

**ONTARIO  
SUPERIOR COURT OF JUSTICE**

B E T W E E N :

**DANIELE RAPONI**

Plaintiff

- and -

**OLYMPIA TRUST COMPANY**

Defendant

Proceeding under the *Class Proceedings Act, 1992*

**STATEMENT OF CLAIM**

**Notice of action issued on July 8, 2020**

TO THE DEFENDANT

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

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

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

Instead of serving and filing a statement of defence, you may serve and file a notice of intent to defend in Form 18B prescribed by the *Rules of Civil Procedure*. This will entitle you to ten more days within which to serve and file your statement of defence.

IF YOU FAIL TO DEFEND THIS PROCEEDING, JUDGMENT MAY BE GIVEN AGAINST YOU IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU. IF

YOU WISH TO DEFEND THIS PROCEEDING BUT ARE UNABLE TO PAY LEGAL FEES, LEGAL AID MAY BE AVAILABLE TO YOU BY CONTACTING A LOCAL LEGAL AID OFFICE.

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

Date: August 6, 2020

Issued by

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Local registrar

Address  
court office

of Superior Court of Justice  
330 University Ave  
Toronto, ON, M5G1R7

**TO:** **Olympia Trust Company**  
2200 125 - 9th Ave SE  
Calgary, Alberta  
T2G 0P6

## I. CLAIM

1. The Plaintiff claims on his own behalf and on behalf of the class:
  - (a) an order certifying this action as a class proceeding pursuant to the *Class Proceedings Act, 1992*, SO 1992, c 6, as amended;
  - (b) declaration that Olympia Trust Company owed a duty of care, fiduciary duty and a duty of trust to the Plaintiff and the class members;
  - (c) a declaration that Olympia Trust Company owed the Plaintiff and the class members a duty to:
    - (i) exercise the care, skill and judgment that a prudent investor would exercise in making investments;
    - (ii) consider relevant criteria in investing in the Fortress SMLs<sup>1</sup>;
    - (iii) ensure that the Fortress SMLs complied with the *Income Tax Act*, RSC 1985, c 1 (5th Supp) (the “*ITA*”);
    - (iv) warn the class members before engaging in services in respect of the grossly improvident Fortress SMLs;
  - (d) a declaration that Olympia Trust Company breached its duties of care, fiduciary duty and duty of trust to the class members;
  - (e) an accounting of the funds that Olympia Trust Company received from class members in its capacity as trustee of the Fortress SMLs;
  - (f) disgorgement of all fees collected by Olympia Trust Company for acting as trustee for the Fortress SMLs;
  - (g) general damages against Olympia Trust Company for negligence, breach of fiduciary duty and breach of trust in an amount to be proven at trial;
  - (h) punitive damages against Olympia Trust Company in amount that this Court finds appropriate;
  - (i) an order directing a reference or giving such other directions as may be necessary to determine issues not determined in the trial of the common issues;
  - (j) costs of this action, plus the costs of notice and of administering the plan of distribution of the recovery in this action plus applicable taxes, pursuant to section 26(9) of the *Class Proceedings Act, 1992*, SO 1992, c 6, as amended;

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<sup>1</sup> “Fortress SMLs” is defined at paragraph 12 of this Statement of Claim.

- (k) pre-judgment and post-judgment interest pursuant to the *Courts of Justice Act*, RSO 1990, c C-43, as amended; and
- (l) such further and other relief as this Honourable Court may deem just.

## II. OVERVIEW

2. The Plaintiff and the Class Members (defined at paragraph 12 below) seek recovery of the losses they incurred arising from their investment in syndicated mortgage loans (“**SML**”) arranged by Fortress Real Capital Inc. and Fortress Real Developments Inc. (individually or collectively, “**Fortress**”), provided to developers to fund the construction of various property development projects.

3. The Class Members invested in the Fortress SMLs through their registered retirement savings plan, registered retirement income fund, tax-free savings accounts, registered disability savings plan, registered education savings plan and/or other registered plan accounts under Division G of the *ITA* (each a “**Registered Plan**”). Olympia Trust Company (“**Olympia**”) was the trustee for these accounts, in accordance with the *ITA* requirement that all Registered Plan accounts be held by a company licensed under provincial or federal legislation to conduct trustee services.

4. The Fortress SMLs were administered and marketed to Class Members as “secure” investments eligible for investment through Class Members’ Registered Plan accounts. Registered Plan eligibility was a central selling point, as it would enable the raising of funds from the retirement and other savings of a broad base of unsophisticated retail investors.

5. However, unbeknownst to Class Members, the Fortress SMLs were not qualified for investment through their Registered Plans. Pursuant to section 204 of the *ITA* and section 4900(1)

of the *Income Tax Regulations*, CRC, c 945, an SML must be “fully secured” to be eligible for investment through a Registered Plan. This means that, for the SMLs to be Registered Plan-eligible, the current fair market value of the mortgage property (the “as-is” value) must be sufficient to cover the full amount of principal and interest outstanding on the loan.

6. None of the Fortress SMLs were fully secured, as the as-is value of the property securing each SML was significantly lower than the amount necessary to cover the principal and interest outstanding on the loan after all amounts owing to lenders ranking higher in priority to the Fortress SML were repaid. Accordingly, these investments were not Registered Plan-eligible.

7. Olympia, as trustee for the Registered Plan accounts, was required to minimize the possibility that a trust governed by a Registered Plan held a non-qualified investment.

8. Olympia failed in its role as the Class Members’ Registered Plan trustee by failing to conduct proper diligence to ensure that the SMLs were *ITA*-compliant and/or otherwise appropriate investments for the Class Members. Among other things, Olympia breached its duties by relying on valuation reports that estimated the future market value of the completed development properties, and not their as-is value as mandated by the *ITA* and the *Income Tax Regulations*.

9. Olympia’s actions were in violation of its legal obligations to the Class Members and accordingly, Olympia is liable to the Plaintiff and the Class Members for damages and restitution.

### **III. THE PARTIES**

10. The Plaintiff, Daniele Raponi, is an individual residing in the Township of King in the Province of Ontario.

11. Mr. Raponi invested \$95,000 in a Fortress SML for the Collier Centre development project through his registered retirement savings plan account held in trust by Olympia.

12. The Plaintiff brings this action on behalf of the following class (the “**Class**” or “**Class Members**”): all persons wherever they may reside or be domiciled, who invested in a syndicated mortgage loan investment (“**Fortress SML**”) through a Registered Plan account held in trust by Olympia Trust Company that was secured by the land of any of the following constructed or proposed development projects (each a “**Development Property**” and collectively the “**Development Properties**”):

1. **6<sup>th</sup> and Tenth Condominiums** (633-10th Ave SW, Calgary, AB);
2. **Bauhaus** (284 King Street E, Toronto, ON);
3. **Bowmanville Development Project** (299 Nash Road & 2538, 2494 Regional Road 57; Clarington, ON);
4. **Bradford Bond Head** (2875 Highway 27, Township of West Gwillimbury, ON);
5. **Braestone** (3009 Line 8 North, Moonstone, ON);
6. **Brookdale on Avenue Road** (375 & 377 Fairlawn Ave, 1678-1704 Avenue Rd, 412 Brookdale Ave, Toronto, ON);
7. **Capital Pointe Condominiums** (1971 Albert St, Regina, SK);
8. **Castlemore** (10431 Gore Road, Brampton, ON);
9. **Charlotte Adelaide Tower** (477 Richmond St W, 353 Adelaide Street W, Toronto, ON);
10. **Collier Center** (55 Mulcaster St, Barrie, ON);
11. **Crestview Commons (a.k.a. Manors of Mineola)** (1640 Crestview Ave, Mississauga, ON);
12. **Eden** (230, 230A, 240, 250 Dew St, King City, ON);
13. **Estates of Nobleton (a.k.a. Nobleton North)** (13735 Hwy 27, Nobleton, ON);
14. **Glens of Halton Hills** (13758 & 13764 Hwy 7, 22 & 24 Dayfoot Dr, 8 Lindsay Ct, Georgetown, ON);
15. **Gotham** (324, 326, 328 Gloucester Street & 224 Lyon Street, Ottawa, ON);

16. **Harmony Village** (3260 Sheppard Avenue East, Scarborough, ON);
17. **Highlands of York Region** (19935, 19851, 19879 2nd Concession, Queensville, ON);
18. **Humberstone** (3 Halton Hills Dr, Halton Hills, ON);
19. **Jasper House** (10160/68 106th St NW, Edmonton, AB);
20. **King Square** (9390 Woodbine Ave, Markham, ON);
21. **Kingridge Square** (235 Speers Rd, Oakville, ON);
22. **Lake & East** (2266 Lakeshore Rd W & 83 East St, Oakville, ON);
23. **Mapleview Commons (a.k.a. Julien Court)** (9891 & 9869 Keele St. Vaughan, ON);
24. **Mississauga Meadows 1** (1041 Lakeshore Ave E, Mississauga, ON);
25. **Mississauga Meadows 2** (1407 Lakeshore Lakeshore Ave E, Mississauga, ON);
26. **Nobleton South** (92 Diana Dr, Nobleton, ON);
27. **North Condominiums** (10305/21 106th St NW, Edmonton, AB);
28. **Old Market Lane** (177, 185, 197 Woodbridge Ave, Woodbridge, ON);
29. **Peter & Richmond Land Assembly** (122, 124, 126, 128 Peter St, 477 Richmond St W, Toronto, ON);
30. **Pivot** (1304 Rutherford Rd SW, Edmonton, AB);
31. **Port Place Condominiums Phase 2** (12, 14, 18, 28, 38 Lakeport St, St. Catharines, ON);
32. **Prescott Homes** (32 Residential lots in Spruce Grove, AB);
33. **Progress Manors** (a.k.a. Ten88) (1088 Progress Avenue, Scarborough, ON);
34. **Residences of Bayview (a.k.a. Lotus Condominiums)** 5,7,9,11,15 Kenaston & 577 Sheppard Avenue East, Toronto, ON);
35. **SkyCity Centre** (245 Graham Ave, Winnipeg, MB);
36. **Soba** (203 Catherine Street Ottawa, ON);
37. **Solterra** (1023 Victoria Rd, Guelph, ON);
38. **The Greenwood** (1177 Danforth Ave, Toronto, ON);
39. **The Harlowe** (604-618 Richmond St W, Toronto, ON);
40. **The Kemp (f.k.a. Harmony Village)** (51, 53, 55, & 75 Bradford St, Barrie, ON);

41. **The Orchard** (602, 606, 610, 620, 624, 626, 628 12th Ave SE, Calgary, AB);
42. **The South Shore** (230-240 Cameron Cres, Keswick, ON);
43. **The Sutton (a.k.a. Link Condos + Towns)** (5236,5226,5218,5210 Dundas Street, 2500 Burloak Drive, Burlington, ON);
44. **The Wade** (1105 Pandora Ave, 1110 Johnson St, 1120 Johnson St, Victoria, BC);
45. **The Woodsworth (f.k.a. The James)** (452-458 Richmond St W, Toronto, ON);
46. **Treehouse** (2535 Gerrard St E, Scarborough, ON);
47. **Triple Creek** (South of Hwy 8, Range Rd 40, Rocky View County, AB);
48. **Union Waterfront (f.k.a. Port Place Phase 1)** (1 Hogans Alley, 11 Main St, 12 Lakeport Rd, 16 Lock St, 20 Lock St, 22A Lock St, St. Catharines, ON);
49. **Unionvillas (a.k.a. Uptowns of Unionville)** (4116, 4128, & 4142 Highway 7 East, on the north side of Highway 7, east of Birchmount Road, ON);
50. **Victoria Park Place** (1650-1682 Victoria Park Avenue, Toronto, ON);
51. **Wellington House** (422-424 Wellington St W, Toronto, ON);
52. **Whitby Commercial Park** (5360, 5400, 5675 Thickson Rd N, Whitby, ON);
53. **White Cedar Estates** (24, 26, 28 & 32 Lansdown Dr, Guelph, ON); and
54. **Wismer 3 (a.k.a. The Mark Condominiums and the Mount Joy Townhouses)** (Block 27, Plan 65M 4071 Markham, ON).

11. The Defendant, Olympia, is a trust company incorporated under the laws of the Province of Alberta with its head office in Calgary.

#### **IV. FACTUAL BACKGROUND**

##### **A. The Fortress SML Scheme**

12. Since approximately 2008, Fortress and its network of non-arms length mortgage administrators and brokers Building & Development Mortgages Canada Inc. (“**BDMC**”), Sorrenti Law Professional Corporation (“**Sorrenti**”), FDS Broker Services Inc., FFM Capital Inc. and FMP

Mortgage Investments Inc. (collectively, the “**Fortress-Related Entities**”) raised over six hundred million dollars in SML investment funds from the Class.

13. An SML is a mortgage for which mortgage funds are collected from one or more investors. These funds are then pooled and provided to a developer borrower in exchange for a fixed rate of interest and a registered charge on the subject property.

14. In order to invest in an SML through a Registered Plan account, the *ITA* requires the investment to be held in trust by a federally or provincially licensed trust company, Olympia was licensed for such purpose under the *Alberta Loan and Trust Corporations Act*, RSA 2000, c L-20.

15. Olympia was engaged by Fortress and the Fortress-Related Entities to act as the Class Members’ Registered Plan trustee for their Fortress SML investments.

16. Under the guidance and direction of Fortress, BDMC and Sorrenti, the affiliate brokers aggressively marketed the Fortress SMLs to prospective investors, including the Class Members, as a secure investment that was eligible for investment through their Registered Plan.

17. Registered Plan eligibility was a primary selling point of each Fortress SML, as it meant that investors would be able invest their retirement or other savings in a tax-efficient manner.

18. However, contrary to what was represented to Class Members, the SMLs were high risk due to their financing structure, including high professional fees, advance profit sharing, lack of proper appraisal, and automatic subordination of creditor priority.

19. Neither Fortress nor Olympia disclosed to the Class Members that a significant portion of their Fortress SML investment principal would never be put toward construction of the Development Property securing the Fortress SML. Of the funds advanced by Class Members, a

significant amount of the funds, in some cases as much as 35%, were used to pay “development consultant fees.” These fees were taken as an advance from the Class Members’ investment principal and split between Fortress, the mortgage administrator (i.e. BDMC or Sorrenti), the brokerages and other service providers.

20. Neither Fortress nor Olympia disclosed to the Class Members that, in some instances, an additional portion of their investment principal was set aside in an “interest reserve” account established by BDMC or Sorrenti to pay the interest owed to those same investors. In such instances, the Class Members were unknowingly being paid their interest on the loan from their own investment capital.

21. In addition, the interest reserve accounts would sometimes be used for matters unrelated to the Fortress SML investors, such as paying interest to higher priority construction lenders and other expenses incurred by the developer.

22. Finally, despite representations to the contrary, as discussed in greater detail below, the Fortress SMLs were not compliant with the *ITA*’s “qualified investment” criteria and therefore were not eligible for investment through Registered Plan accounts.

23. Due to this financing structure, which guaranteed significant upfront fees to Fortress, the Fortress-Related Entities and other actors involved in facilitating the Fortress SML scheme, including Olympia, the developers of the Development Properties securing the SMLs were at a heightened risk of and did default on their financial obligations resulting in the Class Members’ loss of all or part of their investments.

## **B. Olympia’s Central Role in Facilitating the SMLs**

24. Olympia was recruited by Fortress and certain Fortress-Related Entities to act as the Class Members' trustee for their Fortress SML investments through their Registered Plans.

25. In serving as Registered Plan trustee, Olympia played an essential role in enabling Fortress and the Fortress-Related Entities to procure the Class Members' investment funds.

26. Pursuant to the *ITA*, one of Olympia's core responsibilities as trustee was to ensure that the current fair market value of the relevant Development Property securing the mortgage was sufficient to cover the entirety of the principal and interest owed under the Fortress SML after all debt ranking higher in priority to the Fortress SML had been repaid. Where the current value of the property was not sufficient to cover the amounts owed under the Fortress SML, the SML was not eligible for investment through a Registered Plan.

27. As a professional trustee, Olympia knew or ought to have known that the SMLs were not Registered Plan eligible. The valuations for the Development Properties securing the Fortress SMLs indicated clearly that they were not current fair market valuations and were instead estimates of value based on assumptions and hypothetical future scenarios. Olympia did not take appropriate steps or conduct reasonable diligence to ensure that the SMLs were Registered Plan eligible.

28. Had Olympia acted in accordance with its obligations, the Class Members would not have invested in the Fortress SMLs and incurred the losses described herein.

### **C. Class Members Learn the True State of the Fortress SMLs**

41. As of March 27, 2020, the Fortress SML mortgage charges pertaining to the following Development Properties had been discharged, resulting in a complete loss of Class Members' investment principal:

- (a) Bradford Bond Head, resulting in approximately \$8.3 million in Class Member losses;
- (b) Capital Pointe, resulting in approximately \$33.3 million in Class Member losses;
- (c) Charlotte Adelaide Tower (in respect to the Fortress SML ranking third in priority), resulting in approximately \$4 million in Class Member losses;
- (d) Collier Centre, resulting in approximately \$52.9 million in Class Member losses;
- (e) Eden, resulting in approximately \$5.6 million in Class Member losses;
- (f) Glens of Halton Hills, resulting in approximately \$14.4 million in Class Member losses;
- (g) Mississauga Meadows 1, resulting in approximately \$5.2 million in Class Member losses;
- (h) Mississauga Meadows 2, resulting in approximately \$3.6 million in Class Member losses; and
- (i) Union Waterfront, resulting in approximately \$16.8 million in Class Member losses.

45. Additionally, as of March 27, 2020, the Fortress SML mortgage charges for the following Development Properties had been discharged, resulting in a partial loss of Class Members' investment principal:

- (a) Bauhaus;
- (b) Braestone;
- (c) Brookdale;
- (d) Charlotte Adelaide Tower (in respect to the Fortress SML ranking second in priority);
- (e) Crestview Commons;
- (f) Estates of Nobleton (a.k.a. Nobleton North);

- (g) Gotham;
- (h) Harmony Village;
- (i) Humberstone;
- (j) Kingridge Square;
- (k) Residences of Bayview (a.k.a. Lotus Condominiums);
- (l) The Greenwood;
- (m) The Harlowe;
- (n) The Kemp (f.k.a. Harmony Village);
- (o) The Woodsworth (f.k.a. The James);
- (p) The Wade; and
- (q) White Cedar Estates.

45. For the other Development Properties (a) the amounts owing under Fortress SMLs have come due with no repayment to the Class Members; and/or (b) there are potential issues with the project including, but not limited to, the priority lender issuing a notice of sale or commencing other enforcement proceedings, zoning/permitting issues and budget shortfalls. All of the Fortress SMLs for these Development Properties are currently distressed and the entirety of the principal amounts will not be able to be recovered.

## **V. OLYMPIA'S ROLE AS REGISTERED PLAN TRUSTEE FOR THE CLASS MEMBERS' SML**

### **A. Olympia's Relationship with Fortress**

46. Fortress and the Fortress-Related Entities promoted Olympia's services to Class Members, representing that Olympia was suitably qualified to serve as their Registered Plan trustee.

47. Due to its relationship with Fortress and the Fortress-Related Entities and experience as a professional Registered Plan trustee, Olympia knew or ought to have known, and disclosed to Class Members, that the SMLs were extremely high risk investments that were not qualified for investment through a Registered Plan .

48. Olympia did not use its experience and knowledge of Fortress's syndicated mortgage investments to protect the interests of Class Members to whom it was duty-bound to protect.

**B. Olympia's Attempt to Impermissibly Contract Out of its Trustee Duties**

49. Under the terms of the declaration of trust executed between Olympia and each Class Member, Olympia impermissibly purported to reassign its trustee duties back on Class Members.

50. Examples of such impermissible reassignments include statements that the Class Members were responsible for: (a) selecting and assessing the merits of their Fortress SML investment; and (b) ensuring that the Fortress SML investment was, at all times, pursuant to the *ITA*, a qualified investment eligible for investment through a Registered Plan account.

51. Additionally, Olympia's declarations of trust contain exculpatory statements purporting to disclaim Olympia's liability for losses arising from its conduct as SML trustee.

52. Olympia did not use its professional expertise nor its knowledge of Fortress SML investments to protect the interests of Class Members to whom it was legally obligated to protect.

53. Instead, it improperly and impermissibly attempted to shift its legal responsibilities onto its beneficiaries and improperly and impermissibly relied on broad exculpatory language in the declarations of trust to take no protective action despite this knowledge.

54. Olympia improperly and impermissibly attempted to contract out of its legislated and common law duties and obligations. In so doing, Olympia improperly and impermissibly sought to strip the trustee-beneficiary relationship of its essential character and abrogated its role as trustee.

## **VI. OLYMPIA'S OBLIGATIONS AS CLASS MEMBERS' REGISTERED PLAN TRUSTEE**

### **A. Olympia Was Not in Compliance with its Obligations Under the Ontario or Alberta Trustee Acts**

55. The vast majority of Class Members are Ontario residents and the majority of the Development Properties securing the Fortress SML are located in Ontario.

56. The conduct of Ontario trusts and trustees administering them is governed by the *Trustee Act*, R.S.O. 1990, c. T.23 ("**Ontario Trustee Act**"). The Ontario *Trustee Act* applies to all Ontario trusts and the powers and rights contained therein are in addition to those set out in the trust document.

57. Section 27 of the Ontario *Trustee Act* dictates the standard of care applicable to all trustees investing trust property: "a trustee must exercise the care, skill, diligence and judgment that a prudent investor would exercise in making investments." At all material times, this standard of care applied to Olympia in respect to its trusteeship of each Fortress SML.

58. In addition and/or in the alternative, pursuant to the declarations of trust executed between Olympia and each of the Class Members, Alberta law also applied to the trusts.

59. Section 3 of the Alberta *Trustee Act*, RSA 2000, c T-8 (“**Alberta Trustee Act**”), the governing legislation in Olympia’s province of incorporation, imposes broad obligations on trustees investing trust funds, including the following:

- (a) a trustee must invest trust funds with a view to obtaining a reasonable return while avoiding undue risk, having regard to the circumstances of the trust;
- (b) a trustee must review the trust investments at reasonable intervals for the purpose of determining that the investments continue to be appropriate to the circumstances of the trust;
- (c) without restricting the matters that a trustee may consider, in planning the investment of trust funds a trustee must consider the following matters, insofar as they are relevant to the circumstances of the trust:
  - (i) the purposes and probable duration of the trust, the total value of the trust’s assets and the needs and circumstances of the beneficiaries;
  - (ii) the duty to act impartially towards beneficiaries and between different classes of beneficiaries;
  - (iii) the special relationship or value of an asset to the purpose of the trust or to one or more of the beneficiaries;
  - (iv) the need to maintain the real value of the capital or income of the trust;
  - (v) the need to maintain a balance that is appropriate to the circumstances of the trust between:
    - 1. risk,
    - 2. expected total return from income and the appreciation of capital
    - 3. liquidity, and
    - 4. regularity of income;
  - (vi) the importance of diversifying the investments to an extent that is appropriate to the circumstances of the trust;

- (vii) the importance of diversifying the investments to an extent that is appropriate to the circumstances of the trust;
- (viii) the role of different investments or courses of action in the trust portfolio;
- (ix) the costs, such as commissions and fees, of investment decisions or strategies; and
- (x) the expected tax consequences of investment decisions or strategies.

60. By engaging in the acts and omissions particularized herein, Olympia's conduct breached its obligations under both the Ontario *Trustee Act* and the Alberta *Trustee Act*.

**B. Olympia was Not in Compliance with its Obligations under the *ITA***

61. Pursuant to subsections 146(1), 146.1(1), 146.2(6), 146.3(1) and 146.4(1) of the *ITA*, only investments that meet the definition of a "qualified investment" are authorized to be held in a Registered Plan.

62. The definition of qualified investment is in section 204 of the *ITA* and s. 4900(1) of the *Income Tax Regulations*, CRC, c 945. Subsection 4900(1)(j) of the *Income Tax Regulations* addresses debt investments, which includes syndicated mortgage investments, and states that for any such investment to qualify under the *ITA*, it must be "fully secured." To meet this requirement, the current, as-is, fair market value of the property securing the mortgage must be sufficient to cover the full amount of the principal and interest outstanding on the loan.

63. In the context of the Fortress SMLs, the Class Members' investments could only qualify under the *ITA* if, at the time the investments were made, the value of each SML and any other debt obligations ranking higher in priority to the SML did not exceed the fair market value of the Development Property securing the loan.

64. This was not the case. In fact, the value of each Fortress SML and higher-ranking debt far exceeded the current, as-is, fair market value of the Development Property securing the SML.

65. As trustee of the Class Members' Registered Plan investments, under the *ITA*, Olympia was responsible to the Class Members to ensure that the investments in the trust complied with applicable investment rules under the *ITA*.

66. Subsection 207.01(5) of the *ITA* requires that the "issuer, carrier or promoter of a registered plan *shall* exercise the care, diligence and skill of a reasonably prudent person to minimize the possibility that a trust governed by the registered plan holds a non-qualified investment." Olympia owed this duty to the Class Members because, at all material times, Olympia was:

- (a) the "issuer" of the Class Members' Registered Plans that were registered retirement savings plans, tax-free savings accounts and/or registered disability savings plan accounts;
- (b) the "carrier" of the Class Members' Registered Plans that were registered retirement income fund accounts; and
- (c) the "promoter" of the Class Members' Registered Plans that were registered education savings plan accounts.

67. Income Tax Folio S3-F10-C1: *Qualified Investments – RRSPs, RESPs, RRIFs, RDSPs and TFSA*s (the "**Tax Folio**") provides further guidance on a Registered Plan trustee's obligations under the *ITA*.

68. Section 1.95 of the Tax Folio states that the Registered Plan trustee has an ongoing obligation to report, both to the Canada Revenue Agency (the “CRA”) and the beneficiary of the plan if the plan begins or ceases to hold a non-qualified investment.

69. Additionally, section 1.97 of the Tax Folio states that it is the responsibility of the Registered Plan trustee to determine the fair market value of the property involved in the transaction.

70. Where the Registered Plan trustee requires the beneficiary of the Registered Plan to provide evidence to determine the property’s fair market value, as was the case here, the trustee must exercise due diligence in satisfying itself that the documentation provided is sufficient to establish that the investment is Registered Plan eligible.

71. Had Olympia exercised appropriate due diligence, as required under the *ITA*, it would have known or ought to have known that the Fortress SMLs were not Registered Plan eligible because the as-is value of the SMLs and higher-ranking debts far exceeded the values of the Development Properties securing each Fortress SML.

72. Through a reasonable investigation and review of the property valuation reports provided to Olympia, it would have or ought to have been clear to Olympia, a professional registered plan trustee, that these were not current as-is fair market valuations, but rather projections or estimates of market value when the proposed development was fully built.

73. For example, one such valuation report stated that the valuation was based on various “extraordinary assumptions” and “hypothetical conditions.” That report further noted that the report “shall not be advertised to the public or otherwise used to induce a third party to purchase the property or to make a “sale” or “offer for sale” of any security.”

## **VII. RIGHTS OF ACTION**

### **A. Breach of Fiduciary Duty**

74. As trustee of the Class Members' Registered Plans, Olympia owed and breached its fiduciary duty to the Class Members.

75. Olympia had discretion and power over the Class Members' financial interests in administering the trust.

76. Olympia could unilaterally exercise such discretion over the interests of the Class Members by virtue of its position as trustee.

77. In serving as Class Members' Registered Plan trustee, Olympia was bound to act in the utmost good faith to the Class Members.

78. The Class Members were entirely reliant on the skill and expertise of Olympia. The Class Members were in a wholly vulnerable position relative to Olympia.

79. Olympia, as a fiduciary, owed duties to the Class Members to:

- (a) act honestly, in good faith and in their best interests;
- (b) exercise the care, skill, diligence and judgment that a prudent investor would exercise in investing the Class Members' trust funds;
- (c) consider all relevant criteria in investing in the Fortress SML;
- (d) ensure that the Fortress SML investments complied with the *ITA*;
- (e) prevent Class Members from making non-qualified investments in the Fortress SMLs;
- (f) exercise the care, diligence and skill of a reasonably prudent person to ensure that the Class Members' Registered Plans did not hold non-qualified investments;
- (g) report information to Class Members and the CRA if the plan begins or ceases to hold non-qualified investments;

- (h) determine the current fair market value of the Development Property securing the Fortress SML;
- (i) ensure that documentation provided to them sufficiently established the current market value of the Development Property securing the Fortress SML;
- (j) disseminate accurate and truthful information about the Fortress SML; and
- (k) warn Class Members, before creating and administering the trusts, that the Fortress SMLs were high risk and grossly improvident bargains.

80. Olympia breached these duties, resulting in damages to the Plaintiff and the Class Members.

81. Olympia's breaches of duties include failing to:

- (a) discharge its duties as trustee;
- (b) disclose to the Class Members:
  - (i) the amount of the loan funds raised that would be used for the development of each Development Property;
  - (ii) its pre-existing relationship with Fortress and the Fortress-Related Entities, which put it in a conflict of interest with the Class Members;
  - (iii) the priority of the syndicated mortgage charge;
  - (iv) the risks of the Fortress SMLs, including the risks that:
    1. the Fortress SMLs were extremely high risk investments;
    2. the mortgage charges could be subordinated without Class Members' authorization;
    3. the mortgage security may not be enough to cover the amounts owing under the SML if the investment project failed;
    4. the valuations used were not the value of the Development Properties based on their then current condition, use and zoning as at the appraisal dates;
- (c) conduct due diligence:
  - (i) to determine the true risks of the Fortress SMLs;
  - (ii) to minimize the risk of Class Members' Registered Plan holding non-qualified investments;
- (d) prevent Class Members from making non-qualified investments in the Fortress SMLs;

- (e) ensure that Class Members were apprised of the high professional fees that would be paid out of their investment principal;
- (f) advise the Class Members that the property valuations were not current fair market valuations necessary to inform a loan-to-value calculation for the qualified investment analysis;
- (g) advise the Class Members that the Fortress SMLs were not qualified to be held in Registered Plan accounts;
- (h) use its experience and knowledge of Fortress's syndicated mortgage investments to protect the interests of the Class Members; and
- (i) report to the CRA and the Class Members if their plan held a non-qualified investment.

82. Olympia also breached its duty to the Plaintiff and the Class Members by improperly and impermissibly attempted to shift its legal responsibilities onto the Class Members.

83. Olympia failed to ensure that the best interests of the Class Members were being protected. Instead, Olympia put their own financial interests, collecting millions of dollars in fees for its trusteeship of the Class Members' Registered Plans, ahead of the best interests of the Class Members.

84. Olympia's breach of fiduciary duty caused damages to the Class, as described below.

## **B. Olympia's Breach of Trust**

85. Olympia and the Class Members were in a trustee-beneficiary relationship.

86. By engaging in the acts and omissions particularized above, Olympia breached its legislated and common law duties, particularized above at paragraph 79, owed to the Class Members as Registered Plan trustee over the Class Members' Fortress SML investments.

87. The breaches of these duties constituted a breach of trust and caused damages to the Class Members, as described below.

### C. Negligence

88. Olympia, as the Class Members' trustee of the Registered Plan accounts holding their Fortress SML investments, was in close proximity to the Plaintiff and the Class Members. As trustee of their registered accounts, Olympia was in direct contact and communicated with the Plaintiff and the Class Members, including interacting with them from time-to-time to provide them with them with relevant notices, acting as a conduit between the Class Members and the borrowers. Olympia represented to the Plaintiff and the Class Members that it would act in accordance with the duties and obligations of a trustee over their Registered Plans.

89. The purpose of Olympia's role as trustee was to protect the Class Members' investments, and Olympia undertook to do so in assuming that role.

90. Olympia owed a duty of care to the Class Members to:

- (a) exercise the care, skill and judgment that a prudent investor would exercise in making investments;
- (b) consider relevant criteria in investing Class Members' Registered Plan funds in the Fortress SMLs;
- (c) ensure that the Fortress SMLs complied with the *ITA*;
- (d) prevent the Class Members from making non-qualified investments in the Fortress SMLs; and
- (e) warn the Class Members before engaging in services in execution of their investments in the grossly improvident Fortress SMLs.

88. Olympia breached these duties by engaging in the acts and omissions particularized above at paragraph 81.

89. Had Olympia complied with its duties, it would have prevented the Class Members from investing in the Fortress SMLs and they would not have suffered the losses particularized below.

90. In addition and/or in the alternative, had Olympia complied with its duties, it would have uncovered and disclosed to the Class Members the significant risks of investing in the Fortress SMLs and that the Fortress SMLs were not eligible for investment through a Registered Plan account. Had the Class Members known of the Fortress SMLs' true risk profiles and Registered Plan ineligibility, they would have never invested in the Fortress SMLs and accordingly would not have suffered the losses particularized below.

### **VIII. DAMAGE SUFFERED BY THE CLASS MEMBERS**

91. As a result of Olympia's acts and omissions particularized herein, the Plaintiff and the Class Members have sustained damages equal to all or part of their principal investment in the Fortress SMLs.

92. As a result of the Defendant's acts and omissions, the Plaintiff and the Class Members have also suffered a loss of opportunity to earn a reasonable return on their investment principal. But for those acts and omissions, the Class Members would never have invested in the Fortress SML and would have directed the funds in their Registered Plan accounts to other investments that were low-risk and Registered Plan eligible.

93. The Defendant knew, or ought to have known, that as a result of its acts and omissions particularized herein, the Class Members would suffer damages.

94. The Class Members are entitled to restitution from Olympia in an amount equal to all fees paid to Olympia for its trusteeship of the Fortress SMLs.

95. Olympia's conduct was high-handed, outrageous, reckless, and wanton, and entitles Olympia to an award of punitive and/or exemplary damages.

**IX. REAL AND SUBSTANTIAL CONNECTION WITH ONTARIO**

96. The Plaintiff pleads that this action has a real and substantial connection with Ontario because, among other things:

- (a) the Plaintiff is resident in Ontario;
- (b) the vast majority of Class Members reside in Ontario;
- (c) the property securing the Fortress SMLs is substantially situated in Ontario;
- (d) the vast majority of the declarations of trusts and other Fortress SML loan documents were executed in Ontario; and
- (e) the vast majority of the damages sustained by the Class were sustained by persons and entities domiciled in Ontario.

**X. RELEVANT LEGISLATION**

92. The Plaintiff pleads and relies on the *Courts of Justice Act*, RSO 1990, c C-43, as amended, the *Class Proceedings Act*, 1992, SO 1992, c 6, as amended, the *Trustee Act*, RSA 2000, c T-8, *Trustee Act*, R.S.O. 1990, c. T.23 and the *ITA*.

**XI. PLACE OF TRIAL**

93. The Plaintiff proposes that this action be tried in the City of Toronto, in the Province of Ontario, as a proceeding under the *Class Proceedings Act, 1992*, SO 1992, c 6, as amended.

August 6, 2020

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**ONTARIO  
SUPERIOR COURT OF JUSTICE**

Proceeding commenced at Toronto

**STATEMENT OF CLAIM**

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