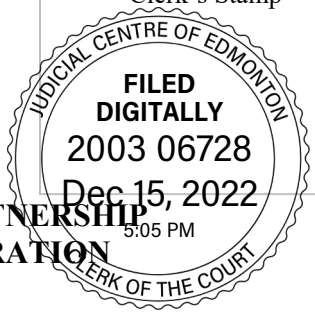
Form 49
[Rule 13.19]

Clerk's Stamp

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|---|---|
| COURT FILE NUMBER | **2003-06728** |
| COURT | COURT OF KING'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** |
| COURT FILE NUMBER | **1903-21473** |
| COURT | COURT OF KING'S BENCH OF ALBERTA |
| JUDICIAL CENTRE | EDMONTON |
| APPLICANTS | **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.** |
| RESPONDENT | **ROMSPEN INVESTMENT CORPORATION** |

ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT

**BORDEN LADNER GERVAIS LLP**
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File No. 443063-000012

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**THIRD SUPPLEMENTAL AFFIDAVIT OF WESLEY ROITMAN**

**SWORN ON DECEMBER 14, 2022**

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I, **WESLEY ROITMAN**, of the City of Toronto, in the Province of Ontario, MAKE OATH AND SAY THAT:

## I. INTRODUCTION

1. I am the Managing General Partner of Romspen Investment Corporation ("**RIC**"), the manager and administrative agent for Romspen Mortgage Limited Partnership (together with RIC, "**Romspen**"). 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 am authorized to swear this Affidavit on behalf of Romspen.

3. I make this Affidavit to further supplement my Affidavit sworn on July 29, 2022 (the "**Prior Affidavit**"), and in support of an Amended Application to Declare Debt Owing filed by Romspen on August 10, 2022, and in response to a Cross-Application filed by the Defendant, Daniel Alexander White, and non-party Applicants, the Dan White Family Trust and Symmetry Asset Management Inc.

4. All capitalized terms not defined herein shall have the meaning ascribed to them as set out in the Prior Affidavit.

5. Attached hereto and marked as Exhibit "**A**" is a true copy of the Report and Recommendation of the United States Magistrate Judge issued in the District Court

Action by United States Magistrate Judge Dustin M. Howell in the District Court Action, dated December 7, 2022 (the "**Recommendation**").

6. Attached hereto and marked as Exhibit "**B**" is a true copy of a commitment letter dated effective as of August 31, 2015, which is the "August 2015 Commitment" described on page 18, among others, of the Recommendation.

SWORN BEFORE ME at the City of Toronto, in the Province of Ontario, this 14th day of December, 2022

A Notary Public in and for Ontario

JOEL MICKELSON
Barrister & Solicitor
162 Cumberland Street, Suite 300
Toronto ON M5R 3N5
Direct Line: 416.928.4870

JOEL SHOLEM MICKELSON NOTARY PUBLIC ONTARIO

**WESLEY ROITMAN**

**This is Exhibit "A" referred to**

**in the Affidavit of WESLEY ROITMAN**

**Sworn before me this 14th day of December, 2022**

**A Notary Public in and for Ontario**

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JOEL SHOLEM MICKELSON
NOTARY PUBLIC
ONTARIO

# UNITED STATES DISTRICT COURT
# WESTERN DISTRICT OF TEXAS
# AUSTIN DIVISION

| | | |
|---|---|---|
| **DANIEL WHITE, and DAN WHITE FAMILY TRUST,** *Plaintiffs* | § | |
| | § | **No. 1:21-CV-00517-RP** |
| **v.** | § | |
| **ROMSPEN MORTGAGE LIMITED PARTNERSHIP, ROMSPEN INVESTMENTS CORPORATION, CHRISTOPHER MILAM, ADAM ZARAFSHANI, PANACHE CONSTRUCTION AND DEVELOPMENT, INC., WESLEY ROITMAN, RICHARD WELDON,** *Defendants* | § | |

## REPORT AND RECOMMENDATION OF THE UNITED STATES MAGISTRATE JUDGE

TO: THE HONORABLE ROBERT PITMAN
UNITED STATES DISTRICT JUDGE

Before the Court are Defendants Romspen Mortgage Limited Partnership's, Romspen Investment Corporation's, Wesley Roitman's, and Richard Weldon's Motion to Dismiss Plaintiffs Daniel White and Dan White Family Trust's[1] Third Amended Complaint, Dkt. 74, Panache Defendants' Motion to Dismiss Plaintiffs' Third Amended Complaint, Dkt. 75, and all related responses and replies. The District Court referred this case to the undersigned for report and recommendation.

[1] The undersigned assumes, for the purposes of this Report and Recommendation that Dan White is representing the Dan White Family Trust in his capacity as trustee.

## I. BACKGROUND

In Plaintiffs' Third Amended Complaint, Dkt. 70, Plaintiffs Daniel White and Dan White Family Trust, bring claims for violations of the Racketeer Influenced and Corrupt Organizations Act (RICO), fraud, breach of fiduciary duty, breach of contract, negligent misrepresentation, and various theories of assisting and encouraging, assisting and participating, and conspiracy against Defendants Romspen Mortgage Limited Partnership, Romspen Investments Corporation, Wesley Roitman, Richard Weldon, Christopher Milam,[2] Adam Zarafshani, and Panache Construction and Development, Inc. Plaintiffs' complaints are related to their investment in Texas property, which ultimately led to bankruptcy and foreclosure, which Plaintiffs assert occurred because of Defendants' duplicity and mismanagement of the projects.

In two separate motions, Defendants move to dismiss Plaintiffs' claims. The Romspen entities[3] argue for dismissal based upon: (1) res judicata; (2) lack of standing; (3) that the claims were released by the Debtor; (4) that the claims were released by Plaintiffs; and (5) a failure to adequately plead pursuant to Federal Rules of Civil Procedure 9(b) and 8. The Panache entities[4] similarly argue for dismissal of Plaintiffs' claims asserting: (1) lack of standing; and (2) failure to adequately plead pursuant to Federal Rule of Civil Procedure 9(b).

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[2] Milam has not been served and has not answered. Claims against him should also be dismissed pursuant to Rule of Civil Procedure 4(m), requiring service within 90 days after the complaint is filed, after notice to Plaintiffs. This Report and Recommendation serves as that notice.

[3] The Romspen entities are as follows: Romspen Mortgage Limited Partnership, Romspen Investments Corporation, Wesley Roitman, and Richard Weldon.

[4] The Panache entities are: Panache Construction and Development, Inc., and Adam Zarashani.

## II. LEGAL STANDARDS

### A. 12(b)(1)

Federal Rule of Civil Procedure 12(b)(1) allows a party to assert lack of subject-matter jurisdiction as a defense to suit. Fed. R. Civ. P. 12(b)(1). Federal district courts are courts of limited jurisdiction and may only exercise such jurisdiction as is expressly conferred by the Constitution and federal statutes. *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994). A federal court properly dismisses a case for lack of subject-matter jurisdiction when it lacks the statutory or constitutional power to adjudicate the case. *Home Builders Ass'n of Miss., Inc. v. City of Madison*, 143 F.3d 1006, 1010 (5th Cir. 1998). "The burden of proof for a Rule 12(b)(1) motion to dismiss is on the party asserting jurisdiction." *Ramming v. United States*, 281 F.3d 158, 161 (5th Cir. 2001), *cert. denied*, 536 U.S. 960 (2002). "Accordingly, the plaintiff constantly bears the burden of proof that jurisdiction does in fact exist." *Id*. In ruling on a Rule 12(b)(1) motion, the court may consider any one of the following: (1) the complaint alone; (2) the complaint plus undisputed facts evidenced in the record; or (3) the complaint, undisputed facts, and the court's resolution of disputed facts. *Lane v. Halliburton*, 529 F.3d 548, 557 (5th Cir. 2008).

The standard of reviewing a motion to dismiss pursuant to 12(b)(1) depends upon whether the defendant makes a facial or factual challenge to the plaintiff's complaint. *Paterson v. Weinberger*, 644 F.2d 521, 523 (5th Cir. 1981). When the defendant makes a facial attack by the mere filing of a Rule 12(b)(1) motion, the trial court looks to the sufficiency of the plaintiff's allegations, which are presumed to be

true. *Id.* When the defendant makes a factual attack by providing affidavits, testimony, and other evidence challenging the court's jurisdiction, the plaintiff must submit facts in support of the court's jurisdiction and thereafter bear the burden of proving that the trial court has subject matter jurisdiction. *Middle S. Energy, Inc. v. City of New Orleans*, 800 F.2d 488, 490 (5th Cir. 1986).

**B. 12(b)(6)**

Pursuant to Rule 12(b)(6), a court may dismiss a complaint for "failure to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). In deciding a 12(b)(6) motion, a "court accepts 'all well-pleaded facts as true, viewing them in the light most favorable to the plaintiff.'" *In re Katrina Canal Breaches Litig.*, 495 F.3d 191, 205 (5th Cir. 2007) (quoting *Martin K. Eby Constr. Co. v. Dall. Area Rapid Transit*, 369 F.3d 464, 467 (5th Cir. 2004)). "To survive a Rule 12(b)(6) motion to dismiss, a complaint 'does not need detailed factual allegations,' but must provide the plaintiff's grounds for entitlement to relief—including factual allegations that when assumed to be true 'raise a right to relief above the speculative level.'" *Cuvillier v. Taylor*, 503 F.3d 397, 401 (5th Cir. 2007) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). That is, "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Twombly*, 550 U.S. at 570).

A claim has facial plausibility "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* "The tenet that a court must accept as true all of the

allegations contained in a complaint is inapplicable to legal conclusions. Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Id*. A court ruling on a 12(b)(6) motion may rely on the complaint, its proper attachments, "documents incorporated into the complaint by reference, and matters of which a court may take judicial notice." *Dorsey v. Portfolio Equities, Inc.,* 540 F.3d 333, 338 (5th Cir. 2008) (citations and internal quotation marks omitted). A court may also consider documents that a defendant attaches to a motion to dismiss "if they are referred to in the plaintiff's complaint and are central to her claim." *Causey v. Sewell Cadillac-Chevrolet, Inc.*, 394 F.3d 285, 288 (5th Cir. 2004). But because the court reviews only the well-pleaded facts in the complaint, it may not consider new factual allegations made outside the complaint. *Dorsey,* 540 F.3d at 338. "[A] motion to dismiss under 12(b)(6) 'is viewed with disfavor and is rarely granted.'" *Turner v. Pleasant*, 663 F.3d 770, 775 (5th Cir. 2011) (quoting *Harrington v. State Farm Fire & Cas. Co.*, 563 F.3d 141, 147 (5th Cir. 2009)).

## III. DISCUSSION

### A. Factual Background from Plaintiffs' Complaint

On September 13, 2012, Romspen Investment and Symmetry Asset Management, Inc., a Canadian company owned and operated by Mr. White entered into a letter agreement providing for $40 million in first-mortgage financing on a property in Fort McMurray, Alberta, Canada. The 2012 Agreement was executed by White on behalf of Symmetry, and by Roitman on behalf of Romspen Investment. Dkt. 70-1. Symmetry did not use these funds to purchase the Fort McMurray

Property. On June 6, 2013, the parties executed a new commitment of the 2012 Agreement again making $40 million available to Symmetry: $20 million to purchase the Fort McMurray Property, and $20 million to develop the property. Symmetry again did not use the full amount of the $40 million extended. Romspen Investment agreed to investigate and source out investment opportunities for White to use the unadvanced portion of the 2013 Commitment extended by Romspen.

In 2014, Romspen Investment learned that a property at 3501 Ed Bluestein Boulevard, Austin, Texas (the "Austin Property") had recently been purchased for $5 million by a group of local investors who planned to develop the property as an office and manufacturing space. That transaction failed, and the Austin Property went back up for auction. In an email to Roitman on October 27, 2014, Weldon said he had received information on the Austin Property, it was "perfect" for White, and that an auction was imminent at which a minimum $3.5 million bid would be required. Roitman forwarded Weldon's email to White and encouraged him to invest the unused loan money.

Romspen Investment, Roitman, and Weldon made other representations to White that his investment in the Austin Property would be a "valet investment," meaning that Romspen Investment and Weldon would manage the development, leasing, and sale of the Austin Property, and White would earn a significant profit in a short period of time. Romspen Investment, Roitman, and Weldon further advised White that the Austin Property would cost approximately $5-7 million, but that White would make a profit of approximately $100 million in two years.

White agreed to allow Romspen Investment to use a portion of the remaining line of credit from the 2013 Commitment to purchase and develop the Austin Property. On July 30, 2015, Romspen Investment amended and restated the 2013 Commitment, providing for a $40 million line of credit and securing the financing with several different properties owned by Mr. White and/or the White Family Trust, referenced as the "Lamont Properties" and the "Edmonton Property".

On August 28, 2015, separate entities were formed in which defendant Christopher Milam was either a manager or the registered agent: MOS8 Holdings, LLC, MOS8 GP, LLC, and MOS8 Partners, Ltd. MOS8 GP, LLC was the sole general partner of MOS8 Partners, LLC. Dkt. 70-3. Defendant Milam was granted ownership interest in MOS8 which Plaintiffs allege was without White's knowledge. On August 31, 2015, Romspen Investment and MOS8 Partners, Ltd. entered into a series of documents with International Development Management, LLC1, as follows: (1) Co-Financing and Co-Sales Agreement; (2) Co-Leasing Agreement; (3) Co-Development Agreement; and (4) Co-Management Agreement. Dkt. 70-4. On the same day, August 31, 2015, Romspen Investment restated and amended the July 30, 2015, commitment approving several tranches totaling approximately $6 million, to make a capital contribution or purchase ownership interests in Partners purchasing the Austin Property, to assist in acquiring the membership interests in GP and to pay fees and transaction costs. Dkt. 70-5.

Pursuant to the terms of the August 2015 commitment, Weldon was required to act as the nominee and agent for White and the other borrowers. *Id.*, at § 25.1. On

September 30, 2015, Partners entered into an agreement to purchase the Austin Property for $13 million, exceeding the $5-7 million price point represented to White by Romspen Investment, Roitman, and Weldon. Dkt. 70-6.

Plaintiffs allege that Romspen created a conflict of interest between Romspen, White, and White's assets due to Romspen's status as a trustee and its financial stake in MOS8, and its undisclosed intent to acquire the Austin Property. White pleads he reasonably relied upon Romspen's advice agreeing to invest in MOS8 to develop the Austin Property. White asserts he would not have invested in MOS8 absent Romspen's advice and/or representations.

Plaintiffs assert that the Romspen Defendants, through MOS8, purchased the Austin Property with White's investment and credit finances, and placed Milam, their representative, in charge of the Austin Property's development. Plaintiffs plead that Milam failed to effectively, manage, control, or perform his duties to MOS8 in the development of the Austin Property in various ways ultimately causing the Property to not be developed. Plaintiffs plead that Milam failed to deal fairly or act honestly in good faith to the best interest of Plaintiffs, while ostensibly acting as Plaintiffs' fiduciary.

Plaintiffs further plead that the Romspen Defendants knew or should have known of Milam's negligent, reckless, and fraudulent acts as manager of MOS8, and as a result of their failure to terminate or properly supervise defendant Milam, the Austin Property was never developed. White pleads that when he learned of Milam's conduct, he demanded his investment be returned, but Romspen Investment

threatened to foreclose on the Austin Property and effectively sink any remaining funds. Plaintiffs claim that Romspen Investment engaged in a "loan to own" scheme.

MOS8 purported to default on the loan, despite Romspen Defendants' claim they had advanced MOS8 $35,000,000. Plaintiffs assert that despite the funds Defendants claimed to have invested in the development of the Austin Property, there was no evidence of any material construction progress on the site. Romspen then offered White further loans to invest in purchasing the Austin property from MOS8. In July 2016, Romspen created a $40,000,000 loan to White's company 3443 Zen Garden, LP, to complete the development of the Austin Property. As part of the loan agreement, White and his assets assumed MOS8's debt, while Romspen received origination and administrative fees for performing the loan. From November 2016, White and his assets continued to invest in the Austin Property.

During 2017, White visited the Austin Property and was approached by Zarafshani, who introduced himself as a "scrap buyer." Zarafshani claimed to be a local developer who owned Panache, a local construction company, and was familiar with local construction and development. Plaintiffs assert that Zarafshani sought to persuade White that Panache would be indispensable in the development of the Austin Property and induce White to enter into a contract to hire Panache as the general contractor for development of the Austin Property. White asserts he did so based on a variety of misrepresentations, including that: Zarafshani possessed the requisite skills to be White's trustee; Zarafshani possessed sufficient skill and resources to serve as an officer or director of one or more of White's assets; Panache

possessed the skill and resources necessary to ensure timely development of the Austin Property within proposed budgetary guidelines; Panache could use its experience in local construction to secure more favorable loan terms from Romspen Investment; and Panache could ensure timely construction draws from Romspen Investment.

White not only hired Zarafshani and Panache as the general contractor for development of the Austin Property, but also appointed Zarafshani to become director of White's assets and serve as his trustee. White asserts he relied on Zarafshani and Panache to manage the business affairs and the development of the Austin Property.

On February 1, 2018, Romspen Mortgage committed to lend Zen Garden an additional $125,000,000. Zarafshani conducted loan negotiations on behalf of Zen Garden. Plaintiffs assert that Zarafshani and Romspen Mortgage improperly colluded during the loan negotiations in breach of their fiduciary duties to White and his assets. Plaintiffs further argue that Zarafshani went on to intentionally sabotage the development in collusion with Romspen Investment so that Zen Garden would default, providing Romspen Investment the ability to directly acquire the Austin Property, thereby fulfilling the alleged "loan to own" scheme.

Plaintiffs also complain that Zarafshani negotiated a loan that contained exorbitant loan fees and interest rates benefiting Romspen Mortgage. And the loan further required great overcollateralization between the Austin Property and other of White's assets in Canada (worth in excess of $260 million USD). Plaintiffs plead that following the signing of the loan, Romspen Mortgage intentionally or recklessly

delayed and failed to make requisite disbursements to stall and sabotage the development of the Austin Property.

Plaintiffs assert that because Romspen Mortgage refused to honor the loan agreement with Zen Garden, Zen Garden declared bankruptcy and lost the Austin Property. Plaintiffs also plead that Defendants conspired not only to force White and Zen Garden to default on payments on the Austin Property, but they also conspired to discount the foreclosure sale. When the Austin Property was put up for auction, Zarafshani and Romspen Mortgage (individually or through representative agents) allegedly issued false statements on the property's value and conditions to drive away potential bidders and to drive down the auction price. Plaintiffs assert that a reasonable bid offer was never received for the project.

On March 22, 2020, Zen was petitioned into an involuntary Chapter 11 bankruptcy in the United States Bankruptcy Court for the Western District of Texas, Case No. 20-10410. Plaintiffs filed an Adversary Proceeding, Adversary Case No. 20-01047 in the Bankruptcy Court, against the Romspen Defendants, Panache, and Zarafshani in which Plaintiffs alleged many of the same issues as those raised in the instant case. On or about December 3, 2021, Plaintiffs and the Romspen Defendants entered into a consensual order dismissing the Adversary Proceeding.

Pursuant to the Order, Plaintiffs were precluded from raising claims against the Romspen Defendants which belonged to the Chapter 11 Trustee. However, the Order specifically carved out any claims that Plaintiffs could independently bring

against the Romspen Defendants, Zarafshani, or Panache. Plaintiffs attempt to bring those claims here.

**B. Romspen Entities' Motion to Dismiss, Dkt. 74**

The Romspen Defendants move to dismiss Plaintiffs' claims arguing they are barred because the claims have been released and therefore Plaintiffs do not have standing to bring them, and that they belong to Zen Garden and must be brought by the Bankruptcy Trustee.

1. Release of Claims Through Zen Loan Agreement

The Romspen Defendants argue that Plaintiffs have released all factual allegations that predate that the Zen Loan Agreement when they entered into that Agreement on April 27, 2018. Dkt. 74, at 8. Plaintiffs argue that: (1) the Zen Loan Agreement is not properly before the Court and thus it cannot be considered when ruling on the motion to dismiss; and (2) the Zen Loan Agreement did not incorporate the RIC/MOS8 Agreements, and therefore does not provide for a release of claims related to those Agreements. Dkt. 76, at 9.

The Romspen Defendants rely on the following release found in the Zen Loan Agreement:

> 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 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.

Dkt. 74-1, at 6.

> "Borrower Parties" are defined as:
>
> 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."

*Id.*, at 68.

Daniel White signed the Agreement in several places in his capacity as: Vice President of 3443 Zen Garden GP, LLC; as an individual guarantor; Director of Lot 11 Limited Partnership; Director of Eco-Industrial Business Park, Inc.; Director of Absolute Energy Resources, Inc.; and Director of Absolute Environmental Waste Management, Inc. *Id.*, at 63-65.

As a preliminary matter, the parties dispute whether the Court can even consider the Zen Loan Agreement in assessing the relevant motions to dismiss. In considering a motion to dismiss for failure to state a claim, a district court must limit itself to the contents of the pleadings, including attachments thereto. Fed. R. Civ. P. 12(b)(6). However, in this case, Defendants move to dismiss, not only based on Rule 12(b)(6), but based upon Rule 12(b)(1), which allows the Court to consider evidence outside the Complaint.

Moreover, regarding a motion to dismiss brought pursuant to Rule 12(b)(6), in *Collins v. Morgan Stanley Dean Witter*, the Fifth Circuit noted approvingly "that

various other circuits have specifically allowed that "[d]ocuments that a defendant attaches to a motion to dismiss are considered part of the pleadings if they are referred to in the plaintiff's complaint and are central to her claim." 224 F.3d 496, 498-99 (5th Cir. 2000) (quoting *Venture Assocs. Corp. v. Zenith Data Sys. Corp.*, 987 F.2d 429, 431 (7th Cir. 1993)). The undersigned finds that in accordance with *Collins*, the attached Zen Loan Agreement documents are central to Plaintiffs' claims and referenced in their Complaint. Dkt. 70, at 12 (referring to "the second loan agreement to Zen Garden"). Moreover, Plaintiffs' harms pleaded in this case are loss of the Austin Property, loss of their investment in the Austin Property, and loss of income from the Austin Property. These losses are as a direct result of Zen Garden's default under this agreement. The Court may properly consider the Zen Loan Agreement in determining Plaintiffs' standing to bring certain claims.

Article III of the Constitution limits federal jurisdiction to actual "[c]ases" and "[c]ontroversies." U.S. Const. Art. III, § 2; *see also Deakins v. Monaghan*, 484 U.S. 193, 199 (1988). "Standing to sue is part of the common understanding of what it takes to make a justiciable case." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 102 (1998) (citing *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990)). Article III standing, therefore, "is a jurisdictional requirement"—in other words, when a plaintiff lacks standing, a federal court lacks subject matter jurisdiction over that plaintiff's claims. *Davis v. Tarrant Cnty.*, 565 F.3d 214, 220 (5th Cir. 2009).

The "irreducible constitutional minimum of standing" includes three elements. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992). "First, the plaintiff must have

suffered an injury in fact—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical." *Id.* (citations and internal quotation marks omitted). Second, the injury must be causally connected to the complained-of conduct; in other words, it must be "fairly ... trace[able] to the challenged action of the defendant, and not ... th[e] result [of] the independent action of some third party not before the court." *Id.* (alterations in original) (quoting *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 41-42 (1976)). And third, "it must be 'likely,' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision.'" *Id.* at 561 (quoting *Simon*, 426 U.S. at 38, 43).

In their Omnibus[5] Response, Plaintiffs assert that White was fraudulently induced into investing in and personally guaranteeing the Austin Project prior to the Zen Loan Agreement, and then fraudulently induced into guaranteeing the Zen Loan Agreement[6] itself. Dkt. 92, at 6 (citing Dkt. 70, Plaintiffs' Third Amended Complaint, at ¶¶ 20-23, 61-63, 84). Accordingly, they argue the release language in the Zen Loan Agreement should not be considered as it was procured by fraud. The Romspen Defendants respond that Plaintiffs are asserting new allegations in their Response that they did not raise in their Complaint, which they cannot do in a response to a motion to dismiss.

[5] Plaintiffs filed two separate Responses, Dkts. 76 and 77, to the Defendants' motions to dismiss and then filed another "Amended Omnibus Response" Dkt. 92. Plaintiffs submit the additional briefing as supplemental to their prior briefing.

[6] The undersigned notes that Plaintiffs assert that they have pleaded a claim that White was fraudulently induced to guarantee the Zen Loan Agreement, thereby negating Defendants' release argument, but also claim the Agreement may not be considered as evidence because it is not central to Plaintiffs' claims. The undersigned finds the case law cited by Plaintiffs in support is inapplicable, and the argument unavailing.

"'A plaintiff may not amend [their] complaint in [their] response to a motion to dismiss.'" *Mun. Emps.' Ret. Sys. of Mich. v. Pier 1 Imports, Inc.*, 935 F.3d 424, 436 (5th Cir. 2019) (quoting *Lohr v. Gilman*, 248 F. Supp. 3d 796 (N.D. Tex. 2017)). A court must limit itself to considering the pleadings, not matters or theories raised in response to the motion to dismiss. *See Lohr*, 248 F. Supp. 3d at 810. The issue here, then, is whether Plaintiffs in fact respond with a theory not raised in their Third Amended Complaint.

The Court has reviewed Plaintiffs' Third Amended Complaint and finds that they have failed to plead a cause of action for fraudulent inducement or attack the validity on the Zen Loan Agreement. The closest they come is in Paragraph 63 where they claim that "Defendants conspired to engineer a fraudulent loan scheme to force Mr. White and Zen Garden to default on payments on the Austin Property, with the intent to purchase the property at a discounted foreclosure rate." Dkt. 70, at 12. But these general allegations do not allege inducement of White to release claims against the Romspen defendants in the Zen Loan Agreement.

Rule 9(b) requires complainants asserting fraud, fraudulent inducement, and negligent misrepresentation to plead facts with sufficient particularity to "provide defendants adequate notice of the nature and grounds of the claim." *Hart v. Bayer Corp.*, 199 F.3d 239, 247 n.6 (5th Cir. 2000). Pleadings must "specify the statements contended to be fraudulent, identify the speaker, state when and where the statements were made, and explain why the statements were fraudulent." *Southland Sec. Corp. v. INSpire Ins. Solutions, Inc.*, 365 F.3d 353, 362 (5th Cir. 2004). "Put

simply, Rule 9(b) requires the 'who, what, when, where, and how' to be laid out." *Benchmark Elecs., Inc. v. J.M. Huber Corp.*, 343 F.3d 719, 724 (5th Cir.), modified, 355 F.3d 356 (5th Cir. 2003). Plaintiffs have not done so here. The Third Amended Complaint does not identify a specific statement, speaker, or fraud related to the Zen Loan Agreement, but merely alludes to a generalized scheme. Accordingly, Plaintiffs have not pleaded that they were fraudulently induced to enter into the Agreement, and that the release is invalid on that basis. The undersigned finds that pursuant to the Zen Loan Agreement, Plaintiffs' claims against the Romspen Defendants that pre-date entry to the Agreement were released.

Plaintiffs make a secondary argument that the Zen Loan Agreement did not contain a release of or incorporate the MOS8 Agreements, and because the MOS8 documents did not contain a separate release, and the Romspen Defendants purchased the Austin Property through MOS8 using Plaintiffs' credit, Plaintiffs have separate claims against the Romspen Defendants that are not released.

First, Plaintiffs were not a party to the MOS8 Agreements, and the Romspen Defendants assert that as non-parties Plaintiffs do not have standing to pursue claims pursuant to these agreements. The undersigned agrees; Plaintiffs cannot bring a claim based upon a contract to which they are not parties. *See Carroll v. JPMorgan Chase Bank*, 575 F. App'x 260, 260-61 (5th Cir. 2014) (finding plaintiff lacked standing and was not the "real party in interest" when it had no right to sue under contract); *Farrell Constr. Co. v. Jefferson Parish*, 896 F.2d 136, 140 (5th Cir. 1990) (finding plaintiff was not a "real party in interest" when it was neither a party

to the contract nor a third party beneficiary). However, also in issue here is whether Plaintiffs released their fraud claims against the Romspen Defendants for other contractual agreements. The undersigned finds they did.

The Zen Loan Agreement specifically provides for a general release of all claims "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." Dkt. 74-1, at 6. The parties dispute whether this release applies to the MOS8 documents. However, a review of the August 2015 Commitment, which is the Supplement No. 1 of the Acquisition Loan, provides that the proceeds for the loan will be used to assist the Borrowers to provide loans and/or capital contributions to the Covenantors, to enable Covenantors to make a capital contribution to or purchase ownership interests in MOS8 Partners, Ltd. Dkt. 70-5, at 2. The Supplement to the Acquisition Loan was the only connection between the Plaintiffs and the MOS8 Agreements, and its purpose was to fund the Austin Property. Thus, the entry into the MOS8 Agreements was a transaction "arising" out of the Acquisition Loan and Acquisition Loan documents, which was clearly within the subject matter of the release, and any claims of fraud relating to those documents Plaintiffs might bring are barred by their release in the Zen Loan Agreement.

The undersigned finds that Plaintiffs have released the Rompsen Defendants of all liability for any acts occurring prior to Aril 27, 2018, and these claims should be dismissed.

2. Standing

As to claims supported by factual allegations that post-date entry into the Zen Loan Agreement, the Romspen Defendants argue Plaintiffs lack the capacity to bring these claims as they are rightfully owned by 3443 Zen Garden Limited Partnership, the debtor in possession that formerly owned the Austin Property, and Plaintiffs are not real parties in interest. The Romspen Defendants also argue that the Trustee has released any claims that the Debtor may have had against the Romspen Defendants in the Confirmed Plan of Reorganization entered by the Bankruptcy Court, and therefore Plaintiffs cannot now bring these claims, unless they request to proceed in a derivative posture, which has not occurred.

Plaintiffs contend that White is asserting his individual claims as a guarantor of the August 2015 Commitment. *See* Dkt. 78, at 16. White asserts that any damages he might recover do not belong to the 3443 Zen Garden bankruptcy estate but "are damages personal to him, stemming from the personal obligations of the debt, which debt was incurred well before the 2018 Loan Agreement." Dkt. 76, at 17. As outlined above, Plaintiffs, including White, released any claims arising against the Romspen Defendants prior to entry into the 2018 Loan Agreement, and thus this claim necessarily fails.

Moreover, claims for corporate injuries must be brought, directly or derivatively, by the entity suffering the injury. *Wingate v. Hajdik*, 795 S.W.2d 717, 719 (Tex. 1990) (quoting *Massachusetts v. Davis*, 168 S.W.2d 216 (1942)) ("Ordinarily, the cause of action for injury to the property of a corporation, or the impairment or

destruction of its business, is vested in the corporation ...." (internal quotation marks omitted)). Hence, an entity's shareholder or owner does not have direct standing to assert a claim based on an injury suffered by the entity itself. *See Siddiqui v. Fancy Bites, LLC*, 504 S.W.3d 349, 360 (Tex. App.—Houston [14th Dist.] 2016, pet. denied) ("[A] limited partner does not have standing to sue for injuries to the partnership that merely diminish the value of partnership interests or a share of partnership income; such claims may be asserted only by the partnership itself.").

In bankruptcy, claims arising from injuries suffered by debtor entities belong to those debtors' estates. *In re Educators Grp. Health Tr.*, 25 F.3d 1281, 1284 (5th Cir. 1994) (citing *S.I. Acquisition, Inc. v. Eastway Delivery Serv., Inc. (In re S.I. Acquisition, Inc.)*, 817 F.2d 1142, 1152 (5th Cir. 1987)). An estate's ownership of claims arising from direct harm to the debtor entity precludes shareholders from asserting derivative claims on the debtor entity's behalf. *See id.* at 1285 (explaining that claims arising from direct harm to a debtor, which only derivatively harmed a plaintiff, belong exclusively to the debtor's estate). *See In re Neighbors Legacy Holdings, Inc.*, 18-33836, 2022 WL 4073663, at *7 (Bankr. S.D. Tex. Sept. 2, 2022). Thus, to proceed with their claims, Plaintiffs must identify a harm other than to 3443 Zen Garden.

Plaintiffs argue that their harm is separate from that of Zen Garden because their personal and trust assets are at risk through White's guarantee of the Zen Garden loan. Plaintiffs' harms pleaded in this case are loss of the Austin Property, loss of their investment in the Austin Property, and loss of income from the Austin

Property. These harms are to Zen Garden. The general rule in Texas is that "guarantors do not have standing to bring claims for breach of contract on behalf of the principal debtor." *Compass Bank v. Veytia*, No. EP-11-CV-228-PRM, 2011 WL 6046530, at *3 (W.D. Tex. Dec. 5, 2011). Where a plaintiff is both a shareholder and a guarantor, he lacks standing to sue in a personal capacity where the claim belongs to the corporation. *See, e.g., Corona v. Pilgrim's Pride Corp.*, 245 S.W.3d 75, 78-79 (Tex. App.—Texarkana 2008, pet.denied) (dismissing breach of contract, negligence, fraud, conspiracy to commit fraud, and conversion claims for lack of standing); *Motorola, Inc. v. Chapman*, 761 F. Supp. 458, 460-61 (S.D. Tex. 1991) (limiting plaintiffs' standing to "claims based on wrongs against them personally," which included claims involving guaranties); *see also DT Apartment Group, LP v. CWCapital, LLC*, No. 3:12-CV-0437-D, 2012 WL 6693192, at *27 (N.D. Tex. Dec. 26, 2012).

In *Wyrick v. Business Bank of Texas, N.A.*, 577 S.W.3d 336 (Tex. App.—Houston [14th Dist.] 2019, no pet.), cited by Plaintiffs, the court of appeals held that the managing members of an LLC, who had guaranteed a loan to the LLC, had standing to assert claims against the lender that arose out of conduct of the lender in procuring the guaranties from the managing members, but the managing members did *not* have standing to assert claims based on post-default conduct of the lender that damaged the value of the LLC's property and interfered with the LLC's ability to contract with third parties.

In this case, a review of the Third Amended Complaint shows that Plaintiffs' complaints against the Romspen Defendants, that are not subject to the release, involve Romspen's acts related to the treatment of Zen Garden in relation to the loan, specifically: consistently and unreasonably denying White and Zen Garden's requests to draw on the loan; attempting to coerce White and Zen Garden into a Forbearance Agreement; attempting to coerce White into accepting a settlement; refusing to honor the loan agreement with Zen Garden causing it to declare bankruptcy and loss of the Austin property; driving away bidders and driving down the auction price through false statements, and thereby causing White and his assets damage to their image as well as significant financial losses due to the loss of the Austin Property's development. Dkt. 70, at 12-13.

The undersigned finds that the conduct outlined above, conduct surviving the release, constitutes the same injuries suffered by Zen Garden, not separate injuries to Plaintiffs. Accordingly, Plaintiffs do not have the standing or capacity to bring these claims on their own behalf. *See Chase v. Hodge*, No. 1:20-cv-0175-RP, 2021 WL 1948470 (W.D. Tex. May 14, 2021), *report and recommendation adopted*, 2021 WL 8017993 (W.D. Tex. June 23, 2021) (concluding that the plaintiff did not have standing to pursue breach-of-fiduciary-duty claims that alleged harm to an LLC because a claim of harm to the entity must be brought directly or derivatively by the entity suffering harm); *but see In Lomix Limited Partnership v. Compass Bank*, No. 1:15-CV-00050, 2018 WL 11152159 (S.D. Tex. 2018), *on reconsideration in part*, 2019 WL 9698534 (S.D. Tex. 2019) (concluding that guarantors of a loan to an LLC were

asserting direct claims as signatories to a contract rather than derivative claims because they alleged that the bank harmed them individually by disclosing their financial information to third parties, and guarantors thus possessed capacity as real parties in interest); *In re Dean*, No. 16-43088-mxm-7, 2018 WL 4810700 (Bankr. N.D. Tex. 2018) (stating that most of the claims asserted by the debtor against her fellow LLC member related to harm that her fellow member allegedly caused the LLC, and the debtor did not have standing to assert the LLC's causes of action, including breach of fiduciary duty owed to the LLC, because she was no longer a member of the LLC).

The Romspen Defendants also argue that Plaintiffs' Complaint should be dismissed because it violates the Agreed Order of Dismissal, Dkt. 74-4, entered by the Bankruptcy Court in the Adversary Proceeding. The Order of Dismissal[7] dismissed with prejudice all claims asserted by Plaintiffs supported by factual allegations taking place after Zen Garden came into legal existence or supported by factual allegations relating to or arising from the Debtor in any way. And after the

[7] The Dismissal Order reads in relevant part:
IT IS FURTHER ORDERED THAT to the extent any and all claims stated by the Plaintiffs in the Second Amended Complaint are supported by any factual allegations (i) allegedly occurring or taking place after the date 3443 Zen Garden Limited Partnership ("Debtor") came into legal existence; or (ii) otherwise involving, relating to and/or arising from the Debtor in any way ("Zen Allegations"), such claims are hereby dismissed with prejudice under Federal Rule of Civil Procedure 12(b)(6) for lack of standing, as the Debtor's bankruptcy estate possesses the exclusive standing to assert any claims supported by such Zen Allegations. The dismissal of all of the Plaintiffs' claims stated in the Second Amended Complaint to the extent supported by any Zen Allegations is with prejudice and shall be construed to act as collateral estoppel, res judicata, and carry full preclusive effect against any claims of the Plaintiffs supported by Zen Allegations, including, but not limited to, those claims supported by Zen Allegations asserted or assertable in the federal court action styled *as Dan White v. Romspen Mortgage Limited Partnership, et al.*, Civil Action No. 21-00517-RP, currently pending in the United States District Court for the Western District of Texas, Austin Division.

Dismissal Order, the Romspen Defendants maintain, Plaintiffs are now also barred from bringing these claims by res judicata. The undersigned agrees and finds that the claims the White Defendants assert in this case are barred by res judicata, notwithstanding any "carve out" in the Bankruptcy Court's Order of Dismissal, which allowed other claims to go forward between the parties to extent those were found by this Court not to belong to the Debtor Zen Garden. In light of the preceding finding that Plaintiffs' claims against the Romspen Defendants belong to Zen Garden, the undersigned finds that the "carve out" is inapplicable and that res judicata applies.

Lastly, the Rompsen Defendants assert that Plaintiffs have failed to adequately plead their causes of action, as required by Rules 9(b) and 8. In light of the above analysis, finding that the Court lacks jurisdiction over their claims, the Court declines to conduct a separate 12(b)(6) analysis regarding Plaintiffs' claims against the Romspen Defendants.

**C. Panache Defendants' Motion to Dismiss, Dkt. 75**

Similar to the Romspen Defendants, the Panache Defendants argue that Plaintiffs cannot bring claims against them because Plaintiffs lack standing to bring those claims, as they belong to Zen Garden as the Debtor in the bankruptcy estate and only the Trustee may bring those claims on behalf of the Debtor. Dkt. 75, at 5. The Panache Defendants argue that through this suit, Plaintiffs are attempting to collect, on a priority basis, contingent contribution and reimbursement claims against the Debtor, by asserting claims that actually belong to Zen Garden for Plaintiffs' own benefit. *Id.*, at 6.

Plaintiffs argue that they are asserting separate claims from Zen Garden against the Panache Defendants, for unique harm from the use and misuse of White Family Trust assets. Dkt. 77, at 6. Specifically, Plaintiffs assert claims against Zarafshani for breach of fiduciary duty as well as breach of the duties of good faith, fidelity, care and candor and disclosure, in his role as trustee to the White Family Trust. Plaintiffs plead that, relying on his false and misleading misrepresentations, White appointed Zarafshani to become a director of White's assets and serve as his trustee. Dkt. 70, at 11. Plaintiffs further plead that Zarafshani had a fiduciary duty to Plaintiffs based upon his role as a director of the White Family Trust. *Id.*, at 28. Plaintiffs also plead that the Panache Defendants misrepresented to them that they would develop the Austin Property in a consistent and profitable basis, on budget and on time, which did not occur. *Id.*, at 33. Plaintiffs assert damages based upon the failure to bring the cost of the project under control, delayed construction, failure to lease out the property, and a general failure to carry out the duties for which they were hired. *Id.*, at 35.

The determination of whether a cause of action belongs to the bankruptcy estate, and whether an individual creditor is therefore precluded from separately litigating it, depends on whether recovery would inure to the debtor corporation's benefit or to the individual creditor's, and on whether the creditor would be barred by a settlement by the trustee. *In re S.I. Acquisition*, 817 F.2d at 1142 (finding two circumstances that affect a creditor's claim against a non-debtor affiliate of the debtor: (1) when the claim "belongs to" the debtor, or (2) when the claim seeks

"recovery or control" of property of the debtor). In *In re Schimmelpenninck*, the Fifth Circuit determined when a trustee, rather than an individual creditor, could pursue a cause of action. 183 F.3d 347, 359–60 (5th Cir. 1999). The court found three kinds of action exist: (1) actions by the estate that belong to the estate; (2) actions by individual creditors asserting a generalized injury to the debtor's estate, which ultimately affects all creditors; and (3) actions by individual creditors that affect only that creditor personally. *Id.* The court held that:

> The trustee is the proper party to advance the first two of these kinds of claims, and the creditor is the proper party to advance the third. This construction ensures that the estate will not be wholly or partially consumed for the benefit of one creditor, or even a small number of creditors.

*Id.* Additionally, in *In re MortgageAmerica Corp.*, the Fifth Circuit found that under Texas law a cause of action asserting that fiduciaries of a corporation have looted that corporation, belongs to the corporation, and if the corporation refuses to act it belongs to its shareholders in a derivative action; however, upon bankruptcy, the cause of action passes to the trustee, who is then charged with prosecuting it for the benefit of all creditors and shareholders. 714 F.2d 1266, 1276 (5th Cir. 1983).

The Panache Defendants argue that: Zen Garden, the Debtor in the bankruptcy action, was the owner of the Austin Property; Zen Garden was the ultimate recipient of Plaintiff's investment; Zen Garden was the borrower under the lending agreement with Romspen Mortgage; as the borrower, Zen Garden submitted construction draw requests to Romspen; and that the alleged delays, late funding, and other failures are alleged to have driven Zen Garden into default causing the loss

of the Austin Property. Dkt. 75, at 7. Therefore, the Panache Defendants argue that Plaintiffs' claims belong to Zen Garden and may only be brought on its behalf either through the Trustee or as a derivative claim. Moreover, the Panache Defendants maintain that the Plan and Confirmation Order entered in the bankruptcy action enjoins anyone other than the Trustee from doing so, Dkt. 75-4, at 20, 52-58, 59-60, and that any circumstances allowing Plaintiffs to proceed in a derivative posture have not occurred, Dkt. 75, at 8. Thus, the Panache Defendants argue that Plaintiffs do not have standing to bring this case. The undersigned agrees.

Plaintiffs argue that the Panache Defendants harmed them apart from claims that could be brought by the Zen Garden bankruptcy estate. Plaintiffs rely on White's 14-page Declaration, Dkt, 77-1, and argue that as a trustee of the White Family Trust, Zarafshani exercised control over a wide-ranging portfolio of Trust assets, including Absolute Environment Waste Management, Inc., Absolute Energy Resources, Inc., and Eco-Industrial Business Park, Inc., which he identifies as Canadian corporations wholly owned and controlled by the Trust. Dkt. 77-1. In his Amended Declaration, Dkt. 78, White testifies that Zarafshani: improperly executed a $1 million line of credit between Panache and 3443 Zen Garden, which he controlled at the time; improperly pledged Trust assets[8] to guarantee the $125 million loan from Romspen Mortgage to 3443 Zen Garden, LP; improperly included a $8.1 million payment to Panache within the $125 million loan; misappropriated Trust property when $4.6

[8] The Third Amended Complaint and evidence properly before the undersigned pursuant to Rule 12(b)(1) reveal that Dan White signed at least some of the relevant documents pledging Trust asserts as collateral.

million was wired to Panache as a draw[9] on the loan; improperly entered into a construction agreement for the Austin Property on behalf of Panache; failed to properly perform the Austin Property construction; improperly retitled a Trust vehicle[10] into his own name; and a litany of other complaints. Dkt. 78. White asserts he has standing to bring these claims, along with others,[11] as the co-trustee of the White Family Trust.

The Panache Defendants point out that White, in attempting to bring claims that would not belong to Zen Garden, is trying to improperly insert new factual bases and claims through White's Declaration, attached to its Response, and through the Omnibus Response. Dkt. 92, at 10. However, the Court has entered an Agreed Order submitted by the parties stating the Third Amended Complaint is Plaintiffs' last opportunity to plead. Dkt. 67 ("Plaintiff shall be precluded from filing any further amendments to the complaint."). Relying on the analysis set out above, the undersigned finds that Plaintiffs cannot latently bring additional claims, including any novel fraudulent inducement claim, regarding Zarafshani's or Panache's actions, not included in the Third Amended Complaint, in a Response. As addressed above, Plaintiffs did not plead they were fraudulently induced to act as guarantors or provide

[9] This event occurred after the creation of Zen Garden and any "looting" or misappropriation of funds meant for the development of the Austin Property would belong to Zen Garden and properly brought by the Bankruptcy Trustee.
[10] This event is not mentioned in Plaintiffs' Third Amended Complaint.
[11] White's Declaration, Dkt. 77-1, also asserts that Zarashani had "complete control" over Absolute Waste, Absolute Energy, and Eco-Industrial Business Park, Inc. He alleges that in his capacity as trustee, Zarafshani not only pledged these company's assets as collateral for the loan between Zen Garden and Rompsen Mortgage Limited Partnership; but also, destroyed and looted these companies for his own benefit. The Third Amended Complaint lacks any similar claims.

their Canadian assets as collateral for the Zen Garden loan, and may not do so at this juncture, through responsive pleadings.

Additionally, Plaintiffs have not identified any "action by an individual creditor" properly before the Court and thus lack the standing and capacity to bring those claims. The claims Plaintiffs have identified against the Panache Defendants in their Third Amended Complaint relate to damage and harm caused by the Panache Defendants to the Austin Property. Those claims belong to Debtor Zen Garden and must be brought by the Bankruptcy Trustee. Plaintiffs do not have standing to bring claims against the Panache Defendants, and any injury Plaintiffs properly allege occurred to Zen Garden.

Accordingly, the undersigned finds that Plaintiffs' claims are properly dismissed for a lack of subject matter jurisdiction.

## IV. RECOMMENDATION AND ORDER

In accordance with the foregoing discussion, the undersigned **RECOMMENDS** that the District Court **GRANT** Defendants Romspen Mortgage Limited Partnership's, Romspen Investment Corporation's, Wesley Roitman's, and Richard Weldon's Motion to Dismiss Plaintiffs Daniel White and Dan White Family Trust's Third Amended Complaint, Dkt. 74, and **GRANT** Panache Defendants' Motion to Dismiss Plaintiffs' Third Amended Complaint, Dkt. 75, and **DISMISS** Plaintiffs' claims for lack of subject matter jurisdiction pursuant to Federal Rule of Civil Procedure 12(b)(1). It is **FURTHER ORDERED** that the referral to the undersigned is **CANCELED.**

Having addressed all the referred motions, this cause of action is **ORDERED REMOVED** from the docket of the undersigned and **RETURNED** to the docket of the Honorable Robert Pitman.

## V. WARNINGS

The parties may file objections to this Report and Recommendation. A party filing objections must specifically identify those findings or recommendations to which objections are being made. The District Court need not consider frivolous, conclusive, or general objections. *See Battle v. United States Parole Comm'n*, 834 F.2d 419, 421 (5th Cir. 1987). A party's failure to file written objections to the proposed findings and recommendations contained in this Report within fourteen days after the party is served with a copy of the Report shall bar that party from *de novo* review by the District Court of the proposed findings and recommendations in the Report and, except upon grounds of plain error, shall bar the party from appellate review of unobjected-to proposed factual findings and legal conclusions accepted by the District Court. *See* 28 U.S.C. § 636(b)(1)(C); *Thomas v. Arn*, 474 U.S. 140, 150-53 (1985); *Douglass v. United Servs. Auto. Ass'n*, 79 F.3d 1415, 1428-29 (5th Cir. 1996) (en banc).

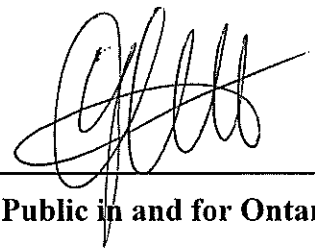
SIGNED December 7, 2022.

DUSTIN M. HOWELL
UNITED STATES MAGISTRATE JUDGE

**This is Exhibit "B" referred to**

**in the Affidavit of WESLEY ROITMAN**

**Sworn before me this 14th day of December, 2022**



**A Notary Public in and for Ontario**

JOEL MICKELSON
Barrister & Solicitor
162 Cumberland Street, Suite 300
Toronto ON M5R 3N5
Direct Line: 416.928.4870

ROMSPEN
investment corporation

**Our File: 8212**

Effective as of August 31, 2015

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 (the "**Commitment**"), among Romspen Investment Corporation, as trustee (the "**Lender**"), Lot 11 Limited Partnership, Eco Energy GP Ltd., Eco Energy Limited Partnership and Absolute Energy Resources 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. 1 (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 "Covenantor" is amended by deleting "Reserved" and inserting the following:

> "The obligations and liabilities of the Borrowers in respect of all tranches of the loan related to the Austin Property (defined below) will be guaranteed, jointly and severally, by all persons or entities owning, directly or indirectly, an interest in the Texas GP or the Texas LP, other than Richard Weldon (each, a "**Covenantor**").

(b) Section 3 "Approved Loan Amount" is amended by inserting the following as the fourth sentence thereof:

"The approved second tranche of the Loan is approximately $545,000. The approved third tranche of the Loan is approximately $137,000. The approved fourth tranche of the Loan is Canadian dollar equivalent of approximately US$5.2 million.";

(c) Section 5 "Advance Dates" is amended by inserting the following at the end thereof:

"The second tranche was advanced on August 31, 2015. The third tranche was advanced on September 16, 2015. The fourth tranche will be advanced on or around September 29, 2015."

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

"The proceeds of the second, third and fourth tranches of the Loan will be used to (a) assist the Borrowers in providing loans and/or capital contributions to the Covenantors, to enable Covenantors to make a capital contribution to (or purchase ownership interests in) MOS8 Partners, Ltd., a Texas limited partnership (the "**Texas LP**"), to assist the Texas LP in purchasing the property municipally known as 3501 Ed Bluestein Blvd., Austin, TX 78721 (the "**Austin Property**"), to assist Covenantors to acquire membership interests in MOS8 GP, LLC, a Texas limited liability company (the "**Texas GP**"), and (b) to pay fees and transaction costs.";

(e) Section 25 "Special Provisions" is amended by deleting "Reserved" and replacing it with the following:

25.1 **Appointment of Nominee**

Borrowers and Dan White hereby appoint Richard Weldon (the "**Nominee**"), as their nominee and agent, to, on their behalf:

(a) receive the proceeds of the second, third and fourth tranches of the Loan, upon a direction to be executed and delivered by the Borrowers in such form as the Lender may require;

(b) negotiate and enter into, as a limited partner, the limited partnership agreement for the Texas LP;

(c) negotiate and enter into, as a member and manager thereof, the operating agreement for the Texas GP;

(d) negotiate, execute and deliver, whether as limited partner of the Texas LP or as a member or manager of the Texas GP, any and all agreements, instruments, certificates or other documents necessary to complete the purchase of the Austin Property by the Texas LP, and to provide for the development and management of the Austin Property, which development and management agreements may be with affiliates of, or parties related to the Lender; and

(e) negotiate, execute and deliver, whether as limited partner of the Texas LP or as a member or manager of the Texas GP, any and all agreements, instruments, certificates or other documents necessary or required by the first lien lender, to complete the first mortgage loan secured by a first-ranking deed of trust of the Austin Property.

25.2 **Pledge of Ownership of Texas GP and Texas LP**

Borrowers and Dan White shall advise the Lender of the proposed ownership structure of the Texas GP and the Texas LP within 2 weeks of the Advance of the fourth tranche. The Lender shall approve such ownership structure, in its sole discretion, acting reasonably. Upon Lender's approval, Lender will cause the Nominee to transfer the Nominee's ownership/partnership interests of the Texas GP and the Texas LP to the Covenantors approved by the Lender.

As additional security for the Loan, Borrowers and/or Dan White shall, or shall cause any Covenantor owning, directly or indirectly, an ownership interest in the Texas GP or the Texas LP, to immediately thereafter pledge all direct or indirect ownership interests in the Texas GP or the Texas LP to the Lender or its nominee, as the Lender may require, and if such interests are certificated, to deliver such certificates to the Lender together with a power of attorney and transfer in blank. Borrowers and Dan White authorize, and will cause any Covenantor to authorize, the Lender to register such pledges in the applicable personal property registries in the applicable jurisdictions. The forms of pledges will be determined by the Lender in its sole discretion, and will include such negative covenants, including, without limitation, covenants regarding transfers, encumbrances and voting, as the Lender may require.

25.3 **Profit Participation**

As a collateral advantage to the Lender, and in consideration of the Lender agreeing to make the Loan to the Borrowers (which Loan will be of a material benefit to the Covenantors), at the interest rates provided herein and on the other terms and conditions set out herein, the Borrowers and Dan White agree to pay to the Lender (or its designee or nominee), and agree to cause the Covenantors to agree to pay to the Lender (or its designee or nominee), in addition to all other amounts payable hereunder or in any other Security, 15% of the partnership distributions or member distributions paid to the Covenantor owning either the limited partnership interests of the Texas LP or the membership interests of the Texas GP (the "**Participation Fee**"), on a pari passu basis between the Lender and such limited partner or member.

For greater certainty, no deduction or allocation of expenses may be made for any overhead, salaries to Dan White or any other employee of the Borrowers or any Covenantor or any other entity, or any other expenses paid to any related party.

For greater certainty, the Lender's (or its designee's or nominee's) entitlement to the Participation Fee will continue regardless of the repayment of all or part of any indebtedness under the Loan.

While this is a present agreement to pay the Participation Fee, the terms upon which the Participation Fee is to be payable will be set out in an agreement (the "**Participation Fee Agreement**"), containing these terms and other terms and conditions required by the Lender, in its sole discretion. The Lender's (or its designee's) entitlement to receive, and the Borrowers' and/or Covenantors' obligation to pay, the Participation Fee shall be secured by such additional security as the Lender shall determine, in its sole discretion, and the Borrowers and Dan White agree to, and will cause the Covenantors and other entities to, execute such additional documents and agreements as the Lender may require to effect same.

The Borrowers and Dan White will cause the Covenantor with the entitlement to the distributions from the Texas LP or the Texas GP to give an irrevocable direction to the Texas GP and the manager, respectively, to pay the portion of the distributions representing the Participation Fee directly to the Lender (or its designee or nominee).

25.4 **Asset/Property Management**

Borrowers, Dan White will, or will cause the entities directly or indirectly owning the Texas GP or the Texas LP, within 2 weeks of the date of the Advance of the fourth tranche, to enter into asset and property management agreements with such entities as the Lender may direct or require ("**Asset Manager**"). Such asset or property management entities may be related to or affiliated with the Lender. Such agreements will contain provisions restricting the ability of the entity(ies) owning partnership interests in the Texas LP and membership interests in the Texas GP from making decisions under the partnership agreement and/or operating agreement, as applicable, without the prior consent of the Lender or Asset Manager.

In addition, Borrowers and Dan White acknowledge that the Texas LP has entered or will enter into an asset/property management agreement with an entity affiliated with or related to the Lender, and under the terms of such agreement, such entity will be entitled to certain fees as set out in such agreement, including, but not limited to, asset management, financing, leasing, and disposition fees. Borrowers and Dan White hereby, on their own behalf, and on behalf of the Covenantors, consent to the terms of such agreements.

25.5 **Default**

Any failure of Borrowers or Dan White to comply with the time requirements in this Section will constitute an Event of Default under the Commitment and the Security.

## 2. Security Amendments

The Security will be amended to reflect these Commitment amendments, to the satisfaction of the Lender and its solicitors. The Borrowers and Dan White agree to, and agree to cause Covenantors 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, 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.

## 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. 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 September ____, 2015.

**BORROWERS:**

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

Per: _____
Name:

Title:

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:
Title:

Per:_____
Name:
Title:

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

_____
**Dan White**