$25,000,000 principal PACE Loan. Romspen not only violated its obligation under the Loan Documents by systematically

refusing to deliver its consent to the PACE Loan, but actively interfered the Debtor's relationship with the PACE Lender.

38. Romspen knew from before extending the Loan and executing the loan documents that the Debtor required additional financing through the PACE program to complete the Project as planned. In fact, Romspen specifically consented to PACE funding as part of the Debtor's overall funding plan. Romspen even knew the Debtor had chosen CleanFund as PACE lender.

39. In a term sheet dated February 1, 2018, Romspen agreed to consent to a PACE funder taking a priority lien position ahead of Romspen. The final loan documents (the "Loan Agreement") incorporated this agreement as well. Section 5.13(c) of the Loan Agreement states:

*The Lender agrees that the PACE Loan shall be a Permitted Encumbrance to title, provided: (i) Lender shall not have issued a Declaration of Default hereunder; (ii) all proceeds from the PACE Loan either are utilized in the Work of the Project (and so offset against Budget items) or paid to Lender to be applied against the Debt; and (iii) the proceeds from the PACE Loan are to be collaterally assigned to Lender in connection with the Loan. (emphasis added)*<sup>2</sup>

40. Notably, this provision deprived Romspen of any right to select the PACE lender or second-guess the Debtor's choice. Nevertheless, even before Romspen executed the Loan Agreement in February 2018, the Debtor presented CleanFund to Romspen as the selected PACE lender.

41. In October 2018, the Debtor secured CleanFund's commitment to provide PACE financing on the Project in the principal sum of \$25 million, contingent on written consent from

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<sup>2</sup> As set forth in the Trustee's adversary complaint, at the time the Debtor sought Romspen's formal consent to the PACE lender, (1) Romspen had not issued a Declaration of Default under the Loan Agreement, (2) all proceeds from the PACE Loan were to be utilized for the Project, and (3) the proceeds from the PACE Loan were to be collaterally assigned to Romspen in connection with the Loan. In other words, Romspen had no basis under the Loan Agreement to withhold its consent to the PACE Loan.

Romspen. In September and again in early November, 2018, the Debtor sent authorization documents for Romspen's execution to advance closing on the CleanFund loan.

42. By mid-November, given the Debtor's failure to obtain Romspen's expected signature, CleanFund's representatives contacted Romspen making themselves available to answer any of Romspen's questions to advance approval. Yet from mid-November 2018 to late January 2019, Romspen ceased communicating with CleanFund – despite multiple follow-ups from the Debtor and CleanFund.

43. Meanwhile, the delay of the PACE financing caused by Romspen's refusal crippled the Project. In a progress report covering November 2018, the general contractor reported to Romspen that, with respect to the PACE financing, **“If we do not close in the early part of January, we will have fund deficiencies in completing the construction project.”**

44. In December 2018, Romspen's own project monitoring company, BTY, sounded the alarm about the lack of PACE funding disrupting the Project. The BTY report dated December 6, 2018 stated:

has not yet requested funds for any PACE scope items. Although BTY is not providing funding recommendations on the PACE scopes of work, the completion of the scopes materially affect the ongoing success of the project. If the PACE agreement does not close, or if the funding is delayed, the project may not be completed with current loan funds. In this case, the Borrower would be required to contribute additional equity and the project would stop until such time as this occurs. Once PACE funding starts, we will include the tracking of such in our draw

BTY included this same warning in *every* monthly report to Romspen from that time forward, including reports for January, March, April, May, June, July, and August of 2019. Romspen ignored its own professionals' repeated warnings.

45. Beginning in January 2019, Romspen's own general contractor on the ground, Dan Richardson, also underscored the lack of PACE funding's negative impact on the Project, in a series of increasingly urgent emails about the status of the PACE funding:

> Good morning  
>  
> Hey skipper just following up with you about the letter from PACE that gives a deadline of 1/24/2019 to get things completed  
>  
> Dan  
> Sent from Dan's I Phone  
>

> On Apr 8, 2019, at 3:59 PM, Dan Richardson <[mitadan335@gmail.com](mailto:mitadan335@gmail.com)> wrote:  
>  
> Just wanted to follow up with you both about PACE money, has anything changed since our conversation Friday.  
>  
> Dan  
>  
> Sent from Dan's I Phone

· On Jun 4, 2019, at 10:44 AM, dan richardson <[projectcontrol335@gmail.com](mailto:projectcontrol335@gmail.com)> wrote:  
,  
,  
, Have you had a chance to review and or speak with the PACE Lender Adam has chosen to fund the Project  
,  
, Dan  
,  
, Sent from Dan's I Phone

From: Dan Richardson [<mailto:mitadan335@gmail.com>]  
Sent: July 8, 2019 3:33 PM  
To: Richard Weldon; Adam Zarafshani  
Subject: PACE

Where are we with PACE FUNDING

46. On March 1, 2019 – more than a year after the Debtor first notified Romspen of CleanFund's role as PACE lender – Romspen for the first time pushed the Debtor to consider a different PACE lender.

47. Then, beginning in mid-March 2019, Romspen notified the Debtor that it would not consent to the PACE lending unless the Debtor signed a modification of the Loan Agreement adding numerous new conditions to Romspen's consent to the PACE financing, including a release of all claims against Romspen. Even though Romspen already agreed in the original Loan Agreement to consent to the PACE financing, Romspen refused to sign the PACE consent document until the Debtor signed the new loan modification document. The Debtor correctly refused to materially modify the terms of the Loan Agreement in this way.

48. In May and June 2019, at Romspen's insistence, the Debtor considered other PACE lenders to appease Romspen, eventually selecting GreenWorks Lending ("GreenWorks"). Romspen continued to withhold its approval. By September 2019, more than a year after the Debtor first requested Romspen's consent, Romspen steadfastly refused any PACE lender.

49. The Debtor formulated its development plans, budgets and entire funding model on PACE funding. Romspen's refusal to consent to the PACE financing – in violation of the Loan Agreement – knocked a sixteen percent deficiency hole in the Debtor's promised funding. Here, Romspen's blocking of this financing had predictable catastrophic effects on the Project. Without this funding, the Debtor could not complete the Project's critical components tied to PACE financing, rendering completion of the Project itself impossible. Romspen starved the Debtor of PACE funding with full knowledge of the resulting negative impact on the Project and over the Debtor's and Romspen's own agents' repeated pleas and warning, revealing Romspen's intent to stall and impede the Debtor into default.

#### **Romspen Reduces and Revokes Funding Under the Loan**

50. At the same time Romspen blocked the Debtor's PACE funding, Romspen tightened its stranglehold on the Debtor further by reducing the Debtor's access to draws under

the Loan. On or about August 16, 2019, Romspen informed the Debtor, in writing, that Romspen would only disburse a maximum of approximately \$102 million under the Loan's promised \$125 million face amount.

51. Romspen admitted that its "routine practice" is to overstate such promissory notes in its loans. The Debtor and various third parties, including contractors and vendors, reasonably relied upon Romspen's promise to loan \$125 million to develop the Project. In fact, combining Romspen's denial of PACE funding with this surprise denial of Loan funding **deprived the Debtor of one-third of its budgeted financing for the Project**, further sealing the Debtor's predicable fate.

52. The Debtor's loss of tens of millions in planned funding predictably prevented payment of creditor claims, resulting in primary suppliers and contractors suspending their performance, stalling construction, and undermining relationships critical to the Project's successful completion.

53. Having backed the Debtor into a desperate corner, Romspen withheld funding of long-pending draw requests to pressure the Debtor to execute a forbearance agreement providing Romspen expansive rights and further control and demanding the Debtor's execution of deed in lieu to assign the Campus to Romspen. Romspen's demand for a deed to the Campus is telling of Romspen's "loan to own" intentions.

54. Meanwhile, subcontractors abandoned the Project due to non-payment. Construction crews walked off the job.

55. By letter dated October 9, 2019, in desperate need of funds, the Debtor provided Romspen formal notice of Romspen's defaults under the Loan Documents.



56. Not coincidentally, after the Debtor substantially advanced the Campus redevelopment and just as the Debtor neared successful completion of critical rezoning and resolution of a condemnation dispute, Romspen refused to continue funding the Loan and formally declared an event of default.

57. Romspen's wrongful actions choked the Project of needed construction, reducing the Campus's value, damaged the Debtor's image, brand, and reputation; and ultimately forced the Debtor to foreclosure, culminating in a receivership and then this involuntary bankruptcy.

### **The Trustee's Remedies**

58. As explained above and further detailed in the Trustee's complaint against Romspen, Romspen's improper control, systematic constrain of funding and breaches of the Loan Agreement establish the Trustee's claims for, among other relief, disallowance of and equitable subordination of the Romspen Claim and liens. As the Trustee asserts the Estate's claims against Romspen on behalf of the Debtor and all its creditors harmed by Romspen's actions, Bankruptcy Code § 510(c) authorize the Court to "(1) under principles of equitable subordination, subordinate for purposes of distribution all or part of [Romspen's] claim to all or part of another allowed claim . . . or (2) order that any lien securing such a subordinated claim be transferred to the estate."

59. In the face of Romspen's inequitable and damaging acts against the Debtor and its creditors, the Trustee must oppose, and the Court should deny, Romspen's credit bid in the Auction. Holding an asserted claim totaling over \$96 million, an unfettered Romspen credit bid risks Romspen acquiring the Campus at the Auction, with no cash proceeds to distribute to the creditors left unpaid by Romspen's actions, rewarding Romspen's inequitable behavior with ownership of the Project, free and clear. Preventing such injustice is the express goal of the Court's power to limit a credit bid "for cause" under Bankruptcy Code § 363(k).

60. In fact, the Credit Bid Stipulations filed to date already establish the precedent and underscore the need to require Romspen to bid cash in the Auction. As noted above, the Credit Bid Stipulations provide for Romspen to fund cash escrows for the benefit of creditors holding over ninety percent (90%) of the dollar value of claims in Non-Romspen creditor pool; however, they provide no protection to the Estate itself or the remaining prepetition claims. At a minimum, the Court should condition Romspen's credit bid on its funding sufficient cash escrows to ensure the payment of these claims in the likely event the Trustee succeeds in subordination or disallowance of Romspen's secured claim. Absent such protections (already afforded to other creditors) the Court should deny Romspen's credit bid and permit only cash bids on the Project at the Auction.

#### **IV. RELIEF REQUESTED**

61. By this Motion, pursuant to Bankruptcy Code §§ 363(k), 510(c), 1129(b)(2)(A)(ii)<sup>3</sup> and 105(a), the Trustee requests the Court to limit or condition any credit bid by Romspen at the Auction. Specifically, the Trustee requests, at a minimum, the Court condition any Romspen credit bid on Romspen's deposit a total of \$7.7 million cash (including \$1.7 million for asserted Non-Romspen claims not covered by the Credit Bid Stipulation and \$6 million for an estimated allowed amount for Panache's unsecured claim<sup>4</sup> not subject to the Panache Credit Bid Stipulation) pending the Court's adjudication of the Trustee's adversary proceeding against Romspen seeking to disallow and equitably subordinate the Romspen Claim (among other relief). Alternatively, the Court should deny Romspen's credit bid, permitting only cash bids at the Auction, with all liens,

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<sup>3</sup> Section 1129 relates to plan sales, as the proposed sale in the case at hand is outside of the plan, the Trustee will not discuss this provision; however, to the extent applicable, the Trustee seeks relief under this provision as well.

<sup>4</sup> Panache filed Proof of Claim Number 22 (the "Panache Claim") asserting the total amount of \$11,826,795.53, including \$5,024,150.00 as a secured claim. The Trustee's estimate reduces the Panache Claim amount to account for (i) the \$1,387,100.46 cash escrow the Panache Credit Bid Stipulation already provides, and (ii) \$4.5 million in asserted fees which the Trustee estimates may not be allowable.

including Romspen's putative liens attaching to the proceeds for disbursement in accordance with the Court's rulings on the Trustee's adversary and similar priority, lien and claim disputes.

## V. BASIS FOR RELIEF

### A. The Court's Power to Limit Credit Bids

62. Pursuant to section 363(k), the Court has the power to limit a creditor's right to credit bid for cause. Section 363(k) states that:

(k) At a sale under subsection (b) of this section of property that is subject to a lien that secures an allowed claim, *unless the court for cause orders otherwise* the holder of such claim may bid at such sale, and, if the holder of such claim purchases such property, such holder may offset such claim against the purchase price of such property.

11 U.S.C. § 363(k) (emphasis added).

63. “[O]nly an allowed claim under § 502 is entitled to “credit bid” at § 363(b) sale.” *In re RML Dev., Inc.*, 528 B.R. 150, 154 (Bankr. W.D. Tenn. 2014). While a secured creditor has the right to credit bid, the “law is equally clear, as Section 363(k) provides, that the Court may for cause order otherwise.” *In re Fisker Auto. Holdings, Inc.*, 510 B.R. 55, 59 (Bankr. D. Del. 2014) (quotations and citations omitted). Further, section 105(a) states that the “court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title.”

11 U.S.C. § 105(a).

64. “The term ‘cause’ is not defined in the Bankruptcy Code and is left to the courts to determine on a case-by-case basis.” *In re Old Prairie Block Owner, LLC*, 464 B.R. 337, 348 (Bankr. N.D. Ill. 2011). Courts limit credit bid rights where (1) a creditor's allowed secured claim is in dispute, (2) the creditor engaged in inequitable conduct, and (3) where limiting a creditor's right to credit bid fosters competitive bidding.

65. Courts routinely deny credit bidding of claims and liens subject in pending objections and bona fide disputes. See *In re: Aéropostale, Inc.*, 555 B.R. at 415 (Bankr. S.D.N.Y. 2016) (“Courts have ... limited the right to credit bid when the validity of a creditor's lien is in dispute.”) (citations omitted); *In re RML Development, Inc.*, 528 B.R. 150, 154–56 (Bankr. W.D. Tenn. 2014) (a claim subject to an objection is no longer allowed and a court may estimate the claim and deem it to be allowed in the estimated amount or disallowed for purposes of the right to credit bid); *Securities and Exchange Commission v. Capital Cove Bancorp LLC*, 2015 WL 9701154 (C.D. Cal. 2015) (denying credit bidding rights to holders of liens in bona fide dispute pursuant to § 363(f)(4)); *In re 160 Royal Palm, LLC*, 2019 WL 989829, \*1, \*8–12 (Bankr. S.D. Fla. 2019), *aff'd*, 600 B.R. 119 (S.D. Fla. 2019) and stay pending appeal denied, 2019 WL 4419236 (Bankr. S.D. Fla. 2019) (the court estimated the secured creditor’s claim at zero for credit bidding purposes in the face of likely avoidance of the lien).

66. For example, *In re RML Dev., Inc.*, a lender asserted a priority secured claim, and an individual creditor asserted a secured claim under a constructive trust theory that arose prior to the lender’s lien. 528 B.R. 150, 152 (Bankr. W.D. Tenn. 2014). The lender sought to credit bid to which the debtor objected seeking to limit any credit bid to the undisputed portion of the lender’s claim, objecting to the lender’s interest calculation and payment ledger. *Id.* at 153 and 156. The court limited the lender’s right to credit bid to the undisputed amount of its claim. *Id.*

67. Similarly, evidence of the secured creditor’s misconduct, such as conduct to specifically harm other creditors, constitutes “cause” to limit the secured creditor credit bid. *In re Aloha Airlines, Inc.*, 2009 WL 1371950 (Bankr. D. Haw. 2009) (finding credit bidding party’s misconduct sufficient to deny the right to credit bid); *In re Antaeus Technical Services, Inc.*, 345 B.R. 556 (Bankr. W.D. Va. 2005) (denying secured creditor’s right to credit bid upon evidence of

creditor improper actions to enhance its positions); *In re The Free Lance-Star Publishing Co. of Fredericksburg, VA*, 512 B.R. 798 (Bankr. E.D. Va. 2014) (finding cause to limit a secured creditor's credit bid due to creditor's inequitable conduct in a loan-to-own scheme and improperly recording financing, among other negative conduct).

68. Courts also limit a creditor's right to credit bid to foster a competitive bidding environment. *See In re The Free Lance-Star Publ'g Co. of Fredericksburg, VA*, 512 B.R. 798, 805 (Bankr. E.D. Va. 2014) (stating that "limiting the amount of the credit bid in this case will restore enthusiasm for the sale and foster a robust bidding process" and "[m]aximizing the value debtors might be able to realize from the sale of their assets is an important policy advanced by the Bankruptcy Code."); *see also In re Philadelphia Newspapers, LLC*, 599 F.3d 298, 316 n.14 (3d Cir. 2010), as amended (May 7, 2010) (stating that a "court may deny a lender the right to credit bid in the interest of any policy advanced by the Code, such as to ensure the success of the reorganization or to foster a competitive bidding environment.").

69. In sum, courts routinely employ Section 363(k) to limit credit bidding at least (i) when an objection or dispute arises as to the amount, priority, and validity of a secured creditor's lien, including an objection to the claim through an adversary proceeding; (ii) when the creditor engaged in inequitable conduct, and (iii) where limiting a creditor's right to credit bid fosters competitive bidding.

70. As discussed below, each of these factors independently justify limiting Romspen's credit bid in the case at hand.

## **VI. THE COURT SHOULD DENY OR LIMIT ROMSPEN'S CREDIT BID**

71. The facts of this case warrant the Court's denial and limitation of Romspen's credit bid "for cause" under each of the key justifications: (i) Romspen's claims and liens remain subject

to numerous bona fide disputes and pending claim objection adversary proceedings; (ii) facts demonstrate Romspen's egregious inequitable conduct and infliction of harm on the Debtor and its creditors; and (iii) removing the threat of a Romspen credit bid protects and encourages competitive cash bidding at the upcoming Auction.

72. First, Romspen currently lacks an allowed or estimated claim on which to base any credit bid - this alone defeats a Romspen credit bid. *See In re CS Mining, LLC*, 574 B.R. 259, 283–84 (Bankr. D. Utah 2017) (determining that a pending adversary proceeding including an objection to the secured creditor's claim can prevent the creditor's credit bid in absence of an "allowed claim"). The Trustee's adversary, the Creditor Challenge Adversary, and the White Adversary all object to Romspen's asserted claims and liens – each raising colorable accusations to support, at a minimum, the disallowance or subordination of Romspen's liens and claims. Neither Romspen, nor any other creditor, should be permitted to use such embattled and putative claims and liens as its sole currency to purchase the Estate's primary asset.

73. Second, as detailed above and chronicled in the Trustee's upcoming adversary proceeding (as well as the Creditor Challenge Adversary and the White Adversary ), the Trustee's investigation establishes a compelling record of Romspen's inequitable conduct including, among other schemes, depriving the Debtor of funding (both third-party PACE funding as well as advances under the Loan), leaving the Debtor undercapitalized and the Project underfunded, and forcing the Debtor's default with vendors, contractors, creditors, and ultimately Romspen.

74. In addition, the investigation strongly suggests Romspen wielded extraordinary control over the Project and the Debtor, acting not as a third-party, arm's length lender, but as the Debtor's non-statutory insider with the fiduciary duties and heightened scrutiny required by such a relationship. In finding cause to limit credit bidding rights, the *in re CS Mining, LLC* court also

relied on the secured creditor's close relationship to the debtor (the equivalent of an insider). *Id.* at 283–84.

75. Such significant inequitable conduct constitutes textbook cause under Bankruptcy Code § 363(k) and the case law to block Romspen's credit bid and prevent Romspen from profiting from and being rewarded for its improper conduct. The Bankruptcy Code provides the Court the express means to block and condition a credit bid on these facts.

76. In determining cause to limit a credit bid, courts "balance the interests of the debtor, its creditors, and the other parties of interests in order to achieve the maximization of the estate and an equitable distribution to all creditors" *See In re: Aéropostale, Inc.*, 555 B.R. at 415 (Bankr. S.D.N.Y. 2016) (citing cases discussing "cause") (citations and internal quotations omitted). To this point, the Credit Bid Stipulations set the precedent and demonstrate the fairness of requiring Romspen to escrow (or bid) cash to protect creditors in the Auction.

77. The Credit Bid Stipulations already provide for Romspen to fund cash escrows for the benefit of creditors holding over ninety percent of the dollar value of Non-Romspen claims, leaving approximately \$7.7 million in prepetition claims unprotected. Granting such inequitable preference and credit bid protections to only some, but not all creditors, undermines the fairness of the sales process and this bankruptcy case.

78. To restore balance, requiring Romspen to fund a similar escrow for the Estate's remaining unpaid creditors' benefit is fundamentally fair to Romspen. A \$7.7 million **cash deposit totals less than eight percent (8%) of Romspen's asserted \$96.5 million secured claim.** This limited relief, consistent with Romspen's voluntary agreements in the Credit Bid Stipulations, leaves Romspen's credit bid rights well in tack, to the tune of almost \$90 million in available non-cash consideration. Thus, the equities balance in favor of granting this Motion.

79. Such a condition is limited in scope and consistent with those imposed by courts when the amount and validity of a lien is in dispute. *See In re Diebart Bancroft*, 1993 WL 21423 (E.D. La. 1993) (requiring the secured creditor fund a cash escrow or pay a portion of its bid in cash pending adjudication of a line priority dispute); *In re RML Development, Inc.*, 528 B.R. 150, 157 (Bankr. W.D. Tenn. 2014) (requiring the lender to provide a letter of credit, surety bond, or other deposit to backstop credit bid).

80. Finally, restricting Romspen's right to credit bid also facilitates the Trustee's ability to sell the Project through the proposed Auction and administer the Estate's assets for the benefit of all legitimate creditors. Permitting Romspen's unfettered credit bid, on the other hand, provides Romspen a no-cash \$96 million check to purchase the Project and risks leaving no cash proceeds to the Estate and creditor (other than those Romspen already hand-picked for protection in the Credit Bid Stipulations).

81. At a minimum, the Court should condition Romspen's credit bid on its funding sufficient cash escrows to ensure the payment of all remaining claims in the likely event the Trustee succeeds in subordination or disallowance of Romspen's secured claim. Absent such protections, already afforded to other creditors, the Court should deny Romspen's credit bid and permit only cash bids at the Auction.

## VII. REQUEST FOR EMERGENCY RELIEF

82. The Trustee requests that the Court conduct an emergency hearing on this Motion in advance of the Auction scheduled for September 29, 2020. Romspen expressly consented "to adjudication of all Credit Bid Challenges through a contested motion practice on such expedited schedule a[s] necessary . . ." Final Financing Order at p. 14, ¶ 11(c). The Trustee is in immediate need of a ruling on Romspen's ability to credit bid prior to convening the Auction. The Trustee,



therefore, seeks immediate adjudication of this Motion to prevent immediate and irreparable harm to the Estate.

#### VIII. RESERVATION OF RIGHTS

83. In addition to the allegations contained and the relief requested in this Motion, the Trustee will file an adversary proceeding asserting further claims, causes of action and requests for relief against Romspen, in part based on some of the same alleged facts. Accordingly, nothing contained in this Motion is intended or should be construed as a waiver of the Trustee's, Debtor's, Estate's, or any other party's rights to further relief against Romspen or any other party. The relief requested in this Motion is neither exclusive nor an election of remedies.

WHEREFORE, PREMISES CONSIDERED, the Trustee requests that the Court (i) condition any Romspen credit bid on Romspen's funding of a \$7.7 million escrow for the Estate's and its creditors' benefit; (ii) in the alternative, deny Romspen's credit bid, requiring only cash bids; and (iii) granting such other and further relief as the Court may deem just and proper.

Dated: September 15, 2020,

/s/ Scott D. Lawrence

Jason M. Rudd

State Bar No. 24028786

Scott D. Lawrence

State Bar No. 24087896

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Telephone: (214) 692-6200

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**COUNSEL FOR GREGORY MILLIGAN,**


**CH. 11 TRUSTEE FOR 3443 ZEN GARDEN, L.P.**

**CERTIFICATE OF SERVICE**

I certify that on September 15, 2020, a true and correct copy of the forgoing was served on the parties listed in the attached service list, via ECF and/or email service where available, and otherwise via First Class United States Postal service on September 16, 2020.

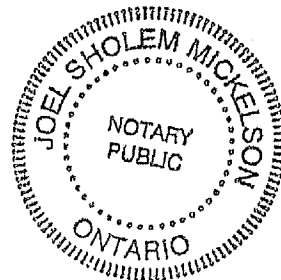
/s/ Scott D. Lawrence

This is Exhibit "28" referred to  
in the Affidavit of Wesley Roitman  
Sworn before me this 16<sup>th</sup> day of November, 2020



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A Notary Public in and for  
the Province of Ontario





The relief described hereinbelow is SO ORDERED.

Signed September 23, 2020.

H. CHRISTOPHER MOTT  
UNITED STATES BANKRUPTCY JUDGE

IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE WESTERN DISTRICT OF TEXAS  
AUSTIN DIVISION

IN RE:	§	
	§	CASE NO. 1:20-10410-HCM
3443 ZEN GARDEN, L.P.,	§	
	§	Chapter 11
DEBTOR.	§	

**STIPULATION AND ORDER TO DEPOSIT FUNDS BETWEEN GREGORY S. MILLIGAN, CHAPTER 11 TRUSTEE AND ROMSPEN MORTGAGE LIMITED PARTNERSHIP RESOLVING CREDIT BID CHALLENGE**

Gregory S. Milligan, Chapter 11 Trustee (“*Trustee*”) for the bankruptcy estate (the “*Estate*”) of 3443 Zen Garden, L.P. (the “*Debtor*”) and Romspen Mortgage Limited Partnership (“*Romspen*” or “*Lender*”) hereby file this Stipulation Resolving Credit Bid Challenge (the “*Stipulation*”) and request that the Bankruptcy Court enter this Stipulation as “*So Ordered*” on the docket in the above styled and numbered Bankruptcy Case.

WHEREAS the Court entered its *Amended Final Order Granting Chapter 11 Trustee’s Motion to Obtain Secured Credit on an Interim and Final Basis* (ECF No. 144, the “*Financing Order*”). All capitalized terms not specifically defined in this Stipulation have the meaning provided in the Financing Order.

WHEREAS the Financing Order reserved substantive rights and preserved claims and causes of actions during the defined Challenge Period, which the Financing Order sets to end “no later than July 20, 2020.” *See* Financing Order, pp. 21-22, ¶ 18. The Financing Order also set August 30, 2020, as the deadline by which any “Credit Bid Challenge . . . proceedings must be completely concluded and fully resolved on a final basis . . .” (the “*Credit Bid Challenge Period*”). *See* Financing Order, p. 14, ¶ 11(c).

WHEREAS the Lender and the Trustee mutually agreed to extend the Challenge Period for the Trustee and the Estate Parties (as defined in the Fourth Credit Bid Challenge Period Stipulation) until “October 19, 2020 for all purposes” pursuant to the Fourth Notice and Stipulation Extending Challenge Period under Final Financing Order dated September 21, 2020 (ECF No. 235, the “*Fourth Credit Bid Challenge Period Stipulation*”).

WHEREAS, on September 15, 2020, the Trustee filed the Emergency Motion to Limit Romspen Mortgage Limited Partnership’s Credit Bid (ECF No. 209) (the “*Credit Bid Challenge*”). In the Credit Bid Challenge, the Trustee asserted challenges against Romspen’s ability to credit bid, including, without limitation, a request that Romspen be prohibited or limited pursuant to 11 U.S.C. § 363(k) from credit bidding on any sale of assets of the Debtor pursuant to 11 U.S.C. §§ 363(b) or 1129(b)(2)(A)(ii).

WHEREAS Romspen disputes and denies the allegations and entitlement to relief as requested by the Trustee in the Credit Bid Challenge.

WHEREAS the Court approved bidding procedures that includes a virtual auction for the Estate’s primary asset on September 29, 2020, at 9:00 a.m. (CT). *See* Bid Procedures Order, p. 16 (ECF No. 194). Additionally, the Bid Procedures Order has a deadline of September 25, 2020, for Romspen to elect to credit bid. *Id.*

WHEREAS as a result, the Credit Bid Challenge and related disputed issues between Trustee and Romspen would need to be resolved or fully adjudicated by the Bankruptcy Court before the commencement of the virtual auction.

WHEREAS such an adjudication is impracticable, if not impossible, in light of the resources and schedule of the Bankruptcy Court, Trustee, and Romspen.

WHEREAS delaying the virtual auction is also impracticable and undermines the predictability of the marketing process undertaken pursuant to the Bid Procedures Order.

WHEREFORE, Trustee and Romspen hereby agree and stipulate as follows, subject to the Bankruptcy Court entering this Stipulation as “So Ordered” on the docket in the Bankruptcy Case:

1. Upon the entry of this Stipulation as “So Ordered” on the docket in the Bankruptcy Case and not later than 7:00 pm (CT) on Friday, September 25, 2020, Romspen shall deposit the sum of US \$7,000,000.00, in cash, in the Trustee’s escrow account to be held in trust (the “*Deposit*”), payable in the amount of and conditioned upon a judgment or order, if any, entered in favor of the Trustee in connection with any claims and relief requested that may be brought against Romspen by the Trustee;<sup>1</sup>

2. No funds from the Deposit shall be released to any party for any purpose without an order of the Court specifying the exact amount of funds to be released to the specific party or parties within a specific timeframe and by a specific delivery method. For the sake of clarity, nothing in this Stipulation shall be construed, presumed or deemed to be an admission against

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<sup>1</sup> The Deposit is provided as adequate protection to resolve the relief requested in the Credit Bid Challenge asserted by the Trustee. For avoidance of doubt, the foregoing “amount payable from the Deposit” limitation is not a cap or limit on Trustee’s, Debtor’s or Estate’s potential allowable claims against Romspen. Further, the foregoing “amount payable from the Deposit” does not prohibit or preclude any award to the Trustee, Debtor or Estate of attorneys’ fees, if applicable, in connection with any cause of action that may be asserted by the Trustee, Debtor or Estate against Romspen. However, the Deposit is established only to provide a source of recovery to the Trustee’s, Estate’s and Debtor’s potential claims against the Romspen as may be adjudicated at a later date.

Romspen or a presumption of any kind that Romspen has engaged in any acts of wrongdoing. By entering into this Stipulation, Romspen shall not be presumed or deemed to have any liability or exposure of any kind. Romspen adamantly opposes the allegations contained in the Trustee's Credit Bid Challenge, and all of Romspen's and the Trustee's, Debtor's and Estate's respective rights and remedies in connection therewith, including, without limitation, all claims, causes of action, defenses, evidence, authorities and other allegations are expressly reserved;

3. Upon the entry of this Stipulation as "So Ordered" and completion of the Deposit by Romspen, the Trustee shall dismiss and withdraw its request that the Court prohibit or limit Romspen's ability to credit bid pursuant to 11 U.S.C. § 363(k) on any sale of assets of the Debtor pursuant to 11 U.S.C. §§ 363(b) or 1129(b)(2)(A)(ii), it being the intention of Romspen and the Trustee that the Deposit shall and does provide the Debtor and the Estate with adequate protection in the context of a Romspen credit bid for any claims and causes of action that the Trustee, Debtor and Estate may have against Romspen, all of which remain disputed by Romspen.

4. The rights, benefits, reservations and protections this Stipulation provides to the Trustee shall apply to any duly appointed subsequent or successor chapter 11, chapter 7 or plan trustee, the Debtor, the Estate or similar legal successors.

###

Dated: September 22, 2020

AGREED TO BY:

/s/ Thomas C. Scannell (with permission)

Thomas C. Scannell

Tex. Bar No. 24070559

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LIMITED PARTNERSHIP**

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**COUNSEL FOR GREGORY MILLIGAN,  
CH. 11 TRUSTEE FOR 3443 ZEN GARDEN, L.P.**



### CERTIFICATE OF SERVICE

I certify that on September 22, 2020, a true and correct copy of the forgoing was filed and served on the following parties via the Court's CM/ECF electronic service system at the indicated email addresses:

Christopher G Burwell on behalf of Creditor Wembley Metal Buildings, LLC  
[cburwell@baileyandbaileypc.com](mailto:cburwell@baileyandbaileypc.com)

Martyn B. Hill on behalf of Creditor Lone Star Materials, Inc.  
[mbh@pdhlaw.com](mailto:mbh@pdhlaw.com), [eservice@pdhlaw.com](mailto:eservice@pdhlaw.com); [mah@pdhlaw.com](mailto:mah@pdhlaw.com); [sserry@pdhlaw.com](mailto:sserry@pdhlaw.com)

B. Russell Horton on behalf of Debtor 3443 Zen Garden, LP  
[rhorton@gbkh.com](mailto:rhorton@gbkh.com), [kseabolt@gbkh.com](mailto:kseabolt@gbkh.com)

Paul H. Jordan on behalf of Creditor Hill Country Electric Supply, L.P., Creditor Koetter Fire Protection of Austin, LLC and Creditor Texas Air, LLC  
[pjordon@sneedvine.com](mailto:pjordon@sneedvine.com), [gtwnfilings@sneedvine.com](mailto:gtwnfilings@sneedvine.com)

Tara LeDay on behalf of Creditor The County of Hays, Texas  
[tleday@ecf.courtdrive.com](mailto:tleday@ecf.courtdrive.com); [kmorriss@mvalaw.com](mailto:kmorriss@mvalaw.com); [vcovington@mvalaw.com](mailto:vcovington@mvalaw.com); [bankruptcy@mvalaw.com](mailto:bankruptcy@mvalaw.com); [alocklin@mvalaw.com](mailto:alocklin@mvalaw.com)

Kell C. Mercer on behalf of Petitioning Creditor ACM Services LLC, Petitioning Creditor Austin Glass & Mirror, Inc. and Creditor Lyle America, Inc. d/b/a Glass.com of Illinois  
[kell.mercer@mercerc-law-pc.com](mailto:kell.mercer@mercerc-law-pc.com)

Lisa M. Norman on behalf of Creditor American Builders and Contractors Supply Co., Inc. d/b/a ABC Supply Co., Inc.  
[lnorman@andrewsmyers.com](mailto:lnorman@andrewsmyers.com), [kdubose@andrewsmyers.com](mailto:kdubose@andrewsmyers.com)

Danielle Nicole Rushing on behalf of Interested Party Lincoln 1861, Inc. and Daniel White  
[drushing@dykema.com](mailto:drushing@dykema.com), [lvasquez@dykema.com](mailto:lvasquez@dykema.com); [docketsat@dykema.com](mailto:docketsat@dykema.com)

Thomas C. Scannell on behalf of Creditor and Interested Party Romspen Mortgage Limited Partnership  
[tscannell@foley.com](mailto:tscannell@foley.com), [acordero@foley.com](mailto:acordero@foley.com)

Jeffrey M. Tillotson on behalf of Creditor Dan White  
[jtillotson@tillotsonlaw.com](mailto:jtillotson@tillotsonlaw.com), [swade@tillotsonlaw.com](mailto:swade@tillotsonlaw.com); [keith@tillotsonlaw.com](mailto:keith@tillotsonlaw.com)

United States Trustee - AU12  
[ustpreion07.au.ecf@usdoj.gov](mailto:ustpreion07.au.ecf@usdoj.gov)

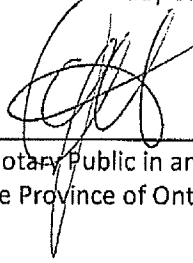
Richard James Wallace, III on behalf of Creditor Equipmentsshare.com, Inc.  
[richard.wallace@solidcounsel.com](mailto:richard.wallace@solidcounsel.com)

Deborah D. Williamson on behalf of Creditor Dan White Family Trust and Dan White  
[dwilliamson@dykema.com](mailto:dwilliamson@dykema.com), [mlongoria@dykema.com](mailto:mlongoria@dykema.com); [docketsat@dykema.com](mailto:docketsat@dykema.com)

*/s/ Jason M. Rudd*

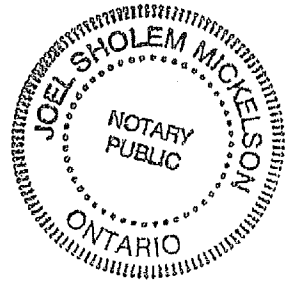
\_\_\_\_\_  
Jason M. Rudd

This is Exhibit "29" referred to  
in the Affidavit of Wesley Roitman  
Sworn before me this 16<sup>th</sup> day of November, 2020



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A Notary Public in and for  
the Province of Ontario





The relief described hereinbelow is SO ORDERED.

Signed October 07, 2020.

H. CHRISTOPHER MOTT  
UNITED STATES BANKRUPTCY JUDGE

IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE WESTERN DISTRICT OF TEXAS  
AUSTIN DIVISION

IN RE:

3443 ZEN GARDEN, L.P.

DEBTOR.

§  
§  
§  
§  
§

CASE NO. 1:20-10410-HCM

Chapter 11

**ORDER AUTHORIZING AND APPROVING THE SALE OF CERTAIN OF DEBTOR'S ASSETS FREE AND CLEAR OF LIENS, CLAIMS, INTERESTS, AND ENCUMBRANCES AND GRANTING RELATED RELIEF**

Upon the *Motion for Orders (I) Authorizing and Approving (A) Bid Procedures, and (B) Form and Manner of Notices for the Bid Procedures and Resulting Sale, (II) Scheduling an Auction to Determine the Highest and Best Offer, (III) Scheduling a Hearing to: (a) Approve the Sale of Assets to the Successful Bidder Free and Clear of Liens, Claims and Encumbrances, and (b) Authorize the Debtor to Assume and Assign Executory Contracts and Unexpired Leases in Connection with the Sale, and (IV) Granting Related Relief* (ECF No. 175, the "Motion")<sup>1</sup> filed

<sup>1</sup> Capitalized terms not otherwise defined herein shall have the meanings ascribed in the Motion.

by Gregory S. Milligan, the Chapter 11 Trustee (the "Trustee") for the bankruptcy estate (the "Estate") of 3443 Zen Garden, L.P. (the "Debtor") appointed in the above-captioned case (the "Chapter 11 Case") requesting entry of: (i) an order (a) approving sale and Bid Procedures (the "Bid Procedures") in connection with sale (the "Sale") of certain assets of the Debtor (the "Assets" as defined herein), (b) authorizing the Trustee to select a Stalking Horse Bidder (as defined in the Bid Procedures Order) and grant Bid Protections, (c) schedule a hearing to consider approval of the sale of Assets (the "Sale Hearing"), (d) approving the form and manner of notice, and (e) granting related relief; and (ii) an order (this "Sale Order") approving the transfer, free and clear of all liens, claims, encumbrances and interests of any kind, to Romspen Mortgage Limited Partnership (together with any affiliated designee, the "Buyer"); and the Court having entered an order approving among other things, the Bid Procedures (ECF No. 194, the "Bid Procedures Order"); and the Trustee having determined that Buyer was the highest and best bidder for the Assets in connection with the Sale in accordance with the Bid Procedures; and based upon the evidence presented at the hearing held on October 7, 2020; and a Qualified Bid having been received from 2289946 Alberta Ltd. ("Competing Bidder"); and after conducting the Auction in accordance with the Bid Procedures Order; and all parties in interest having been heard or having had the opportunity to be heard regarding the Sale; and it appearing that adequate and proper notice of the Motion has been given and that no other or further notice need be given; and the Sale Hearing having been held to consider the relief requested in the Motion; and upon the record of the Sale Hearing and all of the proceedings had before the Court; and the Court having found and determined that the relief sought in the Motion is in the best interests of the Debtor, the Estate, its creditors and all other parties in interest; and the testimony adduced at the Sale Hearing establish

just cause for the relief granted herein; and after due deliberation and sufficient cause appearing therefor

**IT IS HEREBY FOUND AND DETERMINED THAT:<sup>2</sup>**

A. Jurisdiction. The Court has jurisdiction to hear and determine the Motion and to grant the relief requested in the Motion pursuant to 28 U.S.C. § 1334(b).

B. Venue. Venue of this case and the Motion in this district is proper under 28 U.S.C. §§ 1408 and 1409. This is a core proceeding within the meaning of 28 U.S.C. § 157(b)(2).

C. Statutory Predicates. The statutory and legal predicates for the relief requested in the Motion are sections 105, 363, and 365 of title 11 of the United States Code, 11 U.S.C. §§101, et seq. (the “Bankruptcy Code”), and Rules 2002, 6004, 6006, 9006 and 9014 of the Federal Rules of Bankruptcy Procedure (the “Bankruptcy Rules”).

D. Notice. In accordance with the Bid Procedures Order, and as evidenced by the certificate of service previously filed with this Court (ECF No. 195, the “Certificate of Service”), the Trustee served the Sale Notice (as defined in the Bid Procedures Order) on all parties listed therein.

E. Notice Sufficient. Based upon the Certificate of Service and the evidence presented at the Sale Hearing, the Trustee has provided adequate and sufficient notice of the Motion, the Bid Procedures Order, the Bid Procedures, the Sale Hearing, the Sale, and the transactions contemplated thereby (the “Transaction”), in accordance with the Bid Procedures Order and Bid Procedures, sections 105(a), 363 and 365 of the Bankruptcy Code and Bankruptcy Rules 2002, 6004, 6006 and 9006. A reasonable opportunity to object or be heard regarding the relief granted

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<sup>2</sup> Findings of fact shall be construed as conclusions of law and conclusions of law shall be construed as findings of fact to the fullest extent of the law. *See* Fed. R. Bankr. P. 7052, 9014.

by this Sale Order has been afforded to those parties entitled to notice pursuant to Bankruptcy Rule 6004(a).

F. Assets. The “Assets” are: (1) the real property, including all right, title, and interest therein, described on Exhibit A hereto (the “Real Property”); (2) all rights, privileges, easements, and rights of way appurtenant to said Real Property, including without limitation, all mineral, oil and gas and other subsurface rights, development rights, air rights, and water rights (collectively, the “Appurtenances”); (3) all improvements and fixtures located on the Real Property, including, without limitation: (a) all structures affixed to the Real Property; (b) all apparatus, equipment, and appliances used in connection with the operation or occupancy of the Real Property; and (c) all facilities used to provide any services to the Real Property and/or the structures affixed thereto (collectively, the “Improvements”), excluding those fixtures owned by occupants of the Real Property or vendors of the Improvements, if any; (4) all tangible personal property located on and used in connection with the Real Property or the Improvements (excluding the personal property of occupants of the Real Property, if any), (collectively, the “Personal Property”); and (5) all rights, warranties, guarantees, utility contracts, approvals (governmental or otherwise), permits, certificates of occupancy, surveys, and plans and specifications relating to the Real Property, Appurtenances, or Improvements (collectively, the “Intangible Property”); *provided, however*, notwithstanding anything herein to the contrary, the “Assets” do not include any tenant fixtures or other property belonging to occupants of or vendors to the Real Property, if any, or any items leased from third parties.

G. Property of the Estate. The Assets sought to be transferred by the Trustee and the Debtor to the Buyer pursuant to this Order are property of the Estate and title thereto is vested in the Estate.

H. Excluded Assets Certain assets of the Estate are excluded from the Transaction and are referred to herein as the “Excluded Assets.” For the avoidance of doubt, the following are Excluded Assets: (a) all cash and cash equivalents, bank accounts and securities of Seller; (b) intentionally omitted; (c) all accounts or notes receivable of Seller; (d) all trademarks or tradenames, copyrights, or other intellectual property; (e) intentionally omitted, (f) all rights to any refunds, credits, or rebates of or relating to taxes (or other related costs or expenses) that are borne by or the responsibility of Seller or attributable to any tax asset of Seller; (g) all rights to any refunds, credits, or rebates due to Seller by a third party for any overpayment attributable to the Assets with respect to any period of time on or prior to the date the Seller and the Buyer substantially consummate the Sale (the “Closing Date”);<sup>3</sup> (h) all insurance policies and rights to proceeds thereof and unearned premiums related thereto (excluding any mortgagee’s title insurance coverage or any insurance policies in which Buyer is named loss payee or additional insured); (i) all prepayments, good faith, and other bid deposits submitted by any third party under the terms of the Bid Procedures Order; (j) all Claims (as defined in the Bankruptcy Code) belonging to the Estate other than those specifically enumerated herein as part of the Assets; (k) all of the Debtor’s and the Estate’s commercial tort claims (as such term is defined in the Uniform Commercial Code as in effect in the State of Texas) arising on or before the Closing Date, including without limitation, all causes of action against (i) present and former directors and officers of Seller, (ii) direct and indirect equity holders of Seller, and (iii) any other parties with whom the Debtor did business prior to the Closing Date, and the proceeds of all of the foregoing; (l) all claims, actions, causes of action, demands, lawsuits, arbitrations, notices of violation, proceedings, litigations, citations, or summons, whether civil, criminal, administrative, regulatory,

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<sup>3</sup> The Closing Date shall be the date the Court enters this Sale Order on the docket of the Bankruptcy Case.



or otherwise, whether at law or in equity (collectively, "Actions") or Claims against (i) the Debtor's contract counterparties and the proceeds thereof, (ii) A-1 Engineering, LLC, and any of its affiliates, professionals, owners, managers, members, officers, directors, employees, agents, insurers, successors or assigns, (iii) the Debtor's insurance carriers, policies, or coverage (excluding any mortgagee's title insurance coverage or any insurance policies in which Buyer is named loss payee or additional insured), and (m) all Actions arising under sections 502, 510, 541, 542, 543, 544, 545, 547 through and including 553 of the Bankruptcy Code, or under similar or related state or federal statutes and common law, including fraudulent transfer laws, whether or not litigation is commenced to prosecute such Actions, and which may be recovered pursuant to section 550 of the Bankruptcy Code.; (n) all rights of the Estate to object to or seek disallowance or subordination of Claims against the Estate, including any associated setoff, recoupment, or other similar rights; (o) all assets and properties that are not specifically enumerated as Assets herein, and (p) all Claims relating to rights of the Seller arising under this Sale Order or any other Transaction Document.

I. Trustee's Authority. Subject to the entry of this Sale Order, the Trustee: (i) has full power and authority to complete the Sale; (ii) has all of the power and authority necessary to consummate the Transaction; and (iii) has taken all action necessary to authorize and approve the Sale, and any actions required to be performed by the Trustee in order to consummate the Transaction contemplated herein. No consents or approvals of the Debtor are required for the Trustee to consummate the Sale. Pursuant to Amended Final Order Granting Chapter 11 Trustee's Motion to Obtain Secured Credit on an Interim and Final Basis (ECF No. 144, the "Financing Order") p. 16, ¶ 15(c) the Transaction's satisfaction of Claims against the Estate constitutes "moneys disbursed or turned over in the case" by the Trustee "to parties in interest" for purposes

of Bankruptcy Code section 326(a), subject in all respects to complete and full compliance with the limits set forth in the Budget (as defined in the Financing Order).

J. Stipulations. This Sale Order and the Transactions in no way alter, amended or prejudice: (i) the Notice and Stipulation Extending Challenge Period under Final Financing Order (ECF No. 157); (ii) the Second Notice and Stipulation Extending Challenge Period under Final Financing Order (ECF No. 178); (iii) the Third Notice and Stipulation Extending Challenge Period under Final Financing Order (ECF No. 197); (iv) the Fourth Notice and Stipulation Extending Challenge Period under Final Financing Order (ECF No. 235); (v) the Stipulation and Order to Deposit Funds in the Registry of the Court Between Austin Glass & Mirror, Inc., ACM Services, LLC, Koetter Fire Protection of Austin, LLC, Capital Industries, LLC, Hill Country Electric Supply, LP, Lyle America, Inc. d/b/a Glass.com of Illinois, Summer Legacy, LLC, Texas Air, LLC, Ferguson Enterprises, LLC, and American Builders and Contractors Supply Co., Inc. d/b/a ABC Supply (“M&M Lien Claimants”) and Romspen Mortgage Limited Partnership Resolving Credit Bid Challenge (ECF No. 221) (“Lien Stipulation”); (vi) the Stipulation and Order to Deposit Funds in the Registry of the Court Between Adam Zarafshani, Panache Development & Construction, Inc., and Romspen Mortgage Limited Partnership Resolving Credit Bid Challenge (ECF No. 222); and (vii) Stipulation and Order to Deposit Funds Between Gregory S. Milligan, Chapter 11 Trustee and Romspen Mortgage Limited Partnership Resolving Credit Bid Challenge (ECF No. 238) (collectively, the “Stipulations”). Nothing in this Order is intended to, or does, alter, amend, modify or limit the Stipulations. All rights, claims, defenses, arguments, and positions reserved in the Stipulations constitute Excluded Assets as defined herein and are specifically preserved in this Sale Order. To the extent of any inconsistency in the Stipulations and this Sale Order, the Stipulations control. The liens asserted by the M&M Lien Claimants shall

attach to the funds in the registry of the Court pursuant to the terms of the Lien Stipulation to the extent that the M&M Lien Claimants' respective liens are determined (whether through agreement of the parties, order of the Court, or otherwise) to be valid, subsisting, and superior to the liens of Romspen. Further, in order to preserve the "removables" lien priority theories and rights asserted by the M&M Lien Claimants, July 1, 2020, as the date such removables challenges were asserted, shall be the operative date for determining removability and establishing priority of any of the M&M Lien Claimants' interests on any Assets acquired by Buyer through the Transaction.

K. Sufficiency of Marketing; Broker Fee. The Trustee and his professionals, including but not limited to Cushman & Wakefield U.S., Inc. ("C&W"), marketed the Assets and conducted the marketing and sale process as set forth in and in accordance with the Motion, the Bid Procedures Order, and this Court's Order authorizing the Trustee to retain and employ C&W as real property broker (ECF No. 160). Based upon the record of these proceedings, all creditors and other parties in interest and all prospective buyers have been afforded a reasonable and fair opportunity to bid for the Assets. C&W's work fee in the amount of \$40,000.00 and out of pocket expenses in the amount of \$4,241.00 is deemed reasonable and necessary and allowed for payment consistent with this Sale Order.

L. Bid Procedures. The Bid Procedures were substantively and procedurally fair to all parties and all potential bidders and afforded notice and a full, fair and reasonable opportunity for any person to make a higher or otherwise better offer to purchase the Assets. The Trustee conducted the sale process without collusion and in accordance with the Bid Procedures.

M. Bid Deadline; Auction. The Bid Deadline passed on September 25, 2020 at 5:00 p.m. (prevailing Central Time) in accordance with the Bid Procedures and Bid Procedures Order. The Trustee received two (2) Qualified Bids. Pursuant to the terms of the Bid Procedures, the

Trustee conducted an auction on September 29, 2020 (the "Auction"), commencing at 9:00 a.m. central time and determined that the Buyer's credit bid of \$45,000,000.00 constituted the highest and best bid, which was approved by the Court at the Sale Hearing (the "Successful Bid") for the Assets and, therefore, was designated as the Successful Bid. As established by the record of the Sale Hearing, the bidding and related procedures established by the Bid Procedures Order have been complied with in all material respects by the Trustee, the Buyer, and all their affiliates. The Bid Procedures afforded a full, fair and reasonable opportunity for any entity or person to make a higher or otherwise better offer to purchase the Assets, and the Successful Bid constitutes the best and highest offer for the Assets.

N. Back-Up Bidder. At the Auction, the Competing Bidder offered the next highest or otherwise best Qualified Bid, which was a cash bid in the amount of no less than \$13,000,000.00. The Trustee, in his sound exercise of business judgment, and pursuant to the authority provided in the Bid Procedures and Bid Procedures Order, determined that it was in the best interest of the Estate and its creditors that no Back-Up Bidder be selected.

O. Executory Contracts Not Assumed; Cure Objections. On September 8, 2020, the Trustee filed a *Notice of Proposed Cure Costs* (ECF No. 203, the "Cure Notice"). The Cure Notice indicated that the Debtor proposed one executory contract, a construction contract with Panache Development and Construction, Inc. ("Panache"), dated April 20, 2018, as available to potential purchasers for assumption and assignment in connection with the Sale. Panache filed an objection to the cure amounts the Trustee stated in the Cure Notice for the construction contract (ECF No. 224, the "Panache Cure Objection"). Other parties also objected to the Cure Notice to the extent the Estate sought to assume and assign contracts to which they asserted the Debtor was a counterparty (ECF Nos. 225 & 227, collectively with the Panache Cure Objection, the "Cure

Objections”). The Sale to the Buyer does not include the assumption or assumption and assignment of any of the Debtor’s executory contracts. The Cure Objections are thus resolved.

P. Arm’s-Length and Buyer’s Good Faith. The terms of the Sale were negotiated and are undertaken by the Trustee, on behalf of the Debtor, and Buyer at arm’s length without collusion or fraud, and in good faith within the meaning of section 363(m) of the Bankruptcy Code. The Buyer (i) recognized that the Trustee was free to deal with any other party interested in acquiring the Assets, (ii) complied with the Bid Procedures Order in all respects and (iii) willingly subjected the bid to the competitive Bid Procedures approved in the Bid Procedures Order. All payments to be made by the Buyer and other agreements or arrangements entered into by the Buyer in connection with the Sale have been disclosed; neither the Buyer, the Trustee, or the Debtor have violated section 363(n) of the Bankruptcy Code by any action or inaction. The Buyer is a good faith purchaser in accordance with section 363(m) of the Bankruptcy Code and, as such, is entitled to all of the protections afforded thereby. The Buyer is acting in good faith within the meaning of section 363(m) of the Bankruptcy Code in closing the Transaction. The Buyer shall not be deemed to be a successor in interest to the Debtor, the Trustee, the Estate, the reorganized debtor, or any assignee or successor-in-interest to any of such parties, and the Buyer shall not have any successor liability as to any of the Assets.

Q. Sale Highest or Best Offer. The total consideration provided by the Buyer for the Assets as reflected herein is the highest and best offer for the Assets. The Court’s determination that the Buyer’s offer constitutes the highest and best offer for the Assets and the Trustee’s selection of the Buyer’s offer as the Successful Bid constitutes a valid and sound exercise of the Trustee’s business judgment. The Buyer’s offer, upon the terms and conditions set forth herein, including the total consideration to be realized by the Debtor thereunder, (i) is the highest and best offer

received by the Trustee and Court after extensive marketing, including through the Bid Procedures, and (ii) is in the best interest of the Debtor, the Estate, its creditors, and other parties in interest. Taking into consideration all relevant factors and circumstances, no other entity has offered to purchase the Assets for greater economic value to the Debtor or the Estate.

R. Transfer of Assets Free and Clear. The Debtor is the sole and lawful owner of the Assets, or otherwise has a valid, enforceable property interest in such, and title thereto is vested in the Estate within the meaning of section 541(a) of the Bankruptcy Code. Subject to section 363(f) of the Bankruptcy Code, and except as otherwise provided in this Sale Order, the transfer of each of the Assets to the Buyer will be, as of the Closing Date, a legal, valid, and effective transfer of the Assets, which transfer vests or will vest the Buyer with all right, title, and interest to the Assets free and clear of, among other things: (i) all Liens, (ii) all debts arising under, relating to, or in connection with any act of the Debtor or claims (as that term is defined in section 101(5) of the Bankruptcy Code), liabilities, obligations, demands, guaranties, options, rights, contractual commitments, restrictions, interests and matters of any kind and nature, whether arising prior to or subsequent to the commencement of the Chapter 11 Case, and whether imposed by agreement, understanding, law, equity or otherwise (including, without limitation, rights with respect to Claims (as defined below) and Liens (y) that purport to give to any party a right of setoff or recoupment against, or a right or option to effect any modification, profit sharing interest, right of first refusal, purchase or repurchase right or option, or termination of, the Debtor's or the Buyer's interests in the Assets, or any similar rights, or (z) in respect of taxes, restrictions, rights of first refusal, charges of interests of any kind or nature, if any (collectively, the "Claims"), relating to, accruing or arising any time prior to or on the Closing Date. The Claims, collectively with the

Liens, are the "Interests." The Trustee served the Sale Notice on all parties who are known or reasonably believed, after reasonable inquiry, to have asserted any Interests in any of the Assets.

S. Free and Clear Findings Required by Buyer. The Buyer would not have agreed to enter into and would not consummate the Transaction if the Sale of the Assets to the Buyer were not free and clear of any and all Interests pursuant to section 363(f) of the Bankruptcy Code, or if the Buyer would, or in the future could, be liable for any of such Interests. Effective upon the Closing Date, the Buyer shall not be responsible for any Interests, including in respect of the following: (i) any labor or employment agreements; (ii) all mortgages, deeds of trust and security interests; (iii) any intercompany loans and receivables between the Debtor and any non-Debtor affiliates; (iv) any pension, welfare, compensation or other employee benefit plans, agreements, practices and programs, including, without limitation, any pension plan of any Debtor, any affiliate of any Debtor, or any member of the Debtor's "control group"; (v) any other employee, worker's compensation, occupational disease or unemployment or temporary disability related claim, including, without limitation, claims that might otherwise arise under or pursuant to (a) the Employee Retirement Income Security Act of 1974, as amended, (b) the Fair Labor Standards Act, (c) Title VII of the Civil Rights Act of 1964, (d) the Federal Rehabilitation Act of 1973, (e) the National Labor Relations Act, (f) the Age Discrimination and Employee Act of 1967 and Age Discrimination in Employment Act, as amended, (g) the Americans with Disabilities Act of 1990, (h) the Consolidated Omnibus Budget Reconciliation Act of 1985, (i) state discrimination laws, (j) state unemployment compensation laws or any other similar state laws, (k) the Worker Adjustment and Retraining Notification Act, 29 U.S.C §§ 2101 et. seq., or (l) any other state or federal benefits or claims relating to any employment with the Debtor or any of its predecessors; (vi) Interests arising under any Environmental, Health and Safety Laws with respect

to any assets owned or operated by the Debtor or any corporate predecessor at any time prior to the Closing Date and any liabilities of the Debtor; (vii) any bulk sales or similar law; (viii) any tax statutes or ordinances, including, without limitation, the Internal Revenue Code of 1986, as amended; (ix) any and all Interests arising out of violations, or other non-compliance with any law(s), regulation(s), standard(s), guideline(s), enforcement order(s), or any other authority or requirement enforced by, or under the supervision of the Occupational Safety and Health Administration; and (x) any theories of successor liability or causes of action related thereto. A sale of the Assets other than one free and clear of all Interests would yield substantially less value for the Debtor's estate, with less certainty, than the Sale as contemplated. Therefore, the Sale contemplated herein maximizes the Debtor's recovery on the Assets, and, thus, is in the best interests of the Debtor and the Estate, its creditors, and all other parties in interest.

T. Satisfaction of Section 363(f) Standards. The Trustee is authorized to sell the Assets free and clear of all Interests because, with respect to each creditor or other person or entity asserting an Interest, one or more of the standards set forth in section 363(f)(1)-(5) of the Bankruptcy Code has been satisfied. Each creditor or other person or entity asserting an Interest in the Assets: (i) has, subject to the terms and conditions of this Sale Order, consented to the Sale or is deemed to have consented; (ii) will have a Lien attached to the proceeds of the Sale in the same priority and to the same extent as such Lien attached to the Assets; (iii) could be compelled in a legal or equitable proceeding to accept money satisfaction of such lien, claim, encumbrance, or other interest; or (iv) otherwise falls within the provisions of section 363(f) of the Bankruptcy Code. All parties in interest, including, without limitation, any holders of Interests, or who withdrew their objection, to the Sale or the Motion are deemed to have consented to the relief granted herein pursuant to section 363(f)(2) of the Bankruptcy Code. Those holders of Interests



who did not object (or who ultimately withdrew their objections, if any) to the Sale or the Motion are deemed to have consented to the Motion and Sale pursuant to section 363(f)(2) of the Bankruptcy Code. Those holders of any Interests who did object fall within one or more of the other subsections of section 363(f) of the Bankruptcy Code because their Interests will attach to the proceeds of the Sale to the same extent and priority as such Interests attached to the Assets as of the Petition Date.

U. Sale as Exercise of Business Judgment. Consummation of the Sale constitutes the exercise by the Trustee of sound business judgment, and such acts are in the best interest of the Debtor, the Estate, its creditors, and all parties in interest. The Court finds that the Trustee has articulated good and sufficient business reasons justifying the Sale of the Assets to the Buyer.

V. Compelling Reasons for an Immediate Sale. The Trustee has articulated good and sufficient reasons for approval of the Sale. The Trustee has demonstrated compelling circumstances for the Sale outside: (a) the ordinary course of business, pursuant to section 363(b) of the Bankruptcy Code; and (b) a plan of reorganization or liquidation (as the case may be), in that, among other things, the immediate consummation of the Sale to the Buyer is necessary and appropriate to preserve and to maximize the value of the Assets for the Estate. To maximize the value of the Assets, it is essential that the Sale occur promptly.

W. Final Order. This Sale Order constitutes a final order within the meaning of 28 U.S.C. § 158(a). Notwithstanding Bankruptcy Rules 6004(h) and 6006(d), the Court expressly finds that there is no just reason for delay in the implementation of this Sale Order and expressly directs entry of judgment as set forth herein.

**IT IS THEREFORE ORDERED, ADJUDGED AND DECREED THAT:**

1. Motion Granted. The relief requested in the Motion is GRANTED as stated herein.

2. Objections Overruled. All objections, if any, with regard to the relief sought in the Motion that have not been withdrawn, waived, settled, or otherwise dealt with as expressly provided herein or on the record at the Sale Hearing are hereby overruled on the merits, with prejudice.

3. Notice. Notice of the Motion, the Bid Procedures, the Bid Procedures Order, the Sale (and the Transaction contemplated in connection therewith), the Sale Hearing, and all deadlines related thereto was fair and equitable under the circumstances and complied in all respects with section 102(1) of the Bankruptcy Code and Bankruptcy Rules 2002, 6004, 6006.

4. Approval. Pursuant to sections 105, 363 and 365 of the Bankruptcy Code, the Sale of the Assets are hereby approved, and the Trustee, on behalf of the Debtor, is authorized and directed to consummate the Sale, including the sale, transfer and assignment of all of the Debtor's right, title, and interest in the Assets to the Buyer in accordance with the terms stated herein. The Trustee and the Buyer are each hereby authorized and directed to take any and all actions necessary or appropriate to: (a) consummate the Sale of the Assets to the Buyer and the closing of the Transaction (the "Closing")<sup>4</sup> and this Sale Order, and (b) perform, consummate, implement and close fully the Sale together with any and all additional instruments and documents that may be reasonably necessary or desirable to implement the Sale. The automatic stay imposed by section 362 of the Bankruptcy Code is modified solely to the extent necessary to implement the provisions of this Sale Order.

5. Credit Bid. The Successful Bid is a credit bid pursuant to Bankruptcy Code section 363(k). At the Closing, the Buyer shall document the offset, release and satisfaction of

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<sup>4</sup> An asset purchase agreement is not required to effectuate the Closing, and a title company is not being engaged to coordinate the Closing. Accordingly, the only condition precedent to the occurrence of the "Closing" and thus the passing of all legal and equitable title of the Assets to the Buyer is the Court's entry of this Sale Order on the docket of the Bankruptcy Case.

\$45,000,000.00 in indebtedness under the Credit Agreement and the Loan Documents, which shall first be applied to the satisfaction and payment in full of the Post-Petition Indebtedness (as defined in the Financing Order), with the remaining amount applied to the reduction of the Pre-Petition Indebtedness (as defined in the Financing Order), pursuant to the Financing Order.

6. Amendments to terms of Sale. The terms of the Sale and any related agreements, documents, or other instruments may be modified, amended, supplemented or restated by the parties thereto in a writing signed by such parties and in accordance with the terms thereof, without further order of this Court, provided that any such modification, amendment, supplement or restatement does not alter the economic substance of the Sale. The terms of the Sale shall not be altered, amended, rejected, discharged or otherwise affected by any chapter 11 plan proposed or confirmed in these bankruptcy cases without the prior written consent of the Buyer.

7. Transfer Free and Clear. One or more of the standards set forth in section 363(f)(1)-(5) of the Bankruptcy Code has been satisfied. Pursuant to sections 105, 363, and 365 of the Bankruptcy Code, upon the Closing, neither the Buyer, nor any of its respective successors and assigns shall have any liability for any Interest arising from or otherwise related to the Assets, whether known or unknown as of the Closing Date, now existing or hereafter arising, whether fixed or contingent, whether as a successor, vicariously or otherwise, of any kind, nature or character whatsoever. Through this Sale Order, all rights, interests and legal and equitable title in, under and to the Assets are hereby conveyed by the Trustee, on behalf of the Debtor, to the Buyer free and clear of any and all Interests. All liens, claims, encumbrances, and other interests shall attach to the proceeds of the Sale with the same nature, validity, and priority as such liens, claims, encumbrances, or other interests encumbered the Assets prior to the proposed Sale and shall be distributed pursuant to further order of the Court. As of the Closing Date, the Buyer expressly

assumes all liability required to satisfy all ad valorem tax liens, including the year 2020 ad valorem tax liens, pertaining to the subject properties (real and personal) and payment in satisfaction of these claims shall constitute “moneys disbursed or turned over in the case” by the Trustee “to parties in interest” for purposes of Bankruptcy Code section 326(a). On the Closing Date, Buyer shall fund the amount of \$44,241.00 and the Trustee shall use these funds to pay C&W its fees and expenses, which are hereby allowed on a final basis without further application or order of this Court, in accordance with this Court’s Order authorizing the Trustee to retain and employ C&W as real property broker (ECF No. 160).

8. Surrender of Possession. Any and all Assets in the possession or control of any person or entity, including any and all equity security holders, affiliates of the Debtor, vendor, supplier, or employee of the Debtor shall be transferred to the Buyer free and clear of all Interests and shall be immediately delivered to the Buyer and deemed delivered at the time of Closing.

9. Vesting of Assets in the Buyer. Effective upon the Closing, the transfer to the Buyer of the Debtor’s right, title, and interest in the Assets shall be, and hereby is deemed to be, a legal, valid and effective transfer of the Debtor’s right, title, and interest in the Assets, and vests with or will vest in the Buyer all right, title, and interest of the Debtor in the Assets, free and clear of all Interests to the extent permitted by section 363 of the Bankruptcy Code. The Trustee and Buyer are authorized, but not required, to execute any additional documents necessary to effectuate the terms of this Sale Order, including, without limitation, a deed evidencing the passing of title to the Assets to Buyer (“Deed”). Buyer is permitted, but not required, to record, file or otherwise submit this Sale Order, the Deed, or any other documents with any applicable governmental authority or agency to notice Buyer’s title and ownership of the Assets.

10. Good Faith Buyer. The Buyer is entitled to all of the protections afforded by section 363(m) of the Bankruptcy Code, and the Buyer has proceeded in good faith in all respects in connection with the Sale. The Buyer shall not have any successor liability to the Debtor, the Trustee, the Estate, the Debtor's creditors, any of their respective successors or assigns, the Assets or in any way related to or arising from the Transaction evidenced by this Sale Order.

11. No Bulk Sales. No bulk sales law or any similar law of any state or other jurisdiction shall apply in any way to the transactions contemplated by the Motion and this Sale Order.

12. Fair and Equivalent Value. The consideration provided by the Buyer for the Assets under this Sale Order shall be deemed for all purposes to constitute reasonably equivalent value and fair consideration under the Bankruptcy Code and any other applicable law.

13. Transfer of Marketable Title. Upon the Closing, this Sale Order shall be construed and shall constitute for any and all purposes an assignment, conveyance and transfer of all of the Debtor's right, title, and interest in the Assets, or a bill of sale transferring good, indefeasible, valid and marketable title in such Assets to the Buyer at the Closing, free and clear of all Interests.

14. Approval to Release Interests. If any person or entity that has filed financing statements, mortgages, mechanic's liens or other documents or agreements evidencing Interests in or against the Assets has not delivered to the Trustee before the Closing, in proper form for filing and executed by the appropriate parties, termination statements, instruments of satisfaction, releases of liens and easements, and any other documents necessary for the purpose of documenting the release of all Interests that the person or entity has or may assert with respect to the Assets, the Buyer is hereby authorized to execute and file such statements, instruments, releases and other documents on behalf of such person or entity with respect to the Assets. The Buyer shall

not need the consent of any such parties prior to filing or recording any such releases, discharges or terminations of such Interests in the Assets. The Buyer is hereby authorized to file, register or otherwise record a certified copy of this Sale Order, which, once filed, registered or otherwise recorded, shall constitute conclusive evidence of the release of all Interests against the Assets.

15. Effect of Recordation of Order. This Sale Order, once filed, registered, or otherwise recorded, (a) shall be effective as a conclusive determination that, upon the Closing, all Interests of any kind or nature whatsoever existing as to the Assets prior to the Closing have been unconditionally released, discharged, and terminated and that the conveyances described herein have been effected, and (b) shall be binding upon and shall govern the acts of all persons and entities including, without limitation, all filing agents, filing officers, title agents, title companies, recorders of mortgages, recorders of deeds, registrars of deeds and all other persons and entities who may be required by operation of law, the duties of their office, or contract, to accept, file, register or otherwise record or release any documents or instruments, or who may be required to report or insure any title or state of title in or to the Assets. Each and every federal, state, and local governmental agency or department is hereby authorized to accept any and all documents and instruments necessary and appropriate to consummate the Transaction, including, without limitation, recordation of this Sale Order.

16. Subsequent Orders and Plan Provisions. Unless otherwise agreed to by the Trustee and the Buyer, this Sale Order shall not be modified by any chapter 11 plan confirmed in these Chapter 11 Cases or any subsequent order(s) of this Court.

17. Binding Effect of Sale Order. This Sale Order shall be binding in all respects upon the Trustee, the Debtor, the Estate, all creditors of, and holders of equity security interests in, the Debtor, affiliates of the Debtor, officers and/or employees of the Debtor, any holders of Interests

in, against or on all or any portion of the Assets (whether known or unknown), the Buyer and all successors and assigns of the Buyer, notwithstanding the dismissal of any of the Chapter 11 Case or any subsequent appointment of any trustees, examiners, "responsible persons" or other fiduciaries in the Chapter 11 Case or upon a conversion to chapter 7 under the Bankruptcy Code. Nothing in this Order alters, amends, modifies or limits the Stipulations. All rights reserved in the Stipulations constitute Excluded Assets as defined herein and are preserved notwithstanding anything to the contrary in this Sale Order. Effective as of the Closing Date, all persons or entities holding any Interests of any kind in, to or against any Assets shall be, and are hereby deemed, forever barred from asserting or enforcing any of such Interests against Buyer, its successors and assigns or against the Assets after Closing. No person shall take any action to prevent, interfere with or otherwise enjoin the consummation of the Transaction contemplated by this Sale Order.

18. Preservation of Challenge Rights. Notwithstanding any other provision of this Sale Order, nothing in this Sale Order or any document executed regarding the Transaction shall release, waive, restrict or prejudice in any way any rights, remedies, reservations, Claims or causes of action the Trustee, Estate or Debtor (and such duly appointed successor to the Trustee, the Debtor or Estate) may have against the Buyer or the Lender (as defined in the Financing Order), including, without limitation, prosecution of any action to invalidate, challenge, dispute, avoid, subordinate or otherwise impair the claims or liens of Lender or Buyer, or any liens or priorities created under either the Financing Order, the Loan Documents (as defined in the Financing Order) or the Credit Facility (as defined in the Financing Order), or to recover on any claims against or transfers made to Lender or Buyer. For avoidance of doubt, should the Trustee, Debtor or Estate, or any of their successors or assigns, obtain any order or judgment subordinating, disallowing, reducing, impairing, or avoiding the Buyer's or Lender's claims or liens, including, without limitation, the

amounts that constitute the Successful Bid, then upon such order or judgment, the Buyer (including RIC (Austin) LLC or any other designee or assignee) and Lender hereby agree to fund to the Trustee (and such duly appointed successor to the Trustee, the Debtor or Estate) the Successful Bid amount, and such other additional amounts, in cash sufficient to fully satisfy and implement such judgment, order or award. Nothing in this Sale Order limits or restricts the amount of any damages, the type or nature of any relief or specific performance or other remedy the Trustee, Estate or Debtor, or their successors or assigns may obtain against the Buyer or Lender. Notwithstanding any other provision of this Sale Order, nothing in this Sale Order or any document executed regarding the Transaction shall collaterally estop, release, waive, restrict or prejudice in any way any rights, remedies, reservations, Claims or causes of action the M&M Lien Claimants have timely asserted against the Lender (as defined in the Financing Order) in the Amended Complaint filed on September 28, 2020 in Adversary Case No. 20-1048 pending before the Bankruptcy Court.

19. Preservation of White Parties' Challenges. Lender and DANIEL WHITE, LINCOLN 1861 INC., ABSOLUTE ENVIRONMENTAL WASTE MANAGEMENT INC., ABSOLUTE ENERGY RESOURCES INC., LOT 11 GP LTD., LOT 11 LIMITED PARTNERSHIP, ECO INDUSTRIAL BUSINESS PARK INC., THE WHITE FAMILY TRUST, AND SYMMETRY ASSET MANAGEMENT INC. (collectively, the "White Parties") agree and the Court so orders that nothing herein shall constitute a determination as to the extent or validity of the liens or claims asserted by Lender. Lender and the White Parties agree and the Court so orders nothing herein shall limit or otherwise reduce or affect in any manner the right or the amount of setoff (if any) against the claims of Romspen by the Debtor, the White Parties or any other party. Romspen and the White Parties agree and the Court so orders that entry of this order permitting Romspen to purchase the Assets for a credit bid of \$45,000,000 does not limit or otherwise affect the rights of the Debtor, the Trustee, the White



Parties and any other party in interest with standing to challenge the allowance or entry of a judgment on all or any part of any claim asserted by Romspen in this or any other proceeding against the Debtor, any of the White Parties or any entity affiliated with Mr. White. Romspen and the White Parties agree and the Court so orders that if it is ultimately determined by entry of a final judgment (“**Final Judgment**”) that the allowed claim of Romspen is less than \$45,000,000 (the “**Credit Bid**”), Romspen shall pay to the Trustee (or his successors and assigns) the difference between the Credit Bid and the amount of the Romspen claim as ultimately allowed by such Final Judgment. Romspen and the White Parties agree and the Court so orders that nothing herein shall constitute a finding or other Court determination that the Debtor was in default of its obligations to Romspen or that Romspen had the right to declare a default under the relevant loan documents against the Debtor, any of the White Parties or any entity affiliated with Mr. White.

20. Immediate Effect. This Sale Order constitutes a final order within the meaning of 28 U.S.C. § 158(a). Notwithstanding any provision in the Bankruptcy Rules to the contrary, the terms of this Sale Order shall be immediately effective and enforceable upon its entry and not subject to any stay, notwithstanding the possible applicability of Bankruptcy Rules 6004(h) and 6006(d) or otherwise and to the extent Bankruptcy Rules 6004(h) and 6006(d) are applicable, the operative provisions of such rules are hereby waived and deemed inapplicable to the Transaction such that the terms of this Sale Order are immediately effective, operative and fully enforceable on a final basis. Furthermore, because the Buyer has acted in good faith, pursuant to Section 363(m) of the Bankruptcy Code, the reversal or modification of this Order on appeal will not affect the validity of the Transaction contemplated by this Sale Order, unless the same is stayed pending appeal prior to Closing. Therefore, the Trustee and Buyer are authorized to immediately proceed in consummating the sale of the Real Property immediately upon the entry of this Order and are

immediately authorized to take any and all actions necessary to effectuate the terms of this Sale Order Time is of the essence in Closing the Transaction.

21. Trustee Compensation. Pursuant to the Financing Order (ECF No. 144) p. 16, ¶ 15(c) the Transaction's satisfaction of Claims against the Estate constitutes "moneys disbursed or turned over in the case" by the Trustee "to parties in interest" for purposes of Bankruptcy Code section 326(a), subject to in all respects to complete and full compliance with the limits set forth in the Budget (as defined in the Financing Order).

22. Retention of Jurisdiction. The Court shall retain jurisdiction to, among other things, interpret, implement, and enforce the terms and provisions of this Sale Order, and each ancillary document executed in connection therewith to which the Trustee, on behalf of the Debtor, is a party, and to adjudicate, if necessary, any and all disputes concerning or relating in any way to the Sale; provided, however, that in the event the Court abstains from exercising or declines to exercise jurisdiction or is without jurisdiction, such abstention, refusal or lack of jurisdiction shall have no effect upon and shall not control, prohibit or limit the exercise of jurisdiction of any other court having competent jurisdiction with respect to any such matter.

23. Non-Severability. The provisions of this Sale Order are non-severable and mutually dependent.

24. Headings. Headings are included in this Sale Order for ease of reference only.

25. Broker Fees. Except for C&W, no broker or party has a claim to any commission, broker's fee, finder's fee, or similar fee as a result of having negotiated the Sale for, or on behalf of, the Trustee, the Debtor or the Buyer.

26. The findings of fact and conclusions of law entered in this Sale Order shall constitute the Court's findings of fact and conclusions of law pursuant to Rule 7052 of the Federal

Rules of Bankruptcy Procedure, made applicable to this proceeding pursuant to Bankruptcy Rule 9014. To the extent that any finding of fact shall later be determined to be a conclusion of law, it shall be so deemed, and to the extent that any conclusion of law shall later be determined to be a finding of fact, it shall be so deemed.

###

PREPARED AND SUBMITTED BY:

Jason M. Rudd, Tex. Bar No. 24028786  
Scott D. Lawrence. Tex. Bar No. 24087896  
**WICK PHILLIPS GOULD & MARTIN, LLP**  
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jason.rudd@wickphillips.com  
scott.lawrence@wickphillips.com

**COUNSEL FOR GREGORY MILLIGAN,  
CH. 11 TRUSTEE FOR 3443 ZEN GARDEN, L.P.**

**EXHIBIT A**

Real Property Description

EXHIBIT A

LEGAL DESCRIPTION

TRACT 1:

Lot 1A-B, RESUBDIVISION PLAT OF LOT 1A, RESUBDIVISION PLAT OF LOT 1, MOTOROLA INC. ED BLUESTEIN FACILITY, a subdivision in Travis County, Texas, according to the map or plat recorded in Document No. 200900045, of the Official Public Records of Travis County, Texas.

TRACT 2:

NON-EXCLUSIVE EASEMENT ESTATE appurtenant to Tract 1 created pursuant to that certain Easement Agreement for Emergency Reciprocal Access, dated November 15, 2006, by and between Freescale Semiconductor, Inc. and Hewlett-Packard Company, recorded in Document No. 2006222165, Official Public Records of Travis County, Texas; over and across those portions of Lot 1A and 2A, RESUBDIVISION PLAT OF LOT 1, MOTOROLA INC. ED BLUESTEIN FACILITY, according to the map or plat thereof, recorded in Document No. 200600304, Official Public Records of Travis County, Texas, now known as Lot 1A-A and Lot 1A-B, RESUBDIVISION PLAT OF LOT 1A, RESUBDIVISION PLAT OF LOT 1, MOTOROLA INC. ED BLUESTEIN FACILITY, according to the map or plat thereof, recorded in Document no. 200900045, Official Public Records of Travis County, Texas.

TRACT 3:

NON-EXCLUSIVE EASEMENT ESTATE appurtenant to Tract 1 created pursuant to that certain Reciprocal Access Agreement for Landscape and Building Maintenance, dated November 15, 2006, by and between Freescale Semiconductor, Inc. and Hewlett-Packard Company, recorded in Document No. 2006222167, Official Public Records of Travis County, Texas; over and across those portions of Lot 1A and 2A, RESUBDIVISION PLAT OF LOT 1, MOTOROLA INC. ED BLUESTEIN FACILITY, according to the map or plat thereof, recorded in Document No. 200600304, Official Public Records of Travis County, Texas, now known as Lot 1A-A and Lot 1A-B, RESUBDIVISION PLAT OF LOT 1A, RESUBDIVISION PLAT OF LOT 1, MOTOROLA INC. ED BLUESTEIN FACILITY, according to the map or plat thereof, recorded in Document No. 200900045, Official Public Records of Travis County, Texas.

TRACT 4:

NON-EXCLUSIVE EASEMENT ESTATE appurtenant to Tract 1 created pursuant to that certain Ingress and Egress Access Easement dated August 10, 2012, by and between MFPB Ed Bluestein LLC and Freescale Semiconductor, Inc., recorded in Document No. 2012132396, Official Public Records of Travis County, Texas; over and across those portions of Lot 1A-A, RESUBDIVISION PLAT OF LOT 1A, RESUBDIVISION PLAT OF LOT 1, MOTOROLA INC. ED BLUESTEIN FACILITY, according to the map or plat thereof, recorded in Document No. 200900045, Official Public Records of Travis County, Texas.

TRACT 5:

NON-EXCLUSIVE EASEMENT ESTATE appurtenant to Tract 1 created pursuant to that certain Parking Spaces Easement Agreement, dated August 10, 2012, by and between Freescale Semiconductor, Inc. and MFPB Ed Bluestein LLC, recorded in Document No. 2012132397, Official Public Records of Travis County, Texas; all rights therein to the use of the parking spaces located on the third and fourth floors shown as G-1 in Exhibit "B" of Agreement. Said Parking Garage located on Lot 1A-A, RESUBDIVISION PLAT OF LOT 1A, RESUBDIVISION PLAT OF LOT 1,

MOTOROLA INC. ED BLUESTEIN FACILITY, according to the map or plat thereof, recorded in Document No. 200900045, Official Public Records of Travis County, Texas.

TRACT 6:

NON-EXCLUSIVE EASEMENT ESTATE appurtenant to Tract 1 created pursuant to that certain Stairwell Ingress and Egress Access Easement, dated August 10, 2012, by and between Freescale Semiconductor, Inc. and MFPB Ed Bluestein LLC, recorded in Document No. 2012132398, Official Public Records of Travis County, Texas; all rights therein to the use of the stairwell shown in Exhibit "A" of Agreement. Said stairwell located on Lot 1A-A, RESUBDIVISION PLAT OF LOT 1A, RESUBDIVISION PLAT OF LOT 1, MOTOROLA INC. ED BLUESTEIN FACILITY, according to the map or plat thereof, recorded in Document No. 200900045, Official Public Records of Travis County, Texas.

TRACT 7:

NON-EXCLUSIVE EASEMENT ESTATE appurtenant to Tract 1 created pursuant to that certain Reciprocal Easement Agreement for Access through Doorway to Buildings K and L, dated August 10, 2012, by and between Freescale Semiconductor, Inc. and MFPB Ed Bluestein LLC, recorded in Document No. 2012132400, Official Public Records of Travis County, Texas; all rights therein to the access use of the doorway shown in Exhibit "B" of Agreement. Said doorway located on Lot 1A-A, RESUBDIVISION PLAT OF LOT 1A, RESUBDIVISION PLAT OF LOT 1, MOTOROLA INC. ED BLUESTEIN FACILITY, according to the map or plat thereof, recorded in Document No. 200900045, Official Public Records of Travis County, Texas.

TRACT 8:

NON-EXCLUSIVE EASEMENT ESTATE appurtenant to Tract 1 created pursuant to that certain Reciprocal Easement Agreement for Access to Trails and for Lot Line Maintenance, dated August 10, 2012, by and between Freescale Semiconductor, Inc. and MFPB Ed Bluestein LLC, recorded in Document No. 2012132399, Official Public Records of Travis County, Texas; all rights therein to the pedestrian access over and across the trails currently existing as shown in Exhibit "A" of Agreement; all rights therein for landscaping and maintenance. Said trails located on Lot 1A-A, RESUBDIVISION PLAT OF LOT 1A, RESUBDIVISION PLAT OF LOT 1, MOTOROLA INC. ED BLUESTEIN FACILITY, according to the map or plat thereof, recorded in Document No. 200900045, Official Public Records of Travis County, Texas.



FILED AND RECORDED  
OFFICIAL PUBLIC RECORDS

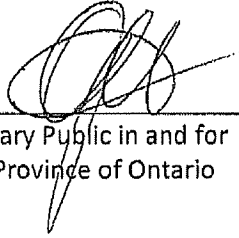
*Dana Debeauvoir*

DANA DEBEAUVOIR, COUNTY CLERK  
TRAVIS COUNTY, TEXAS

April 27 2018 01:16 PM

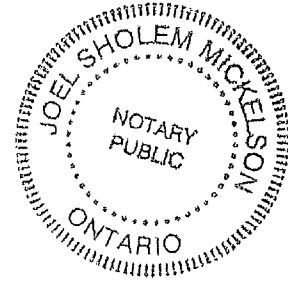
FEE: \$ 174.00 2018064160

This is Exhibit "30" referred to  
in the Affidavit of Wesley Roitman  
Sworn before me this 16<sup>th</sup> day of November, 2020



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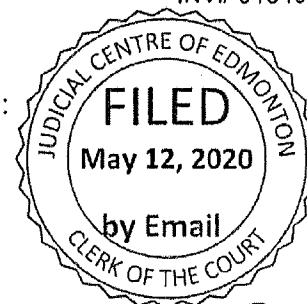
A Notary Public in and for  
the Province of Ontario



\$250.00  
INV# 015408

Form 10  
[Rule 3.25]

Clerk's Stamp:



COURT FILE NUMBER 2003 08412

COURT OF QUEEN'S BENCH OF  
ALBERTA

JUDICIAL CENTRE EDMONTON

PLAINTIFF(S) ABSOLUTE ENVIRONMENTAL WASTE  
MANAGEMENT INC

DEFENDANT(S) ADAM ZARAFSHANI and AMANDA  
WOODHAM

DOCUMENT STATEMENT OF CLAIM

ADDRESS FOR SERVICE AND  
CONTACT INFORMATION OF  
PARTY FILING THIS DOCUMENT

Attention: Jonathan Hillson

Dentons Canada LLP  
Barristers and Solicitors  
2500 Stantec Tower  
10220 - 103 Avenue NW  
Edmonton, AB T5J 0K4  
Phone: (780) 423-7194  
Facsimile: (780) 423-7276  
**Dentons file: 580694-1**

NOTICE TO DEFENDANT(S)

You are being sued. You are a Defendant.

Go to the end of this document to see what you can do and when you must do it.

Note: State below only facts and not evidence (Rule 13.6)

**Statement of facts relied on:**

1. The Plaintiff, Absolute Environmental Waste Management Inc ("Absolute"), is an Alberta corporation that carries on business in Edmonton, Alberta and elsewhere in Alberta.



2. The Defendant, Adam Zarafshani ("Mr Zarafshani"), resides in Austin, Texas or elsewhere in the State of Texas in the United States of America.

3. The Defendant, Amanda Woodham ("Ms Woodham"), resides in Austin, Texas or elsewhere in the State of Texas in the United States of America.

4. In 2017, Absolute was owned by the Dan White Family Trust. Absolute provides oilfield waste disposal services, industrial waste disposal services and laboratory services by storing and disposing of oilfield and industrial waste for third-party customers.

5. During one of Mr White's trips to Austin, Texas in 2017, Mr Zarafshani approached Mr White and asked Mr White to buy used-furniture that was being sold for scrap value. Mr Zarafshani described himself as a scrap buyer and a home builder to Mr White.

6. Thereafter, Mr Zarafshani started cultivating a friendship so as to gain Mr White's trust and trust in Mr Zarafshani abilities as a trustworthy and capable person.

7. In particular, prior to October 26, 2018, Mr Zarafshani and Ms Woodham, and each of them, made representations, whether expressly, by implication or via acquiescence, to Absolute that Mr Zarafshani possessed sufficient skill to:

- (a) competently serve as an officer or corporate director of Absolute;
- (b) expand the business operations, revenue and profits of Absolute; and
- (c) such further and other representations as shall be proven at trial ("the Representations").

8. Soon afterwards, Mr Zarafshani was appointed as a Trustee of the Dan White Family Trust and, on October 26, 2018, Mr Zarafshani became a director of Absolute.

9. Absolute:

- (a) reasonably relied upon the Representations in selecting Mr Zarafshani to serve as an officer or corporate director of Absolute; and

- (b) would not have selected Mr Zarafshani for this purpose if the Representations had not been made.
10. As a result of becoming a director of Absolute, Mr Zarafshani owed a fiduciary duty and a duty of care to Absolute.
11. As a result of these duties and Sections 120 and 122 of the *Business Corporations Act*, RSA 2000, c. B-9, among others, Mr Zarafshani was required to:
- (a) act honestly and in good faith with a view to the best interests of Absolute when exercising his powers and discharging his duties as an officer or corporate director;
  - (b) disclose any and all information that Mr Zarafshani had in relation to matters relating to the financial interests of Absolute;
  - (c) exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances when exercising his powers and discharging his duties as an officer or corporate director;
  - (d) comply with the provisions of the *Business Corporations Act*, RSA 2000, c. B-9 and its regulations;
  - (e) comply with the articles, bylaws and any unanimous shareholder agreements of Absolute; and
  - (f) comply with such further and other duties as may be proven at Trial.
12. After becoming a director of Absolute, Mr Zarafshani:
- (a) breached the fiduciary duties that he owed to Absolute by:
    - (i) failing to act honestly and in good faith with a view to the best interests of Absolute;
    - (ii) failing to disclose any and all information that Mr Zarafshani had in relation to matters relating to the financial interests of Absolute;
    - (iii) pledging the assets of Absolute as collateral for a loan that companies in which Mr Zarafshani held an interest had entered into Texas;
    - (iv) terminating the existing competent employees of Absolute and replacing them with individuals who were beholden to Mr Zarafshani;

- (v) adopting business plans and pursuing business objectives that were not in the best interests of Absolute; and
  - (vi) such further and other acts as shall be proven at Trial.
- (b) breached the legal duties that he owed to Absolute by:
- (i) failing to comply with the articles, bylaws and any unanimous shareholder agreements of Absolute;
  - (ii) failing to exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances when exercising his powers and discharging his duties as an officer or corporate director;
  - (iii) failing to operate Absolute in a prudent and commercially reasonable manner;
  - (iv) entering into commercially unreasonable contracts;
  - (v) adopting business plans and pursuing business objectives that lacked financial viability and commercial reasonableness;
  - (vi) failing to contest inaccurate tax assessments and, thereby, causing tax assessments to accrue against the Lands of Absolute;
  - (vii) failing to generate sales revenue;
  - (viii) failing to generate new leases;
  - (ix) failing to generate new business opportunities;
  - (x) mismanaging Absolute and causing it to lose many of its customers and revenue as a result of his negligence and otherwise improper conduct; and
- (c) performed such further and other acts shall be proven at Trial

13. Mr Zarafshani resigned as a director of Absolute on October 29, 2019 but continued to breach the duties that he owed to Absolute by:

- (a) colluding with creditors of Absolute and endangering the assets of Absolute;
- (b) disseminating the confidential business, financial records and tax records of Absolute without authorization and to the detriment of Absolute;

- (c) intentionally interfering in the contractual relationships between Absolute and its employees by - among other things:
  - (i) encouraging those employees to engage in corporate espionage to the detriment of Absolute;
  - (ii) encouraging those employees to breach their fiduciary duties, duties of fidelity and confidentiality and employment agreements to the detriment of Absolute; and
- (d) performing such further and other acts as shall be proven at the Trial.

14. Further, or in the alternative:

- (a) the Representations were incorrect. Mr Zarafshani and Ms Woodham, and each of them, knew that the Representations were incorrect or, alternatively, made them negligently;
- (b) Mr Zarafshani and Ms Woodham:
  - (i) jointly conspired to injure Absolute;
  - (ii) performed unlawful acts or engaged in unlawful means vis-à-vis Absolute; and
  - (i) acted with malice with towards Absolute.

15. Prior to October 26, 2018, Absolute was a successful and profitable corporation with annual revenue of more than \$3.2M CDN.

16. Absolute has, however, suffered loss or damage as a result of the above breaches of duty, negligence and misrepresentations, or any combination of them, including:

- (a) loss of capital investment;
- (b) loss of profit;
- (c) loss of corporate opportunity;
- (d) a diminution of value for itself and of its assets; and
- (e) such further and other loss or damage and will be proven at trial.

17. Absolute proposes that the trial of this action be held in Edmonton, Alberta and believes that this action will take less than 25 days to try.

18. Absolute claims the right to serve the Statement of Claim outside of the Province of Alberta as this matter involves a Defendant who is not ordinarily resident in the Province of Alberta and there is a real and substantial connection between this Action and the Province of Alberta.

**Remedy sought:**

19. Wherefore the Plaintiff claims against the Defendants, and each of them:

- (a) A Declaration that Mr Zarafshani:
  - (i) breached the fiduciary duty that was owed to Absolute;
  - (ii) breached the duty of care that was owed to Absolute;
  - (iii) breached the statutory duties that were owed to Absolute;
- (b) A Declaration that Mr Zarafshani and Ms Woodham jointly conspired to injure Absolute;
- (c) damages in an amount not less than \$3,400,000;
- (d) interest pursuant to the *Judgment Interest Act*;
- (e) costs; and
- (f) such further and other relief as this Honourable Court deems just.

**NOTICE TO THE DEFENDANT(S)**

You only have a short time to do something to defend yourself against this claim:

20 days if you are served in Alberta

1 month if you are served outside Alberta but in Canada

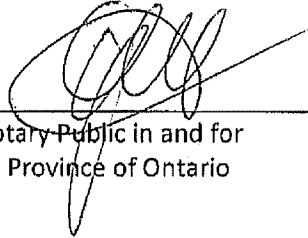
2 months if you are served outside Canada

You can respond by filing a Statement of Defence or a Demand for Notice in the Office of the Clerk of the Court of Queen's Bench at Edmonton, Alberta, AND by serving your Statement of Defence or a Demand for Notice on address for service of the Plaintiff(s).

**WARNING**

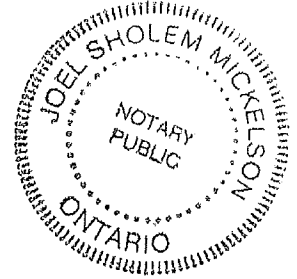
If you do not file and serve a Statement of Defence or a Demand for Notice within your time period, you risk losing the law suit automatically. If you do not file, or do not serve, or are late in doing either of these things, a Court may give a judgment to the Plaintiff(s) against you.

This is Exhibit "31" referred to  
in the Affidavit of Wesley Roitman  
Sworn before me this 16<sup>th</sup> day of November, 2020



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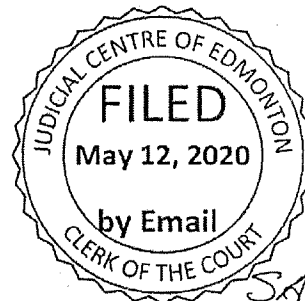
A Notary Public in and for  
the Province of Ontario



Form 10  
[Rule 3.25]

\$250.00  
INV#015403

Clerk's Stamp:



COURT FILE NUMBER 2003 08411

COURT OF QUEEN'S BENCH OF ALBERTA

JUDICIAL CENTRE EDMONTON

PLAINTIFF(S) DAN WHITE FAMILY TRUST

DEFENDANT(S) ADAM ZARAFSHANI, FARA RANJBARAN,  
AMANDA WOODHAM and PANACHE  
DEVELOPMENT & CONSTRUCTION, INC

DOCUMENT STATEMENT OF CLAIM

ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT Attention: Jonathan Hillson

Dentons Canada LLP  
Barristers and Solicitors  
2500 Stantec Tower  
10220 - 103 Avenue NW  
Edmonton, AB T5J 0K4  
Phone: (780) 423-7194  
Facsimile: (780) 423-7276  
**Dentons file: 580694-1**

27  
5-14-20

**NOTICE TO DEFENDANT(S)**

You are being sued. You are a Defendant.

Go to the end of this document to see what you can do and when you must do it.

Note: State below only facts and not evidence (Rule 13.6)

**Statement of facts relied on:**

1. The Plaintiff, Dan White Family Trust ("The Trust"), is a trust that is settled in Alberta.
2. The Trust was established for the purposes of managing and investing the assets of the Trust ("the Trust Assets") in the best interest of the beneficiaries of the Trust.



3. The Trust Assets include a corporation known as 1468527 Alberta Ltd ("146").
4. 146 holds a controlling shareholding interest in:
  - (a) Absolute Environmental Waste Management Inc ("Absolute");
  - (b) Eco-Industrial Business Park Inc ("Eco-Industrial");
  - (c) Purple Tree International, Ltd ("Purple Tree"). Purple Tree owns 50% of the shares of 3443 Zen Garden GP, LLC ("Zen Garden GP"). Zen Garden GP is the general partner of 3443 Zen Garden Limited Partnership ("Zen Garden LP") - a Texas limited partnership; and
  - (d) Blue Roots International, Ltd ("Blue Roots"). Blue Roots owns 100% of Lincoln 1861 Inc ("Lincoln"). Lincoln owns 74% of the partnership interests within Zen Garden LP
5. Zen Garden GP and Zen Garden LP are the owners of a real estate development in Austin, Texas ("the Austin Development"). At all material times, Romspen Mortgage Limited Partnership ("Romspen Mortgage") and Romspen Investments Corporation ("Romspen Investment") had loaned money to Zen Garden LP to fund the development of the Austin Development ("the Romspen / Zen Garden Loan").
6. The Defendant, Amanda Woodham ("Ms Woodham"), resides in Austin, Texas or elsewhere in the State of Texas in the United States of America.
7. The Defendant, Fara Ranjbaran ("Ms Ranjbaran") and Adam Zarafshani ("Mr Zarafshani"), reside in Austin, Texas or elsewhere in the State of Texas in the United States of America.
8. The Defendant, Panache Development & Construction, Inc ("Panache"), is a corporation that operates in Austin, Texas or elsewhere in the State of Texas in the United States of America.
9. At all material times:
  - (a) Mr Zarafshani was the President and a directing mind of Panache;
  - (b) Mr Zarafshani was the President and a directing mind of Jefferson 1804 Ventures, LLC ("Jefferson 1804"); and

- (c) Ms Woodham was the Chief Financial Officer and a directing mind of Panache.
10. During one of Mr White's trips to Austin, Texas in 2017, Mr Zarafshani approached Mr White and asked Mr White to buy used-furniture that was being sold for scrap value. Mr Zarafshani described himself as a scrap buyer and a home builder to Mr White.
11. Ms Ranjbaran and Mr Zarafshani then started cultivating a friendship so as to:
- (a) gain Mr White's trust and trust in Mr Zarafshani abilities as a trustworthy and capable person; and
  - (b) encourage Mr White to trust, rely upon and become vulnerable to Mr Zarafshani.
12. Further, Ms Woodman, Ms Ranjbaran and Mr Zarafshani made representations, whether expressly, by implication or via acquiescence, to the Trust that:
- (a) Mr Zarafshani possessed sufficient skill and resources to serve as a Trustee for the Trust;
  - (b) Mr Zarafshani possessed sufficient skill and resources to serve as an officer or director of one or more of the Trust Assets;
  - (c) Mr Zarafshani possessed sufficient skill and resources to direct Panache in a manner that would see the Austin Development developed on time and within budget;
  - (d) Panache possessed sufficient internal skill and resources to develop the Austin Development on time and within budget;
  - (e) Mr Zarafshani possessed sufficient skill to secure better lending terms from Romspen Mortgage and Romspen Investments than would be the case if Mr Zarafshani and Mr White or Mr White alone negotiated a loan agreement with Romspen Mortgage and Romspen Investments;
  - (f) Romspen Mortgage and Romspen Investments would not issue any further construction draws in relation to the Romspen / Zen Garden Loan until Mr Zarafshani had been given an interest in Zen Garden GP and Zen Garden LP;
  - (g) such further and other representations as shall be proven at trial ("the Representations").

13. Soon afterwards, Mr Zarafshani was appointed as a Trustee of the Trust and later became:

- (a) a director of Absolute;
- (b) a director of Eco-Industrial;
- (c) a director of Zen Garden GP; and
- (d) via Jefferson 1804, a partner within Zen Garden LP.

14. The Trust:

- (a) reasonably relied upon the Representations in selecting Mr Zarafshani to serve as a Trustee and as a director for Absolute, Eco-Industrial and Zen Garden GP; and
- (b) would not have selected Mr Zarafshani for this purpose if the Representations had not been made.

15. As a result of becoming:

- (a) a Trustee of the Trust;
- (b) a director of Absolute, Eco-Industrial and Zen Garden GP;
- (c) a partner within Zen Garden LP;

Mr Zarafshani owed the following duties to the Trust, Absolute, Eco-Industrial, Zen Garden GP, Zen Garden LP, the partners of Zen Garden LP and others:

- (d) a fiduciary duty;
- (e) a duty of fidelity;
- (f) a duty of good faith;
- (g) a duty of candour and disclosure;
- (h) a duty of care that required him to exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances when exercising his powers and discharging his duties; and
- (i) such further and other duties as may be proven at trial

16. As a result of these duties, Mr Zarafshani was required to:

- (a) act honestly and in good faith with a view to the best interests of the Trust, Absolute, Eco-Industrial, Zen Garden GP, Zen Garden LP and others when exercising his powers and discharging his duties;
- (b) disclose any and all information that Mr Zarafshani had in relation to matters relating to the financial interests of the Trust, Absolute, Eco-Industrial, Zen Garden GP, Zen Garden LP and others;
- (c) exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances when exercising his powers and discharging his duties;
- (d) comply with the provisions of the *Business Corporations Act*, RSA 2000, c. B-9 and its regulations;
- (e) comply with the trust documents and all applicable partnership agreements, articles, bylaws and unanimous shareholder agreements; and
- (f) comply with such further and other duties as may be proven at Trial.

17. Notwithstanding this, Mr Zarafshani engaged in conduct that was contrary to the contractual, fiduciary and legal duties that Mr Zarafshani owed to the Trust. The particulars of this conduct included:

- (a) breaching the fiduciary duty that he owed to the Trust by - among other things - engaging in self-dealing by:
  - (i) negotiating a construction contract on behalf of Zen Garden GP, and Zen Garden LP with Panache with respect to the development and construction of the Austin Development ("the Panache Construction Contract");
  - (ii) incorporating terms into the Panache Construction Contract that:
    - A. required Panache to be paid in excess of fair market value;
    - B. were not commercially reasonable;
    - C. were not in the best interests of the Zen Garden GP, Zen Garden LP and the Trust;
  - (iii) negotiated a loan agreement with Romspen Mortgage and Romspen Investments that incorporated:

- A. a term that required Romspen Mortgage and Romspen Investments to pay all or some construction draws directly to Panache as opposed to Zen Garden GP and Zen Garden LP;
  - B. a term that required \$8.1M of the proceeds of the loan agreement to be paid to Panache and Mr Zarafshani personally;
  - C. a term that required the Trust Assets to be pledged as security to secure the loan agreement;
- (iv) attempting to transfer ownership to portions of the Trust Assets - including a BMW motor vehicle - to Mr Zarafshani personally;
  - (v) issuing loans in excess of \$4M from the Trust and the Trust Assets to Mr Zarafshani without appropriate loan documents and on terms that were not commercially reasonable ("the Unauthorized Loans");
  - (vi) earning secret profits or undisclosed profits to the detriment of the Trust; and
  - (vii) misappropriating the Trust Assets;
- (b) breaching the duty of fidelity that he owed to the Trust by:
- (i) slandering and defaming the trust;
  - (ii) frustrating the ability of Mr White and the Trust to sell the Austin Development by - among other things:
    - A. threatening real estate agents who were seeking to facilitate the sale of the Austin Development;
    - B. refusing to allow prospective purchasers to view the Austin Development; and
    - C. such further and other acts shall be proven at Trial
- (c) breaching his duty of candour and disclosure to the Trust by:
- (i) intentionally excluding Mr White and the Trust from negotiations in relation to the Panache Construction Contract;
  - (ii) intentionally excluding Mr White and the Trust from negotiations in relation to the loan agreement with Romspen Mortgage and Romspen Investments;
  - (iii) failing to provide an accounting for the Austin Development;
  - (iv) failing to report on the true state of the Trust Assets;

- (v) failing to disclose the conflict of interest that arose as a result of the formation of the Panache Construction Contract;
- (vi) failing to disclose the conflict of interest that arose as a result of the loan agreement with Romspen Mortgage and Romspen Investments;
- (vii) failing to disclose the conflict of interest that arose as a result of the Unauthorized Loans;
- (viii) failing to disclose the conflict of interest that arose as a result of Mr Zarafshani misappropriating the Trust Assets;
- (d) being negligent in his management and direction of Panache and in connection with the construction of the Austin Development;
- (e) failing to invest and manage the Trust Assets in the best interest of the beneficiaries of the Trust by, among other things:
  - (i) entering into the Panache Contract on terms that were not in the best interest the Trust;
  - (ii) entering into the loan agreement with Romspen Mortgage and Romspen Investments on terms that were not in the best interest of the Trust;
  - (iii) failing to provide complete and accurate information as to the investment and management of the trust assets of the Trust;

18. Further – or in the alternative:

- (a) the Representations were incorrect. Ms Woodman, Ms Ranjbaran and Mr Zarafshani, and any one or combination of them, knew that the Representations were incorrect or, alternatively, made them negligently.
- (b) Ms Woodman, Ms Ranjbaran and Mr Zarafshani:
  - (i) jointly conspired to injure the Trust;
  - (ii) performed unlawful acts or engaged in unlawful means vis-à-vis the Trust;
  - (i) acted with malice with towards the Trust.
- (c) Panache breached the legal duties and the duty of care that it owed to the Trust in connection with the development and construction of the Austin Development - the particulars of these breaches include:
  - (i) failing to perform the construction of the Austin Development in a good and workmanlike manner;

- (ii) failing to employ proper construction methods when constructing and developing the Austin Development;
- (iii) failing to maintain insurance coverage on the Austin Development;
- (iv) failing to construct the Austin Development in compliance with the construction schedule;
- (v) failing to construct the Austin Development in compliance with the construction budget; and
- (vi) such further and other breaches as shall be proven at Trial.

19. Thereafter:

- (a) Romspen Mortgage issued a Declaration of Default under the loan agreement ("the Declaration of Default"); and
- (b) Romspen Mortgage entered a Receivership Order in the District Court of Travis County, Texas against, among others, Zen Garden LP and Mr White on November 26, 2019 ("the Texas Receivership Proceedings").

20. Following the commencement of the Texas Receivership Proceedings, Mr Zarafshani further breached the contractual, fiduciary and legal duties that Mr Zarafshani owed to the Trust. The particulars of this conduct included:

- (a) intentionally failing to defend or resist the advancement of the Texas Receivership Proceedings;
- (b) colluded with Romspen Mortgage and Romspen Investments in the Texas Receivership Proceedings to the detriment of the Trust;
- (c) signing legal documents - including the Consent Receivership Order on behalf of Zen Garden LP - without authorization and to the detriment of the Trust;
- (d) expropriated the property including confidential business, financial records and tax records of the Trust;
- (e) disseminated the confidential business, financial records and tax records of the Trust without authorization and to the detriment of the Trust;
- (f) making multiple representations to the Receiver regarding Mr White and the Trust including that Mr White and the Trust were under investigation by the Canada Revenue Agency. These representations were incorrect and this was known or ought to have been known by Mr Zarafshani;

- (g) encouraging the Receiver to bring about a foreclosure with respect to the Austin Development to the detriment of the Trust;
- (h) causing Panache to prosecute claims against Trust Assets including Zen Garden GP and Zen Garden LP in Texas while Mr Zarafshani was:
  - (i) a shareholder and director of Zen Garden GP; and
  - (ii) Jefferson 1804 was a partner and the managing partner of Zen Garden LLP;
- (i) taking steps or causing a corporation that Mr Zarafshani controlled to take steps to purchase the Austin Lands from Zen Garden GP and Zen Garden LP while Mr Zarafshani was:
  - (i) a shareholder and director of Zen Garden GP; and
  - (ii) Jefferson 1804 was a partner and the managing partner of Zen Garden LLP;
- (j) intentionally interfered in contractual relationships between the Trust Assets such as Absolute and its employees by - among other things:
  - (i) encouraging those employees to engage in corporate espionage to the detriment of the Trust;
  - (ii) encouraging those employees to breach their fiduciary duties, duties of fidelity and confidentiality and employment agreements to the detriment of the Trust; and
- (k) performed such further and other acts as shall be proven at Trial.

21. As a result of the above actions by the Defendants, or any one or combination of them, the Trust has suffered and continues to suffer the following losses:

- (a) a loss of capital assets;
- (b) special damages;
- (c) a loss of profit;
- (d) a diminution of value; and
- (e) such further and other loss or damage as will be proven at trial.

22. Moreover, as a result of the above:

- (a) the Defendants, or any one or combination of them, have been enriched;



- (b) the Trust has suffered a corresponding deprivation; and
- (c) there is no juristic reason to maintain this unjust enrichment.

23. After becoming unjustly enriched in the above manner, the Defendants, or any one or combination of them:

- (a) comingled some or all of the proceeds of the unjust enrichment into bank accounts ("the Bank Accounts");
- (b) acquired or otherwise maintained and improved personal property ("the Personal Property");
- (c) maintained and improved land ("the Lands").

24. As a result, the Bank Accounts, the Personal Property and the Lands became impressed with a constructive trust such that the Defendants, or any one or combination of them, held the Bank Accounts, the Personal Property and the Lands on trust for the Trust to the extent of the unjust enrichment.

25. Consequently, the Trust has an interest in the Bank Accounts, the Personal Property and the Lands.

26. The Trust proposes that the trial of this action be conducted at the Law Courts, in Edmonton, Alberta and believes that it will take less than 25 days to try this matter.

27. The Trust claims the right to serve the Statement of Claim outside of the Province of Alberta as this matter involves a Defendant who is not ordinarily resident in the Province of Alberta and there is a real and substantial connection between this Action and the Province of Alberta.

**Remedy sought:**

28. Wherefore, the Trust claims as against the Defendants, and each of them:

- (a) a Declaration that:
  - (i) the Defendants, or any one or combination of them, have been unjustly enriched;

- (ii) the Trust holds an equitable interest in the Bank Accounts, the Personal Property and the Lands pursuant to a constructive trust;
- (b) A Declaration that Ms Woodman, Ms Ranjbaran and Mr Zarafshani jointly conspired to injure the Trust;
- (c) an Order allowing for the tracing and disgorgement of the amounts by which the Defendants, or any one or combination of them, have been unjustly enriched;
- (d) damages of not less than \$150,000,000;
- (e) Judgment for the interest that will accrue pursuant to the *Judgment Interest Act*, RSA 2000, c.J-1 until the date of Judgment;
- (b) costs on a solicitor-client basis; and
- (c) such further and other relief as this Honourable Court deems just.

**NOTICE TO THE DEFENDANT(S)**

You only have a short time to do something to defend yourself against this claim:

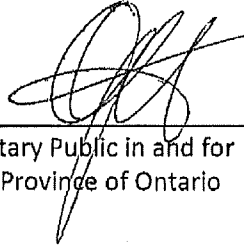
20 days if you are served in Alberta

1 month if you are served outside Alberta but in Canada

2 months if you are served outside Canada

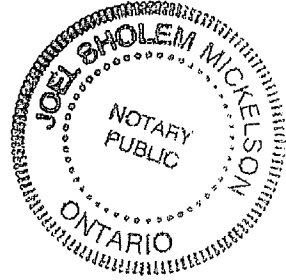
You can respond by filing a Statement of Defence or a Demand for Notice in the Office of the Clerk of the Court of Queen's Bench at Edmonton, Alberta, AND by serving your Statement of Defence or a Demand for Notice on address for service of the Plaintiff(s).

This is Exhibit "32" referred to  
in the Affidavit of Wesley Roitman  
Sworn before me this 16<sup>th</sup> day of November, 2020

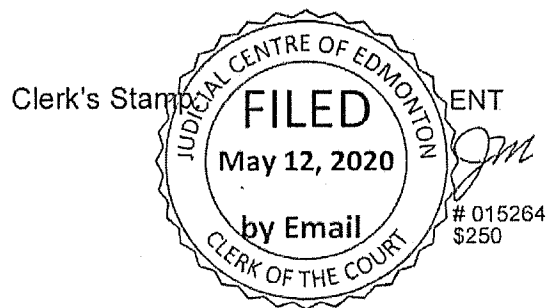


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A Notary Public in and for  
the Province of Ontario



Form 10  
[Rule 3.25]



COURT FILE NUMBER

2003 08204

COURT OF QUEEN'S BENCH OF  
ALBERTA

JUDICIAL CENTRE

EDMONTON

PLAINTIFF(S)

ECO-INDUSTRIAL BUSINESS PARK INC

DEFENDANT(S)

ADAM ZARAFSHANI and AMANDA  
WOODHAM

DOCUMENT

STATEMENT OF CLAIM

ADDRESS FOR SERVICE AND  
CONTACT INFORMATION OF  
PARTY FILING THIS DOCUMENT

Attention: Jonathan Hillson

Dentons Canada LLP  
Barristers and Solicitors  
2500 Stantec Tower  
10220 - 103 Avenue NW  
Edmonton, AB T5J 0K4  
Phone: (780) 423-7194  
Facsimile: (780) 423-7276  
**Dentons file: 580694-1**

27  
5-14-20

**NOTICE TO DEFENDANT(S)**

You are being sued. You are a Defendant.

Go to the end of this document to see what you can do and when you must do it.

Note: State below only facts and not evidence (Rule 13.6)

**Statement of facts relied on:**

1. The Plaintiff, Eco-Industrial Business Park Inc ("Eco-Industrial"), is an Alberta corporation that carries on business in Edmonton, Alberta and elsewhere in Alberta.
2. The Defendants, Adam Zarafshani ("Mr Zarafshani"), resides in Austin, Texas or elsewhere in the State of Texas in the United States of America.

3. The Defendant, Amanda Woodham ("Ms Woodham"), resides in Austin, Texas or elsewhere in the State of Texas in the United States of America.

4. In 2017, Eco-Industrial was owned by the Dan White Family Trust. Eco-Industrial is in the business of selling land parcel inventory and leasing buildings and lands.

5. During one of Mr White's trips to Austin, Texas in 2017, Mr Zarafshani approached Mr White and asked Mr White to buy used-furniture that was being sold for scrap value. Mr Zarafshani described himself as a scrap buyer and a home builder to Mr White.

6. Thereafter, Mr Zarafshani started cultivating a friendship so as to gain Mr White's trust and trust in Mr Zarafshani abilities as a trustworthy and capable person.

7. In particular, prior to October 26, 2018, Mr Zarafshani and Ms Woodham, and each of them, made representations, whether expressly, by implication or via acquiescence, to Eco-Industrial that Mr Zarafshani possessed sufficient skill to:

- (a) competently serve as an officer or corporate director of Eco-Industrial;
- (b) expand the business operations, revenue and profits of Eco-Industrial; and
- (c) such further and other representations as shall be proven at trial ("the Representations").

8. Soon afterwards, Mr Zarafshani was appointed as a Trustee of the Dan White Family Trust and, on October 26, 2018, Mr Zarafshani became a director of Eco-Industrial.

9. Eco-Industrial:

- (a) reasonably relied upon the Representations in selecting Mr Zarafshani to serve as an officer or corporate director of Eco-Industrial; and
- (b) would not have selected Mr Zarafshani for this purpose if the Representations had not been made.

10. As a result of becoming a director of Eco-Industrial, Mr Zarafshani owed a fiduciary duty and a duty of care to Eco-Industrial.

11. As a result of these duties and Sections 120 and 122 of the *Business Corporations Act*, RSA 2000, c. B-9, among others, Mr Zarafshani was required to:

- (a) act honestly and in good faith with a view to the best interests of Eco-Industrial when exercising his powers and discharging his duties as an officer or corporate director;
- (b) disclose any and all information that Mr Zarafshani had in relation to matters relating to the financial interests of Eco-Industrial;
- (c) exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances when exercising his powers and discharging his duties as an officer or corporate director;
- (d) comply with the provisions of the *Business Corporations Act*, RSA 2000, c. B-9 and its regulations;
- (e) comply with the articles, bylaws and any unanimous shareholder agreements of Eco-Industrial; and
- (f) comply with such further and other duties as may be proven at the Trial of this Action.

12. After becoming a director of Eco-Industrial, Mr Zarafshani:

- (a) breached the fiduciary duties that he owed to Eco-Industrial by:
  - (i) failing to act honestly and in good faith with a view to the best interests of Eco-Industrial;
  - (ii) failing to disclose any and all information that Mr Zarafshani had in relation to matters relating to the financial interests of Eco-Industrial;
  - (iii) pledging the assets of Eco-Industrial as collateral for a loan that companies in which Mr Zarafshani held an interest had entered into Texas;
  - (iv) terminating the existing competent employees of Eco-Industrial and replacing them with individuals who were beholden to Mr Zarafshani; and
  - (v) adopting business plans and pursuing business objectives that were not in the best interests of Eco-Industrial; and
  - (vi) such further and other acts as shall be proven at Trial.
- (b) breached the legal duties that he owed to Eco-Industrial by:
  - (i) failing to comply with the articles, bylaws and any unanimous shareholder agreements of Eco-Industrial;

- (ii) failing to exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances when exercising his powers and discharging his duties as an officer or corporate director;
- (iii) failing to operate Eco-Industrial in a prudent and commercially reasonable manner;
- (iv) entering into commercially unreasonable contracts;
- (v) adopting business plans and pursuing business objectives that lacked financial viability and commercial reasonableness;
- (vi) failing to contest inaccurate tax assessments and, thereby, causing tax assessments to accrue against the lands of Eco-Industrial;
- (vii) failing to generate sales revenue;
- (viii) failing to generate new leases;
- (ix) failing to generate new business opportunities;
- (x) mismanaging Eco-Industrial and causing it to lose many of its customers and revenue as a result of his negligence and otherwise improper conduct; and

(c) performed such further and other acts shall be proven at Trial.

13. Mr Zarafshani resigned as a director of Eco-Industrial on October 29, 2019 but continued to breach the duties that he owed to Eco-Industrial by:

- (a) colluding with creditors of Eco-Industrial and endangering the assets of Eco-Industrial;
- (b) disseminating the confidential business, financial records and tax records of Eco-Industrial without authorization and to the detriment of Eco-Industrial;
- (c) intentionally interfered in the contractual relationships between Eco-Industrial and its employees; and
- (d) performing such further and other acts as shall be proven at Trial.

14. Further or, in the alternative:

- (a) the Representations were incorrect. Mr Zarafshani and Ms Woodham, and each of them, knew that the Representations were incorrect or, alternatively, made them negligently;

- (b) Mr Zarafshani and Ms Woodham:
  - (i) jointly conspired to injure Eco-Industrial;
  - (ii) performed unlawful acts or engaged in unlawful means vis-à-vis Eco-Industrial; and
  - (i) acted with malice with towards Eco-Industrial.

15. Prior to October 26, 2018, Eco-Industrial was a successful and profitable corporation that had earned over \$100M in revenue.

16. Eco-Industrial has, however, suffered loss or damage as a result of the above breaches of duty, negligence and misrepresentations, or any combination of them, including:

- (a) loss of capital investment;
- (b) loss of profit and loss of corporate opportunity;
- (c) a diminution of value for itself and of its assets; and
- (d) such further and other loss or damage and will be proven at Trial.

17. Eco-Industrial proposes that the trial of this action be held in Edmonton, Alberta and believes that this action will take less than 25 days to try.

18. Eco-Industrial claims the right to serve the Statement of Claim outside of the Province of Alberta as this matter involves a Defendant who is not ordinarily resident in the Province of Alberta and there is a real and substantial connection between this Action and the Province of Alberta.

**Remedy sought:**

19. Wherefore Eco-Industrial claims against the Defendants, and each of them:
- (a) A Declaration that Mr Zarafshani:
    - (i) breached the fiduciary duty that was owed to Eco-Industrial;
    - (ii) breached the duty of care that was owed to Eco-Industrial;
    - (iii) breached the statutory duties that were owed to Eco-Industrial;



- (b) A Declaration that Mr Zarafshani and Ms Woodham jointly conspired to injure Eco-Industrial;
- (c) damages in an amount not less than \$5,000,000;
- (d) interest pursuant to the *Judgment Interest Act*;
- (e) costs; and
- (f) such further and other relief as this Honourable Court deems just.

**NOTICE TO THE DEFENDANT(S)**

You only have a short time to do something to defend yourself against this claim:

20 days if you are served in Alberta

1 month if you are served outside Alberta but in Canada

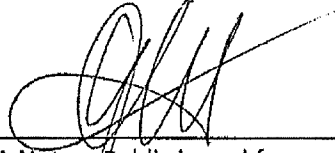
2 months if you are served outside Canada

You can respond by filing a Statement of Defence or a Demand for Notice in the Office of the Clerk of the Court of Queen's Bench at Edmonton, Alberta, AND by serving your Statement of Defence or a Demand for Notice on address for service of the Plaintiff(s).

**WARNING**

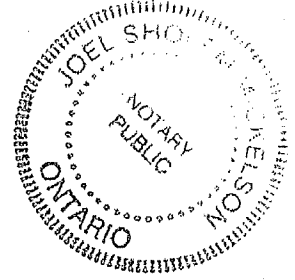
If you do not file and serve a Statement of Defence or a Demand for Notice within your time period, you risk losing the law suit automatically. If you do not file, or do not serve, or are late in doing either of these things, a Court may give a judgment to the Plaintiff(s) against you.

This is Exhibit "33" referred to  
in the Affidavit of Wesley Roitman  
Sworn before me this 16<sup>th</sup> day of November, 2020



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A Notary Public in and for  
the Province of Ontario



Osler, Hoskin & Harcourt LLP  
Suite 2500, TC Energy Tower  
450 – 1<sup>st</sup> Street S.W.  
Calgary, Alberta, Canada T2P 5H1  
403.260.7000 MAIN  
403.260.7024 FACSIMILE

OSLER

Toronto  
Montréal  
Calgary  
Ottawa  
Vancouver  
New York

April 20, 2020

Randal Van de Mosselaer  
Direct Dial: 403.260.7060  
rvandemosselaer@osler.com  
Our Matter Number: 1209810

**SENT BY EMAIL: KBARR@BLG.COM**

Borden Ladner Gervais LLP  
1900, 520 Third Avenue S.W.  
Calgary, Alberta T2P 0R3

Attention: Kevin Barr

Dear Sir;

**Re: Romspen Mortgage Limited Partnership and Romspen Investment Corporation (collectively “Romspen”) v. Absolute Energy Resources Inc. et al, Court of Queen’s Bench of Alberta Action No. 2003-06728 (the “Action”)**

As you are aware, we are counsel to MNP Ltd. in its capacity as Interim Monitor (the “Interim Monitor”), having been engaged to act in such capacity by Romspen pursuant to the April 2, 2020 Order (the “Order”) of Associate Chief Justice K. G. Nielsen granted in the Action. While we understand that a copy of the Order arising from Justice Nielsen’s April 2, 2020 Order has not yet been filed with the Court, we understand that on April 2, 2020 Justice Nielsen directed (amongst other things) that:

- The Interim Monitor was to monitor the business operations of Lot 11 GP Ltd., Lot 11 Limited Partnership, Eco-Industrial Business Park Inc., Absolute Energy Resources Inc., Absolute Environmental Waste Management Inc. and Daniel Alexander White (collectively the “Debtors”)
- Management of the Debtors was directed to cooperate and provide information to the Interim Monitor such that the Interim Monitor would have full transparency of all the Debtors’ business operations and assets,
- The Interim Monitor was to have access to all the business records of the Debtors, and
- The Order was to expire within 30 days, subject to further order of the Court.

We write to update you on the Interim Monitor’s efforts and steps taken since the granting of the Order on April 2.

1. The Interim Receiver was first provided with contact information for an individual at the Debtors on April 8 when the Debtors' counsel advised by email that the appropriate contact person would be a Gary Vandepol, and provided Mr. Vandepol's contact information. Enclosed is a copy of an April 8 email from the Debtor's counsel to your office, and from your office to the Interim Monitor, in this regard.
2. That same day, the Interim Monitor sent Mr. Vandepol an email with a preliminary information request (the "Information Request") for the information and documents that the Interim Monitor required from the Debtors. Enclosed is a copy of the Interim Monitor's April 8 email with the Information Request to Mr. Vandepol.
3. Later that same day the Interim Monitor received an email from Mr. Vandepol in response to the Interim Monitor's earlier email, advising (amongst other things) that: (a) he was limited in how quickly he would be able to provide the Interim Monitor with the information listed in the Information Request, (b) he wanted a copy of the Order, and (c) he wanted to see a copy of the Interim Monitor's scope of work. A copy of that April 8 email from Mr. Vandepol is enclosed with this letter.
4. The Interim Monitor responded to this email (and the various requests) from Mr. Vandepol by email dated April 8. A copy of the Interim Monitor's email is enclosed with this letter.
5. On April 13 the Interim Monitor had not received any of the information listed in the Information Request, and so sent an email to Mr. Vandepol asking when that information would be received. On that same day Mr. Vandepol responded saying that he has "been working on it diligently" and that the Interim Monitor "should start getting info . . . starting tomorrow." A copy of this April 13 email exchange is enclosed with this letter.
6. As at April 16 the Interim Monitor still had not received any of the information which had been requested on April 8. The Interim Monitor therefore sent a follow-up email to Mr. Vandepol on April 16, and a copy of that email is enclosed with this letter.
7. At 6:24 p.m. on April 17 the Interim Monitor received an email from Mr. Vandepol attaching various bank statements. A copy of that email is enclosed with this letter. Having reviewed the bank statements which were attached to this letter, the Interim Monitor determined that they were:

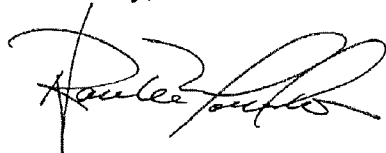
- a. CIBC bank statements for Absolute Environmental Waste Management Inc. from June 2018 to April 2020, and
- b. CIBC bank statements for Eco-Industrial Business Park Inc. from April 2018 to April 2020.

As such, this represents only a small portion of the information which had been requested by the Interim Monitor in the Information Request.

8. On April 18, the Interim Monitor replied to Mr. Vandepol's April 17 email, asking some preliminary questions with respect to the bank statements that had been provided on April 17. A copy of that email is enclosed with this letter. As of the writing of this letter, no response has been received in response to the Interim Monitor's April 18 email.
9. As of the writing of this letter, the Interim Monitor has not had any further response from Mr. Vandepol and has not received any of the additional information which had been requested by the Interim Monitor in the April 8 Information Request beyond the bank statements described above. The bank statements which have been provided fall well short of the information required by the Monitor to permit it to undertake a fulsome monitoring of the Debtors' business operations. As a result, the Interim Monitor now finds itself in a position where even if the balance of the information in the Information Request were provided immediately it is unlikely that the Interim Monitor would have enough time to fully review and analyze such information, have any follow-up questions answered, and be able to provide its report to Romspen before the 30 day expiry of the Order.

We wanted to bring the foregoing to your attention.

Yours truly,



Randal Van de Mosselaer

Enclosure

cc: Interim Monitor

**From:** Hillson, Jonathan <[jon.hillson@dentons.com](mailto:jon.hillson@dentons.com)>  
**Sent:** April 8, 2020 8:40 AM  
**To:** Barr, Kevin <[KBarr@blg.com](mailto:KBarr@blg.com)>  
**Cc:** 'Roderick Payne' <[rodp@hplegal.ca](mailto:rodp@hplegal.ca)>; Kruger, Josef G. A. <[JKruger@blg.com](mailto:JKruger@blg.com)>  
**Subject:** Romspen Investment Corporation v White et al (Barr file: 443063-12)(Dentons file: 580694-1)

Hi Kevin,

I attach a v-Card for Mr Vandepol. I will comment on the request for an extension in a subsequent email.

Thanks



**Jonathan Hillson**  
Partner

Our **COVID-19 Client Resources Hub** is available to the public, part of Dentons' global commitment to help our clients and our communities navigate this pandemic's legal and business challenges.

D +1 780 423 7194  
[jon.hillson@dentons.com](mailto:jon.hillson@dentons.com)  
[Bio](#) | [Website](#)

Dentons Canada LLP  
2500 Stantec Tower, 10220 - 103 Avenue NW Edmonton, AB T5J 0K4 Canada

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**From:** Barr, Kevin <[KBarr@blg.com](mailto:KBarr@blg.com)>  
**Sent:** April 8, 2020 8:31 AM  
**To:** Hillson, Jonathan <[jon.hillson@dentons.com](mailto:jon.hillson@dentons.com)>  
**Cc:** 'Roderick Payne' <[rodp@hplegal.ca](mailto:rodp@hplegal.ca)>; Kruger, Josef G. A. <[JKruger@blg.com](mailto:JKruger@blg.com)>  
**Subject:** RE: Romspen Investment Corporation v White et al (Barr file: 443063-12)(Dentons file: 580694-1)

Jon,

Thanks for this.

Can you please provide me with a telephone number and email address to reach Mr. Vandepol and I will pass that on to MNP.

Also, I will await your position on how to address the form of Order. Importantly, please advise as to your position on an agreed 5 day extension of the initial 30 day period as it took you office 5 full days to provide us with the name of the contact person so that MNP can access the site (and we still don't have actual contact information).

Thanks, Kevin

**Kevin Barr**

Partner

T 403.232.9786 | [KBarr@blg.com](mailto:KBarr@blg.com)

Centennial Place, East Tower, 1900, 520 – 3rd Ave. SW, Calgary, AB, Canada T2P 0R3

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**From:** Hillson, Jonathan <[jon.hillson@dentons.com](mailto:jon.hillson@dentons.com)>

**Sent:** April 8, 2020 7:35 AM

**To:** Barr, Kevin <[KBarr@blg.com](mailto:KBarr@blg.com)>

**Cc:** 'Roderick Payne' <[rodp@hplegal.ca](mailto:rodp@hplegal.ca)>

**Subject:** Romspen Investment Corporation v White et al (Barr file: 443063-12)(Dentons file: 580694-1)

Good morning Kevin,

I have heard from Mr Vandepol and he advises that he would be the contact person for the Monitor for coordinating site visits and dealing with personnel on site.

Although Mr Vandepol is still in Aruba and is unclear when he will be able to return to Canada, he has ready access to email, phone and – as we have discussed – videoconference capabilities.

Please call me if you have any questions



**Jonathan Hillson**

Partner

Our **COVID-19 Client Resources Hub** is available to the public, part of Dentons' global commitment to help our clients and our communities navigate this pandemic's legal and business challenges.

D +1 780 423 7194

[jon.hillson@dentons.com](mailto:jon.hillson@dentons.com)

[Bio](#) | [Website](#)

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**From:** "Kroegerd@telus.net" <kroegerd@telus.net>  
**To:** Gvandepol@symmetryinc.com  
**Cc:** "Aylwardkarene" <aylwardkarene@gmail.com>  
**Sent:** Wednesday, April 8, 2020 9:02:49 AM  
**Subject:** Absolute Environmental et al

Good morning Mr. Vandepol. As you may or may not know, MNP Ltd. Has been retained by Romspen to monitor the business and assets of the Absolute Environmental and its related companies in accordance with the Court Order that was granted last week. Myself and Ms Karen Aylward will be undertaking this engagement on behalf of MNP. We have prepared the attached preliminary information list which information we request be provided to us as soon as possible. Please do not wait until you have all the information before you submit it to us. We anticipate the information provided will generate further questions which we understand should be directed through you.

Should you have any questions please contact me at 403 870 1827.

Regards,

Vic Kroeger  
Senior Vice President  
MNP Ltd

**Information Request for Absolute Environmental Water Waste Management Inc., Lot 11 GP Ltd., Lot 11 Limited Partnership, Eco-Industrial Business Part Inc., Absolute Energy Resources Inc. (collectively, the "Companies")**

**GENERAL AND HISTORICAL INFORMATION**

**Asset Information:**

For each of the Companies, a complete listing of assets list by each entity;

**Financial Information (for each of the Companies):**

1. Most recent account prepared financial statements;
2. Year to date in-house financial statements for the period ending March 31, 2020;
3. Historical in-house financial statements (balance sheet, income statement and statement of cash flows) on a monthly basis from April 2018 to current;
4. General Ledger (April 27, 2018 to current); and,
5. Monthly bank statements (April 27, 2018 to current).

**Other:**

1. Confirmation of which of the Companies holds a bank account(s) and with which financial institution (includes any international accounts);
2. Corporate organization chart;
3. Current Canada revenue agency statements for each of the Companies for GST and payroll source deductions;
4. List of key employees for each entity along with job description.

**WEEKLY REPORTING REQUIREMENTS**

On the Monday of each week, commencing April 13, 2020, the following reports are to be provided for each of the operating entities for the week directly preceding:

1. Copy of general ledger transactions;
2. Bank transaction listing (printed from online banking access);
3. Copy of Accounts Receivable Listing; and,
4. Copy of Accounts Payable listing.

**From:** "Gary vandepol" <[gvandepol@symmetryinc.com](mailto:gvandepol@symmetryinc.com)>  
**To:** "[Kroegerd@telus.net](mailto:Kroegerd@telus.net)" <[kroegerd@telus.net](mailto:kroegerd@telus.net)>  
**Sent:** Wednesday, April 8, 2020 3:15:10 PM  
**Subject:** Re: Absolute Environmental et al

Good Afternoon Mr. Kroeger,

Pleased to make your acquaintance in these trying times, hope you are keeping safe and healthy.

In light of the Covid-19 situation I am limited to how quickly I can get you the information I am obligated to provide but will do my level best to comply to the best of my abilities as quickly as possible.

Please note, there are currently no personnel at the offices of the subject companies and currently very little activity on site. I am operating remotely from Aruba under island quarantine.

Please feel free to attend the location of operations at Hayter Road in Edmonton.

I acknowledge receipt of your email below and attachment. I will start assembling what I can from here in Aruba.

In the meantime would you be kind enough to provide a copy of the Court Order you mention in your email below along with a copy of your Scope of Work from your engagement letter which establishes your parameters? This will help me understand my obligations to the Court and to you as Monitor.

Looking forward to your response.

Gary Vandepol

On Apr 8, 2020, at 11:02 AM, [Kroegerd@telus.net](mailto:Kroegerd@telus.net) <[kroegerd@telus.net](mailto:kroegerd@telus.net)> wrote:  
Good morning Mr. Vandepol. As you may or may not know, MNP Ltd. Has been retained by Romspen to monitor the business and assets of the Absolute Environmental and its related companies in accordance with the Court Order that was granted last week. Myself and Ms Karen Aylward will be undertaking this engagement on behalf of MNP. We have prepared the attached preliminary information list which information we request be provided to us as soon as possible. Please do not wait until you have all the information before you submit it to us. We anticipate the information provided will generate further questions which we understand should be directed through you.

Should you have any questions please contact me at [403 870 1827](tel:4038701827).

Regards,

Vic Kroeger  
Senior Vice President  
MNP Ltd

---

<Info Request.pdf>

**From:** "Kroegerd@telus.net" <kroegerd@telus.net>  
**To:** Gvandepol@symmetryinc.com  
**Sent:** Wednesday, April 8, 2020 5:04:53 PM  
**Subject:** Fwd: Absolute Environmental et al

Gary,

Thanks for your email response. With respect to the various matters you raise in your email, I can advise as follows:

- Firstly, I am unable to provide you with a filed copy of the Order. As you may be aware, while the Order was granted by Associate Chief Justice Neilsen on April 2, the document evidencing the Order that has been granted is still in the process of being finalized by counsel. Moreover, there will no doubt be a delay in having the document filed with the Court in light of the reduced Court operations at the moment due to COVID-19 responses. Nevertheless, the Order is valid and effective from its pronouncement on April 2. Amongst other things, the Order permits Romspen to appoint an Interim Monitor. As noted in my earlier email, Romspen has engaged MNP Ltd. ("MNP", or the "Monitor") for this purpose;
- Secondly, to the extent you wish to understand your obligations under the April 2 Order of A.C.J. Neilsen, we would suggest that you consult with your legal counsel. I am afraid that the Monitor is unable to assist you in this regard;
- Thirdly, as the engagement letter is a matter between Romspen and MNP I am afraid I am not in a position to share a copy of the engagement letter with you;
- Fourthly, any scope of work that may be set out in the engagement letter is between Romspen and MNP. The Monitor has requested the information set out in the preliminary information request which was attached to my earlier email. It is the Monitor's understanding that the April 2 Order granted by Justice Neilsen compels you and all other personnel to cooperate with the Interim Monitor's information requests and to give the Monitor access to all business records. We therefore look forward to receiving such information as soon as possible. While we appreciate that you may be out of the country, we would expect that much of this can be handled remotely, and also expect that there are personnel in Alberta who can assist with these requests. Since the original appointment of the Monitor is for 30 days (subject to further Court Order) we look forward to your cooperation and the cooperation of all personnel who are present in Alberta.
- Finally, thank you for your invitation for the Monitor to attend the Hayter Road location in Edmonton. Are you able to advise if this is "head office" and if some or all of the records we are seeking are kept at that location? It may not be necessary for the Monitor to visit this location if the information and documents that have been requested are provided. But if it would assist for the Monitor to visit this location please advise, and please provide us with the contact information for senior management who may be in charge of the Hayter Road

location for the Monitor to contact if it becomes necessary to organize such a visit.

Regards and stay safe,

Vic

**From:** "Gary vandepol" <[gvandepol@symmetryinc.com](mailto:gvandepol@symmetryinc.com)>

**To:** "Kroegerd@telus.net" <[kroegerd@telus.net](mailto:kroegerd@telus.net)>

**Sent:** Wednesday, April 8, 2020 3:15:10 PM

**Subject:** Re: Absolute Environmental et al

Good Afternoon Mr. Kroeger,

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In light of the Covid-19 situation I am limited to how quickly I can get you the information I am obligated to provide but will do my level best to comply to the best of my abilities as quickly as possible.

Please note, there are currently no personnel at the offices of the subject companies and currently very little activity on site. I am operating remotely from Aruba under island quarantine.

Please feel free to attend the location of operations at Hayter Road in Edmonton.

I acknowledge receipt of your email below and attachment. I will start assembling what I can from here in Aruba.

In the meantime would you be kind enough to provide a copy of the Court Order you mention in your email below along with a copy of your Scope of Work from your engagement letter which establishes your parameters? This will help me understand my obligations to the Court and to you as Monitor.

Looking forward to your response.

Gary Vandepol

On Apr 8, 2020, at 11:02 AM, [Kroegerd@telus.net](mailto:Kroegerd@telus.net) <[kroegerd@telus.net](mailto:kroegerd@telus.net)> wrote:

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Should you have any questions please contact me at 403 870 1827.

Regards,

Vic Kroeger

Senior Vice President

MNP Ltd

---

<Info Request.pdf



From: Victor Kroeger  
Sent: April 16, 2020 8:28 AM  
To: Gary vandepol <[gvandepol@symmetryinc.com](mailto:gvandepol@symmetryinc.com)>  
Cc: Karen Aylward <[Karen.Aylward@mnp.ca](mailto:Karen.Aylward@mnp.ca)>  
Subject: RE: Absolute Environmental et al

Good morning Gary. We have still not received any information from you. As I previously mentioned you do not have to wait until you have all of the information before sending it to us. Please forward information as you get it.

Regards,

Vic

Victor P. Kroeger CIRP, LIT, CPA, CA, CFE DIRECTOR OF CORPORATE RECOVERY WESTERN CANADA

DIRECT 403.298.8479  
CELL 403.870.1827  
TOLL FREE 1.877.500.0792  
1500, 640 - 5th Avenue SW  
Calgary, AB  
T2P 3G4  
[vic.kroeger@mnp.ca](mailto:vic.kroeger@mnp.ca)  
[mnpdebt.ca](http://mnpdebt.ca)

Please be advised that MNP offices are temporarily closed to the public until further notice. We have taken this social-distancing measure to ensure the health and safety of our team members and our clients. Our team continues to work remotely, and are accessible via email and cell phone.

For relevant and up-to-date information, visit our COVID-19 Business Advice Centre on our website. You will find timely updates on Government regulations, tax information, advice for employers and our continued response to this evolving circumstance.

-----Original Message-----

From: Gary vandepol <[gvandepol@symmetryinc.com](mailto:gvandepol@symmetryinc.com)>  
Sent: April 13, 2020 2:23 PM  
To: Victor Kroeger <[Victor.Kroeger@mnp.ca](mailto:Victor.Kroeger@mnp.ca)>  
Subject: Re: Absolute Environmental et al

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Hi Victor

I have been working on it diligently

Not easy given the current circumstances but you should start getting info from me starting tomorrow

Thanks Gary

> On Apr 13, 2020, at 16:12, Victor Kroeger <[Victor.Kroeger@mnp.ca](mailto:Victor.Kroeger@mnp.ca)> wrote:

>

> Good afternoon Gary. Any eta on when we should start to receive information?

>

> Regards,

>

> Vic

>

> Sent from my iPad

>

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**From:** Gary vandepol <[gvandepol@symmetryinc.com](mailto:gvandepol@symmetryinc.com)>  
**Date:** April 17, 2020 at 6:24:51 PM MDT  
**To:** Victor Kroeger <[Victor.Kroeger@mnp.ca](mailto:Victor.Kroeger@mnp.ca)>  
**Cc:** Gary Vandepol <[garyv@vandepols.com](mailto:garyv@vandepols.com)>  
**Subject:** Fwd: Bank statements for the Monitor

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Begin forwarded message:

**From:** David Gamage <[david@gamages.ca](mailto:david@gamages.ca)>  
**Date:** April 17, 2020 at 19:19:27 AST  
**To:** Dan White <[dwhite@symmetryinc.com](mailto:dwhite@symmetryinc.com)>  
**Cc:** Gary Vandepol <[garyv@vandepols.com](mailto:garyv@vandepols.com)>  
**Subject:** Bank statements for the Monitor

Dan,

Here are the bank statements requested by the Monitor. I have appropriately named them and put them in yearly folders for ease of filing. I am working to produce more of the information requested which will follow shortly.

I am still amazed at the level of deposits in Absolute. I swear Adam must of been chasing the clients away with a pitch fork. That used to be such a success story for your group of companies and now its just a burden. So sad.

**From:** Victor Kroeger  
**Sent:** April 18, 2020 1:20 PM  
**To:** 'Gary vandepol' <[gvandepol@symmetryinc.com](mailto:gvandepol@symmetryinc.com)>  
**Cc:** Karen Aylward <[Karen.Aylward@mnp.ca](mailto:Karen.Aylward@mnp.ca)>  
**Subject:** RE: Bank statements for the Monitor

Gary. Thanks for this. A couple of preliminary questions regarding the bank accounts:

1. You have provided bank statements for Absolute Environmental Water Waste Management Inc and Absolute Energy Resources Inc. What about bank statements for Lot 11 GP Ltd., Lot 11 Limited Partnership, Eco-Industrial Business Park Inc., and Daniel Alexander White?
2. Please confirm that the Absolute Environmental bank account was only opened up in June 2018.
3. Please confirm that there are not other bank accounts at CIBC or elsewhere for Absolute Environmental and Absolute Energy.

Thanks

Vic

**Victor P. Kroeger CIRP, LIT, CPA,  
CA, CFE**

DIRECTOR OF CORPORATE RECOVERY  
WESTERN CANADA

**DIRECT 403.298.8479**  
CELL 403.870.1827  
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*For relevant and up-to-date information, visit our **COVID-19 Business Advice Centre** on our website. You will find timely updates on Government regulations, tax information, advice for employers and our continued response to this evolving circumstance.*

**From:** Gary vandepol <[gvandepol@symmetryinc.com](mailto:gvandepol@symmetryinc.com)>  
**Sent:** April 17, 2020 6:21 PM  
**To:** Victor Kroeger <[Victor.Kroeger@mnp.ca](mailto:Victor.Kroeger@mnp.ca)>  
**Cc:** Gary Vandepol <[garyv@vandepols.com](mailto:garyv@vandepols.com)>  
**Subject:** Fwd: Bank statements for the Monitor

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Begin forwarded message:

**From:** David Gamage <[david@gamages.ca](mailto:david@gamages.ca)>  
**Date:** April 17, 2020 at 19:19:27 AST  
**To:** Dan White <[dwhite@symmetryinc.com](mailto:dwhite@symmetryinc.com)>  
**Cc:** Gary Vandepol <[garyv@vandepols.com](mailto:garyv@vandepols.com)>  
**Subject:** Bank statements for the Monitor

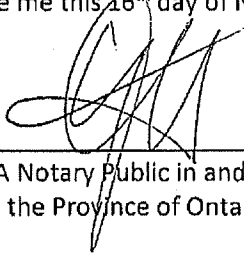
Dan,

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I am still amazed at the level of deposits in Absolute. I swear Adam must of been chasing the clients away with a pitch fork. That used to be such a success story for your group of companies and now its just a burden. So sad.

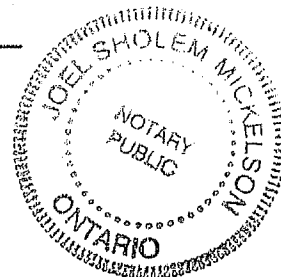
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This is **Exhibit "34"** referred to  
in the Affidavit of Wesley Roitman  
Sworn before me this 16<sup>th</sup> day of November, 2020



---

A Notary Public in and for  
the Province of Ontario





**Absolute Environmental Waste  
Management et al.**  
Second Report of Interim Monitor

**PREPARED BY:** MNP LTD  
Suite 1500, 640 – 5<sup>th</sup> Avenue SW  
Calgary, AB T2P 3G4

**MNP CONTACT:** Victor Kroeger, CIRP, LIT  
Senior Vice President

**PHONE:** 403-298-8479

**EMAIL:** victor.kroeger@mnp.ca

---

## TABLE OF CONTENTS

TABLE OF CONTENTS .....	1
SCHEDULES.....	2
GENERAL RESTRICTIONS AND LIMITATIONS .....	3
BACKGROUND.....	3
MONITORING ACTIVITES .....	3
CURRENT FINANCIAL POSITION.....	4
STATUS OF INFORMATION REQUESTS .....	5
CELANESE PURCHASE AND SALE AGREEMENT .....	5
CONCLUSION AND RECOMMENDATIONS .....	6



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## **SCHEDULES**

SCHEDULE 1: June 15, 2020 Year to Date Income Statement for AEWM

SCHEDULE 2: July 15, 2020 Summary Accounts Receivable Report

SCHEDULE 3: July 15, 2020 Summary Accounts Payable Report

SCHEDULE 4: Celanese Purchase Agreement and Amendments

---

## GENERAL RESTRICTIONS AND LIMITATIONS

This report has been prepared for and only for Romspen Mortgage Limited Partnership and Romspen Investment Corporation (collectively as "Romspen") in accordance with our Engagement Letter dated April 7, 2020 (the "LOE") and for no other purpose. Rompsen engaged MNP Ltd., as Interim Monitor of the financial and operational affairs of Lot 11 GP Ltd., Lot 11 Limited Partnership, Eco-Industrial Business Park Inc. ("Eco"), Absolute Energy Resources Inc., ("Absolute Energy") and Absolute Environmental Waste Management Inc. ("AEWM") (collectively referred to hereinafter as the "Companies") The contents of this report may not be reproduced, quoted, referred to or disclosed to others without our prior written consent in each specific instance. We will not assume any responsibility or liability for losses incurred as a result of the use of our report contrary to these provisions.

We make no representations regarding the sufficiency of the procedures we were requested to perform. In completing this report, we relied on representations of management, management prepared assumptions, unaudited financial documents and other information. We did not carry out an audit of the Companies financial reports or of the information management provided to us, nor did we verify any of the information contained in this report and, accordingly, we express no opinion thereon.

Our comments and conclusions are based on information that has been made available to us. We reserve the right to review all calculations and conclusions included or referred to in this report and, if we consider it necessary, to revise our calculations in light of information existing at the date of this report.

We do not provide any assurance as to any matters relating to the Companies' ability to pay the debt due to Romspen and Romspen is solely responsible for actions taken by it as a result of the findings described in this report.

## BACKGROUND

This is the Second Report of the Interim Monitor (the "Second Report") and it should be read in conjunction with the First Report of the Interim Monitor provided to Romspen on June 5, 2020 (the "First Report").

Capitalized terms not defined in the Second Report are as defined in the First Report.

The purpose of the Second Report is to update Romspen on the monitoring activities of the Interim Monitor, financial affairs of the Companies and an update on the provision of outstanding information following our First Report.

## MONITORING ACTIVITES

The Interim Monitor continues to monitor the financial activities of the Companies on a bi-monthly basis. We previously had been monitoring the accounts and reports weekly, however, Management requested that the frequency be changed to bi-monthly to reduce the administrative burden. Given that there is not a substantial amount of transactions (nor a substantial amount of monies) flowing through the bank accounts, we agreed that a bi-monthly monitoring period would be sufficient.

In the bi-monthly monitoring reporting package, we receive and review the following reports:

- Bank statements for the period for each account(s);
- General Ledger;
- Summary and Detailed Accounts Receivable ("AR") Reports;
- Accounts Payable ("AP") Reports; and,
- Income Statement for the associated period.

---

## CURRENT FINANCIAL POSITION

As noted in the First Report, AEWM is the only active operation which has any material ongoing financial activity. Below is a summary of the financial performance of AEWM for the period of June 1, 2020 through July 15, 2020.

### Revenue and Expenses

On June 15, 2020 Management provided an inhouse income statement for AEWN for the 2020 year-to-date. Based on the income statement, revenue year-to date-totalled \$387,777. Expenses over the same period totalled \$510,961 leaving the company in a net loss position of \$123,184. Based on the detail provided in the income statement, \$132,104 was expended in professional fees and legal fees over the period. We have not reviewed any of the data supporting the income statement, but Management advises that the professional fees relate to director fees owed to Rio. A copy of the year-to-date income statement dated June 15, 2020 is attached as Schedule 1.

We also reviewed the income statements for the periods of June 15, 2020 to June 30, 2020 and July 1, 2020 to July 15, 2020 and report the following:

- Revenue over the period totalled \$53,625 and \$68,561 respectively;
- Expenses over the period totalled \$ \$25,405 and \$29,490.79 respectively; and
- Net income over the period totaled \$29,490 and \$43,155.39 respectively.

### Accounts Receivable ("AR")

We reviewed the detailed AR reports and bank statements for the period of June 1, 2020 through July 15, 2020 and can confirm the following:

- A total sum of \$111,306 was collected throughout the period; and,
- We reconciled the current AR reports with the prior AR reports for each period and it appears that all amounts recorded as collected have been deposited to the bank account(s) for AEWM.

As of July 15, 2020, there is a sum of \$180,663 of accounts receivable outstanding. Of this amount, \$128,138 (or 71%) is current AR aged less than 30 days. Only \$5,954 (or 3%) is aged over 90 days.

A copy of the July 15, 2020 AR Summary is attached as Schedule 2.

### Accounts Payable

As of July 15, 2020, AEWM's AP totalled approximately \$192,663. Of this amount, a sum of \$140,000 relates to amounts owed to Rio. According to Management, Rio and/or Mr. Vandepol has not collected its \$20,000/month Director's Fee in a significant period of time as it would normally be paid at a time when surplus funds are available. We have not noted any payments to Mr. Vandepol or Rio in the financial transactions in June or July to date.

A copy of the July 15, 2020 AP Summary is attached as Schedule 3.

### Bank Statements and General Ledger

In our review of the AEWM bank statements, we did not note any transactions that appear to be out of the normal course of business.

Over the period, the following amounts were transferred to Symmetry:

- \$14,000 on June 12, 2020 billed as Management Fee; and,
- \$19,000 on June 18, 2020 billed as Management Fee.

Insurance premiums are being auto-debited from the bank account on a regular basis which suggests insurance premiums are up to date.

GST refunds are also being deposited to the account which suggests ongoing GST filings are taking place. We have requested and received a copy of the most current filed GST return for AEWB and confirmation of payment of same.

From our review, there are a limited number of transactions flowing through the Eco bank accounts. The transactions through the Eco accounts primarily consist of:

- Transfers between accounts (AEWB, Symmetry and Eco) to pay professional fees and expenses (Rio, accounting and legal);
- Deposit of \$40,000 in relation to the Canadian Emergency Business Loan advance;
- As of July 15, 2020, a balance of approximately \$1,748 remained in the Eco account;
- We have not reviewed any of the underlying invoices relating to professional fees.

## STATUS OF INFORMATION REQUESTS

During the course of our review we have made various requests for additional information from Management. The list below outlines the status of our requests and provision of information to date:

1. Employee Listing – provided;
2. Celanese Purchase and Sale Agreement – provided;
3. 2007 Phase I Environmental Assessments for the Eco Lands - provided;
4. Copies of insurance policies –provided;
5. 2018 internal financial statement snapshot - provided;
6. 2019 internal financial statements – in progress;
7. External Financial Statements – unable to provide;
8. Signed Symmetry Management Agreements – unable to provide;
9. Support for site clean up costs - unable to provide;
10. AEWB Scotiabank statements – unable to provide;
11. Symmetry Invoices – not provided but in progress by Management; and,
12. Detailed Eco asset list – not provided but in progress by Management.

## CELANESE PURCHASE AND SALE AGREEMENT

As described in the First Report, we were advised by an employee of AEWB that Celanese Canada Inc. (the "Seller") (previously described in our First Report as Celanese Corporation) had entered into an agreement upon selling the lands to Eco, in which Celanese maintained the responsibility to perform certain reclamation services on the Eco Lands. Management provided a copy of the Celanese Purchase Agreement dated August 21, 2007 and the Amendments to the Celanese Purchase and Sale Agreement (collectively as the "Celanese Agreement") copies of which are attached as Schedule 4.

In accordance with Schedule 4, the original parties to the Celanese Agreement were Celanese Canada Inc. and Worthington Properties Inc. Based on information provided by Management, the Celanese Agreement was closed by a newly formed entity named Worthington Business Park which subsequently changed its name to what is now known as Eco (the "Buyer"). We have not pulled the corporate searches at this time to confirm the name changes.

Counsel to the Interim Monitor has undertaken a preliminary review of the Celanese Agreement to determine what, if any, liability that Celanese currently maintains. It should be noted that the Interim Monitor's counsel reviewed the Celanese Agreement on a "high-level" basis and that Romspen should engage its own counsel to conduct a thorough review in order to determine the effect (or potential effect) of the Celanese Agreement as it relates to the value of Romspen's security.

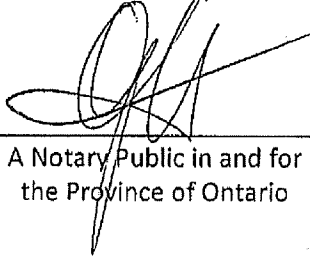
Based on the preliminary review, we highlight the following:

- Exhibit B provides that Celanese will remain liable for the remediation of the purchased lands relating to their environmental condition and to the extent required by environmental law and any governmental entity for a period of 25 years following closing of the transaction. The indemnity provided by Sellers to the Buyer is limited to an aggregate amount of \$10,000,000;
- Exhibit B to the Celanese Agreement provides for continuing liability of the Sellers under two categories of liabilities:
  - o Section 1 of Exhibit B relates to a claim by EPCOR Utilities Inc. ("EPCOR") against the Sellers for alleged migration of 'Hazardous Substances' from the 'Owned Real Property' onto adjacent lands owned by EPCOR; In Section 1(i) Celanese agrees to remain solely responsible for defending the claim and indemnifying the Buyer for any 'Liability' arising from the claim relating to the 'Remediation' of the EPCOR lands; and,
  - o Section 2 of Exhibit B relates to the presence of 'Hazardous Substances' on the Owned Real Property at the time of closing. Celanese agrees to be solely responsible for performing and paying for 'Remediation' of the 'Owned Real Property' to the extent required by applicable 'Environmental Law' or a 'Governmental Entity' and to the extent that the 'Remediation relates to 'Environmental Conditions' that existed prior to closing.
- Pursuant to Section 2 and 7 of Exhibit B, Celanese's liability is limited to the 25th anniversary of closing. It is further limited to the extent additional 'Remediation' is required due to:
  - o the 'Owned Real Property' is rezoned;
  - o the Buyer fails to cooperate with Celanese, fails to implement commercially reasonable standards, or through communications with Governmental Entities seeks imposition of more stringent standards than are currently contemplated
  - o the Buyer damages Celanese's 'Remediation' equipment or systems
  - o after closing there is a release of 'Hazardous Substances' or aggravation of 'Environmental condition due to the Buyer's failure to follow procedures
  - o any disturbance by the Buyer of certain areas marked "Gravel Pit Recovery System", "North Ponds", or "Former Flarestack/Flame Pit"; and,
  - o change or negligence in stormwater management by the Buyer
- Section 10 of Exhibit B provides that indemnification pursuant to Exhibit B is subject to Article 8 of the Celanese Agreement. Article 8 sets out the indemnification process applicable to the entire Celanese Agreement. Section 8(e) sets out the limitations applicable to such indemnification, providing: (i) indemnification shall not be required until the aggregate amount of 'Claims' exceeds an indemnification threshold of \$100,000; and (ii) aggregate liability of is limited to an indemnification cap of \$10,000,000.

## CONCLUSION AND RECOMMENDATIONS

1. With the exception of certain outstanding information detailed above, Management continues to provide the bi-monthly information within the required timeframes and has been responding to further requests arising from the monitor's ongoing review in a timely manner;
2. Based on the information provided to date, the Interim Monitor has not identified any financial transactions which it would consider out of the normal course of business; and
3. Romspen should have its counsel review the Celanese Agreement to determine what responsibly, if any, Celanese maintains for the clean up of the Eco Lands.

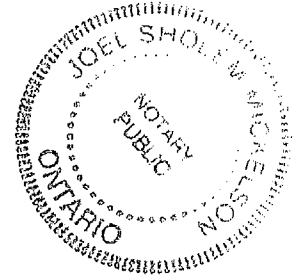
This is Exhibit "35" referred to  
in the Affidavit of Wesley Roitman  
Sworn before me this 16<sup>th</sup> day of November, 2020



A handwritten signature in black ink, consisting of a large, stylized 'J' followed by a series of loops and a long horizontal stroke extending to the right.

---

A Notary Public in and for  
the Province of Ontario



## Barr, Kevin

---

**From:** Victor Kroeger <Victor.Kroeger@mnp.ca>  
**Sent:** September 10, 2020 9:07 AM  
**To:** Barr, Kevin  
**Cc:** Randal Van de Mosselaer - (rvandemosselaer@osler.com); Karen Aylward  
**Subject:** Absolute et al  
**Attachments:** Absolute et al - Ongoing Monitoring Information ; Fwd: Romspen Investment Corporation et al v Absolute Environmental et al - New Contact Person for Monitor (Dentons file: 580694-1); RE: Romspen Investment Corporation et al v Absolute Environmental et al - New Contact Person for Monitor (Dentons file: 580694-1); Absolute et al - Demand for Information ; FW: Absolute et al - Ongoing Monitoring Information ; Re: Absolute et al - Demand for Information; FW: Absolute Environmental et al - URGENT; RE: Absolute Environmental et al - URGENT; FW: Absolute Environmental et al v Romspen et al - Request for Records (Dentons file: 580694-1); FW: Absolute et al - Ongoing Monitoring Information ; RE: Absolute et al - Ongoing Monitoring Information ; RE: Absolute Environmental et al v Romspen et al - Request for Records (Dentons file: 580694-1); FW: Absolute et al - Ongoing Monitoring Information

Hi Kevin. We would like to provide you with an update on our activities as monitor on behalf of Romspen since being informed that Mr. Gary Vandepol ("Vandepol") was no longer affiliated with Absolute Environmental et al ("Absolute"). We would advise that we have received very little of the information we require in order to fulfill our role. We provide below our chronology of our information requests and any responses from the company:

- 1) August 14, 2020 – Pursuant to a telephone call from Romspen's legal counsel, Kevin Barr to Randal Van de Mosselaer of Osler ("Van de Mosselaer") advised us that that Vandepol was no longer with Absolute and the new contact person was a Mr. Gamage.
- 2) August 14, 2020 – Email from Karen Aylward of our office ("Aylward") to David Gamage ("Gamage") as our new contact with Absolute advising that we had not yet been provided with the required financial information for the period of July 16, 2020 through July 31, 2020 and that the reporting information for August 1, 2020 – August 15, 2020 is coming due as well. The information we required for that period was the following:
  - General Ledger;
  - Income Statement;
  - Detailed accounts receivable report;
  - Detailed accounts payable to report; and,
  - Bank Statements (CIBC, Scotia and TD accounts);
- 3) August 14, 2020 – Email from Mr. Jonathan Hillson of Dentons, legal counsel to Absolute ("Hillson") advising us that Vandepol was no longer with Absolute and that Mr. White, Mr. Farooq and Gamage were the original managers and have intimate knowledge of the businesses and the markets they operate in and will be in a better position to provide reporting to the Monitor and the Courts.
- 4) August 17, 2020 – Email from Aylward to Hillson acknowledging receipt of his August 14, 2020 advice and informing him that we have requested information from him to allow us to monitor the affairs of Absolute.
- 5) August 17, 2020 – Email to Gamage from Aylward demanding that Absolute produce and provide to the Interim Monitor by no later than 5:00 PM on Wednesday, August 19, 2020 copies of any and all correspondence (including, but not limited to, internal memos, emails, letters, and all other records) between Vandepol and senior management, employees, officers, directors, or other representatives of the Companies (including Gamage) which have occurred within the last 60 days.

In addition to the foregoing, we also require the following information:

- Details on the status of the employees of the Companies, including details with respect to any terminations or departures that have taken place within the last 60 days, and confirmation of the status of the employee payroll and any severance obligations;
  - In the event that payroll is not current, details on the amount outstanding and to whom;
  - Copies of any and all correspondence between the other terminated or departed employees (if any) and the Companies, its senior management, employees or other representatives within the last 60 days; and,
  - The above noted information to be produced and provided by no later than 5:00 PM on August 24, 2020.
- 6) August 18, 2020 – Email from Aylward to Gamage advising that we have yet to receive an update or confirmation from him with respect to our information request. In addition, we have advised Gamage that we had made multiple requests for a copy of asset lists (other than lands) for Absolute and had still not received this information. We again requested a complete asset listing for Absolute and confirmation as to whether any assets have been purchased or sold since our appointment as Interim Monitor on April 2, 2020.
  - 7) August 18, 2020 - Reply from Gamage to Aylward's August 18, 2020 email basically stating that no information regarding that request would be forthcoming.
  - 8) August 18, 2020 – Email from Van de Mosselaer to Hillson advising him that it was the monitor's position that we were entitled to the information requested in Aylward's August 17, 2020 email to Gamage.
  - 9) August 23, 2020 – Email from Van de Mosselaer to Hillson following up his the August 18, 2020 email.
  - 10) August 23, 2020 – Email I from Hillson to Van de Mosselaer wherein Hillson states that he is in the process of reviewing the records for privilege.
  - 11) August 24, 2020 – Email from Aylward to Gamage stating that we have not yet received any information requested on August 14 and 18, 2020.
  - 12) August 24, 2020 – Aylward advises that she has talked to Gamage and that Gamage states that the information requested will be released to us in the next couple of days.
  - 13) September 4, 2020 – Aylward email to Gamage following up our information requests.
  - 14) September 4, 2020 – Van de Mosselaer email to Hillson again following up on the August 18, 2020 email.
  - 15) September 4, 2020 – Copy of minimal financial information provided by Gamage with a promise that the remaining information will be forwarded on September 8, 2020.

In summary, we have not received the July 15, 2020 to August 31, 2020 (3 reporting periods) financial information, the fixed assets listing, information about asset sales and purchases since April 2, 2020 nor any of the correspondence requested on August 18, 2020. Copies of all of the emails are attached.

Best regards,

**Victor P. Kroeger CIRP, LIT, CPA, CA, CFE**  
DIRECTOR OF CORPORATE RECOVERY WESTERN CANADA

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## Henry, Shayleen

---

**From:** Karen Aylward <Karen.Aylward@mnp.ca>  
**Sent:** August 14, 2020 11:47 AM  
**To:** david@gamages.ca  
**Cc:** Victor Kroeger  
**Subject:** Absolute et al - Ongoing Monitoring Information

Hello David,

We have been advised that Mr. Gary Vandepol is no longer handling the affairs of Absolute Environmental Waste Management (AEWM)/Eco Industrial Business Park (Eco) and that you would be stepping into his place in the interim. We have not yet received the required financial information for the period of July 16, 2020 through July 31, 2020 and the reporting information for August 1, 2020 – August 15, 2020 is coming due as well. The information we require is the following:

- General Ledger;
- Income Statement;
- Detailed accounts receivable report;
- Detailed accounts payable to report; and,
- Bank Statements (CIBC, Scotia and TD accounts);

Can you please confirm if you will be now be providing the information and also a timeline as to when we should expect it.

Regards,

**Karen Aylward, CIRP, LIT**  
VICE PRESIDENT

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## Henry, Shayleen

---

**From:** Karen Aylward <Karen.Aylward@mnp.ca>  
**Sent:** August 14, 2020 4:14 PM  
**To:** Victor Kroeger; Randal Van de Mosselaer,  
**Subject:** Fwd: Romspen Investment Corporation et al v Absolute Environmental et al - New Contact Person for Monitor (Dentons file: 580694-1)

FYI

Sent from my iPhone

Begin forwarded message:

**From:** "Hillson, Jonathan" <jon.hillson@dentons.com>  
**Date:** August 14, 2020 at 4:02:27 PM MDT  
**To:** Karen Aylward <Karen.Aylward@mnp.ca>  
**Cc:** "Barr, Kevin" <KBarr@blg.com>  
**Subject:** Romspen Investment Corporation et al v Absolute Environmental et al - New Contact Person for Monitor (Dentons file: 580694-1)

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Good afternoon Ms Aylward,

As you know, I act for Lot 11 GP Ltd, Lot 11 Limited Partnership, Eco-Industrial Business Park Inc, Absolute Energy Resources Inc, Absolute Environmental Waste Management Inc and Mr Dan White

Gary Vandepol is no longer with Absolute Environmental, Absolute Energy Resources Inc or Eco-Industrial. Mr Dan White, Mr Mohammed Farooq and Mr David Gamage have taken over the management of the corporate parties for whom I act and will be the new contact persons for the Monitor and reporting to the Monitor on an ongoing basis. Mr White, Mr Farooq and Mr Gamage were the original managers and have intimate knowledge of the businesses and the markets they operate in and will be in a better position to provide reporting to the Monitor and the Courts.

Thank you and have a nice weekend.



**Jonathan Hillson**  
Partner

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[Rattagan Macchiavello Arocena](#) > [Jiménez de Aréchaga, Viana & Brause](#) > [Lee International](#) >

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> Hamilton Harrison & Mathews > Mardemootoo Balgobin > HPRP > Zain & Co. > Delany Law >  
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## Henry, Shayleen

---

**From:** Karen Aylward <Karen.Aylward@mnp.ca>  
**Sent:** August 17, 2020 9:46 AM  
**To:** Hillson, Jonathan  
**Cc:** Barr, Kevin; Victor Kroeger  
**Subject:** RE: Romspen Investment Corporation et al v Absolute Environmental et al - New Contact Person for Monitor (Dentons file: 580694-1)

Thank you, Jonathan.

I emailed Mr. Gamage on Friday with the list of the information that is outstanding. I look forward to receipt of it as soon as possible.

Regards,

**Karen Aylward, CIRP, LIT**  
VICE PRESIDENT

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---

**From:** Hillson, Jonathan <jon.hillson@dentons.com>  
**Sent:** August 14, 2020 4:02 PM  
**To:** Karen Aylward <Karen.Aylward@mnp.ca>  
**Cc:** Barr, Kevin <KBarr@blg.com>

**Subject:** Romspen Investment Corporation et al v Absolute Environmental et al - New Contact Person for Monitor  
(Dentons file: 580694-1)

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Good afternoon Ms Aylward,

As you know, I act for Lot 11 GP Ltd, Lot 11 Limited Partnership, Eco-Industrial Business Park Inc, Absolute Energy Resources Inc, Absolute Environmental Waste Management Inc and Mr Dan White

Gary Vandepol is no longer with Absolute Environmental, Absolute Energy Resources Inc or Eco-Industrial. Mr Dan White, Mr Mohammed Farooq and Mr David Gamage have taken over the management of the corporate parties for whom I act and will be the new contact persons for the Monitor and reporting to the Monitor on an ongoing basis. Mr White, Mr Farooq and Mr Gamage were the original managers and have intimate knowledge of the businesses and the markets they operate in and will be in a better position to provide reporting to the Monitor and the Courts.

Thank you and have a nice weekend.



**Jonathan Hillson**  
Partner

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## Henry, Shayleen

---

**From:** Karen Aylward <Karen.Aylward@mnp.ca>  
**Sent:** August 17, 2020 11:50 AM  
**To:** david@gamages.ca  
**Cc:** Victor Kroeger; Van de Mosselaer, Randal  
**Subject:** Absolute et al - Demand for Information

Mr. Gamage,

I have been advised by Mr. Hillson, who represents Lot 11 GP Ltd, Lot 11 Limited Partnership, Eco-Industrial Business Park Inc, Absolute Energy Resources Inc, Absolute Environmental Waste Management Inc (collectively the "Companies") as well as Daniel Alexander White, that Mr. Gary Vandepol is no longer employed by or associated with any of the Companies and that you will be taking over the reporting duties to the Interim Monitor as required pursuant the terms of the Court Orders granted in Action No. 2003-06728.

Given Mr. Gary Vandepol's departure from the Companies and as part of our monitoring of the financial and operational affairs of the Companies, we hereby demand that the Companies produce and provide to the Interim Monitor **by no later than 5:00 PM on Wednesday, August 19, 2020** copies of any and all correspondence (including, but not limited to, internal memos, emails, letters, and all other records) between Mr. Vandepol and senior management, employees, officers, directors, or other representatives of the Companies (including yourself) which have occurred within the last 60 days.

In addition to the foregoing, we also require the following information:

- Details on the status of the employees of the Companies, including details with respect to any terminations or departures that have taken place within the last 60 days, and confirmation of the status of the employee payroll and any severance obligations;
- In the event that payroll is not current, details on the amount outstanding and to whom;
- Copies of any and all correspondence between the other terminated or departed employees (if any) and the Companies, its senior management, employees or other representatives within the last 60 days; and,
- The above noted information to be produced and provided by **no later than 5:00 PM on August 24, 2020**.

Please let me know if you require any clarity on the above requests. Otherwise, we look forward to receipt of the requested information within the timelines noted above.

Regards,

**Karen Aylward, CIRP, LIT**  
VICE PRESIDENT

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## Henry, Shayleen

---

**From:** Karen Aylward <Karen.Aylward@mnp.ca>  
**Sent:** August 18, 2020 10:40 AM  
**To:** Victor Kroeger; Van de Mosselaer, Randal  
**Subject:** FW: Absolute et al - Ongoing Monitoring Information

See below, FYI.

**Karen Aylward, CIRP, LIT**  
VICE PRESIDENT

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---

**From:** Karen Aylward  
**Sent:** August 18, 2020 10:40 AM  
**To:** david@gamages.ca  
**Subject:** FW: Absolute et al - Ongoing Monitoring Information

Hello Mr. Gamage,

I have yet to receive an update or confirmation from you with respect to my email below. Please confirm receipt and advise when I should expect to receive the outstanding information.

In addition, we have made multiple requests for a copy of asset lists (other than lands) for each of the entities for which we've received no fulsome response. I would appreciate if you would send me, as soon as possible, a complete asset listing for each of the entities and confirmation as to whether any assets have been purchased or sold since our appointment as Interim Monitor on April 2, 2020.

As part of our mandate as Interim Monitor, we are to be notified of any sale of assets out of the ordinary course of business.

I look forward to a reply.

**Karen Aylward, CIRP, LIT**  
VICE PRESIDENT

**DIRECT 780.969.1400**  
PH. 780.455.1155  
FAX 780.409.5415  
TOLL FREE 1.866.465.1155  
10235 101st N.W.  
Suite 1300  
Edmonton, AB  
T5J 3G1  
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CANADA 2019

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---

**From:** Karen Aylward  
**Sent:** August 14, 2020 11:47 AM  
**To:** [david@gamages.ca](mailto:david@gamages.ca)  
**Cc:** Victor Kroeger <[Victor.Kroeger@mnp.ca](mailto:Victor.Kroeger@mnp.ca)>  
**Subject:** Absolute et al - Ongoing Monitoring Information

Hello David,

We have been advised that Mr. Gary Vandepol is no longer handling the affairs of Absolute Environmental Waste Management (AEWM)/Eco Industrial Business Park (Eco) and that you would be stepping into his place in the interim. We have not yet received the required financial information for the period of July 16, 2020 through July 31, 2020 and



the reporting information for August 1, 2020 – August 15, 2020 is coming due as well. The information we require is the following:

- General Ledger;
- Income Statement;
- Detailed accounts receivable report;
- Detailed accounts payable to report; and,
- Bank Statements (CIBC, Scotia and TD accounts);

Can you please confirm if you will be now be providing the information and also a timeline as to when we should expect it.

Regards,

**Karen Aylward, CIRP, LIT**  
VICE PRESIDENT

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PH. 780.455.1155  
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## Henry, Shayleen

---

**From:** David Gamage <david@gamages.ca>  
**Sent:** August 18, 2020 10:41 AM  
**To:** Karen Aylward  
**Cc:** Victor Kroeger; Van de Mosselaer, Randal  
**Subject:** Re: Absolute et al - Demand for Information

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Dear Ms. Aylward,

I will attempt to provide immediate answers to your queries.

We take our obligations in the Court Order mentioned in your email below seriously, and have always endeavoured to be as transparent as possible - hence our immediate instructions to our lawyers at Dentons LLP to notify you about Mr. Vandepol's termination.

Timely notification to the Monitor about staffing is one thing but disclosing information/specifics that can be detrimental to someone's reputation and career, be it an ex-staff member, is something we would like to refrain from - we hope you understand.

On your behest for particulars about Mr. Vandepol's termination, it will suffice to state that Mr. Vandepol was terminated for nonperformance and the only example we are comfortable in sharing with you is the Monitor's own complaints in the past about Mr. Vandepol not providing timely information about the Companies.

With respect to your request for disclosure of correspondences between Mr. Vandepol and Management, please note that Mr. Vandepol was part of the litigation advisory group with respect to various claims involving your Client ("Romspen"). There are multiple lawsuits in the Courts of Alberta & Texas between the parties. The communications that you are requesting are subject to privilege and we can not disclose privileged communication.

As informed earlier, all companies are being managed by Mr. Dan White, Mr. Mohammed Farooq and myself - and together we have the credentials and experience to not only keep the businesses ongoing but also to grow & sustain the businesses.

If you are looking for any relevant information that has not already been provided by Mr. Vandepol - please provide a list of outstanding items and we will do our best to provide the information in a timely manner.

Trust you will find this satisfactory - looking forward to working with you.

Cheers,

David Gamage, cga, cpa  
C: 780-901-1518 | E: [david@gamages.ca](mailto:david@gamages.ca)

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addressee. Any unauthorized use or disclosure is strictly prohibited. Disclosure of this e-mail to anyone other than the intended addressee does not constitute waiver of privilege. If you have received this communication in error, please notify us immediately and delete this. Thank you for your cooperation.

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On Aug 17, 2020, at 11:50 AM, Karen Aylward <[Karen.Aylward@mnp.ca](mailto:Karen.Aylward@mnp.ca)> wrote:

Mr. Gamage,

I have been advised by Mr. Hillson, who represents Lot 11 GP Ltd, Lot 11 Limited Partnership, Eco-Industrial Business Park Inc, Absolute Energy Resources Inc, Absolute Environmental Waste Management Inc (collectively the "Companies") as well as Daniel Alexander White, that Mr. Gary Vandepol is no longer employed by or associated with any of the Companies and that you will be taking over the reporting duties to the Interim Monitor as required pursuant the terms of the Court Orders granted in Action No. 2003-06728.

Given Mr. Gary Vandepol's departure from the Companies and as part of our monitoring of the financial and operational affairs of the Companies, we hereby demand that the Companies produce and provide to the Interim Monitor **by no later than 5:00 PM on Wednesday, August 19, 2020** copies of any and all correspondence (including, but not limited to, internal memos, emails, letters, and all other records) between Mr. Vandepol and senior management, employees, officers, directors, or other representatives of the Companies (including yourself) which have occurred within the last 60 days.

In addition to the foregoing, we also require the following information:

- Details on the status of the employees of the Companies, including details with respect to any terminations or departures that have taken place within the last 60 days, and confirmation of the status of the employee payroll and any severance obligations;
- In the event that payroll is not current, details on the amount outstanding and to whom;
- Copies of any and all correspondence between the other terminated or departed employees (if any) and the Companies, its senior management, employees or other representatives within the last 60 days; and,
- The above noted information to be produced and provided by **no later than 5:00 PM on August 24, 2020.**

Please let me know if you require any clarity on the above requests. Otherwise, we look forward to receipt of the requested information within the timelines noted above.

Regards,

**Karen Aylward, CIRP, LIT** <image001.jpg>  
VICE PRESIDENT

**DIRECT 780.969.1400**  
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<image005.jpg>

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## Henry, Shayleen

---

**From:** Van de Mosselaer, Randal <rvandemosselaer@osler.com>  
**Sent:** August 18, 2020 11:58 AM  
**To:** jon.hillson@dentons.com  
**Cc:** Victor Kroeger; Karen Aylward; Barr, Kevin  
**Subject:** FW: Absolute Environmental et al - URGENT  
**Attachments:** Filed Consent Order (June 19, 2020)(114283683.1).PDF; Filed Romспен Order (May 11, 2020).PDF; Filed Order - Romспен Mortgage v 3443 Zen Garden.PDF

**Importance:** High

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Hello Jon,

I trust you are well.

As I believe you are aware, we are counsel to MNP in its capacity as Interim Monitor (the "Interim Monitor") appointed by Romспен in accordance with the provisions of the attached April 2, 2020 Order (and in particular paragraph 5 thereof). As you are aware, the term of the Monitor's mandate granted by the April 2, 2020 Order was extended by the April 30, 2020 Order and the June 29, 2020 Order, copies of which are attached.

As you will also be aware, paragraph 7 of the April 2, 2020 Order obliges the corporate Respondents (as that term is defined in the April 2, 2020 Order) to cooperate with and provide information to the Interim Monitor, and to provide the Interim Monitor with access to the business records of the corporate Respondents.

We are forwarding to you (below) an exchange of emails between the Interim Monitor and your clients yesterday and today. As you can see, the Monitor has asked for specific records which are in the possession of the corporate Respondents and which relate to the corporate Respondents' business, specifically:

"copies of any and all correspondence (including, but not limited to, internal memos, emails, letters, and all other records) between Mr. Vandepol and senior management, employees, officers, directors, or other representatives of the Companies (including yourself) which have occurred within the last 60 days."

As you can see from Mr. Gamage's response below, that request has been refused. Mr. Gamage suggests that the communications that are being requested are "privileged".

On the face of it this assertion seems difficult to comprehend. Mr. Vandepol is not a lawyer, and even if (as Mr. Gamage's email suggests) Mr. Vandepol was part of the "litigation advisory group" with the corporate Respondents it is difficult to believe that all of the correspondence which was requested in the Interim Monitor's August 17 email, and all portions of such correspondence, could reasonably be subject to a claim of privilege. Accordingly, the Interim Monitor is concerned that this claim is being made simply in order to frustrate the Interim Monitor's mandate.

We therefore inquire whether you have had an opportunity to review all of the records which were requested by the Interim Monitor in its August 17 email (below). The Interim Monitor would strongly encourage Mr. Gamage and the corporate Respondents to revisit this issue and to provide the requested materials to the Interim Monitor in accordance with their obligations under the April 2, 2020 Order.

We look forward to hearing from you.

Regards,

**OSLER**

Randal Van de Mosselaer

403.260.7060 DIRECT  
403.260.7024 FACSIMILE  
[rvandemosselaer@osler.com](mailto:rvandemosselaer@osler.com)

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Suite 2500, TransCanada Tower  
450 - 1st Street S.W.  
Calgary, Alberta, Canada T2P 5H1

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---

**From:** David Gamage <david@gamages.ca>  
**Sent:** Tuesday, August 18, 2020 10:41 AM  
**To:** Karen Aylward <Karen.Aylward@mnp.ca>  
**Cc:** Victor Kroeger <Victor.Kroeger@mnp.ca>; Van de Mosselaer, Randal <rvandemosselaer@osler.com>  
**Subject:** Re: Absolute et al - Demand for Information

Dear Ms. Aylward,

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Regards,

**Karen Aylward, CIRP, LIT** <image001.jpg>  
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## Henry, Shayleen

---

**From:** Van de Mosselaer, Randal <rvandemosselaer@osler.com>  
**Sent:** August 23, 2020 9:10 PM  
**To:** jon.hillson@dentons.com  
**Cc:** Victor Kroeger; Karen Aylward; Barr, Kevin  
**Subject:** RE: Absolute Environmental et al - URGENT

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Hello Jon. Just following up on the email below.

I look forward to hearing from you.

Regards,

**OSLER**

Randal Van de Mosselaer

403.260.7060 DIRECT  
403.260.7024 FACSIMILE  
[rvandemosselaer@osler.com](mailto:rvandemosselaer@osler.com)

Osler, Hoskin & Harcourt LLP  
Suite 2500, TransCanada Tower  
450 - 1st Street S.W.  
Calgary, Alberta, Canada T2P 5H1

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---

**From:** Van de Mosselaer, Randal  
**Sent:** Tuesday, August 18, 2020 11:58 AM  
**To:** jon.hillson@dentons.com  
**Cc:** Victor Kroeger <Victor.Kroeger@mnp.ca>; Karen Aylward <Karen.Aylward@mnp.ca>; Kevin Barr - Norton Rose Fulbright (kbarr@blg.com) <kbarr@blg.com>  
**Subject:** FW: Absolute Environmental et al - URGENT  
**Importance:** High

Hello Jon,

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Regards,

**Karen Aylward, CIRP, LIT** <image001.jpg>  
VICE PRESIDENT

**DIRECT 780.969.1400**  
PH. 780.455.1155  
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\*\*\*\*\*





## Henry, Shayleen

---

**From:** Van de Mosselaer, Randal <rvandemosselaer@osler.com>  
**Sent:** August 23, 2020 10:05 PM  
**To:** Victor Kroeger; Karen Aylward  
**Subject:** FW: Absolute Environmental et al v Romspen et al - Request for Records (Dentons file: 580694-1)

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## OSLER

Randal Van de Mosselaer

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Suite 2500, TransCanada Tower  
450 - 1st Street S.W.  
Calgary, Alberta, Canada T2P 5H1

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---

**From:** Hillson, Jonathan <jon.hillson@dentons.com>  
**Sent:** Sunday, August 23, 2020 9:26 PM  
**To:** Van de Mosselaer, Randal <rvandemosselaer@osler.com>  
**Cc:** Kevin Barr - Norton Rose Fulbright (kbarr@blg.com) <kbarr@blg.com>  
**Subject:** Absolute Environmental et al v Romspen et al - Request for Records (Dentons file: 580694-1)

Thanks for the email. I spoke to Mr Barr about this issue last week. I have asked our client to provide me with the records so that I can review them to determine their producibility. Our client provided the records to me last week. I will review the documents and provide our client's position.

Please call me if you have any questions.



Jonathan Hillson  
Partner

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D +1 780 423 7194  
[jon.hillson@dentons.com](mailto:jon.hillson@dentons.com)  
Bio | [Website](#)

Dentons Canada LLP  
2500 Stantec Tower, 10220 - 103 Avenue NW Edmonton, AB T5J 0K4 Canada

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**From:** Van de Mosselaer, Randal <[rvandemosselaer@osler.com](mailto:rvandemosselaer@osler.com)>  
**Sent:** August 23, 2020 9:10 PM  
**To:** Hillson, Jonathan <[jon.hillson@dentons.com](mailto:jon.hillson@dentons.com)>  
**Cc:** Victor Kroeger <[Victor.Kroeger@mnp.ca](mailto:Victor.Kroeger@mnp.ca)>; Karen Aylward <[Karen.Aylward@mnp.ca](mailto:Karen.Aylward@mnp.ca)>; Kevin Barr - Norton Rose Fulbright ([kbarr@blg.com](mailto:kbarr@blg.com)) <[kbarr@blg.com](mailto:kbarr@blg.com)>  
**Subject:** RE: Absolute Environmental et al - URGENT

Hello Jon. Just following up on the email below.

I look forward to hearing from you.

Regards,

**OSLER**

Randal Van de Mosselaer

403.260.7060 DIRECT  
403.260.7024 FACSIMILE  
[rvandemosselaer@osler.com](mailto:rvandemosselaer@osler.com)

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Suite 2500, TransCanada Tower  
450 - 1st Street S.W.  
Calgary, Alberta, Canada T2P 5H1

[osler.com](http://osler.com)

---

**From:** Van de Mosselaer, Randal  
**Sent:** Tuesday, August 18, 2020 11:58 AM  
**To:** [jon.hillson@dentons.com](mailto:jon.hillson@dentons.com)  
**Cc:** Victor Kroeger <[Victor.Kroeger@mnp.ca](mailto:Victor.Kroeger@mnp.ca)>; Karen Aylward <[Karen.Aylward@mnp.ca](mailto:Karen.Aylward@mnp.ca)>; Kevin Barr - Norton Rose Fulbright ([kbarr@blg.com](mailto:kbarr@blg.com)) <[kbarr@blg.com](mailto:kbarr@blg.com)>  
**Subject:** FW: Absolute Environmental et al - URGENT  
**Importance:** High

Hello Jon,

I trust you are well.

As I believe you are aware, we are counsel to MNP in its capacity as Interim Monitor (the "Interim Monitor") appointed by Romspen in accordance with the provisions of the attached April 2, 2020 Order (and in particular paragraph 5 thereof). As you are aware, the term of the Monitor's mandate granted by the April 2, 2020 Order was extended by the April 30, 2020 Order and the June 29, 2020 Order, copies of which are attached.

As you will also be aware, paragraph 7 of the April 2, 2020 Order obliges the corporate Respondents (as that term is defined in the April 2, 2020 Order) to cooperate with and provide information to the Interim Monitor, and to provide the Interim Monitor with access to the business records of the corporate Respondents.

We are forwarding to you (below) an exchange of emails between the Interim Monitor and your clients yesterday and today. As you can see, the Monitor has asked for specific records which are in the possession of the corporate Respondents and which relate to the corporate Respondents' business, specifically:

"copies of any and all correspondence (including, but not limited to, internal memos, emails, letters, and all other records) between Mr. Vandepol and senior management, employees, officers, directors, or other representatives of the Companies (including yourself) which have occurred within the last 60 days."

As you can see from Mr. Gamage's response below, that request has been refused. Mr. Gamage suggests that the communications that are being requested are "privileged".

On the face of it this assertion seems difficult to comprehend. Mr. Vandepol is not a lawyer, and even if (as Mr. Gamage's email suggests) Mr. Vandepol was part of the "litigation advisory group" with the corporate Respondents it is difficult to believe that all of the correspondence which was requested in the Interim Monitor's August 17 email, and all portions of such correspondence, could reasonably be subject to a claim of privilege. Accordingly, the Interim Monitor is concerned that this claim is being made simply in order to frustrate the Interim Monitor's mandate.

We therefore inquire whether you have had an opportunity to review all of the records which were requested by the Interim Monitor in its August 17 email (below). The Interim Monitor would strongly encourage Mr. Gamage and the corporate Respondents to revisit this issue and to provide the requested materials to the Interim Monitor in accordance with their obligations under the April 2, 2020 Order.

We look forward to hearing from you.

Regards,

**OSLER**

Randal Van de Mosselaer

403.260.7060 DIRECT  
403.260.7024 FACSIMILE  
[rvandemosselaer@osler.com](mailto:rvandemosselaer@osler.com)

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Suite 2500, TransCanada Tower  
450 - 1st Street S.W.  
Calgary, Alberta, Canada T2P 5H1

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---

**From:** David Gamage <[david@gamages.ca](mailto:david@gamages.ca)>  
**Sent:** Tuesday, August 18, 2020 10:41 AM

**To:** Karen Aylward <[Karen.Aylward@mnp.ca](mailto:Karen.Aylward@mnp.ca)>  
**Cc:** Victor Kroeger <[Victor.Kroeger@mnp.ca](mailto:Victor.Kroeger@mnp.ca)>; Van de Mosselaer, Randal <[rvandemosselaer@osler.com](mailto:rvandemosselaer@osler.com)>  
**Subject:** Re: Absolute et al - Demand for Information

Dear Ms. Aylward,

I will attempt to provide immediate answers to your queries.

We take our obligations in the Court Order mentioned in your email below seriously, and have always endeavoured to be as transparent as possible - hence our immediate instructions to our lawyers at Dentons LLP to notify you about Mr. Vandepol's termination.

Timely notification to the Monitor about staffing is one thing but disclosing information/specifics that can be detrimental to someone's reputation and career, be it an ex-staff member, is something we would like to refrain from - we hope you understand.

On your behest for particulars about Mr. Vandepol's termination, it will suffice to state that Mr. Vandepol was terminated for nonperformance and the only example we are comfortable in sharing with you is the Monitor's own complaints in the past about Mr. Vandepol not providing timely information about the Companies.

With respect to your request for disclosure of correspondences between Mr. Vandepol and Management, please note that Mr. Vandepol was part of the litigation advisory group with respect to various claims involving your Client ("Romspen"). There are multiple lawsuits in the Courts of Alberta & Texas between the parties. The communications that you are requesting are subject to privilege and we can not disclose privileged communication.

As informed earlier, all companies are being managed by Mr. Dan White, Mr. Mohammed Farooq and myself - and together we have the credentials and experience to not only keep the businesses ongoing but also to grow & sustain the businesses.

If you are looking for any relevant information that has not already been provided by Mr. Vandepol - please provide a list of outstanding items and we will do our best to provide the information in a timely manner.

Trust you will find this satisfactory - looking forward to working with you.

Cheers,

David Gamage, cga, cpa  
C: 780-901-1518 | E: [david@gamages.ca](mailto:david@gamages.ca)

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Please note that errors can occur in electronic transmitted materials. We do not accept liability for any such errors. If verification is required please ask for a hard copy.

On Aug 17, 2020, at 11:50 AM, Karen Aylward <[Karen.Aylward@mnp.ca](mailto:Karen.Aylward@mnp.ca)> wrote:

Mr. Gamage,

I have been advised by Mr. Hillson, who represents Lot 11 GP Ltd, Lot 11 Limited Partnership, Eco-Industrial Business Park Inc, Absolute Energy Resources Inc, Absolute Environmental Waste Management Inc (collectively the "Companies") as well as Daniel Alexander White, that Mr. Gary Vandepol is no longer employed by or associated with any of the Companies and that you will be taking over the reporting duties to the Interim Monitor as required pursuant the terms of the Court Orders granted in Action No. 2003-06728.

Given Mr. Gary Vandepol's departure from the Companies and as part of our monitoring of the financial and operational affairs of the Companies, we hereby demand that the Companies produce and provide to the Interim Monitor **by no later than 5:00 PM on Wednesday, August 19, 2020** copies of any and all correspondence (including, but not limited to, internal memos, emails, letters, and all other records) between Mr. Vandepol and senior management, employees, officers, directors, or other representatives of the Companies (including yourself) which have occurred within the last 60 days.

In addition to the foregoing, we also require the following information:

- Details on the status of the employees of the Companies, including details with respect to any terminations or departures that have taken place within the last 60 days, and confirmation of the status of the employee payroll and any severance obligations;
- In the event that payroll is not current, details on the amount outstanding and to whom;
- Copies of any and all correspondence between the other terminated or departed employees (if any) and the Companies, its senior management, employees or other representatives within the last 60 days; and,
- The above noted information to be produced and provided by **no later than 5:00 PM on August 24, 2020**.

Please let me know if you require any clarity on the above requests. Otherwise, we look forward to receipt of the requested information within the timelines noted above.

Regards,

**Karen Aylward, CIRP, LIT** <image001.jpg>  
VICE PRESIDENT

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\*\*\*\*\*





## Henry, Shayleen

---

**From:** Karen Aylward <Karen.Aylward@mnp.ca>  
**Sent:** August 24, 2020 2:57 PM  
**To:** david@gamages.ca  
**Cc:** Victor Kroeger  
**Subject:** FW: Absolute et al - Ongoing Monitoring Information  
**Attachments:** FW: Absolute et al - Ongoing Monitoring Information

Hello Mr. Gamage,

I am following up on the email below and the monitoring information that remains outstanding. We have not received any information since July 15<sup>th</sup>, 2020. Please provide the requested documents as soon as possible. In addition, I am still looking for confirmation and copies of asset listings as per my email to you dated August 18, 2020 and attached.

Regards,

**Karen Aylward, CIRP, LIT**  
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---

**From:** Karen Aylward  
**Sent:** August 14, 2020 11:47 AM  
**To:** david@gamages.ca

Cc: Victor Kroeger <Victor.Kroeger@mnp.ca>  
Subject: Absolute et al - Ongoing Monitoring Information

Hello David,

We have been advised that Mr. Gary Vandepol is no longer handling the affairs of Absolute Environmental Waste Management (AEWM)/Eco Industrial Business Park (Eco) and that you would be stepping into his place in the interim. We have not yet received the required financial information for the period of July 16, 2020 through July 31, 2020 and the reporting information for August 1, 2020 – August 15, 2020 is coming due as well. The information we require is the following:

- General Ledger;
- Income Statement;
- Detailed accounts receivable report;
- Detailed accounts payable to report; and,
- Bank Statements (CIBC, Scotia and TD accounts);

Can you please confirm if you will be now be providing the information and also a timeline as to when we should expect it.

Regards,

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## Henry, Shayleen

---

**From:** Karen Aylward <Karen.Aylward@mnp.ca>  
**Sent:** September 4, 2020 10:51 AM  
**To:** david@gamages.ca  
**Cc:** Victor Kroeger  
**Subject:** RE: Absolute et al - Ongoing Monitoring Information

Hello David,

I still have not received any monitoring information from you following our call on August 24<sup>th</sup>. Based on our discussion, you were going to have the outstanding information to me within a few days. Please let me know when I should expect to receive it. Right now, we have not received any information following July 15, 2020.

Regards,

**Karen Aylward, CIRP, LIT**  
VICE PRESIDENT

**DIRECT 780.969.1400**  
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FAX 780.409.5415  
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**Sent:** August 14, 2020 11:47 AM  
**To:** [david@gamages.ca](mailto:david@gamages.ca)  
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Can you please confirm if you will be now be providing the information and also a timeline as to when we should expect it.

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## Henry, Shayleen

---

**From:** Van de Mosselaer, Randal <rvandemosselaer@osler.com>  
**Sent:** September 4, 2020 11:13 AM  
**To:** Hillson, Jonathan  
**Cc:** Barr, Kevin; Victor Kroeger; Karen Aylward  
**Subject:** RE: Absolute Environmental et al v Romspen et al - Request for Records (Dentons file: 580694-1)

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Hello Jon,

I am following up on our exchange below.

Can you please advise if you have yet completed your review and if you are now in a position to provide your position on the requested documents?

Thanks.

## OSLER

Randal Van de Mosselaer

403.260.7060 DIRECT  
403.260.7024 FACSIMILE  
[rvandemosselaer@osler.com](mailto:rvandemosselaer@osler.com)

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Calgary, Alberta, Canada T2P 5H1

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**From:** Hillson, Jonathan <jon.hillson@dentons.com>  
**Sent:** Sunday, August 23, 2020 9:26 PM  
**To:** Van de Mosselaer, Randal <rvandemosselaer@osler.com>  
**Cc:** Kevin Barr - Norton Rose Fulbright (kbarr@blg.com) <kbarr@blg.com>  
**Subject:** Absolute Environmental et al v Romspen et al - Request for Records (Dentons file: 580694-1)

Thanks for the email. I spoke to Mr Barr about this issue last week. I have asked our client to provide me with the records so that I can review them to determine their producibility. Our client provided the records to me last week. I will review the documents and provide our client's position.

Please call me if you have any questions.

 DENTONS

Jonathan Hillson



Partner

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jon.hillson@dentons.com  
Bio | Website

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---

**From:** Van de Mosselaer, Randal <[rvandemosselaer@osler.com](mailto:rvandemosselaer@osler.com)>

**Sent:** August 23, 2020 9:10 PM

**To:** Hillson, Jonathan <[jon.hillson@dentons.com](mailto:jon.hillson@dentons.com)>

**Cc:** Victor Kroeger <[Victor.Kroeger@mnp.ca](mailto:Victor.Kroeger@mnp.ca)>; Karen Aylward <[Karen.Aylward@mnp.ca](mailto:Karen.Aylward@mnp.ca)>; Kevin Barr - Norton Rose Fulbright (<[kbarr@blg.com](mailto:kbarr@blg.com)>) <[kbarr@blg.com](mailto:kbarr@blg.com)>

**Subject:** RE: Absolute Environmental et al - URGENT

Hello Jon. Just following up on the email below.

I look forward to hearing from you.

Regards,

**OSLER**

Randal Van de Mosselaer

403.260.7060 DIRECT  
403.260.7024 FACSIMILE  
[rvandemosselaer@osler.com](mailto:rvandemosselaer@osler.com)

Osler, Hoskin & Harcourt LLP  
Suite 2500, TransCanada Tower  
450 - 1st Street S.W.  
Calgary, Alberta, Canada T2P 5H1

[osler.com](https://www.osler.com)

---

**From:** Van de Mosselaer, Randal

**Sent:** Tuesday, August 18, 2020 11:58 AM

To: [jon.hillson@dentons.com](mailto:jon.hillson@dentons.com)

Cc: Victor Kroeger <[Victor.Kroeger@mnp.ca](mailto:Victor.Kroeger@mnp.ca)>; Karen Aylward <[Karen.Aylward@mnp.ca](mailto:Karen.Aylward@mnp.ca)>; Kevin Barr - Norton Rose Fulbright ([kbarr@blg.com](mailto:kbarr@blg.com)) <[kbarr@blg.com](mailto:kbarr@blg.com)>

Subject: FW: Absolute Environmental et al - URGENT

Importance: High

Hello Jon,

I trust you are well.

As I believe you are aware, we are counsel to MNP in its capacity as Interim Monitor (the "Interim Monitor") appointed by Romspen in accordance with the provisions of the attached April 2, 2020 Order (and in particular paragraph 5 thereof). As you are aware, the term of the Monitor's mandate granted by the April 2, 2020 Order was extended by the April 30, 2020 Order and the June 29, 2020 Order, copies of which are attached.

As you will also be aware, paragraph 7 of the April 2, 2020 Order obliges the corporate Respondents (as that term is defined in the April 2, 2020 Order) to cooperate with and provide information to the Interim Monitor, and to provide the Interim Monitor with access to the business records of the corporate Respondents.

We are forwarding to you (below) an exchange of emails between the Interim Monitor and your clients yesterday and today. As you can see, the Monitor has asked for specific records which are in the possession of the corporate Respondents and which relate to the corporate Respondents' business, specifically:

"copies of any and all correspondence (including, but not limited to, internal memos, emails, letters, and all other records) between Mr. Vandepol and senior management, employees, officers, directors, or other representatives of the Companies (including yourself) which have occurred within the last 60 days."

As you can see from Mr. Gamage's response below, that request has been refused. Mr. Gamage suggests that the communications that are being requested are "privileged".

On the face of it this assertion seems difficult to comprehend. Mr. Vandepol is not a lawyer, and even if (as Mr. Gamage's email suggests) Mr. Vandepol was part of the "litigation advisory group" with the corporate Respondents it is difficult to believe that all of the correspondence which was requested in the Interim Monitor's August 17 email, and all portions of such correspondence, could reasonably be subject to a claim of privilege. Accordingly, the Interim Monitor is concerned that this claim is being made simply in order to frustrate the Interim Monitor's mandate.

We therefore inquire whether you have had an opportunity to review all of the records which were requested by the Interim Monitor in its August 17 email (below). The Interim Monitor would strongly encourage Mr. Gamage and the corporate Respondents to revisit this issue and to provide the requested materials to the Interim Monitor in accordance with their obligations under the April 2, 2020 Order.

We look forward to hearing from you.

Regards,

**OSLER**

Randal Van de Mosselaer

403.260.7060 DIRECT  
403.260.7024 FACSIMILE  
[rvandemosselaer@osler.com](mailto:rvandemosselaer@osler.com)

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Suite 2500, TransCanada Tower  
450 - 1st Street S.W.  
Calgary, Alberta, Canada T2P 5H1

osler.com

---

**From:** David Gamage <[david@gamages.ca](mailto:david@gamages.ca)>  
**Sent:** Tuesday, August 18, 2020 10:41 AM  
**To:** Karen Aylward <[Karen.Aylward@mnp.ca](mailto:Karen.Aylward@mnp.ca)>  
**Cc:** Victor Kroeger <[Victor.Kroeger@mnp.ca](mailto:Victor.Kroeger@mnp.ca)>; Van de Mosselaer, Randal <[rvandemosselaer@osler.com](mailto:rvandemosselaer@osler.com)>  
**Subject:** Re: Absolute et al - Demand for Information

Dear Ms. Aylward,

I will attempt to provide immediate answers to your queries.

We take our obligations in the Court Order mentioned in your email below seriously, and have always endeavoured to be as transparent as possible - hence our immediate instructions to our lawyers at Dentons LLP to notify you about Mr. Vandepol's termination.

Timely notification to the Monitor about staffing is one thing but disclosing information/specifics that can be detrimental to someone's reputation and career, be it an ex-staff member, is something we would like to refrain from - we hope you understand.

On your behest for particulars about Mr. Vandepol's termination, it will suffice to state that Mr. Vandepol was terminated for nonperformance and the only example we are comfortable in sharing with you is the Monitor's own complaints in the past about Mr. Vandepol not providing timely information about the Companies.

With respect to your request for disclosure of correspondences between Mr. Vandepol and Management, please note that Mr. Vandepol was part of the litigation advisory group with respect to various claims involving your Client ("Romspen"). There are multiple lawsuits in the Courts of Alberta & Texas between the parties. The communications that you are requesting are subject to privilege and we can not disclose privileged communication.

As informed earlier, all companies are being managed by Mr. Dan White, Mr. Mohammed Farooq and myself - and together we have the credentials and experience to not only keep the businesses ongoing but also to grow & sustain the businesses.

If you are looking for any relevant information that has not already been provided by Mr. Vandepol - please provide a list of outstanding items and we will do our best to provide the information in a timely manner.

Trust you will find this satisfactory - looking forward to working with you.

Cheers,

David Gamage, cga, cpa  
C: 780-901-1518 | E: [david@gamages.ca](mailto:david@gamages.ca)

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Please note that errors can occur in electronic transmitted materials. We do not accept liability for any such errors. If verification is required please ask for a hard copy.

On Aug 17, 2020, at 11:50 AM, Karen Aylward <[Karen.Aylward@mnp.ca](mailto:Karen.Aylward@mnp.ca)> wrote:

Mr. Gamage,

I have been advised by Mr. Hillson, who represents Lot 11 GP Ltd, Lot 11 Limited Partnership, Eco-Industrial Business Park Inc, Absolute Energy Resources Inc, Absolute Environmental Waste Management Inc (collectively the "Companies") as well as Daniel Alexander White, that Mr. Gary Vandepol is no longer employed by or associated with any of the Companies and that you will be taking over the reporting duties to the Interim Monitor as required pursuant the terms of the Court Orders granted in Action No. 2003-06728.

Given Mr. Gary Vandepol's departure from the Companies and as part of our monitoring of the financial and operational affairs of the Companies, we hereby demand that the Companies produce and provide to the Interim Monitor **by no later than 5:00 PM on Wednesday, August 19, 2020** copies of any and all correspondence (including, but not limited to, internal memos, emails, letters, and all other records) between Mr. Vandepol and senior management, employees, officers, directors, or other representatives of the Companies (including yourself) which have occurred within the last 60 days.

In addition to the foregoing, we also require the following information:

- Details on the status of the employees of the Companies, including details with respect to any terminations or departures that have taken place within the last 60 days, and confirmation of the status of the employee payroll and any severance obligations;
- In the event that payroll is not current, details on the amount outstanding and to whom;
- Copies of any and all correspondence between the other terminated or departed employees (if any) and the Companies, its senior management, employees or other representatives within the last 60 days; and,
- The above noted information to be produced and provided by **no later than 5:00 PM on August 24, 2020**.

Please let me know if you require any clarity on the above requests. Otherwise, we look forward to receipt of the requested information within the timelines noted above.

Regards,

**Karen Aylward, CIRP, LIT** <image001.jpg>  
VICE PRESIDENT

**DIRECT 780.969.1400**  
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FAX 780.409.5415  
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<image002.png> <image003.png> <image004.png>

<image005.jpg>

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For relevant and up-to-date information, visit our [COVID-19 Business Advice Centre](#) on our website. You will find timely updates on Government regulations, tax information, advice for employers and our continued response to this evolving circumstance.

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## Henry, Shayleen

---

**From:** Karen Aylward <Karen.Aylward@mnp.ca>  
**Sent:** September 8, 2020 8:59 AM  
**To:** Victor Kroeger  
**Subject:** FW: Absolute et al - Ongoing Monitoring Information  
**Attachments:** Sales for August 2020.pdf; ATT00001.htm; Aged AR August 31, 2020.pdf; ATT00002.htm

Just FYI – this is all I have received. I also followed up for the bank statements.

**Karen Aylward, CIRP, LIT**  
VICE PRESIDENT

**DIRECT 780.969.1400**  
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---

**From:** David Gamage <david@gamages.ca>  
**Sent:** September 4, 2020 5:12 PM  
**To:** Karen Aylward <Karen.Aylward@mnp.ca>  
**Subject:** Re: Absolute et al - Ongoing Monitoring Information


**CAUTION:** This email originated from outside of the MNP network. Be cautious of any embedded links and/or attachments.  
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Good afternoon Karen,

It has been a bit of a grind getting all the ducks in order. I am keeping ahead of the billings and receivables and payroll of course. I am still waiting on confirmation I have all of the supplier invoices in hand so I can complete the ledgers for the month. I am attaching the AR and sales ledger for the month of August. I should have the AP and GL by Tuesday.

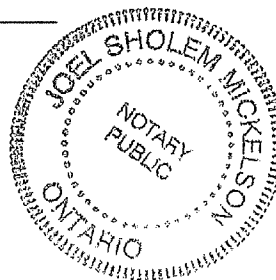


This is Exhibit "36" referred to  
in the Affidavit of Wesley Roitman  
Sworn before me this 16<sup>th</sup> day of November, 2020



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A Notary Public in and for  
the Province of Ontario



## Barr, Kevin

---

**From:** Victor Kroeger <Victor.Kroeger@mnp.ca>  
**Sent:** September 16, 2020 4:05 PM  
**To:** Barr, Kevin; Randal Van de Mosselaer - (rvandemosselaer@osler.com)  
**Cc:** Karen Aylward  
**Subject:** FW: Absolute Environmental et al

FYI

Vic

**Victor P. Kroeger CIRP, LIT, CPA, CA, CFE**  
DIRECTOR OF CORPORATE RECOVERY WESTERN CANADA

**DIRECT 403.298.8479**  
CELL 403.870.1827  
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Calgary, AB  
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[vic.kroeger@mnp.ca](mailto:vic.kroeger@mnp.ca)  
[mnpdebt.ca](http://mnpdebt.ca)



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*Please note that our Calgary office is now open to the public with COVID-19 restrictions in place. We continue to take proper social-distancing measures to ensure the health and safety of our team members and clients. For more information on our reopening strategy, please contact your advisor.*

*For relevant and up-to-date information, visit our **COVID-19 Business Advice Centre** on our website. You will find timely updates on Government regulations, tax information, advice for employers and our continued response to this evolving circumstance.*

**From:** Victor Kroeger  
**Sent:** September 16, 2020 4:04 PM  
**To:** David Gamage <david@gamages.ca>  
**Cc:** Karen Aylward <Karen.Aylward@mnp.ca>  
**Subject:** Absolute Environmental et al

Good afternoon David. We are getting very concerned that we have not received any meaningful financial information since July 15, 2020. We need this information by the end of this week. Please see Karen's prior emails for the exact information to be provided and as September 15 has just passed we require the information updated to that date.

In addition we have heard that several employees have not been paid and that the electricity to the site has been disconnected. Please advise how each of these issues are being dealt with.

Vic

**Victor P. Kroeger CIRP, LIT, CPA, CA, CFE**  
DIRECTOR OF CORPORATE RECOVERY WESTERN CANADA

**DIRECT 403.298.8479**  
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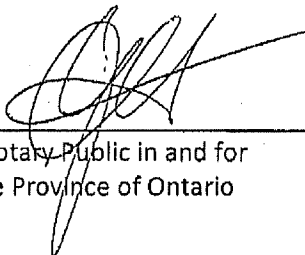
CANADA 2019

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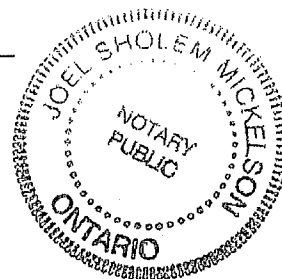
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This is Exhibit "37" referred to  
in the Affidavit of Wesley Roitman  
Sworn before me this 16<sup>th</sup> day of November, 2020



---

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the Province of Ontario



## Barr, Kevin

---

**From:** Karen Aylward <Karen.Aylward@mnp.ca>  
**Sent:** October 16, 2020 10:32 AM  
**To:** Barr, Kevin  
**Cc:** Victor Kroeger; Randal Van de Mosselaer - (rvandemosselaer@osler.com)  
**Subject:** FW: Reporting for Absolute and Eco

Hi Kevin,

See below, FYI. Will keep posted on a response.

Thanks,

**Karen Aylward, CIRP, LIT**  
VICE PRESIDENT

**DIRECT 780.969.1400**  
PH. 780.455.1155  
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---

**From:** Karen Aylward  
**Sent:** October 16, 2020 10:31 AM  
**To:** 'David Gamage' <dgamage@symmetryinc.com>  
**Cc:** Victor Kroeger <Victor.Kroeger@mnp.ca>  
**Subject:** FW: Reporting for Absolute and Eco

Hello David,

I have sent you a couple emails over the last two days and I confirm receipt of the additional documents you've provided for the September reporting period – thank you. We are looking to provide a comprehensive update to the senior lender on this file and currently have insufficient detail to do so. For ease of reference, below is a summary of the information that remains outstanding. Please note that we require the outstanding information to be provided at or before the close of business on Wednesday, October 21, 2020.

- All reporting for July 16 – July 30, 2020 (AR, AP, GL, Bank Statements, Income Statement);
- Income Statement for AEW for August 2020;
- Detailed accounts receivable listing and summary accounts payable statement for August 2020 (AEWM);
- TD Bank statements for August 2020;
- Clarity around “Undeposited funds” of approximately \$14,763.63 in the August GL for AEW;
- Support for Symmetry management fee paid from the TD Bank account of AEW on August 1, 2020 totalling \$12,772.77;
- Reporting for September 1 – September 30, 2020 (Bank Statements and Income Statement not provided);
- All Reporting for October 1 – October 15, 2020 (AR, AP, GL, Bank Statements, Income Statement);
- Copies of all correspondence received from CRA (in respect of Eco and AEW) within the last 90 days; and,
- Statements of account form CRA (electronic or paper) in respect of Eco and AEW in relation to the payroll, GST and corporate tax accounts.

Regards,

**Karen Aylward, CIRP, LIT**  
VICE PRESIDENT

**DIRECT 780.969.1400**  
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**From:** Karen Aylward  
**Sent:** October 14, 2020 11:30 AM  
**To:** David Gamage <[dgamage@symmetryinc.com](mailto:dgamage@symmetryinc.com)>  
**Cc:** Victor Kroeger <[Victor.Kroeger@mnp.ca](mailto:Victor.Kroeger@mnp.ca)>  
**Subject:** RE: Reporting for Absolute and Eco

Hello David,

I am following up once again for the outstanding monitoring information. For reference, below is a list of what remains outstanding:

- All reporting for period of July 16 through July 30;
- Detailed AR report and summary AP report for month of August;
- TD Bank Statement for the month of August;
- Income statement for month of August;
- All reporting for the month of September 2020.

In addition, there is reference to "Undeposited funds" of approximately \$14,763.63 in the August GL for AEW. This appear to be accounts receivables collections. Has been this since been deposited? If so, when and where? If not, why?

Lastly, October 1 to October 15<sup>th</sup> reporting is coming due within days.

I look forward to an update at your earliest.

**Karen Aylward, CIRP, LIT**  
VICE PRESIDENT

**DIRECT 780.969.1400**  
PH. 780.455.1155  
FAX 780.409.5415  
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**From:** Karen Aylward  
**Sent:** October 8, 2020 9:02 AM  
**To:** David Gamage <[dgamage@symmetryinc.com](mailto:dgamage@symmetryinc.com)>  
**Cc:** Victor Kroeger <[Victor.Kroeger@mnp.ca](mailto:Victor.Kroeger@mnp.ca)>  
**Subject:** RE: Reporting for Absolute and Eco

Hello David,

Following up again on the below.

Thanks,

**Karen Aylward, CIRP, LIT**  
VICE PRESIDENT

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**From:** Karen Aylward  
**Sent:** October 1, 2020 10:47 AM  
**To:** David Gamage <[dgamage@symmetryinc.com](mailto:dgamage@symmetryinc.com)>  
**Cc:** Victor Kroeger <[Victor.Kroeger@mnp.ca](mailto:Victor.Kroeger@mnp.ca)>  
**Subject:** RE: Reporting for Absolute and Eco

Thanks, David.

There's no detailed AR report attached, the attached report relates to detailed AP.



Could you please also send the remaining information for September as soon as possible. Given that it's October, we now require the entire month. For clarity:

- Bank statements (both Eco and AEWM);
- GL report for September
- Detailed AR for Sept 1 – through Sept 30
- AR Summary – as at Sept 30<sup>th</sup>.
- AP Summary – as at Sept 30.
- Income Statement for AEWM for August 2020 and September 2020 (in the form as attached).

Regards,

**Karen Aylward, CIRP, LIT**  
VICE PRESIDENT

**DIRECT 780.969.1400**  
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**From:** David Gamage <[dgame@symmetryinc.com](mailto:damage@symmetryinc.com)>

**Sent:** September 27, 2020 5:25 PM

**To:** Karen Aylward <[Karen.Aylward@mnp.ca](mailto:Karen.Aylward@mnp.ca)>

**Subject:** Reporting for Absolute and Eco

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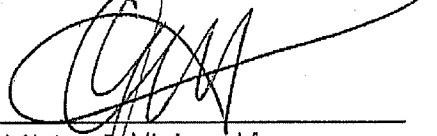
Good day Karen,

Please find attached the information requested. I have done a detailed AR for the calendar year only. The full detailed report wants to go back to the beginning of time. The export function quit after 533 pages.

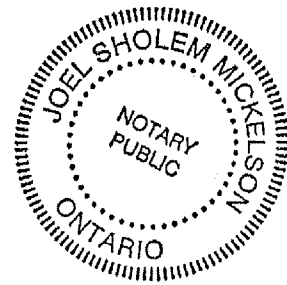
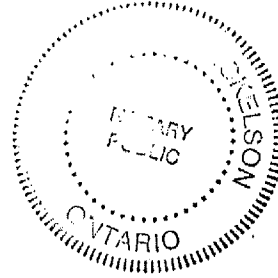
David Gamage, CGA  
SymmetryAsset Management Inc.  
780-784-7888 x.3004

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This is Exhibit "38" referred to  
in the Affidavit of Wesley Roitman  
Sworn before me this 16<sup>th</sup> day of November, 2020



A Notary Public in and for  
the Province of Ontario



## **Barr, Kevin**

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**From:** Karen Aylward <Karen.Aylward@mnp.ca>  
**Sent:** November 5, 2020 3:11 PM  
**To:** Barr, Kevin  
**Cc:** Victor Kroeger; Randal Van de Mosselaer - (rvandemosselaer@osler.com)  
**Subject:** Absolute Environmental Waste Management et al - Monitor's Update

Hello Kevin,

Further to my email of earlier this week, here is a brief update on the monitoring activities of Lot 11 GP Ltd., Lot 11 Limited Partnership, Eco-Industrial Business Park Inc. ("Eco"), Absolute Energy Resources Inc., ("Absolute Energy") and Absolute Environmental Waste Management Inc. ("AEWM") (collectively referred to as the "Companies"). The below encompasses what we have been able to ascertain based on the information provided following our previous email update on October 14, 2020.

### **Status of Information Requests:**

We have reconciled the information provided in respect of our requests for monitoring information, and confirm that the following information remains outstanding:

- Reporting for July 16 – July 30, 2020;
- Income Statement for August 2020
- Detailed accounts receivable listing and summary accounts payable statement for August 2020;
- TD Bank statements for August 2020;
- Reporting for September 2020 (in relation to the TD Bank Statement and Income Statement for AEWM and GL for Eco);
- Reporting for October 1 – October 15 (in relation to all bank statements, income statement) and:
- All reporting for October 16 through October 31, 2020.

Since our prior update, the companies representative, David Gamage ("Gamage"), has provided the following:

- Accounts payable and accounts receivable report (for period ending Sept 30<sup>th</sup>) and general ledger for period of September 1 through September 30<sup>th</sup> 2020 for AEWM;
- AEWM and Eco Bank statements (CIBC) for month of September 2020;
- Accounts payable summary and detailed accounts receivable report for AEWM from October 1 through October 15;
- General Ledger report for AEWM from October 1 through October 15 for AEWM; and,  
(Collectively referred to as the "**Newly Submitted Information**").

With respect to the Newly Submitted Information, we note the following:

### **Bank Statements and General Ledger ("GL") for AEWM**

#### *September 2020*

1. Based on the Bank Statements and general ledger for AEWM, a total sum of \$28,742.90 in AR was collected in September 2020;
2. A combined sum of \$10,600 was transferred to Symmetry through two transactions on September 3, 2020 and September 25, 2020 from the CIBC Bank Account. We are following up with Gamage for support for the transfer but also note that Symmetry appears to have advanced \$4,400 back to AEWM on September 30, 2020 (to cover end of September 2020 payroll);

3. Payroll for three employees (excluding source deductions) was paid on September 15 and September 20, 2020;
4. Insurance was paid on September 23, 2020; and,
5. The combined ending bank balance on September 30, 2020 (both CIBC accounts) was \$1,372.87.

*October 1 – October 15, 2020*

1. As noted, no bank statements have been provided for this period;
2. Based on the general ledger report, a sum of \$103,251 in accounts receivable was collected in AEWM in this period;
3. A sum of \$90,000 was transferred to Symmetry from AEWM. Support for the transfer has not been provided but is being requested.

**Bank Statements and General Ledger (“GL”) for Eco**

*September 2020*

1. Minimal transactions run through this bank account. The minimal deposits consist of rent revenues;
2. A combined sum of \$7,500 was transferred to Symmetry in the period and no support has been provided;
3. The combined ending bank balance as at September 30, 2020 (both CIBC accounts) totalled \$1,211.91.

*October 1 – October 15, 2020*

1. No information has been provided for Eco in this period.

**Accounts Receivable (“AR”) for AEWM**

*September 2020*

1. Based on a summary AR report, the AR has grown by approximately \$33,000 from \$412,000 to \$445,000 from August 31, 2020 to September 30, 2020;
2. Excluding the three aged/likely uncollectible accounts totalling \$211,541, the balance of the “Collectible” outstanding AR is more accurately estimated to be \$233,740 (the “Revised AR Balance”); and,
3. Based on the Revised AR Balance, approximately 38% is current and 41% is aged between 31 and 60 days;

*October 1 – October 15, 2020*

1. Excluding the three aged/likely uncollectible accounts totalling \$211,541, the total collectible outstanding AR is estimated to be \$184,594 as of October 15, 2020. Of this amount, 50% is current and 25% is aged between 31 and 60 days.

**Accounts Payable (“AP”) for AEWM**

*September 2020*

1. Based on a detailed AP report, the total outstanding AP is \$234,426 (excluding Encanex AP which is in dispute) at the end of the September 2020. This is an increase of approximately \$13,056 in AP from August 31, 2020; and,
2. A summary AP listing was not provided; and,
3. Based on the GL and Bank Statements, minimal payments are being made on aged AP.

*October 2020*

1. Based on a detailed AP report, the total outstanding AP is \$235,476 (excluding Encanex AP which is in dispute) at the end of the Period. This is an increase of approximately \$1,050 of AP since September 20, 2020; and,
2. It appears that minimal payments are being made in an effort to reduce the AP.

**Income and Expenses**

1. An income statement for September 2020 was not provided despite being requested;
2. An income statement for October 2020 was not provided despite being requested.

Summary

As per above, there still remains information outstanding that has not been provided to the Monitor. As such, it continues to be difficult to monitor the affairs of the Companies in a meaningful and timely way. We will continue to follow up with Gamage in respect of the outstanding and ongoing financial data. It is clear that the accounts payable continues to age and that receivable collections are not being used to reduce AR, but instead, all available monies are periodically being transferred to Symmetry as they become available which leaves each of AEW and Eco with very limited cash flow on a regular basis.

We are following up on the outstanding financial information (including support for the Symmetry transactions) as well as seeking an update on operational matters status of (employees, regulatory reporting, etc.). We are also following up on the status of the various CRA accounts, as this has not been provided to date.

Should yourself or Romspen wish to review any of the underlying financial information referenced within this update, please let us know and we will make those available.

As always, let us know if you have any additional questions or concerns at this time.

Regards,

**Karen Aylward, CIRP, LIT**  
VICE PRESIDENT

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