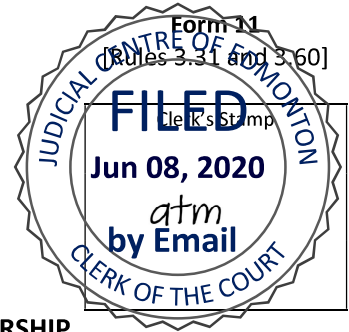


COURT FILE NUMBER	2003-06728
COURT	COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE	EDMONTON
PLAINTIFFS (DEFENDANTS BY COUNTERCLAIM)	ROMSPEN MORTGAGE LIMITED PARTNERSHIP and ROMSPEN INVESTMENT CORPORATION
DEFENDANTS (PLAINTIFFS BY COUNTERCLAIM)	3443 ZEN GARDEN LIMITED PARTNERSHIP, LOT 11 GP LTD., LOT 11 LIMITED PARTNERSHIP, ECO-INDUSTRIAL BUSINESS PARK INC., ABSOLUTE ENERGY RESOURCES INC, ABSOLUTE ENVIRONMENTAL WASTE MANAGEMENT INC. and DANIEL ALEXANDER WHITE
PLAINTIFFS BY COUNTERCLAIM	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
DEFENDANTS BY COUNTERCLAIM	ROMSPEN MORTGAGE LIMITED PARTNERSHIP, ROMSPEN INVESTMENT CORPORATION, RICHARD WELDON and WESLEY ROITMAN
DOCUMENT	STATEMENT OF DEFENCE TO COUNTERCLAIM
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	BORDEN LADNER GERVAIS LLP 1900, 520 Third Avenue S.W. Calgary, Alberta T2P 0R3 Josef Krüger, QC/Kevin E. Barr Telephone: 403.232.9563/9786 Facsimile: 403.266.1395 Email: jkruger@blg.com/kbarr@blg.com File Number: 443063-000012



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Note: State below only facts and not evidence (Rule 13.6)

Statement of facts relied on:

1. Unless otherwise specified, capitalized terms in this Statement of Defence to Counterclaim have the same meaning as in the Statement of Claim.
2. Unless specifically admitted herein, the Defendants by Counterclaim, RMLP, Romspen Investment Corporation ("**RIC**", and together with RMLP, "**Romspen**"), Richard Weldon ("**Weldon**"), and Wesley Roitman ("**Roitman**") deny each and every allegation set out in the Counterclaim, and put the Plaintiffs by Counterclaim to the strict proof thereof.
3. As set out more fully in this Statement of Defence to Counterclaim, White, as the principal and directing mind of all of the other Plaintiffs by Counterclaim, was at all times the primary driver of all of the transactions now complained of in the Counterclaim with respect to the Austin Lands (as defined in the Counterclaim). None of the Defendants by Counterclaim induced White to do anything, whether by representation or otherwise. Further, the Defendants by Counterclaim did not "install" Christopher Milam ("**Milam**"), do not bear any responsibility for any wrongful acts done by Milam (which wrongful acts are denied), did not "insert" themselves into or interfere with any business of Zen Garden, and at all times acted reasonably and in good faith. White was the maker of his own misfortune, and the architect of his own default.

I. Improper Forum

4. In response to the Counterclaim as a whole, the Defendants by Counterclaim state that the Plaintiffs by Counterclaim are barred from advancing their claims in Alberta and instead are required to bring all the claims alleged in the Counterclaim in the State of Texas.
5. It is a an express term of the Loan Agreement that the Loan Agreement shall be governed, construed, applied and enforced in accordance with the laws of the State of Texas without regard to the conflicts of law provisions thereof, and that all of the Plaintiffs by Counterclaim, as Borrower Parties, consent to personal jurisdiction in the State of Texas.
6. It is a further express term of the Loan Agreement that the jurisdiction and venue of any action brought to enforce the Loan Agreement or any other Loan Document (as defined therein) or any action relating to the loan under the Loan Agreement or the relationships created by or under the Loan Documents (as defined therein) shall, at the election of RMLP as Lender, be in a State or Federal Court of appropriate jurisdiction in Texas, and if any action is originally brought in another venue, the action shall at the election of RMLP be transferred to same.
7. RMLP has elected for the claims alleged in the Counterclaim to be tried in the District Court Travis County, Texas, 261st Judicial District (the "**Texas Court**"). The Counterclaim is in fact duplicative of a counterclaim previously filed by Zen Garden and Daniel White, in addition to Eightfold and Adam Zarafshani, against RMLP in the Texas Court, within Cause No. D-1-GN-19-007269.
8. The Defendants by Counterclaim further expressly plead and rely upon the doctrines of *res judicata*, issue estoppel, cause of action estoppel, and abuse of process in respect of the Counterclaim.

II. The Plaintiffs by Counterclaim Released the Defendants by Counterclaim

9. In further response to the Counterclaim as a whole, the Defendants by Counterclaim state that the Plaintiffs by Counterclaim expressly, unconditionally, irrevocably, and jointly and severally released the Defendants by Counterclaim from all of the claims alleged in the Counterclaim.
10. RIC, as Lender, and LP, Eco Energy Limited Partnership, Eco Energy GP Ltd., on its own behalf, and Absolute Energy, as Borrowers, were parties to an Amended and Restated Commitment Letter dated July 30, 2015 (the "**Commitment**"). The Commitment amended and restated in its entirety a prior mortgage loan commitment dated June 6, 2013 between RIC, as lender, and White, as borrower (the "**Prior Commitment**").
11. The Commitment was thereafter amended by seven supplemental agreements:
 - (a) A supplemental agreement effective August 31, 2015 ("**Supplement No. 1**");
 - (b) A supplemental agreement effective May 31, 2016 ("**Supplement No. 2**");
 - (c) A supplemental agreement effective June 17, 2016 ("**Supplement No. 3**");
 - (d) A supplemental agreement effective August 19, 2016 ("**Supplement No. 4**");
 - (e) A supplemental agreement effective November 9, 2016 ("**Supplement No. 5**");
 - (f) A supplemental agreement effective August 1, 2017 ("**Supplement No. 6**"); and
 - (g) A supplemental agreement effective February 1, 2018 ("**Supplement No. 7**").
12. Supplement No. 4 amended the Commitment to add the Plaintiff by Counterclaim, Zen Garden, as Covenantor to the Commitment.
13. It was a term of Supplement No. 5 that Borrowers and Covenantors, including LP, Absolute Energy, and Zen Garden, for themselves and their respective successors and assigns, released and waived all claims and/or defenses they then may have had against Lender and its successors and assigns on account of any occurrence relating to the Commitment and the loan made thereunder. "Lender" was defined to include RIC, its present and former officers, directors, shareholders, partners, employees, agents and attorneys, including Roitman and Weldon, and the release enured to their benefit.
14. Supplement No. 6 provided for a further release as of its effective date, upon the same terms as the above-described release in Supplement No. 5.
15. Supplement No. 7 provided for a further release as of its effective date, upon the same terms as the above-described releases in Supplement No. 5 and Supplement No. 6.
16. RMLP, as Lender, and Zen Garden, as Borrower, subsequently entered into the Loan Agreement dated as of April 27, 2018.

17. It is a term of the Loan Agreement that Zen Garden, LP, GP, Eco-Industrial, Absolute Environmental, and White, each as Borrower Parties, and RMLP, RIC, and all of their respective directors, officers, employees, agents, loan servicing agents, attorneys, affiliates and subsidiaries, each as Lender Parties, each unconditionally and irrevocably, jointly and severally, released and forever discharged 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 Commitment (as amended), the loan made thereunder, and all associated security and guarantee documents.

Waiver of Counterclaim, Contractual Limitation on Liability, and Indemnity

18. In further response to the Counterclaim as a whole, it is an express term of the Loan Agreement that all amounts due under the Loan Agreement or associated Loan Documents, as defined therein, shall be payable without setoff, counterclaim or any deduction whatsoever. In addition, Zen Garden, as Borrower, expressly agreed to waive the right to assert a counterclaim, other than a compulsory counterclaim, in any proceeding brought against Zen Garden by RMLP, as Lender, or RMLP's agents, or otherwise offset any obligations to make payments required under the Loan Documents.
19. Further, Zen Garden expressly agreed that it waives and releases any right to assert any claim, cause of action, offset or defense against RMLP with respect to the loan advanced under the Loan Agreement, or the associated Loan Documents, which is any way related to any other note or subordinate loan documents by which Zen Garden is indebted to RMLP.
20. In further response to the Counterclaim as a whole with respect to Zen Garden, it is an express term of the Loan Agreement that none of RMLP, as Lender, or its agents or employees shall be liable to Zen Garden for any monetary damages, including any special, consequential or punitive damages whatsoever, whether in contract, tort or any other legal or equitable principle and Zen Garden's sole remedies shall be limited to commencing an action for specific performance under the Loan Documents.
21. In further response to the Counterclaim as a whole with respect to Zen Garden, it is an express term of the Loan Agreement that Zen Garden shall, at its sole cost and expense, protect, defend, indemnify, release and hold harmless the Indemnified Parties (as defined, including all of the Defendants by Counterclaim) from and against any and all Losses (as defined, including among other things any and all claims, suits, liabilities (including strict liabilities), actions, proceedings, obligations, debts, damages, losses, costs, judgments, awards, amounts paid in settlement, punitive damages, foreseeable consequential damages, and damages and expenses of whatever kind or nature), incurred, directly or indirectly, except as a result of fraud, gross negligence or intentional malfeasance.

IV. Specific Responses to the Counterclaim

22. RMLP admits that it is an Ontario partnership. RIC admits that it is an Ontario corporation. Weldon and Roitman admit that they reside in Toronto, Ontario. RMLP and RIC deny that either of them operates in Edmonton, Alberta or elsewhere in Alberta, in that neither of them has an office through which it regularly carries on business in Alberta.

23. The Defendants by Counterclaim deny that Weldon is, or ever was, the managing partner of RMLP. The Defendants by Counterclaim further deny that Roitman is, or ever was, the general managing partner of RMLP. Roitman is a director and officer of RIC, and Weldon is an employee and indirect shareholder of RIC, but Roitman and Weldon deny that either of them is a controlling mind of RIC.
24. In specific response to paragraph 8 of the Counterclaim, the Defendants by Counterclaim deny that White resides in Edmonton, Alberta. To the best of their knowledge, White now ordinarily resides in the country of Panama.
25. The Defendants by Counterclaim deny that RMLP and RIC, or either of them, is a “mezzanine” lender as that term is commonly understood in the real estate lending market. Unlike mezzanine lenders, whose primary security generally consists of a borrower’s equity interest and ordinarily ranks in a subordinate position, and whose loans are made at above-market interest rates, RMLP and RIC are primarily in the business of issuing mortgage loans with a first-ranking security position and at interest rates that are within prevailing market ranges.
26. The Defendants by Counterclaim admit that the State of Texas had, at all material times, a loan program administered under the *Property Assessed Clean Energy Act* known as the PACE Program. The Defendants by Counterclaim deny that loans under the PACE Program were necessarily or always “low-cost”. The Defendants by Counterclaim admit that loans under the PACE Program were long term, often amortized over 20-25 years, and took prime position over existing encumbrances and mortgages. For that reason, it was an established and reasonable business practice for RMLP and RIC to be cautious, to exercise due diligence on proposed PACE lenders and loans, and to require additional security or other protections for its loans when lending to a project making use of the PACE Program.
27. In specific response to paragraph 12 of the Counterclaim, the events described therein cannot have taken place in 2014 because MOS8 Partners Ltd. (“**MOS8**”) and MOS8 GP LLC (“**MOS8 GP**”) were not formed until 2015. Further RMLP and RIC deny that they owned or directly or indirectly controlled MOS8 or MOS8 GP.
28. In further specific response to paragraph 12(e) of the Counterclaim:
- (a) In June 2013, as described above, RIC provided the Prior Commitment to White. The Prior Commitment was in the maximum amount of \$40 million in connection with the potential purchase and development of an industrial site in Fort McMurray, Alberta. However, the transaction did not close, and no loan funds were advanced;
 - (b) As further described above, the Prior Commitment was later entirely amended and restated to become the Commitment in July 2015. Under the terms of the Commitment, the total loan amount made available (up to a maximum of \$40 million), and the amount of each advance under the loan facility, was in RIC’s sole discretion. Approximately \$3.15 million was advanced on July 30, 2015;
 - (c) Effective August 31, 2015, by way of a bare trust agreement (the “**Trust Agreement**”), Symmetry Asset Management Inc. (“**Symmetry**”), a corporation owned and controlled by White, appointed Weldon as nominee, agent, and bare trustee to hold ownership interests in MOS8 and MOS8 GP for and on behalf of Symmetry as beneficial owner, in connection with MOS8’s subsequent purchase of the Austin Lands;

- (d) In September 2015, Supplement No. 1 amended the Commitment to approve a further total amount of approximately \$6 million for the purpose of the Borrowers and Covenantors (including White) under the Commitment to variously make loans and capital contributions to MOS8 and to allow the Covenantors to acquire membership interests in MOS8 GP. Further, under the terms of Supplement No. 1, White and the Borrowers under the Commitment appointed Weldon as their nominee and agent to negotiate and enter into the respective agreements for MOS8 and MOS8 GP. Thereafter, White and the Borrowers under the Commitment expressly pledged their interests in MOS8 and MOS8 GP to RIC as further collateral for the loan under the Commitment, including the increased approved amount;
 - (e) In May 2016, Supplement No. 2 further amended the Commitment to approve additional loan tranches for the purpose of making further indirect capital contributions to MOS8;
 - (f) In June 2016, Supplement No. 3 further amended the Commitment to approve an additional loan tranche of \$1.95 million for the purpose of the Borrowers and Covenantors (including White) to purchase Milam's partnership interests in MOS8 and membership interests in MOS8 GP. Further, the Borrowers and Covenantors (including White) under the Commitment appointed Weldon as their bare trustee and nominee to negotiate, execute and deliver all agreements, instruments, certificates and other documents in connection with that purpose;
 - (g) In August 2016, Supplement No. 4 further amended the Commitment to, among other things, add Zen Garden as a Covenantor (as previously described) and to provide for a second-ranking deed of trust on the Austin Lands, to be recorded upon an event of default (the "**Austin Mortgage**");
 - (h) In November 2016, Supplement No. 5 further amended the Commitment to increase the total approved loan amount to \$25.75 million and to approve the advance of a further tranche of \$10.425 million, for the purpose of paying out and discharging the first-priority lien on the Austin Lands held by Service Lloyds Insurance Company. Further, the Austin Mortgage was then immediately recorded and became a first-ranking lien, and the Borrowers and Covenantors under the Commitment gave the aforementioned release;
 - (i) In August 2017, Supplement No. 6 further amended the Commitment to increase the total approved loan amount to \$31.75 million, and the Borrowers and Covenantors under the Commitment gave another aforementioned release; and
 - (j) In February 2018, Supplement No. 7 further amended the Commitment to increase the total approved loan amount to \$34.25 million, and the Borrowers and Covenantors under the Commitment gave another aforementioned release.
29. Each additional loan increase and tranche payment was specifically requested by White, including so that he could invest borrowed funds in MOS8 and MOS8 GP, and subsequently, to further develop the Austin Lands.
30. The Defendants by Counterclaim specifically deny making any of the representations alleged at paragraphs 13-14 of the Counterclaim or at all (the "**Representations**"). The Defendants by Counterclaim state that:

- (a) They drew White's attention to the Austin Lands;
 - (b) They introduced White to Milam, who was a local contact of the Defendants by Counterclaim and who knew the then-owner of the Austin Lands; and
 - (c) At all material times thereafter, following his own independent review of the potential opportunity the Austin Lands presented, White became enamoured with the Austin Lands and independently embarked on a course of action to pursue the opportunity at all cost, without reliance upon any acts or representations of the Defendants by Counterclaim, including requesting the additional loan amounts under the Commitment described above for the purposes of investing in MOS8, MOS8 GP, and developing the Austin Lands.
31. In the alternative, if any of the Defendants by Counterclaim did make any of the Representations, which is denied, the Defendants by Counterclaim state that those Representations were true and accurate at the time they were made.
32. Further, or in the alternative, if any of the Defendants by Counterclaim did make any of the Representations, which is denied, White did not rely on those representations and would have invested money in MOS8 irrespective of whether the Representations were made.
33. Further, or in the alternative, if the Defendants by Counterclaim did make any of the Representations, and if the Representations were untrue at the time they were made, each of which is denied, the Defendants by Counterclaim deny that they knew the Representations were untrue, and deny that the Representations were made negligently. The Defendants by Counterclaim further deny that they owed White any duty of care in respect of any Representations, if they were made, which is denied.
34. In specific response to paragraph 19 of the Counterclaim, the Defendants by Counterclaim state that the purchase of the Austin Lands closed on September 30, 2015.
35. In specific response to paragraph 20 of the Counterclaim, neither RMLP nor RIC owned or directly or indirectly controlled MOS8 or MOS8 GP. White was unable to establish the necessary limited partnership structure in time to hold his indirect interest in the Austin Lands at closing, so White specifically directed in writing, in respect of Weldon, that "You have my approval to close it and can hold my interest for me until further instructions". Weldon therefore only held an interest on behalf of White.
36. In specific response to paragraph 21 of the Counterclaim, neither RMLP nor RIC lent money or provided credit facilities to MOS8. Instead, as described above, funds were advanced to entities controlled by White under the terms of the Commitment (as amended), which funds White, and entities under his control, directed or contributed to MOS8.
37. As previously stated, the Defendants by Counterclaim deny that any of them "installed" Milam as a manager of MOS8. White knew that Milam was a potential local development partner well before the acquisition of the Austin Lands, and that Milam, who knew the then-owner of the Austin Lands, could help facilitate the acquisition. Milam became interested in participating in the deal independently of the Defendants by Counterclaim, and at all material times, the Defendants by Counterclaim kept the Plaintiffs by Counterclaim apprised of the negotiations with Milam, including his equity investment and agreement to be the local development partner.

38. The Defendants by Counterclaim presume that the Plaintiffs by Counterclaim intended to say, in paragraph 23 of the Counterclaim, that “Milam was incapable of or unable to competently perform his duties as the manager of MOS8”, rather than “Mr Weldon”.
39. In further response to paragraph 23, the Defendants deny that they owed any duty of care to the Plaintiffs by Counterclaim in respect of the negotiation and agreement with Milam, and further deny that any of them were negligent or reckless in respect of the negotiation and agreement with Milam.
40. The Defendants by Counterclaim deny that Milam committed any of the wrongful acts alleged at paragraph 24 of the Counterclaim. If he did commit such wrongful acts, the Defendants by Counterclaim deny that they owed any duty of care or fiduciary other duty to the Plaintiffs by Counterclaim in respect of Milam’s actions.
41. In response to paragraph 25 of the Counterclaim, the Defendants by Counterclaim:
- (a) Specifically deny any knowledge or foreseeability of any wrongful acts by Milam (which are denied), as alleged or at all;
 - (b) Deny that they “allowed to continue” any such wrongful acts, as alleged or at all; and
 - (c) Deny that the benefitted from any such wrongful acts, as alleged or at all.
42. Further, in connection with the subsequent buy-out of Milam’s interests in MOS8 and MOS8 GP, the Borrowers under the Commitment executed a certificate in favour of RIC, dated June 2, 2016, certifying, among other things:
- (a) The continued accuracy of all representations and warranties made to RIC in the Commitment, the associated Security (as defined therein), and any other document, material, information or report supplied or delivered to RIC or any representative of RIC by or on behalf of the Borrowers under the Commitment;
 - (b) That no act of default had occurred pursuant to or under the Commitment or the Security (as defined therein) and no event or circumstance had occurred and no condition existed which would result, either immediately, or with the lapse of time or giving of notice, or both, in the occurrence or existence of such an act of default; and
 - (c) As of the date of the certificate, there was no pending or threatened litigation, action, claim or fact known to the Borrowers under the Commitment and not disclosed to the Lender which materially adversely affected or could have so affected the lands or other collateral which were the subject matter of the Commitment.
43. In specific response to paragraph 26 of the Counterclaim, the Defendants by Counterclaim did not advance any loan to MOS8, as previously stated. Therefore, there cannot have been any default of such loan.
44. The allegations contained in paragraph 27 of the Counterclaim are patently false. Rather than White “demanding” that his investment be “returned to him”, it was always contemplated that

White's beneficial interest in MOS8, held on his behalf by Weldon as bare trustee at White's direction, would be transferred to an entity under White's control.

45. The Defendants by Counterclaim deny that they lent money and provided credit facilities to Zen Garden, as alleged at paragraph 28 of the Counterclaim. Rather, in accordance with Supplement No. 4, Zen Garden was added as a Covenantor to the existing Commitment. Further funds were then made available to the Borrowers under the Commitment, which did not include Zen Garden, in accordance with Supplement No. 5.
46. The Defendants by Counterclaim deny that they required Zen Garden to assume the debts of MOS8, as alleged at paragraph 29 of the Counterclaim. To the contrary, in order for the transfer of the Austin Lands to occur, the first-priority lien in favour of Service Lloyds Insurance Company needed to be paid out and discharged. This was facilitated, in part, through the advance of funds under Supplement No. 5, as stated previously. The Defendants by Counterclaim further repeat that Supplement No. 5 contained a release.
47. In specific response to paragraph 33 of the Counterclaim:
 - (a) The February 1, 2018 letter referenced therein was a proposal to restructure the existing Commitment;
 - (b) The Loan Agreement provided that the PACE Loan constituted a Permitted Encumbrance (as defined therein) but only if:
 - (i) RMLP has not issued a Declaration of Default under the Loan Agreement;
 - (ii) All proceeds from the Pace Loan were either utilized in the Work (as defined) or paid to RMLP to be applied against the existing debt; and
 - (iii) The proceeds from the Pace Loan were collaterally assigned to RMLP; and
 - (c) RMLP reasonably and in good faith required additional collateral for the substantial increase in the loan amount under the Loan Agreement.
48. The Defendants by Counterclaim state that the contractual negotiations and dealings between them and the Plaintiffs by Counterclaim were arm's length and between sophisticated commercial parties. The Defendants by Counterclaim deny that any duty of care or duty of good faith and fair dealing arose in the circumstances.
49. Further, and in the alternative, if any such aforementioned duties did arise, the Defendants by Counterclaim state that they acted at all times in accordance with those duties, specifically deny committing the acts alleged at paragraph 35 of the Counterclaim, and deny that those acts, if committed, constitute a breach of any such duties.
50. In particular, the Defendants by Counterclaim:
 - (a) Did not demand a change in ownership structure of Zen Garden or any of the other Plaintiffs by Counterclaim;

- (b) Did not exclude White from any negotiations that would affect him or the other Plaintiffs by Counterclaim;
 - (c) Did not insist that negotiations be conducted by Adam Zarafshani (“Zarafshani”), and in any event, Zarafshani was found and selected by White as a construction manager and partner, and was authorized to negotiate on behalf of Zen Garden; and
 - (d) Did not, and could not have, imposed unconscionable terms upon White, Zen Garden, or any other Plaintiffs by Counterclaim, which are sophisticated commercial actors.
51. In specific response to paragraph 36 of the Counterclaim, the Loan Agreement was fully executed. RMLP and RIC did not force any draws upon Zen Garden, but rather issued them in accordance with the terms of the Loan Agreement which Zen Garden agreed to.
52. In response to paragraph 37 of the Counterclaim, RMLP and RIC state, and the fact is, that:
- (a) Any delays in processing the funding of draw requests were justified;
 - (b) Any refusal to disburse the loan was due to failures of conditions precedent to such disbursement;
 - (c) RMLP and RIC did not unreasonably refuse to consent to any PACE Loan;
 - (d) Any registered or recorded encumbrances against properties were specifically agreed to;
 - (e) RMLP and RIC did not manufacture any circumstances, which the Plaintiffs by Counterclaim fail to specify, in order to charge excessive fees; and
 - (f) Zen Garden did breach the Loan Agreement as alleged by RMLP and RIC.
53. In approximately the spring and summer of 2019, RMLP and RIC notified the borrowers, under the Loan Agreement and associated facilities, including Zen Garden, that, among other things, the budgeted interest reserve was insufficient, and that a Balancing Event (as defined in the Loan Agreement) had occurred.
54. Further, around approximately the same time, there was an event of default with the project’s lead tenant under the lease for the Austin Lands.
55. Notwithstanding the foregoing defaults and failures of conditions precedent to the advance of funds, and the inability of the borrowers to raise additional money, RMLP and RIC offered to lend additional funds on a forbearance basis in order to complete a key first component of the project. The borrowers, including Zen Garden, refused this offer, effectively bringing work on the project to a standstill.
56. None of the Defendants by Counterclaim inserted themselves into, or interfered with, the business of Zen Garden, as alleged at paragraph 38 of the Counterclaim or at all. Rather, as previously stated, it was White who found and selected Zarafshani as a construction manager and, later, a partner, and put Zarafshani in charge of the Austin Lands. The Defendants by Counterclaim never demanded that ownership interests be assigned to Zarafshani.

57. RMLP and RIC deny that they became joint venturers, co-developers, or co-managers of the Austin Lands, and deny that they were a lender in possession. The Defendants by Counterclaim further deny that they owed any fiduciary duties to the Plaintiffs by Counterclaim. To the contrary:
- (a) It is an express term of the Loan Agreement that RMLP, as Lender, shall not be deemed to constitute a mortgagee-in-possession, tenant-in-common, or in control of, or a partner or joint venture with, or insider of, any Borrower Party (including all of the Plaintiffs by Counterclaim);
 - (b) It is a further express term of the Loan Agreement that the relationship between RMLP and RIC, as Lender, and Zen Garden, as Borrower, is solely that of debtor and creditor, that the Lender has no fiduciary or other special relationship with the Borrower, and that no term of any other loan documents shall be construed so as to deem the relationship to be other than that of the debtor and creditor relationship; and
 - (c) There was no relationship of trust and confidence by, or particular vulnerability of, the Plaintiffs by Counterclaim in respect of the Defendants by Counterclaim, which are all sophisticated commercial actors.
58. If fiduciary duties did arise and were owed by the Defendants by Counterclaim to the Plaintiffs by Counterclaim, which is denied, the Defendants by Counterclaim deny that they committed any acts in breach of such duties, as alleged or at all.
59. The Defendants by Counterclaim expressly plead that each and every one of the contractual provisions contained in the Loan Agreement, including without limitation the provisions specifically described and relied upon in this Statement of Defence to Counterclaim, are enforceable under the law of contract applicable in the State of Texas.

Any matters that defeat the claim of the Plaintiffs by Counterclaim:

60. The express terms of the contracts between the parties, including without limitation:
- (a) The choice of law and venue provisions described herein;
 - (b) The releases described herein; and
 - (c) The waiver of counterclaim, limitation of liability, and indemnity provisions described herein.

Remedy sought:

61. The Defendants by Counterclaim seek the dismissal of the Counterclaim in its entirety, with costs on a solicitor-client, substantial indemnity basis.