

1 Vancouver, BC
2 November 21, 2014
3 Hearing before the British Columbia Securities
4 Commission in the matter The Falls Capital Corp.,
5 Deercrest Construction Fund Inc., West Karma Ltd.
6 and Rodney Jack Wharram:

7 **(PROCEEDINGS COMMENCING AT 10:00 A.M.)**

8 THE HEARING OFFICER: All rise.
9 THE CHAIR: Good morning.
10 MR. WHARRAM: Good morning.
11 MR. FAGBAMIYE: Good morning.
12 THE CHAIR: All right. Mr. Fagbamiye, I believe you're up
13 first.
14 MR. FAGBAMIYE: Yes. Can I proceed?
15 THE CHAIR: Yes.
16 MR. FAGBAMIYE: Thank you. Members of the panel, you have the
17 executive director's written submissions, and we
18 rely on the details set out there.
19 THE CHAIR: Yes, and I can confirm that the panel has read all
20 of the submissions for the parties and there's no
21 need to read in or direct us to any particular
22 parts of those. Obviously tell us what you want
23 to tell us, but we have read all the written
24 submissions.
25 MR. FAGBAMIYE: Okay. What I had in mind is to tell the panel

1 that I'm not going to take you through those
2 submissions page by page.

3 THE CHAIR: Yes.

4 MR. FAGBAMIYE: I just plan to take you to the high points only
5 and some sections of the law which I wish to
6 highlight for you.

7 THE CHAIR: Thank you.

8 MR. FAGBAMIYE: Now, in doing that I also would like to give
9 what I will call a road map so it's easy for you
10 to follow along. I will start with the
11 allegations in Part 1, go briefly over the section
12 57 framework, and go to an overview of how Wharram
13 and through him the corporate respondents knew he
14 was perpetrating a fraud on the investors through
15 his conduct relating to the Falls and Deercreech
16 securities. I will then proceed to Part 2, cover
17 off the *actus reus* and *mens rea* analysis starting
18 with the Falls, and cover the key disagreements
19 that we have over the interpretation of the Falls
20 OMs, and how the entirety of the Falls investor
21 funds was put at risk by the respondents. I will
22 also cover briefly the respondent's new evidence
23 starting with the Falls. I'll then go to Part 3
24 and deal with the applicable standard of proof.
25 And our argument in this case is that the

1 applicable standard of proof is balance of
2 probabilities. And then I'll go to Part 4, cover
3 all the *actus reus* and *mens rea* analysis for
4 Deercrest, again cover the disagreements about the
5 interpretation of the Deercrest OMs and how the
6 entirety of the Deercrest investor funds was put
7 at risk by the respondents. I will cover off
8 quickly the submissions on the previously entered
9 evidence with respect to Deercrest, and then go
10 briefly over a summary of the section 57 framework
11 in the context of Falls and Deercrest taken
12 together, and then round up in Part 6 with false
13 statements to investigators.

14 So I'll start with the allegations. These
15 case is primarily a case of fraud, with an
16 additional allegation of false statements, and
17 I'll start with the alleged fraud. We have
18 alleged that Mr. Wharram, The Falls Capital
19 Corporation, Deercrest Construction Fund
20 Incorporation, and West Karma Ltd. perpetrated a
21 fraud on the investors in The Falls and Deercrest
22 raising \$9,395,400 for property development and
23 only advancing about \$3,936,000 to the developer,
24 and using about \$500,000 of the investments for
25 Wharram's personal expenses.

1 Now, with respect to the section 57
2 framework, we know that from November 22, 2007 to
3 the present Section 57(b) of the Act has stated:

4 A person must not, directly or indirectly,
5 engage in or participate in conduct relating
6 to securities or exchange contracts if the
7 person knows, or reasonably should know, that
8 conduct perpetrates a fraud on any person.

9 The earlier version of section 57(b) was worded
10 differently, but does not significantly alter the
11 approach to be taken in this case.

12 Now, Mr. Wharram and the corporate
13 respondents were clearly engaging in conduct
14 relating to securities by distributing the Falls
15 and Deercrest securities issued pursuant to the
16 offering memorandums of those companies.

17 THE CHAIR: Can I just interrupt you just to ask a framework
18 question. What do you say is the quantum of the
19 fraud here?

20 MR. FAGBAMIYE: The quantum of the fraud will be the amounts
21 that was not advanced to the developer, that will
22 be the quantum of the fraud.

23 THE CHAIR: Okay. Thank you.

24 MR. FAGBAMIYE: And that's the basis on which we're proceeding.

25 THE CHAIR: Okay.

1 MR. FAGBAMIYE: Mr. Wharram and the corporate respondents were
2 clearly engaging in conduct relating to securities
3 by distributing the Falls and Deercrest securities
4 each pursuant to the offering memorandum of those
5 companies. There is no issue in this case about
6 whether it's securities we're dealing with, the
7 securities were the Falls units and the Deercrest
8 bonds issued pursuant to the offering memorandum.

9 The conduct relating to securities which
10 perpetrated a fraud on the Falls and Deercrest
11 investors is that which we have detailed in our
12 submissions through the framework set out in the
13 Supreme Court of Canada decision in *Theroux*, the
14 *actus reus* and *mens rea* of fraud. The *mens rea* of
15 fraud, which are set out in our submission, sets
16 out the details of how the respondents knew that
17 their conduct perpetrated a fraud on the Falls and
18 Deercrest investors.

19 Now I'll proceed to Part 2 and take you to
20 the *actus reus* and *mens rea* analysis by going
21 through some broad points. Our definition of the
22 *actus reus* is derived from *R v Theroux*, a Supreme
23 Court of Canada decision, which can be located at
24 tab 11 of the ED's authorities binder, at page 5
25 of paragraph 9, the hyperlink version is -- that's

1 the hyperlink version which the panel members
2 have. Essentially the definition that we have for
3 the *actus reus* of fraud says it will be
4 established by a prove of:

5 a) the prohibited act, be it an act of
6 deceit, a falsehood or some other fraudulent
7 means; and

8 b) deprivation caused by the prohibitive act,
9 which may consist in actual loss or the
10 placing of the victim's pecuniary interest at
11 risk.

12 Now, to the Falls. The Falls raised
13 \$5,442,400 to lend to a developer. Mr. Wharram
14 confirmed this in his interview and, he also
15 provided three investor lists to the commission
16 staff. However, the Falls only advanced
17 \$2,302,332 to the developer, and these are the
18 only confined to the Falls claims and a whole
19 bunch of documents, and also through Mr. Wharram's
20 oral interview.

21 Now, Wharram provided a summary of all the
22 cheques written by the Falls to the Falls Resort.
23 This showed that the Falls payments of 2,189,301
24 to Blackburn, and payments also totalling
25 113,031.33 to the bare trustees.

1 The executive director submits that by
2 failing to advance such a large portion of
3 investors' funds, Wharram, the Falls and West
4 Karma put the entirety of the Falls investments at
5 risk within the second component of the *actus reus*
6 of fraud deprivation.

7 There was risk of deprivation in that
8 Wharram, the Falls and West Karma only advanced
9 42.30 percent of the Falls investments to the
10 development in which the investors had intended
11 that the majority of their funds were to be
12 invested pursuant to the Falls OMs. Having less
13 than half of the Falls investments forwarded to
14 Blackburn greatly increased the project's risk of
15 failure and therefore the risk of deprivation was
16 present for the entirety of the Falls investments.

17 The executive director further submits that
18 by failing to advance the majority of the Falls
19 investments to the developer as stated in the
20 Falls OMs, Wharram, the Falls and West Karma
21 committed a prohibited act, specifically an
22 unauthorized use of investors' funds within the
23 other fraudulent means component of the *actus reus*
24 of fraud, the prohibited act.

25 I'd like to draw the attention of the panel

1 to the case law on other fraudulent means which is
2 part of the *actus reus* of fraud. You will recall
3 that in the first part of the test for fraud is
4 proof of prohibited act, be it an act of deceit, a
5 falsehood or some other fraudulent means.

6 We have submitted that by failing to advance
7 the majority of the Falls investment to the
8 developer as stated in the Falls OMs, Wharram, the
9 Falls and West Karma committed a prohibited act,
10 specifically an unauthorized use of investors'
11 funds which falls within the other fraudulent
12 means component of the *actus reus* of fraud.

13 The primary authority for this can be found
14 in *Zlatic*, a decision from the Supreme Court of
15 Canada, and this can be found at tab 12 of the
16 executive director's binder authorities at page
17 44, paragraphs 4, lines 8 to 10.

18 Under the heading (i) Fraud by Other
19 Fraudulent Means, the court cites how other
20 fraudulent means includes situations involving the
21 use of corporate funds for personal purposes and
22 also unauthorized diversion of funds.

23 At the end of page 47, paragraph 2, the court
24 cites the Ontario Court of Appeal decision from
25 *Currie*, and I quote:

1 The accused were in the business of investing
2 funds in a certain company, Water-Eze
3 Products Limited, but diverted these funds
4 without notice to the investors to an
5 aviation company known as Aerobec. There was
6 no question of any misrepresentation, nor was
7 there any question as to what the accused
8 were authorized to do with the funds given
9 them. The court found that the accused used
10 the funds in a manner which was not
11 authorized and this was sufficient grounds
12 for finding that the accused acted
13 dishonestly.

14 While still on the *actus reus* of fraud I will now
15 cover the disagreement we have over the
16 interpretation for the Falls OM.

17 THE CHAIR: Just before you go there, just help me with how you
18 view this question about unauthorized use of funds
19 in the context of we have not had much evidence in
20 this hearing as to what the funds that were not
21 specifically advanced as reflecting in the notice
22 of claim, what was that used for. You've led some
23 evidence about some specific uses, but there's a
24 lot of funds which I will call unattributed from
25 an evidentiary point of view. How do you think

1 about that in the context of this -- of this test
2 for unauthorized use of funds?

3 MR. FAGBAMIYE: The context in which we have used the
4 unauthorized use of funds is tied closely to what
5 you have in the notice of hearing, and that is
6 tied to the specific funds that were used without
7 notice to the investors, because the investors
8 testified that they didn't know that some of the
9 funds were to be used in the purpose for which the
10 respondents used it, and for those headings those
11 are the ones in which we are using under
12 unauthorized use of funds. For the other
13 segments, which the panel here has raised, without
14 a tracing we cannot specifically say what those
15 funds were used for. At the same time those funds
16 were not returned to the Falls investors, nor was
17 it returned to the Deercrest investors, so if we
18 cannot raise the funds, and if the respondents
19 cannot account for how the funds were used, and
20 there's nothing going back to the investors, those
21 funds still -- were still not used in an
22 authorized manner, because we have 70 townhomes to
23 be built, for instance, and only two townhomes
24 were built. So only aggregates, we will say our
25 argument would not only survive unauthorized use

1 of funds as specified in the notice of hearing,
2 the issue also provided orders for which it has
3 not been attributed. That's our position.

4 THE CHAIR: Thank you.

5 MR. FAGBAMIYE: Now, I will now cover the disagreements we have
6 with the interpretation of the Falls OM, and I
7 will take the indulgence of the panel chair to go
8 to specific exhibits to point specific things out
9 here to make it easier for us to follow. If madam
10 hearing officer could please bring up BCSC 163.
11 And at BCSC 163 I will take you to page 4, and at
12 page 4 I will direct the attention of the panel
13 members to the topic 1.2, Use of Net Proceeds, and
14 under that heading I will take the panel members
15 to item one, description of intended use of
16 available funds listed in order of priority, and
17 under number one or paragraph number one it says
18 the majority of the proceeds of this offering will
19 be loaned to meet its financial contributions
20 pursuant to the four joint venture agreements to
21 facilitate the funding of the Falls.

22 And I'll stop right there and I'll go to page
23 5. And at page 5 I will take you to section 2.2
24 under the second paragraph. To the top, second
25 paragraph where it says the corporation is raising

1 funds pursuant to this offering for the purpose of
2 lending the majority of the funds raised hereunder
3 for the purpose of meeting its financial
4 contribution obligations as set out in item 2.2.3
5 below.

6 And I'll go to page 6, and at page 6 I will
7 go to section 2.2.3, at that last paragraph under
8 joint ventures where he says the funds advanced by
9 the investors to the corporation shall be
10 transferred by the corporation to the joint
11 ventures and each of the bare trustees.

12 I'm going to now go to page 7, and at page 7
13 go to item (i) where it says from the funds
14 advanced to the joint ventures the joint ventures
15 -- sorry. Yeah, from the funds advanced to the
16 joint ventures, the joint venture that receives
17 such funds agrees to transfer 13.4615 percent of
18 each loan to WKL, standing for West Karma Limited,
19 as reimbursement for any and all costs and
20 expenses WKL incurs as a result of this offering.

21 Now, I will take you now back to page 2 under
22 selling agreements, and if you go to the very last
23 paragraph under selling agreements where it says
24 all fees, the very last sentence to the end to
25 under selling agents, all fees and commissions

1 earned with respect to the sale of units pursuant
2 to this offering will be paid by the corporation
3 on behalf of the corporation -- on the
4 corporation's behalf by West Karma Limited. And
5 if we go over to page 10 of this document under
6 section 2.7, and we go to the last paragraph, it
7 says the majority of the monies raised pursuant to
8 this offering will be committed to the loan.

9 And if we go to BCSC 158, and we go to
10 paragraph 33 at page 5, during the March -- it
11 reads here that during the March 12 interview
12 Wharram confirmed that West Karma was entitled to
13 13.4615 percent of the funds loaned to the joint
14 ventures for reimbursement of sales commissions
15 and expenses. Essentially we take the position
16 that the Falls OMs when all the provisions are
17 interpreted together in their entirety,
18 represented to the Falls investors, that the
19 majority of their funds were loaned to the Falls
20 investments.

21 Again, if you look at all the readings we've
22 had on commissions, the commission is to be
23 derived from the amount loans to the developer,
24 not from the amount raised. Having said that, in
25 our submission any reasonable way you calculate

1 the math based on the evidence entered in this
2 case the respondents did not advance the majority
3 of the funds to the developer. Even if you deduct
4 the commissions paid and the working capital
5 deficiency the evidence tendered in this case is
6 still that the respondents advanced less than half
7 of the funds to the developer.

8 And I've done some math calculations, I'm not
9 sure if the panel chair will be interested, I've
10 done some math calculation to show one, if the
11 funds advanced includes the commissions on the
12 entire amount of the -- on the entire amount
13 raised versus what you find on the OMs which says
14 for Deercrest 10 percent, for Falls 13.615
15 percent. So we have some calculations here, it's
16 just for our own guide, the calculations make it
17 clear that whichever way you go there is no way
18 that the respondents based on the evidence entered
19 in this case ever advanced more -- they did not
20 advance the majority of the funds, they advanced
21 less than half of the funds whichever the
22 calculation goes. Even if you look at the
23 calculation use of the net proceeds in the
24 offering memorandum for the Falls 2007 and 2008,
25 and for Deercrest 2009 and 2010 amended offering

1 memorandum there is no way that the respondents
2 advanced more than half of the funds to the --

3 THE CHAIR: Let me just stop you there. In his reply
4 submissions and in a number of his questions
5 throughout this proceeding the respondent has
6 suggested that the critical test here is whether
7 or not 50.1 percent of the proceeds were advanced.
8 Is that the appropriate framework to think about
9 what majority means?

10 MR. FAGBAMIYE: Well, we take the position that anything beyond
11 50 percent is a majority, anything less than 50
12 percent, 50.1 percent, is not a majority. It's
13 not a framework -- the framework we used was that
14 looking at it globally more than -- less than half
15 of the funds was advanced period.

16 THE CHAIR: I understand your -- I understand your argument
17 that even if you accept that framework you say he
18 doesn't get to that threshold, but is that the
19 right framework is the question I'm asking.

20 MR. FAGBAMIYE: It will be the right framework.

21 THE CHAIR: Okay.

22 COMMISSIONER ROWLATT: Could I? I'm trying to figure -- first
23 a very detailed question on what is page 4 of one
24 of the OMs you just had up on the board. This
25 really is a bean counter question, but sometimes

1 that helps. Could I get it on the screen?

2 MR. FAGBAMIYE: That's BCSC 163.

3 COMMISSIONER ROWLATT: There we go. In the top chart,
4 right-hand side, assuming maximum offer, 52
5 million working capital deficiency, am I just
6 going wonky in my old age or does that
7 subtraction, is that not correct? I hope it's not
8 correct because then I'll know I'm not wonky. So
9 I then began to wonder, gee, what other numbers in
10 this example are incorrect. Okay. Leaving that
11 aside that's my detailed question which bothers a
12 guy like me that the numbers actually are not even
13 subtracted correctly, at least I did a look at
14 them. My broader question in your response to the
15 chair, is there anything in these OM, and there's
16 basically the two of them, that suggest that the
17 majority is 50.1? I'll ask it in a better way.
18 What would the potential investor believe would be
19 transferred having read the OMs, of course which
20 is there only potential source, the examples are
21 essentially all nearly a hundred percent, the
22 language. So I bothered -- I mean you've answered
23 very honestly to the chair, but I read this like a
24 potential investor and I was searching for what
25 might be the meaning of the OM, what I as an

1 investor might interpret. That's a rambling
2 question, but I think you --

3 MR. FAGBAMIYE: The difficulty we had with the OM is that one,
4 we do not have any definitions, but from our
5 perspective, and from the investors' point of view
6 when we talk in terms of majority, which would
7 mean a substantial amount of the monies raised
8 would essentially go towards the project. I don't
9 believe that the investors will take a 50.1
10 percent as being a majority. They may even --
11 they may think it should be far much more than
12 that for the project to have any chance of
13 success. So we don't have any definitions to go
14 by in the OM, and all we can do is divide whatever
15 figures we have by two and take that -- take it
16 from there. So really the OM provides no answers
17 at all to the question, that would be our
18 submission.

19 COMMISSIONER ROWLATT: Thank you.

20 MR. FAGBAMIYE: Mr. Chair, I will now proceed to the next
21 analysis that I have for Falls with respect to the
22 *mens rea*, and basically our definition of *mens rea*
23 is derived from *Theroux*, which is at tab 11 of the
24 ED's binder of authorities, and the definition we
25 have for *mens rea* there says that the *mens rea* of

1 fraud is established by proof of:

2 c) subjective knowledge of the prohibited
3 act; and.

4 d) subjective knowledge that a prohibited act
5 could have as a consequence the deprivation
6 of another, which deprivation may consist in
7 knowledge that the victim's pecuniary
8 interests are put at risk.

9 The use of proof the Supreme Court of Canada held
10 in *Theroux* and *Zlatic*, that where the conduct and
11 knowledge required by these definitions are
12 established, the accused is guilty whether he
13 actually intended the prohibited consequence or
14 was reckless as to whether it would occur.

15 The Supreme Court of Canada also held in
16 *Theroux* that the accused believe that the conduct
17 is not wrong or that no one will in the end be
18 hurt affords no defence to a charge of fraud.

19 The executive director submits that Wharram
20 had subjective knowledge of the prohibited acts
21 that of the 5,442,400 of Falls investments, the
22 Falls and the bare trustees, mainly the joint
23 ventures to the Falls, had only advanced 2,300,000
24 to Blackburn instead of investing the majority of
25 the funds, and he had also diverted the Falls

1 investor funds from the intended purpose and
2 instead spent part of the Falls investments on the
3 residence purchase payment and the personal use of
4 sale of claims proceeds.

5 Wharram was the sole authorized user of the
6 Falls accounts and had knowledge of where the
7 funds from the Falls account went because he was
8 the only one authorized to move those funds
9 around. And Wharram was the only one who signed
10 the Falls creditor claims, which in our submission
11 is an admission that he and the Falls only
12 advanced 2,300,000 to Blackburn.

13 Now, to the second component which is the
14 subjective knowledge that the prohibited acts
15 could cause deprivation. Wharram, and through him
16 the Falls and West Karma, had subjective knowledge
17 that the prohibited acts will indeed cause
18 deprivation. Wharram's subjective knowledge of
19 the prohibited acts and the risk of deprivation
20 flows from his being the founder, operating mind
21 and director and officer of the corporate
22 respondents. The executive director submits that
23 Wharram, and through him, the Falls and West
24 Karma, had subjective knowledge that not advancing
25 the majority of the Falls investments to the

1 developer as per the OMs puts the entirety of the
2 Falls investments at risk. Wharram at least had
3 to have appreciated those consequences as a
4 possibility. He knew that the prohibited acts
5 would cause deprivation to the Falls investors.
6 Possession of the knowledge that the respondents
7 knew he was placing the investors' money at risk
8 is enough to establish the *mens rea*. The
9 authority for this can be found in *Theroux*, which
10 is cited here, on the hyperlink we have page 7,
11 paragraph 9. of course investing less than half
12 the funds in the intended real estate project puts
13 the investment at risk.

14 In addition Wharram knew that diverting the
15 funds which are not advanced to Blackburn resulted
16 in depriving the Falls investors of those funds.
17 Wharram knew that when he spend the Falls
18 investments on the residence purchase payments and
19 the personal use of sale of proceeds, he was
20 taking those funds from unauthorized purpose and
21 depriving the Falls investors of their funds.

22 I will now proceed to the submissions on the
23 new evidence. The executive director made some
24 written submissions, and it is our position that
25 the new evidence with respect to the Falls should

1 have no weight because the respondents have not
2 put forward a witness to give evidence about the
3 new evidence, and the panel ought not to take the
4 unsubstantiated submissions in the respondents
5 application as evidence. The Monitor as a
6 professional and independent firm scrutinized all
7 the cheques and supporting documents submitted by
8 the respondents as part of the Falls proofs of
9 claim, however, the cheques listed in the
10 respondents' new evidence with respect to the
11 Falls did not go to the Monitor and were not
12 reviewed and scrutinized. Specifically four
13 cheques included in the new evidence were made out
14 by the Falls to the Falls joint ventures, which in
15 our in my submission are all related parties to
16 the Falls.

17 The respondents did not lead evidence with
18 supporting documents to show that the Falls joint
19 ventures transferred the funds they received from
20 the Falls for a total of 131,538.41 to Blackburn
21 for the Falls/Deercrest projects. The additional
22 cheques written to Blackburn for a total of 85,288
23 do not show what they were used for. Did the
24 respondents need to substantiate every cheque
25 listed in its new evidence application which

1 allowed in part of the Falls proof of claim? We
2 say yes. And have the respondents identified
3 and/or substantiated the cheques in the new
4 evidence? The answer before this panel is no.
5 Neither Foley nor Wharram testified about the new
6 evidence and the previously entered evidence, and
7 therefore there was no opportunity to
8 cross-examine either on the cheques.

9 Mr. Chair, I will now proceed to Part 3 of
10 the ED's submission with respect to the standard
11 of proof that's applicable in this case. We
12 submit that the balance of probabilities is the
13 applicable standard of proof to be applied in this
14 case. And I'll be going to -- I'll just go back
15 in broad strokes paragraphs 37 to 41 of the
16 executive director's submissions.

17 Prior to the *McDougall* decision of the
18 Supreme Court of Canada in 2008 there was
19 uncertainty about the standard of proof to be
20 applied in civil cases which involved grave
21 allegations of fraud. The Supreme Court of Canada
22 decision in *F.H. v McDougall* captured this
23 uncertainty succinctly. And that's -- you can
24 find *F.H. v McDougall* in tab 8 of the ED's
25 authorities binder at paragraph 26 from where I

1 quote.

2 Much has been written as judges have
3 attempted to reconcile the tension between
4 the civil standard of proof on a balance of
5 probabilities and cases in which allegations
6 made against a defendant are particularly
7 grave. Such cases include allegations of
8 fraud, professional misconduct, and criminal
9 conduct, particularly sexual assault against
10 minors.

11 The confusion arose as a result of cases like
12 the BC Court of Appeals decision in *Anderson*,
13 which you can find at tab 6 of the ED's
14 authorities binder at paragraph 29, in which the
15 court found that fraud under section 57 of the Act
16 is a very serious allegation requiring a high
17 standard of proof. The court invoked clear and
18 convincing to describe the proof required of fraud
19 under the Act. However, this is no longer the law
20 in British Columbia or anywhere else in Canada as
21 the Supreme Court of Canada has expressly rejected
22 this approach. In *McDougall* the Supreme Court of
23 Canada addressed the clear and convincing standard
24 and decided once and for all that balance of
25 probabilities is the only civil standard of proof.

1 If I can refer you to the ED's authorities at
2 tab 8, and I will take you to page 27 of *McDougall*
3 and take you through the various approaches at
4 paragraph 39, and I'll quote from those various
5 approaches.

6 I summarize the various approaches in civil
7 cases where criminal or morally blameworthy
8 conduct is alleged as I understand them:

9 (1) The criminal standard of proof applies in
10 civil cases depending upon the seriousness of
11 the allegation.

12 (2) An intermediate standard of proof between
13 the civil standard and the criminal standard
14 commensurate with the occasion applies to
15 civil cases.

16 (3) No heightened standard of proof applies
17 in civil cases or the evidence must be
18 scrutinized in greater care where the
19 allegation is serious.

20 (4) No heightened standard of proof applies
21 in civil cases, but the evidence must be
22 clear, convincing and cogent.

23 (5) No heightened standard of proof applies
24 in civil cases, but the more improbable the
25 event, the stronger the evidence is needed to

1 meet the balance of probabilities test.
2 And it goes on to say that the approach the
3 Canadian courts should now adopt.

4 Like the House of Lords, I think it is time
5 to say, once and for all in Canada that there
6 is only one civil standard of proof at common
7 law and that is proof on a balance of
8 probabilities.

9 *McDougall* is the law in Canada on the burden
10 to be discharged. It does not increase the
11 standard of proof in serious cases. And our
12 submission is that standard of proof in this case
13 remains as what *McDougall* has postulated as proof
14 on a balance of probabilities.

15 I will now proceed to Part 4 of the executive
16 director's submission with respect to Deercrest,
17 and what I'm going to do with Deercrest is go
18 straight to the *actus reus* by going straight into
19 the facts of the case.

20 Deercrest raised 3,953,000 to lend to a
21 developer to develop 70 residence units and a
22 clubhouse at the Falls Resort. Again Mr. Wharram
23 provided three investor lists. He confirmed these
24 at an interview that he had with commission staff.
25 The respondents only advanced 1,636,000 to the

1 developer. Again, Mr. Wharram confirmed this at
2 an interview that he had.

3 Our submissions on Deercrest as well is that
4 by loaning only 41.39 percent of the Deercrest
5 investments to the developer the respondents puts
6 the entirety of the Deercrest investments at risk.
7 The investigator in this, Liz Chan, walked the
8 panel members through BCSC 1115 to see how the
9 calculations are made. I do not intend to take
10 the panel through that because that was
11 effectively covered in the course of direct
12 examination.

13 With respect to Deercrest we are also relying
14 on the other fraudulent means branch of the first
15 component of the *actus reus* of fraud. Our
16 submission is that the respondents committed an
17 unauthorized use of investors funds.

18 And next I will go to *actus reus* for
19 Deercrest. Wharram, and through him the corporate
20 respondents, knew that they had raised 3,953,000
21 and only advanced 1,636,000 because Wharram was
22 the sole authorized signatory on the bank accounts
23 which Deercrest used, he was the president and
24 sole director of Deercrest, he made all the
25 decisions for the company, and he signed the

1 Deercrest claims for only 1,636,000.

2 Wharram, and through him the corporate
3 respondents, knew that, A, by advancing less than
4 half of the Deercrest investments to the developer
5 they were putting the entirety of the Deercrest
6 investment at risk. This is the nature of
7 inference to be drawn. As well, Wharram knew that
8 when he took Deercrest investments and spends them
9 on residence payments, the Nature's Fare 240,000,
10 and a diamond ring, he was diverting that money
11 for an unauthorized purpose and depriving
12 Deercrest investors of those funds. Again, the
13 respondents believe that the conduct is not wrong
14 or that no one will in the end be hurt affords no
15 defence to a charge of fraud.

16 Next I'll proceed to the personal use of
17 Deercrest and Falls investor funds. Senior
18 investigator Chan walked the panel through the
19 tables she created to show that Mr. Wharram used
20 investors' funds for various personal expenditures
21 in the instance of both Deercrest and the Falls.
22 I'm not walking you through those tables today,
23 you have our written submissions on how that
24 constitutes fraud, and you have those tables
25 themselves, the source documents which prove them,

1 and the hearing transcripts from day one and day
2 two which contains Ms. Chan's detailed evidence in
3 direct examination on those points.

4 What I will do, however, is to refer to the
5 executive director's submissions on liability
6 regarding the diversion of funds to the grocery
7 store Nature's Fare, and note a passage from
8 *Currie* which applies. I'll draw your attention to
9 page 35 of the executive director's submissions on
10 liability.

11 And at page 35 at paragraph 132 Wharram in
12 the March 13 interview stated that the four
13 Deercrest account payments to Nature's Fare
14 totalling \$240,000 were a loan to his wife to buy
15 50 percent of Nature's Fare Langley.

16 At paragraph 133 Wharram further stated that
17 he did not inform Deercrest investors about this
18 loan to his wife, and that none of the Deercrest
19 investors knew about these payments to Nature's
20 Fare.

21 At paragraph 134, Chan testified that the
22 240,000 in bank drafts was purchased using the
23 investors' funds from Deercrest.

24 If you go on to page 36 at paragraph 136
25 Wharram testified that Nature's Fare bought

1 Jennifer Boyd's shares, that's the share of
2 Wharram's wife, and returned 300,000 by bank
3 drafts payable to West Karma, not Deercrest, from
4 where the funds was drawn, and after the funds was
5 returned to Wharram's wife, she ceased to be a
6 director.

7 There are a couple of points I would like to
8 make on this. First is that I will take you to
9 *Currie* which is at tab 10 of the ED's authorities
10 at page 5, the last paragraph, where the court
11 held, and I quote:

12 We take it as settled law that an honest
13 belief that a fraudulent act may be
14 subsequently ratified is not a valid defence
15 to a charge of fraud.

16 The respondents' submissions refers at various
17 points to an intention to repay. There is no
18 evidentiary basis for such an assertion, and the
19 respondents' submissions on that point cannot be
20 conceded as evidence. There is a distinction
21 between money going into Deercrest account and
22 money going into West Karma account. Money going
23 into West Karma account is not money going to
24 Deercrest investors, it's going to West Karma.
25 Most importantly is this principle as noted in

1 *Currie*, once the respondents have divested
2 investors' funds from their intended purpose as we
3 have seen repeatedly in this case, it doesn't
4 matter whether there is an intent to subsequently
5 return the money it's been diverted from the
6 intended use and a fraud has been committed.

7 Lastly, specifically with respect to these
8 \$240,000 diversion of Deercrest investor funds to
9 the wife's interest in the Nature's Fare grocery
10 store, any suggestion that this falls within the
11 OM provision of a reallocated funds for some
12 business reasons is entirely without merit. This
13 expenditure is so far removed from the Deercrest
14 investment outlined in the offering memorandum, it
15 is so far removed from what the investors
16 testified that they were investing in, and they
17 said they had never heard of Nature's Fare. And
18 of course Mr. Wharram admitted in his interview
19 that he had never told investors about this money
20 going to Nature's Fare for his wife.

21 And again we'll go to the disagreement about
22 the interpretation of the Deercrest offering
23 memoranda, and basically it is the same as in the
24 Falls. There are various provisions here. There
25 are provisions in BCSC 185, page 4, section 1.21

1 is the same as in the Falls. It says that a
2 majority of the proceeds of this offering is to be
3 loaned to the corporation. It goes on again to
4 say in section 2.2.1 that the corporation is
5 raising funds pursuant to the offering for the
6 purpose of lending the majority of funds raised to
7 Deercrest Construction -- to Deercrest to be used
8 for the purposes of the development. And again it
9 goes on at section 2.7 of BCSC 185 to say that the
10 majority of the monies raised pursuant to the
11 offering will be committed to the loan.

12 Again it address the question of commissions
13 at section 5.7, page 17, item 7. And basically it
14 says that a maximum of 10 percent should be paid
15 as commission. And the common thread in all the
16 offering memoranda is that Falls wasn't supposed
17 to be the one paying the commission. Deercrest
18 was not required to pay the commission. West
19 Karma Limited was required to pay the commission
20 on behalf of these two corporate entities, and
21 that is what we have in the offering memoranda.

22 Now, with respect to the Deercrest offering
23 memoranda, we take a position that the Deercrest
24 OMs when all the provisions are interpreted
25 together in their entirety represented to the

1 Deercrest investors that the majority of the funds
2 would be loaned to the developer.

3 Again having said that, in our submission,
4 any reasonable way you calculate the math based on
5 the evidence entered in this case, the respondents
6 did not advance the majority of the funds to the
7 developer. Even if you deduct the commissions
8 entitled and the 30,000 working capital
9 deficiency, the evidence tendered in this case is
10 still that the respondents advanced less than half
11 of the funds to the developer, and when you
12 advance such a small percentage of the development
13 funds the entire investment is basically put at
14 risk.

15 I'll proceed to the executive director's
16 submissions on the previously entered evidence in
17 Deercrest.

18 THE CHAIR: Can I just stop you there, and this I think ties
19 back to one my first questions about what you say
20 the quantum of the fraud is. I'm trying to
21 reconcile that in both the Falls and Deercrest the
22 two allegations of fraud. If one -- if you're
23 successful on the first ground of the fraud, that
24 there was a fraud created as a result of not
25 advancing the majority of the funds, is the second

1 ground even relevant? In other words, you say a
2 portion of the money that wasn't advanced was then
3 specifically advanced for personal purposes, but
4 isn't it sort of once the first ground is made out
5 the second one become irrelevant? Help me
6 reconcile the two separate claims there.

7 MR. FAGBAMIYE: What we are doing, Mr. Chair, is to give you
8 all the components that goes into the fraud.

9 THE CHAIR: Yeah.

10 MR. FAGBAMIYE: There can be very many components went into the
11 fraud, and when all this is looked at in entirety
12 then we can make out that that fraud was
13 committed. So we think all this points at
14 relevance to the question of fraud when you look
15 at the global picture, and that's the approach
16 that we take. So it's relevant that the majority
17 of the funds was not advanced, and one of the
18 reasons why the majority of the funds wasn't
19 advanced was that this money was being spent in
20 unauthorized ways, and you need to have examples
21 to see what these unauthorized ways are. If we
22 tell you the monies were spent in unauthorized
23 ways and don't give you the examples I don't think
24 we give the panel sufficient basis on which to
25 find that funds were even used in an unauthorized

1 manner, and to that extent we think it is better
2 for us to give the full picture that the majority
3 of the money wasn't raised, some of the money was
4 used in an unauthorized manner, and these are
5 examples of how these funds were used in an
6 unauthorized manner, and that's the ED's
7 submission.

8 COMMISSIONER DOWNES: So are you saying there are essentially
9 two instances in the allegation of fraud, there
10 are two instances cited, one being the less than
11 majority of funds were advanced and the second
12 being essentially the personal use of the
13 proceeds, are you saying that both of those
14 elements have to be proved in order to find the
15 contravention of section 57 or as long as one is
16 proved then are you saying that we can find that
17 the contravention has occurred?

18 MR. FAGBAMIYE: I think the approach we have is a global
19 approach, which is fraud has been committed and
20 these are the components of the fraud. So
21 everything goes together. If you find that a
22 majority of the funds have not been advanced you
23 can see the examples of where the funds went to,
24 and all that ties into the question of fraud. So
25 we are not separating either of these, we are

1 taking everything together. That's going to be
2 our submission on that point.

3 COMMISSIONER GLOVER: If I can just press -- this may or may
4 not be significant, but let's assume for sake of
5 argument that we were to find the first element
6 alleged was not proven, let's take for sake of
7 argument we find that a majority of the funds and
8 some reasonable interpretation had been advanced,
9 are you saying that the second allegation of
10 personal use of funds and diversion of the
11 proceeds of sale of receivables is then not
12 relevant or could we make a separate finding of
13 fraud on that second element? Again a totally
14 hypothetical question, but I'm just trying to
15 understand the import of the way the notice of
16 hearing is set up in terms of the heads of fraud.

17 MR. FAGBAMIYE: Okay. In terms of the global picture, even if
18 you don't find that the majority of the funds was
19 advanced fraud was still committed because we have
20 funds that are unaccounted for, we have investors
21 who don't have their monies back, we have projects
22 that have not been completed. So even if you find
23 that a majority of the funds was not advanced our
24 position and our submission is that fraud has
25 still been committed.

1 COMMISSIONER GLOVER: Thank you.

2 MR. FAGBAMIYE: Mr. Chair, I was on the -- I was going to the
3 submissions on previously entered evidence in
4 Deercrest, and our position is the same as we have
5 for the Falls, that the -- that the panel should
6 attach no weight to the previously entered
7 evidence. The cheque should have been part of the
8 Deercrest proofs of claim, but it wasn't,
9 therefore it was not scrutinized by the Monitor
10 for the supporting documents. Furthermore, we did
11 not have the opportunity to cross-examine Wharram
12 on this point, and there are no supporting
13 documents to show what the cheque was used for,
14 and that will be our position on that point.

15 And that will take me to Part 5 of the ED's
16 submission where if we go back to globally to
17 section 57, and our point is that Wharram knew
18 that his conduct perpetrated fraud on the Falls
19 and Deercrest investors. He was in charge of the
20 monies and he was the sole authorized signatory on
21 the companies bank accounts. He knew he raised
22 9,395,400 and only loaned less than 4 million to
23 the developer. He knew that he had actually
24 deprived investors of some of their funds and have
25 put the entirety of their investment at risk by

1 using such a small portion of the funds raised to
2 the developer.

3 I would like to draw the attention of the
4 panel to the very critical point in the process of
5 these submissions. Paragraph 56 of the
6 respondents' submissions on liability was clear
7 that the respondents' indicated they had made a
8 mistake in the information they provided to
9 PricewaterhouseCoopers, they said they made a
10 mistake in the information provided to the
11 commission, they made a mistake also they said in
12 the calculation of amounts advanced to the
13 developer. Now, that's on the one hand. The
14 respondents asserts that they made a mistake.

15 THE CHAIR: Sorry, can you just give me one moment just to find
16 this paragraph just so I can follow it here. All
17 right. Thank you.

18 MR. FAGBAMIYE: In that paragraph you find a series of mistakes
19 the respondent said they make. They made a whole
20 bunch of mistakes. They also said they made a
21 mistake on the submissions they made to Blackburn.
22 And at that point the respondents were not saying
23 Blackburn asked them to reduce their claims, they
24 were just saying they made a mistake. On the
25 other hand the respondents came later to say well,

1 Blackburn asked us to reduce our claim. The
2 respondents cannot have it both ways. You cannot
3 not now say you were making mistakes when there is
4 nothing to substantiate mistakes, no documented
5 evidence, no evidence provided to that effect, and
6 on the other hand you say Blackburn asked you to
7 reduce our claim. Our position is that every
8 explanation to justify fraud has failed to meet
9 entirety, especially where the respondents have
10 not led any evidence to substantiate their claim.

11 Next I'll proceed to the final segment of the
12 executive director's submissions on the additional
13 allegations of false statements to an
14 investigator. I will take you to tab 4 of the
15 ED's authorities with specific reference to
16 section 168.1(1). It states, and I will quote:

17 A person must not make a statement in
18 evidence or submit or give information under
19 the Act to the commission, the executive
20 director or any person appointed under this
21 Act or the regulation that, in a material
22 respect at the time and in light of the
23 circumstances under which it is made, is
24 false or misleading, or omits facts from the
25 statements or information necessary to make

1 that statement of information not false or
2 misleading.

3 I will now take you to briefly to page 48 of
4 the ED's submissions on liability and I will just
5 go through the paragraphs in broad strokes. Chan
6 and Lori Chambers were appointed pursuant to an
7 investigation order dated June 29, 2012.

8 During the March 13 2013 interview Wharram
9 made two false statements. Wharram was asked if
10 he had raised any funds from investors in 2013.
11 Wharram said no. This was Wharram's first false
12 statement at the interview. Wharram was also
13 asked if he was currently trying to raise any
14 funds from investors. He said no. This was
15 Wharram's second false statement at the interview.

16 In our submission, the two statements were
17 clearly false, they were the opposite of something
18 at the heart of the investigation. Mr. Wharram
19 did not lead any evidence at this hearing of
20 confusion. He did not take the stand. The
21 evidentiary basis that you have is that Mr.
22 Wharram raised funds right before the interview.
23 You also have significant evidence of his attempts
24 to raise funds from February 2013 until April
25 2013, therefore there was current -- therefore he

1 was currently trying to raise funds from
2 investors. The executive director submits that we
3 have exceeded the proof on the balance of
4 probabilities in this case.

5 And those would be the executive director's
6 submissions.

7 THE CHAIR: Okay, thank you. Any further questions? I'm going
8 to suggest so we don't cause you to start and then
9 break, we'll take our morning break here and then
10 we will resume at five after eleven.

11 **(PROCEEDINGS ADJOURNED AT 10:51 A.M.)**

12 **(PROCEEDINGS RESUMED AT 11:11 A.M.)**

13 THE HEARING OFFICER: All rise.

14 THE CHAIR: Thank you.

15 MR. FAGBAMIYE: Mr. Chair, I would just like to make a very
16 quick clarification before we proceed.

17 THE CHAIR: Yes.

18 MR. FAGBAMIYE: With respect to the notice of hearing and the
19 heads of fraud that's listed under the Falls, we
20 have less than half of the funds raised and we
21 have the personal use of sale of claims proceeds.

22 THE CHAIR: Yes.

23 MR. FAGBAMIYE: Just to clarify that each of those heads can
24 actually stand on their own. Even though you're
25 looking at together, each of those heads can stand

1 on their own.

2 THE CHAIR: Thank you.

3 MR. FAGBAMIYE: Thank you.

4 THE CHAIR: All right. Mr. Wharram.

5 MR. WHARRAM: Before I begin today I would like your permission
6 to read a brief statement I'd like to make for the
7 record. Can I do that?

8 THE CHAIR: I don't know what you're about to say, so I don't
9 really have any comment about that, so carry on.

10 MR. WHARRAM: In the last week I've been approached at my
11 residence by nothing short of what I would call a
12 hoodlum. The hoodlum in no certain terms told me
13 they wanted their friend's money back that I
14 scammed. I have made a police report of the
15 incident with a Constable Nishin (phonetic) of the
16 Chilliwack RCMP and have been issued a police file
17 number.

18 Recently I had an opportunity to watch what
19 the British Columbia Securities Commission in
20 another glamorous press release calls an
21 entertaining video. In the video the main
22 character, the mother of a victim of fraud,
23 attacks an alleged fraudster with physical
24 violence that I will call a vigilante act. The
25 video is a sick, pathetic attempt to make the

1 people of BC aware of securities fraud. This
2 would be equivalent of the Vancouver Police
3 Homicide Department making an entertaining video
4 promoting family members of murder victims to
5 attack an alleged perpetrator.

6 On November 6, 2014 Brenda Leung, the chair
7 of the British Securities Commission, calls the
8 fraud fighter video fun in a speech that she did
9 at the Financial Consumer Agency of Canada's 2014
10 national conference. I'm concerned if anything
11 happens to my family or myself, I think this video
12 is -- and if anyone hasn't seen it in this room I
13 encourage you to see it, it is actually sick, made
14 me sick to my stomach when I first seen it. I
15 just want to bring it to the panel's attention,
16 public's attention. I think it's important that
17 people like myself are protected out there. Thank
18 you.

19 I have the utmost respect for the British
20 Columbia Securities Commission and work that they
21 do. I think it is imperative to have this group
22 of professionals enforce the rules and regulations
23 of the *Securities Act* of British Columbia, and
24 they have my full support. But what I don't have
25 respect for, and certainly don't support is the

1 way this commission has come up with their theory
2 surrounding the events of this matter, and then
3 believe they didn't have to bring in evidence to
4 prove both parts of the elements of fraud. Even a
5 moment ago the staff litigator when asked if he
6 had the right framework he replied yes, but gives
7 no explanation or no basis for his reply. They
8 assumed many items, they relied on summary
9 information with no backup to support their case,
10 they relied upon inaccurate information, they
11 decided that they didn't need to look at bank
12 statements to see where investor funds went, and
13 then went as low to even cut and paste a portion
14 of the respondents' offering memorandum to
15 manipulate the reader to adopt their theories of
16 this case. And let's be clear, that is all the
17 executive director is brought forward is a theory.

18 In my opening in April at the hearing I
19 stated that it is apparent that staff got this one
20 wrong, and I stand by those words, and I will
21 until the day I die. I did not commit fraud
22 against my investors or make a false statement to
23 an investigator. I said many times that I made
24 mistakes in the management of the business, and
25 certainly should have had better bookkeeping.

1 However, taking the leap from bad bookkeeping to
2 allegations of fraud without actually
3 investigating where investor funds went is beyond
4 comprehension, the public should expect more from
5 the executive director.

6 Today, as I have in my written submissions,
7 I'm going to show that the executive director
8 simply did not make a solid case against the
9 respondents, and did not prove with clear and
10 compelling evidence the allegations set out in the
11 notice of hearing. As staff litigator just said a
12 moment of ago the quantum of fraud was the amount
13 not advanced to the developer. This is the basis
14 of their allegation and what this panel must find.
15 Staff have not proven the quantum of fraud in this
16 matter as they have defined.

17 In addition, I posed questions in my written
18 arguments that staff failed to provide answers to
19 in their really reply submissions for whatever
20 reason. If staff wanted to prove their case they
21 should have answered, A, why did the executive
22 director assume things to be true in this matter,
23 B, why did the executive director take a theory of
24 what they thought occurred with the respondents
25 and at any cost decided they must stick with that

1 theory, even going as far to manipulate evidence
2 to sway the reader of their submissions. I think
3 it is important for staff to answer why they cut
4 and pasted a very significant portion of the OM
5 while omitting many other relevant parts. C,
6 despite uncovering evidence in advance of issuing
7 their notice of hearing why did they ignore this
8 evidence and allow an inaccurate notice of hearing
9 to be issued to the respondents. D, the executive
10 director or his staff have made a string of errors
11 including the wrong date on the notice of hearing,
12 the wrong name on a will say statement, and typos
13 such as the Martinson mistake that were in
14 evidence in the hearing. Why was there no amended
15 notice of hearing issued by the executive
16 director. Why did staff simply ignore all these
17 items in the response to my submissions. Why did
18 staff make all these sloppy mistakes over and over
19 again, yet when confronted by them in the
20 respondents' submissions they've never addressed
21 them. And, E, and finally at top of it all why
22 did the executive director rely upon summary
23 evidence in a case before this panel with the
24 complexity and closeness of the numbers anyone can
25 see. Even though the executive director had

1 banking statements and cheques that were written
2 to the developer or on behalf of the developer in
3 their possession they chose to ignore them and
4 instead took the lazy route and relied upon
5 summary, inaccurate information to bring forward
6 their allegations.

7 These are questions I encourage we find out
8 the answers here today before this panel makes
9 their decision. One way or another the
10 respondents deserves these questions to be
11 answered. How does the executive director make
12 the accusation that someone automatically know
13 something without providing evidence to support
14 their allegations specifically when the law states
15 otherwise. In this case the executive director
16 has repeatedly stated that the respondents had
17 subjective knowledge of the fraud, and then they
18 -- and that they had proven this beyond the
19 balance of probabilities. How is this possible?
20 There is no evidence that the respondents misled
21 investors to invest in a fictitious project.
22 There is, however, evidence that the projects were
23 real and unfortunate due to management of the
24 development and subpar economy the projects ended
25 up in creditor protection.

1 There is no evidence, no witnesses brought
2 forward by staff, nothing that would lend to the
3 fact that Wharram intentionally with subjective
4 knowledge committed fraud, only a theory and
5 quotes from a couple of case laws indicating
6 Wharram ought to have known. How is it assumed
7 that staff knew what was happening in Wharram's
8 mind. How is that they can Wharram ought to have
9 known or that Wharram subjectively knew he was
10 committing fraud when they brought forward no
11 evidence to support this assumption. Staff know
12 nothing of Wharram's history or belief system. In
13 my opening at the hearing last spring I challenged
14 staff to bring forward answers, and more
15 importantly proof that I had subjective knowledge
16 of the fraud, and they have not done so. Bringing
17 in assumptions, partial records, some bank
18 records, summary math and then quoting some
19 completely irrelevant case law does not bring this
20 panel under Wharram's thought process and his
21 wilful intent to commit a fraud. Where is a
22 witness that testified he or she knew Wharram was
23 committing fraud. Where is an expert's opinion.
24 Where is anything showing that they knew Wharram's
25 intent was committing fraud against his investors.

1 The reason staff brought no evidence of Wharram's
2 subjective knowledge is because there is none.

3 Remember staff didn't even bother to look at
4 where the investor funds went before making
5 allegations, and they didn't even talk to
6 witnesses or the accused himself before bringing a
7 harmful allegation of making a false statement to
8 an investigator.

9 In this hearing room staff counsel had the
10 duty to bring in actual evidence that would prove
11 the respondents had subjective knowledge of their
12 intent. Most of staff's evidence supports a
13 theory and not a fact. And the factual evidence
14 they did bring in does not prove the mental
15 element or subjective knowledge needed for the
16 allegations to be proven. Again only a theory
17 quoted by some case law but no evidence that
18 proves with subjective knowledge.

19 I have shown in my written submissions and I
20 will show here today that even after a 30 month
21 investigation into companies staff brought forward
22 this theory, wrapped it around some subpar summary
23 investigation work, added in some case laws, and
24 submitted this as what they want this panel to
25 rule on. Through it all we continue to see

1 sloppy, incomplete investigative work. Evidence
2 like Liz Chan's notes had typos and mistakes.
3 Important legal documents like will say statements
4 that the respondents were to rely upon had the
5 wrong name on it. And of course even the notice
6 of hearing itself had a basic elementary mistake.
7 Throughout it all never once has staff addressed
8 these mistakes, rather they have chose to ignore
9 them.

10 I never thought I'd be standing before this
11 panel facing the allegations brought forward by
12 the executive director, but I tell you with the
13 resources, training and the team of professionals
14 working in this building I would think I would
15 have expected more. These allegations against me
16 are significant and the impact of an adverse
17 finding will affect my life for ever. Just the
18 allegations alone, this hearing, having my picture
19 in full colour on the entire front page of *The*
20 *Vancouver Province* newspaper has severely
21 negatively affected my life. If I were guilty I
22 would take the lumps, move on and finish out my
23 days, but this is not the case. It is the utmost
24 importance that this panel needs to base their
25 decision on facts, not assumptions, subpar

1 investigative work, manipulated or manufactured
2 evidence or unsubstantiated theories. I've
3 challenged staff to bring forward some answers to
4 a few questions here in my opening. It is time I
5 do hope they do answer these questions. Thank
6 you.

7 Excuse me for a moment. I'll be as brief as
8 possible. I did things a little bit differently,
9 I've obviously never been through this, but I
10 answered back in detail to each one of the
11 executive director's reply submissions, and
12 placeholder 00088, but I for sake of timing and
13 whatnot I will try to expedite this process as
14 much as possible.

15 Can we pull up 00088. That's the executive
16 director's reply submissions. You can go to page
17 2 or where it begins. Sorry. That's fine. In
18 1A, Part 1, staff indicate the respondents
19 provided no evidence funds that were not advanced
20 directly to the developer were used for the
21 benefit of the Falls, Deercrest or the investors.
22 The respondents will begin by submitting the
23 burden of proof is on the executive director in a
24 hearing before this panel, not the other way
25 around. Staff for the executive director have to

1 bring in clear and compelling evidence and prove
2 that any amount of investor funds not advanced
3 directly to the developer were not used for the
4 benefit of the Falls, Deercrest or the investors.
5 It is the responsibility of the executive director
6 to prove the allegations in the notice of
7 hearing. As we have seen in the submissions of
8 the respondents, and will see in the rest of these
9 oral submissions, this was not the case in this
10 matter.

11 With allegations as serious as fraud it is
12 the executive director's responsibility to
13 properly investigate, inquire, and determine where
14 the funds were used and for what purpose.
15 Bringing serious allegations of fraud without any
16 evidence of where the funds went, only partial
17 evidence of where some of the funds went and
18 picking and choosing to submit only some of the
19 relevant information, staff have called this
20 summary information, is not sufficient evidence to
21 proceed with allegations of fraud at a hearing
22 before the commission.

23 It is the submission of the respondents that
24 via strong cross-examination of the lead
25 investigator during the hearing, exhibits entered

1 by both staff and the respondents and our written
2 submissions the respondents have in fact argued
3 strongly and provided valid evidence showing that
4 funds not advanced directly to the developer were
5 used for the benefit of the Falls, Deercrest and
6 the investors. Staff's statement in 1A, Part 1 is
7 incorrect in that the respondents did provide
8 evidence of the funds not advanced directly to the
9 developer were used for the benefit of the Falls,
10 Deercrest or the investors.

11 Not only were all relevant banking documents
12 showing payments made given to staff during their
13 investigation, or in during her cross-examination
14 of Elizabeth Chan got her to admit that she saw
15 these items. We argue this very diligently in
16 paragraphs 48 to 57 of our submissions. It is
17 impossible for staff to say the respondents
18 provided no evidence when that is all we did.
19 Bank statements, credit card statements, receipts,
20 cancelled cheques, you name it, it's all there in
21 evidence for anyone to see that takes -- that
22 bothers to take the time to review it.

23 Staff would rather bring in this feeble
24 argument that Wharram did not provide evidence
25 than to admit they decided to rely on summary

1 work. This is very telling. As we see throughout
2 the day -- as we well see throughout the day
3 relying on summary work did not and does not work
4 in this matter.

5 Staff for the executive director continuing
6 1A, Part 2, to state that the respondents did not
7 provide evidence that any of the additional
8 business payments the respondents say they made
9 were permitted by the OMs. This contradicts what
10 they accused the respondents of in 1A, Part 1.
11 There they say the respondents did not bring any
12 evidence. Now in Part 2 they are questioning
13 whether the amounts brought forward are permitted
14 by the OMs. Nonetheless as argued extensively in
15 our written submissions it is the respondents'
16 position that the OM themselves are tendered as
17 evidence by the executive director. The OM does
18 not specifically allow for -- sorry, strike that.
19 And the OM does specifically allow for the payment
20 of additional business expenses clearly written in
21 black and white in section 2.7 of all submitted
22 offering memorandums tendered by the executive
23 director.

24 For staff to say the respondents provided no
25 evidence that any of the additional business

1 expenses they made were permitted by the OMs is
2 bizarre. Wharram has specifically pointed the
3 reader of his submissions of the only evidence
4 there possibly could be, the OM itself. What
5 other evidence do they want me to submit. There
6 is nothing else. Additionally they bring no
7 argument against the submission of the
8 respondents, merely indicating Wharram provided no
9 evidence. Of course they argue with a no evidence
10 theme otherwise they'd have to argue against
11 making an epic mistake that makes a large portion
12 of their allegations invalid.

13 Additionally it is worth noting again that
14 the responsibility of the executive director is to
15 provide clear and convincing evidence to support
16 their theory that these business payments were not
17 allowed or permitted by the offering memorandums.
18 They have not done so. I will speak to this more
19 in detail later on proving that the respondents
20 did not lead with evidence to argue very strongly
21 against staff.

22 The burden of proof and tendering of evidence
23 that state that the respondents were not able to
24 use investor funds for additional items is on the
25 executive director to provide. This is not the

1 case in this matter. It is telling that staff
2 argue that the respondents provided no evidence
3 when they themselves have brought forward no
4 evidence to argue against section 2.7 of the
5 offering memorandums at the hearing or in either
6 of the written submissions. Their submission in
7 1A, Part 2 does not bring any argument back to the
8 respondents written submission on the topic.

9 In 1B staff indicate the partial payments of
10 the investor funds does not provide a defence by
11 the respondents. The respondents submit that the
12 repayment of investor funds does play a key role
13 in determining the *mens rea* or subjective
14 knowledge aspect of the alleged fraud. If the
15 panel is to consider the respondents' frame of
16 mind, the *mens rea* subjective aspect if you will,
17 the repayment of investor funds before any
18 investigation began, and repayment of short term
19 loans does provide evidence that the intent to
20 commit fraud against the investors was simply not
21 there. If there was a mental or wilful act of
22 committing fraud then the respondents would not
23 have paid back any of the investor funds. These
24 actions of the respondents are not conducive to a
25 person purposely committing an act with knowledge

1 of that fact.

2 Staff in order to prove their case needed to
3 bring evidence proving Wharram's mental frame of
4 mind was wilfully committing the act of fraud.
5 They have tendered no evidence based on facts,
6 rather they have decided to quote a few case laws
7 that have no bearing on the mental thoughts of
8 Wharram. It's easier for the respondent in this
9 matter to know without a doubt the truth as he was
10 there during all relevant times. I know what my
11 mind was thinking, and I assure you it was not on
12 fraudulently taking advantage of my investors.

13 Staff have brought no evidence, no witness
14 indicating they heard Wharram say he was
15 defrauding his investors, no experts, nothing that
16 brings forward any reason to think Wharram had
17 subjective knowledge of a malicious fraud. Only a
18 theory based upon partial investigative work and
19 summary evidence. The executive director came up
20 with a theory because of bank statements, receipts
21 and then allowed an investigator to only complete
22 summary evidence to which was relied on. However,
23 staff then needed to bring in clear and compelling
24 proof that Wharram had subjective knowledge as to
25 what his actions could have. They have not.

1 Again, no witnesses, no testimony. No exhibits to
2 clearly show Wharram was mentally aware that his
3 alleged actions would ever be considered fraud.

4 In 1C staff indicate that the respondents
5 Wharram gave a false answer to an investigator
6 after being asked a straightforward and direct
7 question. The respondents argue that this
8 question was not straightforward. If we were to
9 look at BCSC 00099, page 176, lines 3 to 12,
10 Wharram has provided a complete and credible
11 submission in number 191 of his respondents'
12 submissions on page 55 to the issues around this
13 question. Furthermore, and more importantly,
14 staff have not provided any direct evidence from
15 any party that Wharram borrowed funds from. Where
16 is testimony from Drury, Lang, Neigum to back
17 their claim, instead relying on simple notes from
18 the investigator that may or may not be accurate
19 or may or may not be biased.

20 Cross-examination of the investigator during the
21 hearing revealed she was not exempt from making
22 mistakes during her note taking, but yet staff has
23 relied almost solely on her subpar investigation
24 work and even her assumptions.

25 Can we put up placeholder 00087, please. And

1 can we go to paragraph 210 on page 60. Zoom in on
2 that, please. Staff have admitted they possibly
3 assumed their theory, and even admitted by Chan in
4 her cross-examination as we see here. Think about
5 that for a moment. The lead investigator handling
6 this file admits she possibly assumed information
7 given to the executive director. This very
8 assumption ultimately caused the executive
9 director to bring forward the allegation of making
10 a false statement to an investigator in the notice
11 of hearing.

12 I don't think there needs to be a lot of time
13 spent on this. Staff investigator Chan saw the
14 name Schacher on the wire transfer that mistakenly
15 had the word investment written on the memo line.
16 I get that this would cause the investigator to
17 have suspicion of the Schacher loan being some
18 sort of investment falling under the jurisdiction
19 of the commission, but I do not understand why it
20 was assumed to be true and not investigated to
21 determine its accuracy, especially with the
22 ramifications this allegation has on the
23 respondents.

24 As members of this very panel have found in
25 other cases making a false statement to an

1 investigator is one that is not to be taken
2 lightly. Let's put the shoe on the other foot.
3 The respondents state the opposite. Being accused
4 of making a false statement to an investigator
5 when it is not true is one that is not to be taken
6 lightly. This formed part of the slanderous press
7 release submitted by the respondents as Exhibit
8 00256 that was picked up by newspapers across
9 Canada and is now all over the Internet, before I
10 might add, I even got a fair chance to defend
11 myself.

12 THE CHAIR: Mr. Wharram, can I interrupt you?

13 MR. WHARRAM: Yes.

14 THE CHAIR: On this part of it I take it that your argument is
15 that a making of a loan is not an investment?

16 MR. WHARRAM: Say again?

17 THE CHAIR: I take it that on this particular point your
18 argument is that the making of a loan is not an
19 investment?

20 MR. WHARRAM: Borrowing money from a friend is not an
21 investment.

22 THE CHAIR: Okay.

23 MR. WHARRAM: Chan makes a phone call to Schacher and does not
24 get ahold of him. Eight days later there is a
25 notice of hearing issued against the respondents

1 with the allegation of making a false statement to
2 an investigator. Laying their hat, if you will,
3 on an assumption without conducting a proper
4 interview with any other relevant parties is not
5 clear or compelling at any level. During this
6 eight day window, and only four days before the
7 notice of hearing is issued, staff have contact
8 with the respondents' banker and physically find
9 out that \$55,000 has been issued back to Schacher,
10 yet still Chan does not contact Wharram or even
11 Schacher to find out what the heck is going on.
12 And it appears she did not tell her superiors,
13 including the executive director or the
14 information she had uncovered or if she did they
15 ignored her and sent the notice of hearing to the
16 respondents with this bogus allegation.

17 Can we go to placeholder 00087, and it's the
18 respondents' submissions again on 214 on page 61.
19 Same document. In an attempt to bolster their
20 case they then called Schacher as a witness at the
21 hearing. During cross-examination and while under
22 oath as we see here Mr. Schacher indicates it was
23 never classified as an investment. He also
24 indicated he told the staff litigator the same
25 thing before the hearing. Staff had the

1 opportunity to follow up with the other lenders of
2 the \$495,000 to ask them additional questions or
3 even call them as witnesses but they elected not
4 to do so.

5 The respondents maintain the monies received
6 from Schacher, Drury, Neigum and Lang were all
7 loans, not investments. Wharram still owes money
8 to Neigum and Drury, and paid interest and
9 principal back to both Schacher and Lang. Staff
10 have not brought forward clear and compelling
11 evidence such as an OM, a subscription agreement
12 or even a loan agreement from any of the lenders,
13 only a theory based on an assumption admitted by
14 Chan while under oath which has led to this
15 allegation before this panel.

16 Looking at 214 of the respondents'
17 submissions and again seeing Schacher's words it
18 was never classified as an investment is really
19 all there is needed to be heard period. The
20 respondents say it was a loan. The lender who was
21 called as a witness for the executive director
22 says it was a loan. All the parties involved call
23 it a loan, but the commission who do not even
24 interview Schacher or Wharram before they made
25 their allegation call it an investment because

1 their investigator assumed something to be
2 factual. This is not right at any level, and
3 bearing in mind how much leeway these commission
4 investigators have to get the answers, the
5 executive director had the onus to bring in clear
6 and compelling evidence in order to make the
7 allegation accurate. They failed to do so.

8 On the balance of the probabilities staff
9 have not proven that Wharram made a false
10 statement to an investigator at his compelled
11 interview, let alone did staff even begin to bring
12 in evidence that Wharram had the mental belief or
13 subjective knowledge that the funds obtained from
14 these lenders was ever considered an investment in
15 his mind and that he was not telling the truth
16 when he answered the investigator's questions
17 during the interview.

18 The allegation that I made a false statement
19 to an investigator should be dismissed due to the
20 fact that the investigator admitted while under
21 oath that this allegation was possibly based on an
22 assumption, and the fact that Wharram through a
23 cross-examination of Schacher was able to get to
24 the truth behind the funds. Staff's evidence is
25 not clear and compelling and it's just one example

1 of the sloppy investigative work completed by the
2 investigator and submitted to the executive
3 director and then relied upon by the same
4 executive director in the notice of hearing.

5 In 2 staff indicate the respondents failed to
6 lead evidence that 5.4 million of investor not
7 advanced to the developer were returned to the
8 investors. First of all, and as the respondents
9 argued in their written submissions, and will
10 argue throughout the day, the number alleged in
11 the notice of hearing of 5.4 million is not
12 accurate. Without the need -- without the need of
13 the respondents leading evidence the panel will
14 see that many expenses clearly allowed as per the
15 offering memorandums were completely ignored by
16 the staff at the commission. Staff are attempting
17 to lead the panel to believe that an extravagant
18 \$5.4 million fraud occurred, yet ignored the
19 definition of available funds written in the OMs
20 by simply subtracting two numbers and deducting
21 commissions. By doing a Grade 2 math calculation,
22 ignoring all other transactions, staff of the
23 commission have clearly done only summary work.
24 The OMs state, and the respondents argue, that
25 there are other numbers to consider. Staff did

1 not consider these additional numbers despite
2 knowing about them at all relevant times. Staff
3 want the panel to believe that this \$5.4 million
4 number is one that is needed to be returned to the
5 investors, but this is simply not true. Returning
6 \$5.4 million to the investors in both Falls and
7 Deercrest would be physically impossible to do as
8 there was never that amount to return. Staff
9 seems stuck with that fact that there were other
10 numbers to consider and that the simple math they
11 produced as part of their summary work is not
12 accurate.

13 We argue in paragraph 63 to 101 and
14 paragraphs 142 to 167 of our submissions we
15 outline, recap the numbers that the respondents
16 have relied upon at all relevant times including
17 well before the investigation into this matter
18 ever began.

19 Additionally as outlined in the respondents'
20 submissions at paragraph 227, staff must be held
21 to the allegation made in the notice of hearing
22 and must not stray beyond the same. As much as
23 staff needed the panel to believe the respondents
24 did not lead showing 5.4 million worth of investor
25 funds not advanced to the developer were returned

1 to the Falls and Deercrest investors, the
2 respondents submit they did not have to return
3 that amount as per the definition of net available
4 funds found in all offering memorandums and also
5 because of the expenses that were allowed as per
6 the offering memorandum. Again staff for whatever
7 reason decided to rely on their summary work by
8 their investigator when it was just simply not
9 that simple.

10 In point number 4 staff indicated Wharram
11 said that no funds raised by the Falls resulted in
12 any residential or hotel units being built, and
13 again they attached a small snippet from hundreds
14 of pages of the compelled interview of Wharram.
15 The respondents reply that there was not enough
16 money raised proportionally to finish building the
17 units which is not abnormal. If complete funding
18 was not raised, as was the case in the Falls with
19 only 5 million out of 52 million being raised it
20 would be fair to say the project would have
21 unfinished units. The monies advanced to the
22 developer were used to start the project, and as
23 planned they paid for soft costs such as the water
24 tower sewage system. Again whether or not units
25 were built is not an indication of fraud being

1 committed, and we question the relevance of this
2 submission by staff. Staff are more than capable
3 of investigating the funds that were spent by the
4 developer to see proportionately what was
5 completed and what was not, but they decided not
6 to pursue that route for whatever reason.

7 In point 5 staff say Wharram admitted that
8 only 12 units were built and only two completed in
9 the Deercrest property. Again this was
10 proportionate to the amount of funds that we
11 raised, only 4 million out of the 12 million
12 raised. As per the OM that is in evidence the
13 project was built in stages with profits being
14 rolled over into building other phases and the
15 clubhouse. Either way staff knew there were 12
16 units built on site with two completed. This is
17 in evidence. They would not have been built if
18 the Deercrest monies were not advanced to the
19 project. There were no other lenders.

20 In point 6 staff want the panel to believe
21 there is no evidence of additional payments
22 required or made in relation to the development of
23 the Falls or Deercrest or permitted by the OMs.
24 Again here we have the executive director
25 attempting to get out of the fact their

1 investigation was incomplete and that they have
2 relied upon summary Grade 2 math calculations to
3 allege Wharram did not advance the majority of the
4 funds to the developer. Again the burden of proof
5 is on the executive director to provide clear and
6 convincing evidence to show where the funds went
7 in order to prove the allegations in the notice of
8 hearing. As well staff needed to tell this panel
9 why they claim that additional payments were
10 required or made in relation to the development
11 were not permitted by the OMs when it clearly says
12 it in black and white. I encourage staff counsel
13 to please tell us why they -- I encourage staff
14 counsel to please tell us why they were not
15 allowed, or more specifically why the executive
16 director did not bring a total of this alleged
17 fraud minus these expenses.

18 When looking at BCSC 00163, and we go to
19 section 2.7 on page 10, as early as 2007 and 2009
20 staff were provided offering memorandums for both
21 Falls Capital Corp. and the Deercree entities.
22 Later in 2010 when the investigation into the
23 respondents began they were provided again. In
24 these OMs it clearly states in section 2.7 that
25 cash could be used to pay expenses incurred by the

1 issuer. And to be clear we are not talking about
2 West Karma, the third party marketing arm. With
3 staff's statement of no evidence of this being
4 permitted the respondents will encourage the panel
5 again to read BCSC 00163, section 2.7 on page 10
6 of the Falls OM and the similar segment in the
7 Deercrest OM in section 2.7.

8 We also need to ask ourselves why staff are
9 arguing that there is no evidence of additional
10 payments being required or made in relation to the
11 offering memorandum. Of course they would try to
12 argue these payments being permitted by the OM as
13 that totally blows the doors off their theory in
14 their case and would make much of the allegations
15 in the notice of hearing very untrue, let alone
16 the damning slanderous amount of 5.45 million they
17 allege in their press release.

18 Bearing in mind staff's odd submission in
19 number 6, and while looking at what the offering
20 memorandum physically says, the respondents
21 respectfully submit that there is no other
22 evidence that could have been provided other than
23 the OM itself. The offering memorandum is the
24 evidence. Point 6 in staff's submission falls
25 under a heading there is no evidence of additional

1 payments required or made in relation to
2 development of Falls or Deercrest or permitted by
3 the OMs. This is odd, for when staff's
4 investigator was under cross-examination at the
5 hearing she states she was familiar with the
6 offering memorandum. And because the onus is on
7 them to prove their case you would certainly think
8 that staff before this panel today would have
9 familiarized themselves with the contents of the
10 OM. It appears they did not.

11 In point 7 staff indicate that the
12 respondents' submission that the banking
13 statements for the Scotiabank Visa, Amex cards and
14 cash withdrawals used to pay trades people were
15 not included in of what was billed to be advanced
16 to the developer. It is important to note that
17 this paragraph falls too under the previous noted
18 heading. As we argued a moment ago any valid
19 expenses that was incurred by the issuer was able
20 to be paid as per section 2.7 of the offering
21 memorandums. Some of these expenses were paid by
22 credit cards as Wharram showed in a small sampling
23 during the cross-examination of the investigator
24 during the hearing submitted as Exhibits 270, 271
25 and 272.

1 During the cross of Chan it was very apparent
2 in a short time she knew about the credit cards
3 but had not reviewed them or any other statements
4 related to the respondents' valid expenses.
5 Knowing about the credit cards, but not
6 subtracting any valid business expense from them,
7 would make the amount in the notice of hearing
8 inaccurate. Once again staff allege this big
9 \$5.45 million number that was not returned to the
10 investors, but failed to bring any sort of proper
11 accounting that would prove this amount is
12 inaccurate. Very quickly, and somewhat easily,
13 the respondents are proving to this panel that the
14 amount alleged in the notice of hearing is
15 inaccurate. The respondents question why staff
16 still cling to their submission that there is no
17 evidence these payments were permitted by the
18 offering memorandum when we see right in front of
19 us in black and white they were allowed as per
20 section 2.7 of the OMs. Staff goes on to state
21 the respondents failed to provide any records,
22 receipts or statements to show payments were made.
23 It is the submission of the respondents that all
24 the records were either provided to the
25 investigator directly from the respondents or the

1 investigator obtained or had the ability to obtain
2 the documents directly from the financial
3 institutes pursuant to their investigation order.

4 During cross-examination the staff
5 investigator admitted she had the ledgers and
6 relevant banking statements, yet had no knowledge
7 of the credit card statements other than that she
8 had seen some of them in her review. The
9 information was provided and obtained by staff,
10 yet they neglected to use the evidence to show
11 where the funds went. The onus to provide
12 evidence is on the executive director. The
13 respondents do not need to provide evidence and
14 bring in a forensic accounting of where every
15 penny went, however, it is the responsibility of
16 the executive director to do so when bringing in
17 the allegation of fraud, with I might add an exact
18 number of 5.45 million not being advanced to the
19 developer as part of their allegations.

20 During the cross-examination of the lead
21 investigator during the hearing the respondents
22 asked significant questions that determined the
23 investigator knew nothing about the credit card
24 payments of valid business expenses as allowed per
25 the OM. She admits that her summary work was to

1 only show the difference between funds raised and
2 funds advanced. She did not even know how many
3 credit cards the respondents had when asked about
4 the expenses despite the respondents' fully
5 supplying every statement they were asked to
6 produce. This is not clear and compelling at any
7 level. Staff starting with Chan, then the
8 executive director, dropped the ball by simply
9 relying on summary evidence. The bottom line is
10 Wharram more than provided records, receipts and
11 statements that would have given staff an accurate
12 portrait of all monies paid by the respondents if
13 they had bothered to look. Very early on in the
14 investigation through his companies Wharram
15 provided to staff financial statements prepared by
16 his bookkeeper. These were entered as Exhibits
17 266 and 267. Visa statements were provided to
18 staff by the respondents during their
19 investigation. Despite having this information
20 that equates to their fingertips the lead
21 investigator, and ultimately the executive
22 director decided to overlook this supplied
23 evidence and rely on summary information only.

24 In this submission staff are not even
25 indicating Wharram did not lead with evidence,

1 they're simply stating the respondents did not
2 provide records, receipts or statements. This is
3 contradicted by simply looking at the exhibits
4 tendered as evidence, most by the executive
5 director. Bank records, again 0078, 0079, 0080,
6 0081, etcetera, we go on and on. And then again
7 the statements, financial statements are submitted
8 is 266 and 267. For staff to state that Wharram
9 did not provide information or even calculations
10 of these payments is not accurate. We need to
11 start truly asking ourselves why staff have
12 ignored all these other numbers and insisted at
13 all costs it seems to bring in this big inaccurate
14 number of 4.54 million. Excuse me.

15 In point number 8 staff indicate that the
16 respondents argument about additional expenses
17 beyond those allowed in the OM lack merit and go
18 on to insert a sections from the compelled
19 interview. This is great, but in section -- if we
20 go to BCSC 00168, if we look at pages 113 and 114,
21 the section staff sent us to read, staff
22 investigator Chan is asking Wharram if WKL was
23 entitled to any other reimbursement, not the
24 issuer Falls Capital Corp. The respondents
25 maintain the issuer was entitled to pay their own

1 bills as per the OM, and yes, some of those bills
2 were paid by West Karma on behalf of the issuers
3 and are part of the West Karma banking records
4 entered by staff as Exhibit 00 -- BCSC 00074. Yet
5 staff have failed to bring any accurate amount of
6 these numbers for whatever reason.

7 Staff are not talking about two different
8 things -- sorry, strike that. Staff are talking
9 about two different things in their submission
10 number 8. The issuer was allowed to pay bills not
11 covered by WKL as per the offering memorandums.
12 These amounts were never determined by the staff
13 investigator, and again despite having the
14 information at our fingertips, and were never
15 brought to the hearing as clear and compelling
16 evidence. The fact staff are bringing this
17 portion of the respondents' interview is telling.
18 They're clearly talking about two different
19 things. Asking if West Karma was entitled to any
20 other reimbursement or compensation is different
21 than asking if West Karma was entitled to any
22 repayment of expenses paid on behalf of the
23 issuers. Clearly the issuers were mandated to pay
24 their own bills, and this is what occurred, but
25 staff have come to the hearing with no correct

1 accounting of this number. They allege the big
2 number of 5.45 million, and when you accuse
3 someone of fraud in this setting the onus is to
4 bring an accurate number, or at least prove you
5 attempted to find an accurate number. Staff have
6 done either neither of these.

7 In point number 9 staff want the panel to
8 believe that the respondents' OMs for both the
9 Falls and Deercrest did not allow for payment of
10 additional expenses and proceed to paste a small
11 snippet of the Falls Capital Corp. offering
12 memorandum which discusses the 13.4615 percent
13 that WKL would receive to cover any and all costs
14 and expenses WKL incurs. First of all, there are
15 four distinct OMs, two for each of the two
16 entities, entered as exhibits, so why staff would
17 only include verbiage from one of The Falls
18 Capital Corp. OMs while stating it is from the
19 Deercrest OM is questionable and confusing to the
20 reader. I'm assuming that's a typo, but
21 nonetheless it did confuse me at first.

22 The position the respondents have taken in
23 the submission was the additional expenses that
24 the issuer, either Falls or Deercrest, incurred
25 were able to be paid rather than in advance to the

1 developer. To be clear these are expenses that
2 are not the responsibility of West Karma. Both
3 Falls Capital Corp. OMs clearly state in section
4 2.7 that, and I will quote, "Whole cash reserves
5 to pay for all management, administration,
6 marketing and operating expenses incurred by the
7 issuer in the conduct of his business." WKL would
8 never have been able to pay expenses like the
9 Olympia Trust fess from the 13.4615 percent it
10 earned as per the OM and then pay commission and
11 other expenses on top of that. This does not make
12 sense. Of course the issuers were able to pay the
13 bills associated with their day-to-day operations,
14 but staff continue to argue against this fact and
15 have tendered no evidence as why they believed
16 this.

17 THE CHAIR: Mr. Wharram, let me interrupt you there. What were
18 the day-to-day operations of these issuers?

19 MR. WHARRAM: The day-to-day operations of the issuers was
20 to -- well, Falls Capital Corp. was to -- they
21 entered into a joint venture agreement with the
22 developer to facilitate the build out of the Falls
23 property. They had their own bills. They were
24 obligated to pay bills. They had their own bills
25 at all relevant times. They paid accounting, they

1 paid fees to Olympia Trust. We'll get into that
2 in a moment, but they had viable bills just like
3 any other company would.

4 THE CHAIR: They were not the developer, they were not building
5 the project.

6 MR. WHARRAM: They entered into a joint venture agreement with
7 the developer to build the four different aspects
8 of the project.

9 THE CHAIR: So you're saying they had direct costs because they
10 were in fact doing some of the development?

11 MR. WHARRAM: I'm not saying they had direct costs, I'm saying
12 -- I guess I am. I'm talking specifically in
13 relation to something like the Olympia Trust fees.
14 There were hundreds of thousands of dollars paid
15 in Olympia Trust fees. West Karma wasn't
16 responsible to pay those fees, the issuer was.
17 Those were never tallied, they were never included
18 by staff. Does that answer your question? I'm
19 doing my best.

20 THE CHAIR: Yeah, that answers my question.

21 MR. WHARRAM: Okay. In submission number 9, as confusing it
22 is, staff have submitted a portion of the OM they
23 want us to read. In this section 2.2.3 at Part 1
24 of The Falls Capital OM it does state all costs
25 and expenses WKL incurs as a result of this

1 offering. The respondents agree it does say this,
2 but it says nothing about the issuers bills and
3 responsibilities. Again some of the bills and the
4 responsibilities of the issuers were paid by WKL.
5 To what extent and an accounting as such has never
6 been brought forward as evidence by staff. What
7 is clear and in evidence is that the respondents
8 used WKL bank account as part of the ongoing
9 business of the issuer. In the absence of a
10 proper accounting of funds it is unfair and simply
11 sloppy work to rely on summary calculations. Over
12 and over again this is a problem that we're
13 continuing to see relying on summary information.

14 It is really important to understand the
15 complete story the way these businesses were
16 operated. Yes, there was overlapping of expenses
17 that were paid by other parties and reimbursed by
18 others. In hindsight I've even been confused by
19 some of the decisions that were made, but that is
20 all the more reason why I stand here today and say
21 we needed to have an accurate accounting
22 completed. To take small portions of numbers from
23 three complex intertwined companies is not clear
24 and compelling, and if staff want to lay a \$5.45
25 million allegation of fraud on these respondents

1 they needed to do so with clear and compelling
2 evidence. They did not do so.

3 In point 10, staff indicate the amounts
4 Wharram or the respondents paid in excess are
5 irrelevant to whether they committed a fraud. It
6 is the respondents' submission that indeed it is
7 extremely relevant. Any funds used for legitimate
8 business expenses needs to be included in the
9 executive director's calculations. They are not.
10 Staff even in both sets of their submissions have
11 never brought a valid argument against the issuers
12 being able to pay expenses associated with their
13 internal structure. Staff are trying to cover up
14 sloppy investigative work and a lack of accounting
15 by stating that West Karma was not responsible to
16 pay bills for issuers. The respondents have taken
17 the position and have submitted that the this
18 entire project contained complex accounting and
19 investor funds being used for expenses of the
20 issuers were paid by various respondents. Staff
21 admit that they knew this, but have never brought
22 an accounting of evidence to prove the amount of
23 the allegation is accurate.

24 COMMISSIONER DOWNES: Mr. Wharram, just to interrupt you for a
25 moment here. There seems to be a cap in the

1 offering memorandum on the maximum that will be
2 used for management, administration, marketing and
3 operations and it's only \$10,000, and that's if
4 the maximum is raised.

5 MR. WHARRAM: Okay.

6 COMMISSIONER DOWNES: No, I'm just saying that there does --
7 that the amount that's supposed to be allocated
8 for that purpose is very small.

9 MR. WHARRAM: Very small.

10 COMMISSIONER DOWNES: Because the minimum -- that's assuming
11 the maximum. Assuming the minimum it's only
12 \$1,015.

13 MR. WHARRAM: Yes, it was very small, and admitted it being
14 very small, but at the same time, you know, I can
15 argue this two ways. I was the fund manager, I
16 did have the ability to go in and take other funds
17 to pay bills and different things. The company's
18 were responsible to pay the bills and different
19 items like that. So, you know, items like the
20 Olympia Trust fees were a lot more than \$10,000.

21 COMMISSIONER DOWNES: So the OM again is inaccurate in their --
22 when they're authorizing the allegation of these
23 funds or suggesting to the investors what monies
24 will be allocated for these purposes you're
25 saying.

1 MR. WHARRAM: It would be inaccurate. But again I did have the
2 ability -- as the fund manager I did have the
3 ability to go in and take extra funds to pay bills
4 that were associated with the company. Is that
5 your question?

6 COMMISSIONER DOWNES: Yes.

7 MR. WHARRAM: Okay. Thank you.

8 In point number 12 staff submit that with
9 respect to the Olympia Trust fees, section 2.9.4
10 of the Falls OMs did not mention any fees. Can we
11 please bring up BCSC 00164. If we could go to
12 page 12. We concede this paragraph does state
13 exactly what staff says, but I need to question
14 whether or not they actually read the offering
15 memorandum. If we can go back over on page 11,
16 please, and if we look at section 2.8, it talks
17 here -- it clearly discusses the amount of fees to
18 be paid to Olympia Trust. I'm sorry, just one
19 moment. Oh, sorry, it states Eyelogic's interest
20 in the property is to earn admin fees. And if we
21 go and look back over on page 12, if we look at
22 section 2.9.2 it clearly discusses the amount of
23 the fees to be paid to Olympia Trust by the
24 corporation, not West Karma. The corporation is
25 Falls Capital Corp., thus they were able to pay

1 this bill as per the offering and was not part of
2 the fees earned by WKL.

3 One wonders what kind of submission argument
4 this is by staff. Either the litigator has not
5 read the OM and has no idea what it says or he has
6 read it and doesn't understand what it says, but
7 whether or not he read it is not what's really at
8 point. The fact is that the Falls Corp. OMs were
9 entered as an exhibit in this hearing, and the
10 Olympia Trust fees as outlined within the OMs were
11 permitted to be paid by the issuer at all relevant
12 times. Facts are there in black and white for
13 anyone to read. Falls Capital Corp. was able to
14 use investor funds to pay the bill which they
15 incurred at Olympia Trust. Staff did not include
16 this in summary work completed by the investigator
17 and entered as BCSC 01115, the summary of their
18 summary, making the number of 5.45 million alleged
19 in the notice of hearing inaccurate. I do
20 apologize for being repetitive, but this is just
21 another example of the basic Grade 2 math
22 calculation done by staff, ignoring so many other
23 aspects of this project, and why staff
24 calculations simply do not work.

25 In 13 and 14 staff argue that Wharram

1 confirmed in his compelled interview he used
2 investor funds to pay interest to the Falls
3 investors. The respondents argue that skipping
4 the step of writing a cheque to the developer so
5 that he could then turn around and pay his
6 receivables, including development costs like
7 interest, is not a fraudulent act, just bad
8 bookkeeping, and this certainly does not prove the
9 *mens rea* or subjective knowledge that the
10 respondents had no way of understanding this could
11 be perceived as fraud, only that the respondents
12 were trying to save time and money writing the
13 cheque to the developer only to have him turn
14 around and pay his bills including the investor
15 interest.

16 Can we please put up -- actually I don't need
17 it put up, but if we were to look at BCSC 00077
18 there's several bank statements, 154 pages of
19 returned cheques for Falls Capital Corp. These
20 cheques are not in any particular order, but in
21 reviewing them anyone can see they're numbered
22 from the high 500s to high 700s. Where are the
23 other roughly 650 cheques. There is no other
24 exhibit entered with these missing cheques. If we
25 were to look at BCSC 00072 is a series of bank

1 statements for Falls Capital Corp. If one was to
2 look through from page 1 to roughly page 107 we
3 could see the monthly bank statements from Falls
4 Capital Corp. from its inception to when Falls
5 Capital Corp. stopped paying their investor their
6 interest. More specifically if we look closely at
7 the cheque numbers of funds leaving the account we
8 would see cheques numbered below 100, cheques in
9 the 100s, 200s and all the way up into the high
10 700s. What is my point? The investigator had the
11 bank records and only some of the corresponding
12 cancelled cheques, but never investigated these
13 cheques, and she certainly did not provide a
14 total. Why not? They had the onus to do so if
15 they wanted to bring in an accurate amount to this
16 hearing.

17 My only thoughts on this will be brief.
18 Staff never brought forward the allegation of
19 fraud or misrepresentation against the respondents
20 because they wrote cheques from Falls Capital to
21 pay investors their interest. Nor did they bring
22 forward any dollar amount of cheques that were
23 written on behalf of the developer. Falls Capital
24 Corp. paid this interest on behalf of the
25 developer no different than if they would have

1 paid the monies to the developer and the developer
2 turned around and wrote a cheque back to the
3 respondents. Staff's collection of data was
4 horrible. They see these cheques but never come
5 forward with any accounting to support their
6 theories. Staff's point in 13 and 14 is unknown.
7 To say that Wharram confirms that he used investor
8 funds despite the OM not allowing it, but then
9 bring no point, no allegation of wrongdoing and no
10 proof of wrongdoing. Wharram paying investor
11 interest as staff allege in their submission does
12 not take away from the fact these numbers should
13 have at least have been accounted for, something
14 we could have looked at, but we have nothing.
15 This too is not clear and compelling at any level.

16 In 15 to 17 staff argue there was no interest
17 reserve set up as per the OM. Again the
18 respondents argue that not taking the one extra
19 step of opening up a bank account is irrelevant in
20 proving the *mens rea* of fraud. It does not amount
21 to a wilful or intentional act of fraud. Staff
22 are once again deflecting. Nowhere in the notice
23 of hearing does it allege fraud by the respondents
24 not opening up an interest reserve account, but
25 they are purposely trying to focus the reader in

1 another area away from why they did not include
2 the Deercrest interest as part of their summary
3 work and subtract this off of a \$5.45 million
4 number. The bottom line is investor numbers were
5 able to be used to pay interest and should have
6 been included in the numbers in staff's summary
7 work.

8 If the respondents had opened an account for
9 the interest reserve would it have changed things
10 and made the executive director magically bring in
11 these amounts as part of their summary reporting?
12 Staff argued that there was no interest reserve
13 account set up by the respondents, but again they
14 do not argue against why these numbers were not
15 included in the summary information supplied in
16 BCSC 01115. And they certainly do not argue back
17 to the respondents' submissions, paragraph 57xi on
18 page 23. It is very telling that they have no
19 explanation to the respondents' submission as they
20 are using this to deflect the real question why
21 was the investor interest not included in the
22 summary reporting of the alleged \$5.45 million
23 fraud, or more specifically in the calculations of
24 the net available funds as indicated in all of the
25 OMs the respondents relied upon. As we see in

1 Exhibit 00273 this alone takes over \$600,000 off
2 of the \$5.45 million alleged in the notice of
3 hearing.

4 In 18 staff indicate that the investors who
5 testified thought their funds were going into
6 townhomes and that no investor knew or understood
7 their funds were being used for interest. They go
8 on to encourage the reader to review transcripts
9 from the hearing where five investors were
10 witnesses for the commission. Reading these
11 transcripts are telling. At no time during the
12 direct conducted by both lawyers representing the
13 commission are these witnesses ever asked about an
14 interest, yet here we have staff leading evidence
15 in this submission that none of their witnesses
16 knew or understood their funds were being used for
17 interest payments.

18 Also of note, staff directed the reader of
19 the submission to five different spots in the
20 hearing whereby investors took the stand. Of the
21 five witnesses three were Deercrest investors and
22 two were Falls investors. Clearly we are under
23 the tab in the submission labelled Deercrest, so
24 why staff are submitting anything with regard to
25 Falls investors is questionable. During

1 cross-examination the respondents asked each of
2 the witnesses or investors, specifically the
3 Deercrest investors Amado, Lucas and Cardoza if
4 they had received a copy of the offering
5 memorandum and they all said yes. None of them
6 denied having seen the offering memorandum.

7 The Deercrest offering memorandum clearly
8 states that investor dollars would be used to pay
9 interest until which time the units were funded.
10 Three-fifths of the witnesses staff mentioned in
11 the submission had funds in the Deercrest
12 offering. Deercrest fully disclosed that they
13 were using investor funds to pay the interest, and
14 again the other two investors were never asked if
15 they knew or understood their funds were being
16 used for investor interest payments. Of course
17 the investors would think their investment was
18 going to be used for the development. That would
19 be a standard answer for nearly all the investors
20 if they were asked that question. If staff wanted
21 to bring evidence that investors did not know
22 their dollars were being used for interest then
23 they should have asked this question directly
24 while their witnesses were on the stand. They
25 chose not to.

1 In 19 and 20 staff argue that the interest
2 cheques were all written on a Deercrest account
3 and then respondents took money from investor B to
4 pay investor A. The respondents question the
5 relevance of this submission by staff. This was
6 allowed as per the Deercrest offering memorandum
7 which all Deercrest investors received at the time
8 of their investment. This is yet another example
9 of staff attempting to paint a picture that
10 supports a theory of our case, as inaccurate as
11 that may be. Simply put staff did not include
12 investor interest in the Grade 2 math calculation
13 they did or not attempting to minimize this
14 mistake. These were relevant expenses that were
15 permitted in the OM and not considered by staff
16 when the summary evidence was prepared.

17 THE CHAIR: Mr. Wharram, I just want to interrupt you and make
18 sure I understand something. You just used the
19 figure of over \$600,000 in interest, which first
20 of all my first question is I presume that's
21 aggregate as between the two entities, is it?

22 MR. WHARRAM: No, it's just Deercrest.

23 THE CHAIR: Just Deercrest. Okay. Where in evidence would we
24 find the 600,000 figure?

25 MR. WHARRAM: I don't have it memorized, but I think it's 273,

1 but just let me confirm that though. Yes, it was
2 273.

3 THE CHAIR: Exhibit 273. Thank you.

4 COMMISSIONER DOWNES: Sorry, just another question for you,
5 Mr. Wharram. But isn't the -- the offering
6 memorandum says the majority of the proceeds of
7 the offering will be used. So why would we
8 consider investor interest to be proceeds of the
9 offering for the purposes of determining what --
10 as I understand it you're saying we should be
11 including that \$600,000 in our determination of
12 whether the majority of the investors were --

13 MR. WHARRAM: My defence or my theme that I'm saying is any
14 amount of money that -- that staff have alleged
15 that I --

16 COMMISSIONER DOWNES: I understand you're saying payment of the
17 interest is somehow --

18 MR. WHARRAM: It should be deducted off of the \$5.45 million
19 amount along with many other expenses, but we have
20 no idea what that number is.

21 COMMISSIONER DOWNES: Sorry, I misunderstood.

22 MR. WHARRAM: That's my point here today. There's no accurate
23 number before that was brought in during the
24 hearing at any time of what this number is and
25 what it should be. They allege 5.45 million they

1 say that wasn't advanced to the developer and it
2 wasn't given back to my investors. So that's my
3 argument.

4 COMMISSIONER ROWLATT: You use those numbers a fair little bit,
5 and we often go back to that NOH too, because we
6 have to do that ourselves. Can you point to me
7 where in the NOH it says the fraud was 5.45
8 million? I'm sure we can get the NOH out.

9 THE CHAIR: Sorry, when you're talking about the NOH we are
10 talking about the notice of hearing, just so
11 there's no confusion.

12 COMMISSIONER ROWLATT: Sorry, and I don't know the number.

13 MR. WHARRAM: If it helps it -- I know you want to look at the
14 notice of hearing, but it was in the amount that
15 was in the newspaper.

16 COMMISSIONER ROWLATT: What I'm interested in is the very --

17 MR. WHARRAM: Okay. I don't have a copy of it.

18 COMMISSIONER ROWLATT: We'll get it up on the screen in a
19 moment. There we are. And so my question is
20 since you've used that number a lot, and it's
21 always helpful to me to know, I don't think it
22 says that in the NOH.

23 MR. WHARRAM: Okay.

24 COMMISSIONER ROWLATT: It seems to me that if we scroll down a
25 bit here, in the NOH there's issue of half, you

1 know, of majority.

2 MR. WHARRAM: Majority.

3 COMMISSIONER ROWLATT: And the issue is the -- for both
4 Deercrest and for -- and the use of some of the
5 monies for your personal. Those I think are what
6 are in the NOH, and you're characterizing, and I
7 just want to make sure we're on the same page, if
8 you will, you're characterizing this as saying you
9 committed a \$5.44 million fraud. The NOH I do not
10 believe says that.

11 MR. WHARRAM: Okay.

12 COMMISSIONER ROWLATT: I think the NOH says not a majority was
13 transferred and that you used some of the funds
14 for your personal so, you know, we've got to stick
15 to --

16 MR. WHARRAM: I think what, and this was part of the hearing if
17 I remember correctly with Liz Chan during her
18 cross-examination, and I've probably done exactly
19 what the newspapers did when they wrote their
20 article, and the person that does your -- the
21 commission press releases, you know, point 20 says
22 raising 3.9 million and only advancing 1.6 to the
23 developer, and I've subtracted that amount when
24 you --

25 COMMISSIONER ROWLATT: And I appreciate where the number comes

1 from.

2 THE CHAIR: I will be fair to Mr. Wharram, that my note from
3 the executive director's submission when I asked
4 him what the quantum of fraud was is he said it
5 was the difference between the amount raised and
6 the amount advanced, that's my note from this
7 morning, and that would \$5.4 million.

8 COMMISSIONER ROWLATT: I remember that now. I guess I still --
9 my lawyer friends here teach me to go back and
10 look at the NOH and actually read it time after
11 time, and I was just doing that, sir, so I still
12 think that's important.

13 MR. WHARRAM: I respect that. I hope -- I hope I'm not making
14 a mistake then by using the number 5.45 million,
15 it's just that's the total that they're alleging
16 wasn't advanced to the developer.

17 COMMISSIONER GLOVER: This may not be helpful, it may not even
18 be right, but I think part of the issue is there
19 were sort of two 5.4 millions in the NOH and in
20 the evidence. One is the Falls total amount
21 raised, and the other is that the 5.4 million is
22 the net amount allegedly not advanced on the two
23 projects, so that may be some of the problem.

24 MR. WHARRAM: There was a little confusion. If I remember
25 correct at the hearing there was a little

1 confusion but we did go through that with the
2 witness Ms. Chan. Would you like me to proceed or
3 can I just ask the schedule?

4 THE CHAIR: Well, first of all just give me a sense of where
5 you think you are in your total set of submissions
6 here. How much time do you think you have left?

7 MR. WHARRAM: I'm going to -- again, I've never done this
8 before, and I do apologize in advance, I thought I
9 was to rebuttal everything they said in there. So
10 I am skipping some, there's a lot of stuff, like
11 some stuff that's going to be irrelevant here. I
12 will go through at lunchtime and kind of wipe out
13 what I think is irrelevant for the purpose of what
14 you guys want to hear.

15 THE CHAIR: All right. Well --

16 MR. WHARRAM: I timed it at home, and I was at about two, two
17 and a half hours total, so.

18 THE CHAIR: Well, we've been just over an hour, so I'm going to
19 say we're somewhere in the hour and a half range
20 give or take, which is fine. So I'm going to
21 suggest though that we break now and resume at
22 quarter to two just to ensure that we don't run
23 late or we don't run out of time this afternoon.
24 So we'll resume at quarter to two.

25 MR. WHARRAM: Thank you.

1 THE CHAIR: Thank you.

2 (PROCEEDINGS ADJOURNED AT 12:18 P.M.)

3 (PROCEEDINGS RESUMED AT 1:45 P.M.)

4 THE HEARING OFFICER: All rise.

5 COMMISSIONER ROWLATT: As we're getting settled, before the
6 break, Mr. Wharram, you gave us a good reference
7 for the interest, Exhibit 273, and I found that.
8 That refers to interest payments by Deercrest.

9 MR. WHARRAM: That's correct.

10 COMMISSIONER ROWLATT: I guess is there a comparable document
11 for Falls or did Falls pay any interest?

12 MR. WHARRAM: Falls definitely 100 percent paid interest. At
13 the time of the hearing I didn't enter that in as
14 an exhibit, but there's a significant amount of
15 money that was paid by Falls Capital Corp. for
16 interest as well.

17 COMMISSIONER ROWLATT: But it's not in the evidence.

18 MR. WHARRAM: No, it's there though.

19 COMMISSIONER ROWLATT: Thank you.

20 MR. WHARRAM: Can I begin?

21 THE CHAIR: Yes.

22 MR. WHARRAM: Okay. Before the break we were talking just
23 going through my -- going through items and
24 whatnot. I'm just going to -- I am going to skip
25 over some of this stuff and just touch on it

1 briefly so we can -- in lieu of time here. But in
2 paragraphs 21 to 29 of staff's response
3 submissions staff focused on the use of the Falls
4 investor funds for various personal expenses.
5 Each of these transactions has been addressed in
6 the respondents' written submissions. I'm just
7 going to touch on them again just briefly. I
8 don't want to go through all of this, but
9 regarding the \$75,000 advance for the home
10 purchase I do want to direct the panel to review
11 paragraphs 111 and 121 again in my reply
12 submissions, just with the thought though when a
13 person advances \$75,000 with a current plan in
14 place to replace the amount immediately the
15 thought of deprivation or risk of deprivation does
16 not even come into play in a person's mind.
17 There's no subjective knowledge. When I have a
18 plan put into place that I'm paying back the money
19 in a very short amount of time there's no
20 subjective knowledge in that whatsoever. Staff
21 have not proven my intent or my mental element
22 needed through any of their evidence, only that
23 these transactions took place.

24 With regards to the sale of claims proceeds
25 I'll direct the panel to look at 126 to 141 of my

1 submission, while looking at paragraph 22 to 23 of
2 the executive director's reply submissions. Staff
3 insist on quoting *Currie*, a case in the Ontario
4 Court of Appeal where the court confirmed that the
5 use of investor funds in a manner that was not
6 authorized was sufficient grounds for finding the
7 accused acted dishonestly.

8 In *Currie* there's no definition of the word
9 authorized. There's no definition whatsoever that
10 the judge in that case led people to review where
11 there was no ruling regarding that, so I just
12 again would like the panel to look closely at
13 those submissions in Lang.

14 Reliance on management is another thing that
15 is in the OM, and decisions regarding the
16 management of the joint ventures affairs will be
17 made exclusively by the operating committee of the
18 joint ventures in consultation with the officers
19 and directors of the corporation. The respondents
20 were the authorizing party again, and I just do
21 want to make a point to that that I did make in my
22 written submissions, I just want to touch on that
23 briefly here today.

24 THE CHAIR: Mr. Wharram, though but I think, I don't want to
25 put words in your mouth, but I think what you're

1 saying is you're right there's no definition of
2 authorized in *Currie*, but I think what you're then
3 implying is that you were authorized -- you
4 believe you were authorized under the offering
5 memorandum and the various contracts to spend
6 money on your own personal expenses.

7 MR. WHARRAM: I don't believe I had authorization to do that,
8 and I fully admit that. What I am saying though
9 is that there is not subjective knowledge of that.
10 I did not intentionally do this to any of my
11 investors or to any of the people involved in
12 this. And that's kind of where I'm -- you know,
13 I'm not saying things the right way here today,
14 I'm a simple guy, but there's no subjective
15 knowledge by me doing something like borrowing
16 money on a short term basis with a plan put in
17 place, I'm just saying that there was no intent
18 there, and that's my submission on this. There's
19 no intent whatsoever of me purposely, deceitfully
20 with subjective knowledge doing this to my people
21 or to my investors.

22 COMMISSIONER ROWLATT: Mr. Wharram, could I just follow that?
23 The OM describes you in the OM, as it should, as
24 an experienced business person, that you've done a
25 lot of stuff, a lot of developments. An

1 experienced business person knows he can't divert
2 funds to himself, doesn't he?

3 MR. WHARRAM: My reply to that will be yes, in my -- in
4 hindsight, and I have to go back, there's two
5 different things at play here. At the time when a
6 person's doing this and, yes, with my experience
7 and what not maybe I should have known better, but
8 at the time that's not what a person's consciously
9 thinking about. In hindsight I can stand here
10 today before you and I agree with you, and I'm
11 probably cutting my own wrists here saying that,
12 but I do agree today standing here, but at the
13 time when I was -- at that time there's no
14 subjective knowledge. I didn't understand the
15 consequences and the deprivation and the possible
16 deprivation, and all the things I know now I
17 didn't know at the time. Just because I was
18 experienced at raising capital before that and had
19 some business experience prior to that doesn't
20 automatically bring proof that I did know that.
21 That's my opinion on that.

22 COMMISSIONER ROWLATT: Okay.

23 MR. WHARRAM: Any other questions? Okay.

24 Just touching on *Currie* again, the trial
25 judge has his opinion on what constitutes fraud

1 but doesn't go into detail whatsoever on the
2 second element needed to prove the fraud, the *mens*
3 *rea* or subjective knowledge that we just
4 discussed. The respondents did get into the *mens*
5 *rea* subjective knowledge throughout the written
6 submissions and have today as well. My opinion is
7 staff have brought forward no proof of the state
8 of Wharram's mind, no witnesses, no evidence,
9 nothing to prove that Wharram had the mental
10 element or the intent to commit fraud at that
11 time.

12 In paragraph 24 the executive director
13 submits that Wharram used investor funds for
14 personal purposes and most of the investor funds
15 were not returned to the account from which they
16 were taken. Staff for the executive director are
17 again making a distinct difference between the
18 accounts that funds were placed in stating
19 numerous times that repayment of funds went into
20 West Karma's account and not into the Deercreech or
21 Falls account, yet at no time has the executive
22 director submitted any evidence whatsoever to
23 indicate that these funds were not used for the
24 benefit of the investors or to the development of
25 the project. It has been clear throughout these

1 proceedings that the respondents used all of their
2 accounts, including the WKL account, to fund the
3 projects or pay expenses related to the issuers
4 expenses. I ask this panel right now to question
5 why these numbers are not here in a case of this
6 magnitude.

7 Again the onus and burden of proof is on the
8 executive director to prove that the funds that
9 were placed in the WKL account were not used to
10 benefit the investors and the project or funded to
11 the developer through other accounts as they
12 allege. Staff of the executive director are
13 simply guessing and assuming these funds were not
14 used for the project again to support their theory
15 of the case. These are not facts, they are just
16 assumptions.

17 In 26 and 27 staff again bring up the
18 reference to the \$75,000 and the funds that were
19 received from the mortgage of his residence and
20 ended up in the West Karma bank account and not
21 the Falls. They then in their submission, number
22 27, by stating nor were the investor funds
23 returned to the Falls account. There's no proof
24 of that. They haven't come forward, it's a
25 statement that they make in their submission and

1 bring no proof of that.

2 Okay. As argued previously staff needed to
3 extend their investigation to prove the funds
4 stayed in the WKL account and were not transferred
5 back to The Falls Capital account or used by WKL
6 to pay bills on behalf of the Falls Capital Corp.
7 entity. They did not bring this evidence to this
8 hearing, certainly not in any of their
9 submissions. Right now I'm not allowed to say
10 with a hundred percent authority that the funds
11 went to the developer or to the project expenses
12 because staff would say that I was bringing
13 evidence into this hearing and I can't lead
14 evidence. I say the same thing back, they're
15 assuming, they're leading with evidence saying
16 that I never gave the money back, but there's no
17 proof of that whatsoever here.

18 In paragraphs 31 to 35 of the staff's
19 response submissions they focus on the Deercrest
20 construction investor funds, and again I'll skip
21 through it. I do want to touch just briefly on
22 the Nature's Fare loan, and I argue that
23 extensively in 172 to 177. If we look at
24 respondents' submissions 0087 on page 51 we can
25 address staff's assertion, and I quote:

1 This prohibited act caused actual deprivation
2 though Deercrest investors were deprived of
3 the \$240,000 from the Deercrest investments
4 which was used for the wife's grocery store
5 payment.

6 As we argued in our written submissions this is
7 not a payment, it was a loan, and it is easily
8 confirmed by Exhibit 00255, a loan agreement
9 entered by the respondents. Also as we noted all
10 funds were returned to the respondents with no
11 deprivation to the investors as indicated by
12 staff.

13 Skipping ahead and going into the purchase of
14 my residence we do argue in our submissions 178 to
15 181. I would ask that the panel do re-read those
16 submissions again before rendering your decision.
17 With respect to the diamond ring purchase, staff
18 discussed the \$24,000 diamond ring purchase and
19 discussed Wharram's assertion that he considered
20 it a commission but led no evidence to support
21 this assertion. The respondent Wharram will argue
22 that staff knew Wharram had earned commissions
23 from selling Deercrest investments yet never asked
24 Wharram whether he felt this was a commission he
25 felt he earned. If we pulled up placeholder 0087,

1 the respondents' submissions at 168, or the
2 hearing transcript of April 14th, page 57, here
3 investigator Chan admits during her
4 cross-examination she never asked if I thought
5 taking the monies from Deercrest was reimbursement
6 for commission that I was due.

7 While taking the commission directly through
8 the Deercrest bank account was wrong, it certainly
9 doesn't show the mental aspect or subjective
10 knowledge needed to show Wharram committed fraud.
11 This was a mistake in hindsight but it does not
12 show wilful intent or the mental aspect needed to
13 prove fraud. Wharram at all times, including at
14 tax time, included the \$24,000 as earned income.
15 Staff never investigated this. They never asked
16 for my personal or corporate tax returns, they
17 only rely on an assumption that Wharram
18 intentionally took funds to buy his wife a ring.

19 THE CHAIR: On what theory would the commission have been owed
20 to you out of Deercrest? The offering memorandum
21 was explicit that the only commissions were to be
22 paid through West Karma.

23 MR. WHARRAM: Payable to West Karma.

24 THE CHAIR: Correct.

25 MR. WHARRAM: Okay. West Karma owed Rod Wharram commissions.

1 THE CHAIR: The evidence of that is?

2 MR. WHARRAM: Sorry.

3 THE CHAIR: And the evidence of that is?

4 MR. WHARRAM: Did I bring in evidence you're asking me?

5 THE CHAIR: Correct.

6 MR. WHARRAM: I don't remember. Probably not. I'm not a
7 lawyer. But they owed me money. I skipped the
8 step of writing a cheque to West Karma, West Karma
9 turning around and writing a cheque to Rod
10 Wharram. It was an accounting mistake. It's not
11 fraud in my opinion. Okay. Were you -- I'm
12 sorry, I get confused. Do you have further
13 questions?

14 THE CHAIR: No.

15 MR. WHARRAM: Okay. Sorry.

16 In 37 staff indicate that Wharram and the
17 respondents did not lead evidence at the hearing
18 that the monies returned to Falls and Deercrest
19 account were returned to the investors, and as
20 we've argued already here today with a re-current
21 theme, staff did not lead with evidence that the
22 funds were not used for valid business reasons or
23 on behalf of the issuers, nor have they given us
24 any amount of what was to be returned to the
25 investors. They have not brought forward any

1 evidence indicating these funds or the amount of
2 these funds had to go back to the investors. At
3 the time of the funds going into the Falls and
4 Deercrest accounts the investors were not due to
5 get any money back. The bonds and shares had not
6 yet matured. It was an ongoing project and funds
7 were in the project. Staff just implying that the
8 respondents had to return some \$4.54 millions does
9 not work before this panel. Staff needed to bring
10 in an amount, if there even was one, after
11 completing a proper accounting if they wanted this
12 panel to believe that money was due back to the
13 investors.

14 Based on the balance of probabilities while
15 knowing the West Karma bank account paid for
16 several items on behalf of the issuers there is a
17 strong probability that monies returned to the
18 West Karma bank account were used for business
19 directly related to the issuers. Again as pointed
20 out in the respondents' submission 121, where we
21 talk about the return of the \$75,000 from the
22 mortgage proceeds, there's no other reason for
23 Wharrams to seek a mortgage on his home other than
24 to the repay the Falls Capital Corp. entity. This
25 is eight months before an investigation was

1 started by the commission.

2 The real issue here is staff see a cheque go
3 mistakenly into West Karma's account and then do
4 not cross reference it to prove the funds were not
5 used for business directly related to Falls
6 Capital Corp. yet bring allegations of fraud
7 against the respondents. This is not clear and
8 compelling and if staff wanted to assert Wharram
9 did not use the funds that were returned from the
10 mortgage being placed on his home for Falls
11 business they should have brought forward evidence
12 of this assertion instead of an assumption, and
13 with many other items they are guessing as to what
14 happened to the funds. This is not compelling and
15 hurts their case.

16 In 38 staff again indicate Wharram used
17 investor funds and admits he advanced less than
18 half of the funds to the developer. Can we please
19 put up 00087 and go to paragraph 273 on page 78.

20 THE HEARING OFFICER: Placeholder 00087?

21 MR. WHARRAM: Yes.

22 THE HEARING OFFICER: We are there, and paragraph 278?

23 MR. WHARRAM: Paragraph 273 on page 78. As we see Wharram was
24 answering a question of an exhibit that was placed
25 directly in front of him during his compelled

1 interview. If we look just below we see another
2 segment from the interview. Now, when asked
3 another question a moment later my answer was I
4 don't know until I see the documentation. As I've
5 already argued this is hardly an admission of
6 guilt, only that I was answering a question to the
7 best of my ability on an exhibit that was placed
8 in front of me. I did not have any of my own
9 supporting documents in front of me. I did not
10 have the numbers related to the issuers memorized.
11 Again the accounting that I was relied on was more
12 complex than taking the amount raised, subtracting
13 the amount of cheques written to the developer and
14 then subtracting the commissions amount. Far more
15 complex. The writer, like investor interests and
16 other legitimate business expenses that I simply
17 did simply did not have memorized in that setting.

18 In paragraphs 40 to 43 staff want to argue
19 that Wharram had subjective knowledge of the
20 deceit and that it could have as a consequence the
21 deprivation of others. They then on go to refer
22 the reader to look at *Anderson* and *Theroux*, other
23 cases that have come before this one. The
24 respondents argue that these two other cases are
25 not the British Columbia Securities Commission

1 versus Rod Wharram and the corporate respondents.
2 I was there at all relevant times and I did not
3 know that some of the actions taken by myself
4 while running my companies could give the
5 appearance of the alleged fraud.

6 Allowing items like the reallocation clause
7 whereby management is allowed to reallocate funds
8 for some business reasons is leaving this decision
9 up to the fund manager. As we read earlier there
10 is another section of the OM discussing the
11 reliance on managers. Either way the respondents
12 maintained for the report that there was no
13 knowledge of this act being fraud, and staff had
14 brought forward no concrete evidence, again only a
15 theory of what the respondents' mindset was during
16 the relevant times.

17 When we look at the entire picture instead of
18 specific acts the facts are that Wharram and the
19 corporate respondents trusted several business
20 professionals, ran his companies to the best of
21 his abilities and did not realize his actions
22 could have deprivation against the investors.
23 Funds that were lent out were all returned or were
24 in the process of being returned when the cease
25 trade was issued by the commission, so Wharram had

1 no indication that any deprivation against the
2 investors would or could ever occur. Staff state
3 that Wharram's subjective knowledge of the
4 prohibited acts and the risk of deprivation flows
5 from his being the founder, operating mind and
6 director and officer of the corporate respondents.
7 He had brought no evidence forward of Wharram's
8 subjective knowledge of that claim, only quoting a
9 couple of case laws that have no bearing on my
10 mind-set. Being a founder, operating mind,
11 director and officer does not prove the subjective
12 knowledge was there, only that their theory that
13 it ought to be. Staff seem more content on
14 calling it a fraud and then quoting a couple of
15 case laws rather than bringing in evidence of any
16 kind that would show Wharram's frame of mind.
17 Calling it fraud and then not producing any
18 evidence of why they're calling it fraud is not
19 compelling.

20 At any rate, for anyone at the commission to
21 assume that someone ought to have known their
22 actions were considered fraud just because they
23 were a founder, operating mind, director, officer
24 is fundamentally wrong. Staff needed to prove
25 that a person's mind was intentionally committing

1 an offence, not this grey area or even the
2 confusion around the word fraud.

3 In 50 staff again discuss the making of a
4 false statement we touched on earlier so I'll skip
5 through a lot of what I was going to say here, but
6 bearing in mind Schacher always considered it a
7 loan. As indicated in the response submissions,
8 staff had an opportunity to conduct a proper
9 interview of Schacher before they issued the
10 notice of hearing yet decided not to, and only
11 contacted him some months later to see if he would
12 testify at the hearing. This completely back
13 fired on them as Schacher indicated his funds were
14 a loan at all times.

15 In point 51 staff attempt to indicate Wharram
16 raised funds from Schacher in 2013 by trying to
17 insinuate that Wharram needed the funds from
18 Schacher or he was going to lose the Deercrest
19 deal. This does not provide compelling evidence
20 of their theory of their matter. Schacher's
21 testimony at the hearing is the why, why Wharram
22 needed funds, but not the how, how he obtained the
23 funds from Schacher. The conversation between
24 Schacher and Wharram in the spring of 2013 was not
25 fully investigated by staff and this small snippet

1 does not provide the cogent evidence needed for
2 staff to prove their case. Staff appearing and
3 unconvincing with the statement. Obtaining money
4 either from a friend either through an investment
5 vehicle or loan or even a gift are all valid
6 avenues to obtain money. The fact Schacher
7 testified Wharram needed money for a project
8 proves other nothing other than that, that Wharram
9 needed funds for a project. This in no way proves
10 he was raising investment funds, and staff have
11 brought forward no evidence that go against the
12 submission for the respondents either at the
13 hearing or during their submissions.

14 In section 52 staff assert -- in paragraph 52
15 staff assert that the West Karma Envision bank
16 account statements indicate that Wharram raised,
17 and I use the word raised, \$495,500 between
18 November 30th, 2012 and June 4th, 2013. The
19 respondents argue this is far removed from proving
20 the respondent Wharram raised capital from
21 investors in 2013 as alleged in the notice of
22 hearing. The notice of hearing clearly states the
23 year 2013, but in this paragraph they go back to
24 November of 2012 which confuses the reader.

25 If we pull up again 87, and if we looked at

1 submissions 203 to 210 on page 57. Additionally
2 of the \$495,000 they want to sensationalize there
3 is clear and compelling proof, even admitted by
4 the investigator during cross-examination, that
5 the Schacher and Lang funds were clearly repaid
6 with interest in Spring 2013 as we see in the
7 transcript portion of paragraph 203.

8 In paragraphs 204 to 208 of the respondents'
9 submissions we clearly discuss the Schacher loan
10 history and make valid points questioning why
11 staff did not contact Schacher in the time leading
12 up to the notice of hearing being issued to the
13 respondents. Chan knew on June 10th, 2013, the
14 day she talked to the bank representative, that
15 Schacher was repaid his funds plus interest but
16 still allows an inaccurate, or let's call it a
17 non-investigated section of the notice of hearing
18 to be issued and says nothing to her superiors or
19 the executive director himself. Again, and one
20 more time for clarity, Schacher testified that he
21 never considered his funds an investment and that
22 it was to be a loan at all times. That is the
23 respondents' position as well.

24 Borrowing funds does not constitute raising
25 funds from investors as written in the notice of

1 hearing. The commission staff have brought no
2 evidence, testimony from Lang, Drury or Neigum
3 despite having the onus to do so if they wanted to
4 prove their case. Instead they would rather have
5 allowed their investigator to bring a possible
6 assumption to their legal documents.

7 In paragraph 53 staff argue that a review of
8 the West Karma bank account provides, and I quote:

9 Compelling evidence that Wharram not only
10 raised funds from an investor in 2003, but
11 was currently raising funds from investors.

12 My comments will be brief. I will start by
13 stating that reviewing, which I take means looking
14 at, bank statements and seeing funds deposited
15 into the account does not constitute proof of
16 Wharram raising funds. Loan proceeds are
17 deposited in a bank account no different than an
18 investment would be, usually by a cheque or money
19 order, wire transfer. Staff argue that this
20 so-called review of West Karma's banking records
21 provides compelling evidence of their claim.
22 Again, looking at bank account is compelling? It
23 is the submission of the respondents that if staff
24 would have wanted to bring compelling evidence to
25 the hearing they should have at least talked to

1 the relevant parties and found out the truth
2 instead of an assumption from an investigator.

3 We now reach the point in the executive
4 director's reply submissions where staff argue
5 points under a title called Additional Issues
6 Raised By the Respondents Are Not Persuasive. In
7 paragraph 54 staff bring up section 2.5 of the
8 offering memorandums and argue that a grocery
9 store is far removed from a development or
10 townhomes in Chilliwack. Staff's use of the
11 wording is most troublesome. The grocery store
12 for his wife is an attempt to bias the reader.
13 Wharram brought evidence, Exhibit 00255, showing
14 this was set up as a bona fide loan not a grocery
15 store for his wife. Who the loan was made to
16 should make be a relevant factor in the decision
17 by the fund manager to make it a loan, especially
18 with the terms and condition in this document.
19 Also, nowhere in section 2.5 of the offering
20 memorandum does it say that the reallocation of
21 the funds must be in the same neighbourhood, nor
22 does it say it has to be a like-minded project
23 like townhomes or similar in any way. The
24 respondents will argue that lending money to a
25 developer or lending money to a grocery store

1 entity does have in fact similarities. They were
2 both done to bring interest into the fund. Again
3 the perception by Wharram was that the
4 reallocation was allowed providing the common goal
5 was to bring money into the fund, and with this
6 belief his subjective knowledge of any intentional
7 act of fraud was nonexistent.

8 THE CHAIR: Mr. Wharram, do you believe that the investors
9 thought that that's where the money was going to
10 go?

11 MR. WHARRAM: No, I am not claiming that. What I am saying is
12 the investors at all times were expecting interest
13 to be paid on their monies, so when I get into a
14 point where I lent money out with the intent, it
15 wasn't given to my wife, it wasn't handed to her,
16 it was again my belief that I was able to do that.
17 I full-heartedly -- I had money in another bank
18 account at the time, I wouldn't have done it from
19 that bank account if I thought for one second that
20 I was doing anything fraudulent. In hindsight now
21 and knowing what I know today it was a mistake,
22 absolutely. But my knowledge of that at that time
23 was not that. I would never have done it if I
24 would have known that it would have been perceived
25 as fraud.

1 In 59, and earlier today, staff argue that
2 Wharram admits during his compelled interview that
3 he advanced less than half of the money of the
4 Deercrest raised to the developer. The
5 respondents argue again that Wharram was answering
6 a direct question based on a spreadsheet that was
7 placed in front of him. It is impossible to say
8 what Wharram would have said if he was not looking
9 at an exhibit placed in front of him. Answering
10 the question in that setting is not an admission
11 of guilt, but rather a respondent doing his best
12 to answer a question accurately without their own
13 supporting documents.

14 Staff send the reader of this submission to
15 read a transcript of Wharram's compelled interview
16 on page 73 -- on page 73 and then a segment on
17 page 85. If a person reads the section outlined
18 by staff on page 73 Wharram is being asked does it
19 sound like the total to which he replies yes,
20 keywords or sounds like. Then a moment later with
21 words sounds like fresh in his mind he is shown a
22 spreadsheet and is asked is this the amount and he
23 replies yes, it matches the cheques. Wharram is
24 clearly answering questions based on a visual
25 instrument he is looking at in this very

1 persuasive manner in which he was being
2 interviewed. The funds transferred from the
3 Deercrest account to the developer does not
4 constitute the entire amount of investor funds
5 used for the benefit of the project or advanced to
6 the project. If the staff for the executive
7 director want to make the assumption that they do,
8 the burden of proof is on the executive director
9 to show where the rest of the funds, the 5.45
10 million that they allege, was not spent on the
11 project or for the benefit of the investors. They
12 have never done so.

13 Looking at my respondents' submissions,
14 paragraph 58 on page 25, we are stating that the
15 numbers were too close for staff to prove their
16 case on the balance of probabilities. In proving
17 their case staff have failed to do the following.
18 They did not familiarize themselves with the
19 aspects of the offering memorandum. Not including
20 items like investor interest for Deercrest, Falls,
21 Olympia Trust fees or even the definition of not
22 available funds is a fundamental mistake that has
23 shown simple math does not work in this instance.
24 They relied on summary information from an
25 investigator that admits the purpose of her work

1 was to only show the difference between the funds
2 raised and the funds advanced in cheque form.
3 They have failed to bring in proof that the
4 respondents were not allowed to spend investor
5 funds on valid business expenses as outlined in
6 all memorandums.

7 In paragraph 59 the respondents feel staff
8 brought forward only summary evidence when a full
9 accounting should have been completed in an
10 attempt to prove their case. Staff should have
11 known by seeing actual funds advanced to the
12 developer, they allege 42.3 percent being Falls
13 and 41.39 percent in Deercrest, that there could
14 have been a mistake made in any of the
15 calculations. The respondents will encourage the
16 panel to question why staff did not take other
17 measures to prove their case when numbers were so
18 close to being the majority. In considering the
19 seriousness of the allegation of the respondents
20 not advancing the majority of the funds to the
21 developer there is no excuse as to why they relied
22 on summary work prepared by the investigator.
23 Staff want to argue my submission is not being
24 persuasive. How are any of the items not brought
25 up just -- how are any of the items just brought

1 up not persuasive? Summary work in a case of this
2 magnitude is not persuasive.

3 THE CHAIR: Mr. Wharram, you need to address the materials that
4 you signed and filed in the bankruptcy proceeding
5 which are consistent with the numbers that have
6 been used by the BC investigator. How do we
7 reconcile those things?

8 MR. WHARRAM: Again what I will say to that is when I walked
9 into the room at the first CCA proceedings there
10 were no less than 12 hours in the room, there were
11 the Monitor, there were numerous people, and when
12 you're basically being -- and I'm not the only
13 creditor that feels this way, but when you're in
14 that setting for the first time and you're not
15 understanding the procedure, I had never been
16 through a CCA before, I had no idea what was going
17 on, but when they come in and they say you have
18 this, this, this and this and you have to add up
19 all your cheques and you have to do all this,
20 you're not consciously thinking about other
21 things. When I put in my submissions, when my
22 accountant, my bookkeeper completed the numbers I
23 knew there was -- I knew there was numbers that
24 were not included. I knew that I had advanced
25 more funds than what were there. But again you're

1 being pushed, you're given an extremely tight time
2 limit, and when you're being told that you had to
3 have your submissions in by this date and you had
4 to do this and do that I buckled. I went in
5 there, I'm not the only creditor, there's more
6 than me, Ryan Foley, there is lots of us that felt
7 the same pressure in that setting. So to answer
8 your question how I justify the claim amounts
9 being incorrect is again it's just an overwhelming
10 setting, people are literally telling you what to
11 do in those settings and it was wrong.

12 THE CHAIR: Okay. Thank you.

13 MR. WHARRAM: In 60 staff want the panel to reject the
14 respondents' calculations because the respondents
15 led no evidence at the hearing. On the contrary
16 the respondents argue the numbers brought forward
17 via their interpretation of the OMs are in
18 evidence and have been for a very long time.
19 Wharram was legally able to bring forward his
20 written submissions as per the process and did not
21 have to lead with evidence to prove his
22 understanding of an OM that was tendered by staff
23 as an exhibit. It is not the respondents' fault
24 or issue that staff did not familiarize themselves
25 with the offering memorandum and realize there was

1 more to consider than just the cheque amounts of
2 1.636 million or that doing a proper calculation
3 of net available funds would result in a majority
4 of billable funds being sent to the developer or
5 used for the benefit of the developer.

6 The respondents argue that other items over
7 and above the total of the cheques written to the
8 developer is something they were never asked about
9 during the entire investigation. Staff
10 interviewed Wharram for two full days, conducted
11 an investigation that included reviewing the
12 offering memorandums for some 24 months but never
13 once did they ever ask Wharram about his
14 interpretation of the offering memorandum or the
15 way he perceived them. They will now try to seal
16 their case by indicating Wharram admitted he did
17 not advance the majority of the funds by answering
18 a question with an exhibit placed in front of him.
19 This is their entire case, a document that Wharram
20 prepared that was proven last week to be
21 inaccurate. And this is all because Wharram
22 answered a question by staff when an exhibit was
23 placed in front of him. Staff investigators
24 simply did not conduct a thorough investigation.
25 The onus was not upon the respondents to bring

1 forward their interpretation of legal documents
2 like the offering memorandums. If the commission
3 wanted to prove these allegations to the panel
4 their executive director and his investigators
5 were obligated to become familiar with the
6 offering memorandums. They were obligated to
7 complete the task of determining the relevant
8 numbers or possible interpretations of the
9 offering memorandums. They were obligated to
10 interview Wharram during his compelled interview
11 to find out information such as his possible
12 interpretation of the OM and other items that he
13 relied upon. They were obligated to come to this
14 hearing with evidence that was clear and
15 compelling.

16 But this never occurs and now staff would
17 rather the panel not take into consideration my
18 interpretation because I did not lead with
19 evidence. Their submissions never speak of why my
20 interpretation is not accurate, only that it
21 should not be considered. That would be equal to
22 me saying that their interpretation should not be
23 considered and not needing to give any arguments
24 as such. The difference is the onus is on them to
25 prove their case, not the respondents. And I

1 simply relied on my interpretation of the OM at
2 all times. They needed to prove it, I did not.

3 This is their case. The allegations against
4 Wharram state that he did not advance the majority
5 of the funds to the developer. Wharram's
6 calculations taken directly from a table inside
7 the offering memorandum, along with the definition
8 outlined inside the offering memorandum indicate
9 otherwise. It is telling that staff in their
10 reply submissions do not need to bring into
11 evidence any defence of their interpretation and
12 they elect to have the respondents submission
13 rejected by the panel because I didn't lead with
14 evidence. Because I didn't lead with evidence.
15 That is their defence to my submission, swipe it
16 under the rug and ignore it with no reply as to
17 why their interpretation is accurate or the one
18 that I should adhere to.

19 Looking at placeholder 87, respondents'
20 submissions paragraphs 105 to 107, as pointed out
21 in paragraphs 105 to 107 staff have to realize is
22 something was wrong when they completed their
23 summary work entered as BCSC 01115, and their
24 commissions did not compute. This should have
25 triggered an additional segment of their

1 investigation. It did not. The onus is on the
2 executive director to make sure the allegations
3 are correct and cannot simply pick numbers to suit
4 the theory of their case. The investigator was
5 cross-examined on the stand during the hearing was
6 asked several questions regarding her accounting
7 review of the respondents' books, and at no time
8 does she indicate she included all relevant
9 numbers in her calculations. In fact she admits
10 she did not include the interest payments due to
11 the Deercrest investors as submitted in paragraph
12 57xi on page 23 of the respondents' submission. I
13 would ask the panel to read this in entirety
14 before they make their decision.

15 The respondents although they did not testify
16 at the hearing brought forward exhibits such as
17 Exhibit 273, the total interest for the Deercrest
18 that was permitted by the panel during the hearing
19 and one that the respondents relied upon during
20 the cross-examination of the investigator.
21 Whether the panel decides to put weight on this
22 exhibit the bottom line is staff for the
23 commission knew about these interest cheques being
24 written to the investors. In fact there are
25 literally hundreds of them entered as exhibits by

1 staff in BCSC 0077, 0079, 0080 and 0081 and 0082.
2 Investigator Chan admits she sees the interest
3 payments in the hearing transcript segment noted
4 in paragraph 57xi of the respondents' submissions
5 but did not calculate that the total interest paid
6 for whatever reason, only stating it was not part
7 of the analysis that she completed.

8 In staff's response submission number 20 it
9 is acknowledged that even the Deercrest OMs
10 mention interest payments, so it is fair to say
11 that the litigators knew of this interest
12 payments, and despite this they now bring in the
13 submission that it should not be argued by the
14 respondents because they didn't lead with
15 evidence. These numbers were and are relevant at
16 all times and including them should have been the
17 basic simple math that the investigator completed.
18 Again these allegations against the respondents
19 based on the balance of probabilities were too
20 close to call and purposely leaving out factual
21 numbers that every one seemed to know about and
22 relying on different interpretations from that of
23 the respondents unfortunately has led the
24 respondents being wrongly accused of not advancing
25 the majority of the net available funds to the

1 developer.

2 Getting back to the crux of paragraph 60 in
3 the executive director's reply submissions the
4 respondents' key argument remains that although
5 the Deercrest Construction fund respondents only
6 wrote 1.636 million in cheques to the developer
7 they were authorized in the OM, which staff have
8 claimed they have read cover to cover, to pay
9 interest on behalf of the developer using investor
10 funds. These cheques were to the benefit of the
11 developer and would be equivalent to Wharram
12 writing a cheque to the developer and then he turn
13 around and writing a cheque to the investors.

14 The interest payments made by the issuers
15 were paid on behalf of the developer and should
16 have been tallied by staff as funds advanced to
17 the developer or for the betterment of the
18 project. If they had been included the executive
19 director would have been able to allege -- would
20 not have been able to allege the majority of funds
21 were not advanced to the developer, or as they
22 said earlier the quantum of their allegation of
23 fraud. Placing this submission under the heading
24 that states Additional Issues Raised By the
25 Respondents Are Not Persuasive staff have failed

1 to tell us why these claims by the respondents are
2 not persuasive. How does reading the OM and
3 adhering to what it says not persuasive.

4 In 61 and 62 staff hang on to their belief
5 they did not have to do a funds tracing and that
6 it is irrelevant. As we have argued throughout
7 our oral and written submissions only seeing such
8 a small portion of the business being conducted by
9 the respondents it is very difficult to prove
10 their theory and certainly the accuracy of their
11 claim. One of the major claims in the notice of
12 hearing and much of staff's testimony during the
13 hearing and even in their submissions is that the
14 respondents did not advance the majority of the
15 funds to th developer. In fact if we look at
16 respondents' submissions paragraph 42 the
17 respondents point out several different spots.
18 This is mentioned by staff in their original
19 written submissions and in their notice of
20 hearing. And again it is admitted today that this
21 is the quantum of their fraud allegation.

22 The point that the respondents want to make
23 is that by staff not providing funds tracing or a
24 thorough accounting it is relevant to a major
25 portion of their notice of hearing where they

1 allege the respondents did not advance the
2 majority of the funds to the developer. Our
3 desire to have a funds tracing does not relate to
4 other allegations in the notice of hearing as
5 staff seem to confuse in the latter part of number
6 61 in their submission.

7 In 68 to 70, remembering we are still under
8 the subheading Additional Issues Raised By the
9 Respondents Are Not Persuasive from page 13, staff
10 argue that the respondents led no evidence at the
11 hearing to suggest that staff misinterpreted the
12 provisions of the OM. Can we bring up 00086, the
13 placeholder, and it's the executive director's
14 submissions. I'd like to go to paragraph 10 on
15 page 5.

16 THE HEARING OFFICER: Sorry. Did you say page 10?

17 MR. WHARRAM: Paragraph 10 on page 5. Speaking of the word
18 persuasive, the respondents will begin their
19 argument by stating that because staff felt the
20 need to cut and paste two different portions of
21 the OM they knew of the different interpretations.
22 If we were to look at 0087, the respondents'
23 submissions, at paragraphs 105 to 107, page 32, we
24 will add that staff had to have known as pointed
25 out in 106 there was a different interpretation in

1 the commissions of \$469,806 would have been needed
2 to be paid from a total of \$309,929. Again it is
3 telling that staff's only response to my
4 interpretation of the offering memorandum is that
5 it should not be considered by this panel because
6 I did not lead with evidence or that it is not
7 persuasive. In point 70 of their submissions they
8 even go as far to say that the respondents have to
9 prove staff misinterpreted the offering
10 memorandum.

11 Can we bring up -- I'm sorry, I'm not going
12 to bring it up. If we were to look at the
13 respondents' submissions at paragraph 68 on page
14 27, this section defining the Falls Capital Corp.
15 net proceeds and the use of net proceeds is what
16 was relied upon at all times by the respondents.
17 This is not cut and pasted. Nor is the equally
18 relevant Deercrest Construction Fund section
19 submitted by the respondents in paragraphs 146 on
20 page 44. And it was these two graphs that were
21 interpreted and used. Nobody can prove that
22 Wharram did not rely on this interpretation, and
23 the onus is certainly not on him to prove that he
24 read the OM and adhered to sections 1.1 and 1.2 of
25 the offering memorandums.

1 Looking at this as simple as possible while
2 still addressing staff's assertion that Wharram
3 did not lead evidence, Wharram ran his businesses
4 using his interpretation of the offering
5 memorandums at all times. The onus was on the
6 commission investigator and then staff before this
7 panel today to investigate to get to the bottom of
8 whether or not there was a fraud committed and to
9 what extent. They simply didn't accuse me of a
10 fraud with an open window as to the amount. They
11 issued numbers equaling 5.45 million in a press
12 release and indicated I committed fraud by not
13 advancing the majority of the funds to the
14 developer. They then decide to bring summary
15 evidence, BCSC 01115, in the same amount of 5.45
16 million to a hearing before this panel. Wharram
17 submits he advanced the majority of the available
18 funds to the developer as per the offering
19 memorandums for both entities.

20 And now they want to argue that I did not
21 lead with evidence to prove that I relied on the
22 interpretation of an OM. My interpretation of the
23 OM, which was supplied to the commission before
24 their investigation even began, was right there in
25 black and white, never changed at any relevant

1 time and it is vital, as I point out, I did not
2 have to cut and paste portions of it to persuade
3 the panel to my way of thinking. The respondents
4 bring a fairly damning accusation in their written
5 submissions in paragraph 102, but staff don't even
6 once try to explain this action in their reply
7 submissions. Why not? Why did they not explain
8 why they manipulated a legal submission that is
9 now public record? Not a word of it.

10 Manipulating a very significant portion of
11 the OM and submitting it as a document which they
12 want this panel to consider while making their
13 decision of the allegations of fraud is
14 unfathomable. Is this not fraud in itself? The
15 fact that both litigators signed their names to
16 this document I assume they will both be taking
17 responsibility for it in the future.

18 In 72 staff again try to argue that no weight
19 should be put on Exhibits 273, 274 and 275, and
20 then go on to argue that there was no evidence of
21 who created them, how they were prepared, what the
22 source of the information was, when they were
23 prepared and an explanation of what they purport
24 to show. The respondents first comment on this
25 will be that he should not have been the one to

1 who have produced these documents. Staff or the
2 commission should have come to this hearing with
3 these numbers as part of their summary reporting
4 as they were very important and related directly
5 to their allegations. Despite knowing about these
6 amounts staff felt it not important to bring these
7 numbers into their proper summary of the
8 respondents' numbers. Again they decided to rely
9 on summary numbers completed using a Grade 2 math
10 calculation.

11 During the hearing while arguing the
12 importance of these documents the respondents
13 indicated they created them by reviewing the
14 relevant banking letters, also discussed was how
15 they were prepared, what the source of the
16 information was, when they were prepared and an
17 explanation of what they purport to show. This is
18 not a complex calculation and should have been
19 prepared by staff, or at least cross checked by
20 staff during their extended investigation.

21 Again staff had all the cheques written to
22 the investors for the investor payments and even
23 entered them as exhibits in BCSC 0077, 79, 80, 81
24 and 82. Despite having the onus to do so staff
25 did not rely on complete accurate information from

1 its investigator during her some 30 month
2 investigation into the respondents. The
3 investigator had the full ability to review the
4 books and records of the respondents but decided
5 not to. She does, however, acknowledge during the
6 hearing she did see these interest payments -- she
7 did see these interest payment cheques being
8 written to the investors for interest, but does
9 not look into it any further and tallies no total.
10 Staff say they have read the Deercrest OM and
11 understand it allowed for interest but decided not
12 to include it in their summary work. They then
13 follow up with an inaccurate amount alleged in the
14 notice of hearing. Of course they do not want any
15 weight attributed to these documents or my
16 submissions as it has an extreme negative effect
17 on the theory of their case and again whether or
18 not the panel determines there should be no weight
19 it is admitted by staff that they knew about them,
20 but nonetheless these amounts are extremely
21 relevant and an important part of their entire
22 case.

23 In 76 staff allude to the respondents leading
24 evidence through their submissions and that the
25 items located in 76 A to D should not be

1 considered by the panel because the respondents
2 led no evidence. The respondents did not need to
3 lead evidence when documents staff brought in as
4 exhibits and ones entered by the respondents used
5 to cross-examine witnesses clearly state items
6 like the interest for the Deercrest investors
7 could be paid from these funds. In 76 A staff say
8 the respondents submission in paragraph 40
9 discussing the calculation of the amounts advanced
10 to the developer should not be considered by the
11 panel. If we were to look at placeholder 00087,
12 the respondents' submissions in paragraph 40 on
13 page 11, my point in point 40 is that staff have
14 relied solely on information supplied by Wharram,
15 and that information possibly may or may not have
16 been accurate, and that staff did not bring
17 forward any additional evidence to verify the
18 amounts alleged to have been raised or not
19 advanced to the developer. Staff relied on these
20 three items supplied directly by Wharram that
21 possibly were inaccurate, then produced their
22 notice of hearing and then their entire case
23 around. There is not clear and compelling and
24 should have been cross-referenced against an
25 accounting completed by staff. This would have

1 assured accuracy on the balance of probabilities
2 instead of this unconvincing accounting that we
3 have now before us.

4 We now know that since Wharram wrote his
5 submissions in July 2014 there in fact have been
6 proof brought forward that the amounts submitted
7 in the PricewaterhouseCoopers claims were
8 inaccurate and that staff unfortunately relied on
9 the three documents without verifying them. This
10 hurts their case immensely as again the amount
11 alleged in the notice of hearing is not correct.
12 We will talk more in a moment regarding staff's
13 immense desire to have new evidence of no weight
14 in these proceedings.

15 From the answers given by the investigator
16 during her cross-examination at the hearing, and
17 then submissions by the respondents, and even the
18 application heard before the panel last week, it
19 is clear that there were mistakes made in the
20 calculation collection -- sorry, it is clear to
21 see there were mistakes made in the collection of
22 the pertinent information and the numbers alleged
23 in the notice of hearing issued in a commission
24 press release and brought to court as Exhibit
25 01115. Again an example of this is the investor

1 interest and even the Olympia Trust fees that were
2 clearly allowed as previously staff decided were
3 not needed as part of their calculations.

4 Speaking of the application heard last week
5 by the panel, both staff and the respondents
6 exchanged written submissions with staff's coming
7 over just Wednesday of this week. Can we put up
8 the executive director's further written
9 submissions on liability? And I don't have a
10 number for it. It should be the last document.

11 THE HEARING OFFICER: Yes.

12 MR. WHARRAM: If you could take me paragraph 12, please.

13 Staff want -- looking at paragraph 12 on page
14 2, staff want the panel to place no weight on the
15 respondents' application as we didn't lead with
16 evidence or put forward a witness to give evidence
17 about the new evidence or previously entered
18 evidence. Let's be clear. The reason we brought
19 forward the new evidence or the existing evidence
20 is that it was relevant to the case, it was
21 credible, and it was overlooked by all parties
22 involved. These numbers are accurate and there is
23 proof that these items physically existed.

24 Nonetheless they go on in 12 C to mention
25 four cheques made out by the Falls to the Falls

1 joint ventures. Staff are wasting their time
2 arguing this point. With Exhibits 64, 65, 66 and
3 67 there is already evidence entered and labelled
4 as the creditor claim funds for the four JV
5 companies that were accepted during the CCA
6 process. The four cheques that were entered as
7 new evidence were simply adding to this total.
8 Whether they were reviewed or not by the Monitor
9 is not relevant -- sorry. Whether or not they
10 were reviewed or not by the Monitor is not
11 relevant in the case before the commission. The
12 facts are they were obtained by staff's own
13 investigator from a chartered bank and are valid
14 credible documents that can be relied upon in this
15 hearing.

16 In 12 D they now argue that the respondents
17 did not lead evidence with supporting documents to
18 show that the Falls joint ventures transferred the
19 funds they received from Falls to Blackburn. I
20 hate to be bold here, but what on God's green
21 earth are they talking about? I know we talked
22 earlier about staff perhaps not reading and
23 familiarizing themselves with the OMs, but I
24 wasn't sure which litigator wasn't familiar with
25 the OM. Now that Ms. Leggat is no longer working

1 on this file I know for a fact that it is this
2 lawyer that is not familiar with Falls Capital
3 Corp. OMs. We'll talk about Liz Chan in a moment,
4 but at least she knew and understood that the
5 Falls OMs and in effect cheques that were supposed
6 be written to the four JV companies and not
7 Blackburn. The cheques were to be written to the
8 four JV companies and not Blackburn. The four JV
9 companies were the entities that The Falls Capital
10 Corp. funds were to go to at all times as clearly
11 stated in the offering memorandums. In fact, if
12 the litigator in this matter would have read the
13 transcript from Wharram's compelled interview Liz
14 Chan extensively questioned Wharram regarding why
15 cheques were being written to Blackburn as opposed
16 to the four JV companies. For reference it's BCSC
17 00098 pages 86 to 96.

18 This staff litigator seems to have no
19 understanding of the way these businesses were set
20 up, and this is just another example of how he did
21 not familiarize himself with the OMs or other
22 documents the parties entered into or he would not
23 be bringing forward a submission asking for
24 supporting documents showing funds needed to be
25 transferred to Blackburn. They did not need to be

1 transferred to Blackburn. The OM never says that.

2 In 12 E staff begin by stating the additional
3 cheques written to Blackburn do not show what they
4 were used for, and this is their argument. We've
5 argued already today that the funds that went to
6 Blackburn were used for the project itself. These
7 funds were given to Blackburn in 2007. I think
8 it's pretty safe to say that these funds given to
9 Blackburn in 2007 went into the project. Nowhere
10 in these proceedings during the investigation or
11 during the hearing has staff argued anything to do
12 with what the funds given to Blackburn were to be
13 used for, and now on the eleventh hour they want
14 to argue that this is the reason no weight should
15 be placed on my new evidence and previously heard
16 evidence. This is absurd.

17 The bottom line is these cheques existed,
18 they were overlooked by all parties involved, and
19 they do have extreme relevance in this matter.
20 Wharram fully explained how he came to find them
21 just before the scheduled oral submissions in
22 October, and even brought forward a witness to
23 testify regarding his knowledge of how Wharram
24 found the cheques. He did so and staff had no
25 questions whatsoever regarding the conversation

1 between Foley and Wharram. It is telling that
2 staff unopposed Wharram bringing in as evidence
3 and then now try to have the panel put no weight
4 on them for the desperate reasons in their latest
5 submissions. I think the respondents deserve to
6 have an outcome based on factual information with
7 all relevant information included. Again this
8 goes back to the sloppy investigative work
9 completed by the investigator and relied upon by
10 the executive director. If they wanted to bring
11 in a compelling case against the respondents they
12 should have brought accuracy to their numbers to
13 begin with before this panel. They have failed to
14 do so.

15 In 76 C staff again argue the amounts
16 advanced to the developer and the interpretation
17 of the calculation should not be allowed by
18 stating that the respondents are attempting to
19 lead evidence through their submissions. First of
20 all, again you will notice how staff for the
21 executive director do not dispute nor challenge
22 the calculations made in the respondents'
23 submissions as being inaccurate, only that they
24 don't want them to be considered by this panel.
25 They're simply attempting to have all the

1 calculations tossed out by claiming it was not
2 entered as evidence. All relevant information
3 relied upon by the respondents in their defence
4 and used in our written submissions was in fact
5 entered as evidence by the executive director
6 mostly in the form of an offering memorandums,
7 again which were supplied very early on in the
8 investigation to the -- early on in the
9 investigation to the investigators.

10 The submissions in 85 and 185 and 186 of the
11 respondents' submissions are again from the
12 interpretation Wharram relied upon at all relevant
13 times and are factual in all aspects, not based on
14 summary information or an assumption. The number
15 that was derived by Wharram is from his
16 interpretation of the majority net available funds
17 and staff needed to bring in evidence as to why
18 this should not be considered by the panel. The
19 offering memorandums are all submitted by the
20 executive director as evidence. Making a
21 calculation by reading the OM that was submitted
22 in evidence by the executive director and without
23 cutting and pasting sections does not constitute
24 entering evidence or even that respondents
25 submitted no evidence at any level, and by simply

1 drawing the panel's attention to aspects of the
2 executive director's evidence that contradicts
3 itself is not entering new evidence.

4 It is the respondents' submissions -- in the
5 respondents' submissions dated July 6, 2014 at
6 paragraph 81 it states that the false cheque
7 summary in which staff rely, shows Falls made
8 payments totalling \$2,189,301.42 to Blackburn, and
9 payments totalling \$113,031.33 to the bare
10 trustees for a total of \$2,302,332.75 being
11 forwarded to the developer. Adding the
12 \$216,826.49 the respondents entered as new
13 evidence last week this bumps the total advance to
14 the developer to \$2,519,159.24.

15 In paragraphs 84 and 85 of the respondents'
16 submissions the total of investor funds advanced
17 to the developer totals \$2,332,332.75 for a total
18 of 50.19 percent of the billable funds being
19 advanced to the developer. Taking into
20 consideration the new evidence entered by the
21 respondents, and configuring them in with the
22 numbers as we just discussed, the total of the
23 billable funds advanced to the developer is now
24 54.21 percent, well over the majority.
25 Additionally, as with the Falls, when we look at

1 Deercrest numbers in paragraphs 155 and 162 of the
2 respondents' submissions we see that \$2,252,128.55
3 out of \$3,448,640.00 of net available funds were
4 advanced to the developer or on behalf of the
5 developer. This equates to 65.3 percent of the
6 funds being advanced to the developer. Adding the
7 \$30,000 to Deercrest from the new evidence
8 application takes it to 66.17 percent of net
9 available funds being advanced to the developer.

10 Can we bring up 00086? Go to paragraph --
11 that's not it.

12 THE HEARING OFFICER: What are you --

13 MR. WHARRAM: Placeholder 00086.

14 THE HEARING OFFICER: That is placeholder. Are you looking for
15 the --

16 MR. WHARRAM: The executive director's submissions.

17 THE HEARING OFFICER: Yes, okay.

18 MR. WHARRAM: Oh, sorry, is that 87?

19 THE HEARING OFFICER: Yes.

20 MR. WHARRAM: Paragraph 10 again, page 2 or 3. Sorry. Right
21 there. The fact we have here is that the
22 executive director staff have submitted
23 inaccurate, incomplete and biased evidence in an
24 attempt to sway the panel, even going as far as
25 cutting or pasting different sections of the OM to

1 bolster this claim to create the calculations
2 needed to support their theory of the case. One
3 needs to question why staff felt the need to do
4 this, and once again I challenge the staff
5 litigator standing next to me to tell this panel
6 why he elected to do this. Was it an attempt to
7 sway the panel to their theory of the case or did
8 they realize midstream the case they tried to
9 bring forward had flaws as pointed out in the
10 respondents' submissions in paragraphs 85, 185 and
11 186 and needed to resort to this in an attempt to
12 rectify a mistake.

13 Can we put up placeholder 87, and it's the
14 respondents' submissions paragraph 68, page 27.
15 This is what the full complete sections of 1.1 and
16 1.2 look like without being cut and pasted. Staff
17 do not want the numbers legally submitted by the
18 respondents as part of their submissions included
19 in 76 C because it makes a great portion of the
20 notice of hearing inaccurate. Again they are not
21 bringing in any evidence to negate the numbers the
22 respondents relied upon, only that they want them
23 dismissed because the respondents did not lead
24 with them. This is telling on many levels as it
25 is very hard for them to defend factual

1 information, and quite frankly impossible.

2 Staff, of course, are attempting to have this
3 submission by the respondents dismissed as it will
4 completely destroy their theory of the case, again
5 a theory that has been created by doing only a
6 small percentage of the investigative work
7 required, assuming numbers that are accurate
8 without backing up their work, and blatantly
9 ignoring black and white factual items written
10 into many of their exhibits that go against their
11 theories.

12 Now, by pointing out an alternative
13 calculation in which they relied the respondents
14 are simply showing the panel the errors made by
15 the executive director in this investigation and
16 the exhibits relied upon by staff during and in
17 both sets of their submissions. An error in
18 interpretation by the executive director, and by
19 not including all valid expenses allowed per the
20 OM, staff have come to this hearing with an
21 inaccurate number and in this case where the
22 margins are so close this has affected whether or
23 not a fraud as alleged by the executive director
24 has occurred. Undeniably staff have a hard time
25 arguing against Wharram with respect to the

1 interpretation that he relied upon because they
2 are not him. They cannot possibly put themselves
3 in Wharram's brain and argue now that Wharram did
4 not use his interpretation as this would not make
5 sense and is physically impossible for them to do
6 so.

7 If we were to look at placeholder 87,
8 respondents' submissions again at paragraph 226
9 and 227 on page 65, as pointed out in the
10 respondents' submissions staff had the burden of
11 proof -- have the burden to prove the allegations
12 at set out in the notice of hearing, and staff are
13 held to the allegations in the notice of hearing
14 and must not stray beyond the same. And as with
15 our submission 232 -- and in our submissions
16 paragraph 232 members of this very panel ruled in
17 the Hugh case that proof tendered by staff must be
18 clear and compelling in nature.

19 In a number of spots in the notice of hearing
20 the executive director alleges a total of \$5.45
21 million fraud occurred because the respondents did
22 advance the majority of the funds to the
23 developer, but only brought inaccurate incomplete
24 summary information, let alone an inaccurate
25 interpretation of the offering memorandum. This

1 is not clear or compelling.

2 In 76 D staff indicate they do not want the
3 repayment of \$45,000 considered as evidence by the
4 respondents as again Wharram led with no evidence.
5 Wharram's cross-examination of investigator Chan
6 determined that she knew about the 45,000 going
7 into the bank account but did not feel it was
8 relevant and as a result did not include it in her
9 summary. As with the offering memorandums the
10 copy of the bank draft for \$45,000 was entered and
11 accepted as evidence as Exhibit 00268, and Wharram
12 has every right to cross-examine staff's witness
13 in relation to this exhibit. As revealed during
14 th hearing the investigator stopped her
15 calculations before this repayment was made into
16 the Falls bank account.

17 If we were to look at placeholder 0087, the
18 respondents' submissions and go to paragraph 127
19 on page 38, during cross-examination the
20 investigator indicates this would not impact the
21 evidence she prepared. The respondents submit
22 that in fact it would of course impact the
23 evidence she prepared as it would paint -- it
24 would paint and show a very different story than
25 the one that's being presented by the executive

1 director. With these funds going back into the
2 Falls bank account, yet staff trying to have the
3 submission suppressed by the panel, we have the
4 following. Number one, the funds being repaid so
5 there's no deprivation against the investors in
6 the amount of \$45,000. Number two, it shows
7 Wharram's mental aspect with respect to the
8 subjective knowledge needed for staff to prove
9 their case. Wharram's actions are not a
10 purposeful deceit, only a repayment into the Falls
11 bank account. It shows staff once again trying to
12 sweep valid evidence that was legally entered into
13 evidence under the mat by saying I did not lead
14 with evidence. Wharram questioning a witness
15 about evidence that was entered as an exhibit and
16 then bringing this portion of the hearing into his
17 submissions is allowed as per his rights to defend
18 himself. The cross-examination of Chan revealed
19 she knew about the \$45,000 going into the Falls
20 bank account, yet she admits she did not include
21 this in any of her work is an attempt for staff to
22 sensationalize a number that once again they try
23 to persuade the reader to believe. This is
24 unacceptable behaviour before this panel. The
25 corporate respondents have rights, and these

1 rights include staff being honest and forthright
2 during the investigation and the hearing, and
3 including some cheques and not others show staff
4 were not and have not been honest and accurate
5 with their math skills.

6 Again here we have another example of the
7 executive director cherry picking based upon
8 partial and incomplete investigative work to
9 attempt to portray the respondents in a negative
10 manner in order to support the theory of their
11 case. The facts are Wharram repaid this amount to
12 the Falls bank account and the investigator
13 despite testifying she saw the \$45,000 going into
14 the Falls bank account elected not to include this
15 in her summary she prepared for the hearing in
16 which the executive director has relied.

17 Indicating that she knew about the \$45,000 and not
18 including those funds in her analysis and stating
19 this would not impact the evidence is completely
20 wrong, let alone when a fraud allegation is being
21 brought forward by the executive director.

22 As pointed out in paragraph 132 of the
23 respondents' submissions on page 42 there is no
24 other reason for this payment going back into the
25 Falls bank account, and the fact this amount is

1 going back into the bank account is telling with
2 respect to the *mens rea* subjective knowledge
3 portion of the allegation. Wharram's intent was
4 never to commitment fraud against his investors as
5 his mind was simply not in that capacity, and his
6 actions prove this.

7 Again staff have put forward this submission
8 under a heading of No Evidence and want the panel
9 to dismiss amounts paid to the Falls amount
10 because it goes directly against their belief
11 Wharram intentionally committed fraud against his
12 investors. Despite no leading with evidence
13 Wharram cross-examined investigator Chan
14 extensively and she blatantly ignored this deposit
15 because it was not part of her analysis. Staff
16 indicate Wharram was leading with evidence when he
17 is simply submitting a portion of the hearing he
18 was legally entitled to conduct, the
19 cross-examination of the investigator. Asking
20 questions of Chan while on the stand and then
21 quoting the section in his submissions is not
22 leading evidence but rather valid submissions.

23 It is telling, we argue extensively with
24 respect to the \$45,000, their only reply is no,
25 they didn't reply with -- they didn't lead with

1 evidence. We questioned why this was blatantly
2 ignored by staff and their reply is no, they
3 didn't lead with any evidence. We question in 137
4 and 138 why staff submit that the investors had
5 actual deprivation when the funds were returned
6 and their reply is no, they didn't lead with any
7 evidence. We bring in credible new evidence and
8 valid previously entered evidence through an
9 application and their reply is no, they didn't
10 lead with any evidence, and it goes on and on and
11 on. Again it is very telling that staff would
12 rather the panel dismiss these submissions rather
13 than argue against them. The respondents submit
14 this is because they do not have a valid argument
15 against the sloppy investigative work completed
16 throughout this case, arbitrarily picking and
17 choosing what numbers get entered into an
18 investigation in which the executive director
19 alleges fraud is sloppy and shows the staff are
20 sticking to their allegations in the notice of
21 hearing no matter what they have to do.

22 Thank you. That concludes my oral arguments.
23 I do have some closing remarks. Do you want those
24 now or after?

25 THE CHAIR: Now is the time to make your closing remarks.

1 MR. WHARRAM: Okay. In closing, I think that one day when I
2 look back over the last three years my companies
3 have been investigated by the British Columbia
4 Securities Commission, and I truly look at the
5 facts, one thing is going to stick out for me.
6 The executive director and his staff relying on
7 summary work in a case of this magnitude. Summary
8 work by literally a team of professionals in a
9 case as fairly complex as this one just simply did
10 not make sense. Why they would choose to bring
11 allegations of a \$5.45 million fraud on summary
12 investigative work boggles one's mind. There is
13 absolutely no excuse why staff needed to rely on
14 summary evidence with the resources and
15 qualifications they had going into the
16 investigation.

17 Staff very early on in their investigation
18 had a theory that Wharram did not advance the
19 majority of the funds to the developer and
20 essentially ran with it. And when we look at
21 super close to the facts surrounding this case it
22 is very apparent that they started to do whatever
23 they needed to do to make the evidence suit their
24 theory. They manipulated an offering memorandum
25 entered as evidence in an attempt to remove the

1 title and definition of net proceeds and use of
2 net proceeds in their submissions to confuse the
3 reader. They argued strongly for the panel to
4 reject the respondents' ability to rely on the
5 same exhibit they cut and pasted per the only
6 reason that the respondents did not lead with any
7 evidence without bringing any reason as to why the
8 respondents should not be able to rely on the
9 offering memorandum that was in evidence.

10 They omitted key figures from their
11 calculations despite knowing about them in an
12 attempt to validate their claim the respondents
13 did not advance the majority of the funds to the
14 developer. They took from a spreadsheet Wharram
15 provided the total number of dollars the
16 respondents raised but did not confirm this amount
17 with banking records or cross-referencing with any
18 other source. They did no work to determine the
19 accuracy of these numbers, instead using them as
20 part of a summary evidence to allege the \$5.45
21 million fraud. The fact Wharram found simple key
22 evidence that was in even in their own disclosure
23 documents, some even entered as evidence, is
24 baffling. This amounted to nearly a quarter
25 million dollar inaccuracy alone.

1 I have an idea what really happened here.
2 Staff back at the beginning of their investigation
3 saw the respondents not out in the capital markets
4 raising capital. I had stopped raising money in
5 September 2010. They went on conducting their
6 investigation at what amounts to a snail's pace.
7 They saw no monies in the Scotiabank accounts and
8 relatively no activities with the companies
9 whatsoever. The companies slowly but surely went
10 through the 24 month CCA proceedings. The
11 respondents went literally months without hearing
12 from the commission. Then in March 2013 at my
13 compelled interview they asked questions about my
14 bank accounts and I told them I was now dealing
15 with Envision instead of Scotiabank.

16 In the spring of 2013 they rapidly tried to
17 put together a case because they perceived Wharram
18 was back out in the public raising capital. They
19 saw money in a bank account that Wharram had
20 borrowed from a friend. They don't even talk to
21 the lender to verify their assumption during an
22 eight day window in June of 2013. They now
23 enhance their theory that I must have lied to them
24 when I told them I was not actively raising
25 capital from investors. They run with it.

1 In their rush to get me cease traded they
2 start committing mistake after mistake after
3 mistake without really thinking things through.
4 They see creditor claims that I told Chan were
5 wrong from day one but ran with it. They even
6 were in such a rush that they wrote the wrong date
7 on a notice of hearing, probably the most
8 important document legal document in these
9 proceedings. But at midstream somewhere around
10 the time of the hearing they must have started to
11 realize that the information they had relied on at
12 the beginning was inaccurate. In their
13 submissions they had to start manipulating the
14 evidence or the allegations were not going to be
15 proven. They had to base a large portion of their
16 reply submissions on a feeble belief that the
17 respondents led with no evidence or that I was
18 leading with evidence. I was to avoid having an
19 argument on what was really at hand or what I was
20 bringing into my arguments. Sorry, strike that.
21 This was to avoid having an argument on what was
22 really at hand and what I was bringing up with my
23 arguments.

24 The reason staff do not want to answer my
25 questions is they do not have the answers they

1 want anyone to hear. In midstream the theory in
2 which they came up with back at the beginning was
3 exposed. Wharram in his submissions struck at the
4 core of their case and they did not have answers
5 to any of his questions, some even asked here
6 today. Again, why has the staff litigators not
7 answered any of the questions posed in my opening.

8 Investigators have sent me e-mails and asked
9 if I did commit fraud against them. One even
10 asked if I was remorseful. The answer is yes, I'm
11 absolutely remorseful. But this is an extremely
12 important part. I am remorseful that the
13 investors have lost their money. I am remorseful
14 for what my investors have been told by staff at
15 the British Columbia Securities Commission, and
16 from what they've read about this matter in the
17 newspaper because this is simply not accurate. I
18 am very remorseful that my investors have been led
19 to believe I committed this \$5.45 million fraud
20 well before any hearing or evidence was
21 considered. I am remorseful that they have formed
22 negative feelings and thoughts about me without
23 knowing the truth.

24 I know the truth and what my mind was
25 thinking during the relevant periods. I know the

1 truth of what happened lies in the detailed
2 forensic accounting of where the investor funds
3 were spent. The truth does not lie in summary
4 work released to the public via a glamorous press
5 release. There is not a day I do not think about
6 my investors. Each one of them are very unique
7 and have a story. I've had many of them in my
8 home as guests and have become very good friends
9 with many of them. To accuse me of defrauding
10 them, or even more importantly the allegation that
11 my mind was capable of committing fraud against
12 them is ludicrous.

13 People have asked me what I thought of the
14 moment I was cease traded and I had my assets
15 frozen. I tell them I was shocked and surprised.
16 I tell them that I was aware the commission was
17 investigating and that I was fully co-operating
18 with the investigation. I tell them that I was
19 actively working on a project that would see the
20 return of some of the investors monies. The exact
21 moment I heard about the notice of hearing I was
22 at a sign shop picking up real estate signs that
23 were going to help sell Deercree units so I could
24 start the process of paying back my investors the
25 money that was lost in The Falls Capital Corp. and

1 Deercrest offerings. At the exact moment these
2 allegations were being sent to my e-mail account I
3 was actively working full time to better the
4 situation my investors were in. Staff knew this.

5 The panel needs to understand my way of
6 thinking. There was a far greater payday for West
7 Karma and myself down the road. My company stood
8 to gain a large far more significant amount of
9 money getting the projects to the finish line than
10 the items staff allege in their notice of hearing.
11 It makes no sense that I would foolishly with
12 intent commit an act of fraud against anyone, let
13 alone my investors. I would not never foolishly
14 risk my name, my reputation and a large amount of
15 future earnings to buy my wife a diamond ring.
16 This does not make sense no matter how you look at
17 it. Does someone who has intentionally committed
18 fraud as alleged in the notice of hearing
19 co-operate fully with the commission investigator,
20 even going as far to make an hour drive to meet
21 that investigator at the commission's office to
22 receive a summons. Does a person willingly pay
23 back money before an investigation begins if they
24 intentionally commit fraud against another party.

25 Staff cannot say on the balance of

1 probabilities that I committed fraud, and more
2 importantly has read no evidence to suggest I had
3 subjective knowledge or *mens rea* of the alleged
4 fraud with any respect to the allegations. Only a
5 theory with no proof that I had intent to defraud
6 the investors. Based upon the executive director
7 providing a case wrapped around summary evidence,
8 or more importantly the lack of detailed evidence
9 proving the respondents with subjective knowledge
10 set forth to commit the allegation of fraud set
11 out in the notice of hearing, the respondents
12 respectfully submit the allegation of fraud should
13 be dismissed in its entirety. Furthermore, based
14 on the evidence provided by the executive director
15 and the respondents' cross-examination of the lead
16 investigator, who have missed possibly assuming
17 items submitted as part of the notice of hearing,
18 along with the testimony from one of staff's own
19 witnesses that contradicts their theory of the
20 case, we respectfully submit the allegation of
21 making a false statement to an investigator be
22 dismissed in its entirety.

23 I would also like to take this time to say
24 how unfortunate it is in this day and age matters
25 like this could not be conducted with more of a

1 focus on the investors themselves. This
2 unfortunate costly hearing could have been avoided
3 if all the parties would have sat down and focused
4 on an outcome that would have worked for the
5 investors as I had asked for many months ago while
6 the investigators -- strike that. This
7 unfortunate costly hearing could have been avoided
8 if all of the parties involved sat down and
9 focused on an outcome that would have worked for
10 the investors as I had asked for many months ago
11 while the investors would still have recouped a
12 significant portion of their funds. I know that
13 this is not appealing as a great press release for
14 newspapers, but it would have been better for the
15 investors. Thank you.

16 THE CHAIR: Thank you. Any questions? So we will take our
17 afternoon recess, and we will resume at 3:20 at
18 which time I presume you intend to make some reply
19 comments.

20 MR. FAGBAMIYE: Yeah, some reply comments.

21 THE CHAIR: Thank you.

22 **(PROCEEDINGS ADJOURNED AT 3:07 P.M.)**

23 **(PROCEEDINGS RESUMED AT 3:20 P.M.)**

24 THE HEARING OFFICER: All rise.

25 THE CHAIR: Thank you. Reply.

1 MR. FAGBAMIYE: So I'll make a few comments in reply, and the
2 comments will be limited to issues that are
3 absolutely relevant to the notice of hearing.

4 First I would like to start by indicating
5 that the respondents took an issue with staff's
6 decision not to have a complete tracing in this
7 matter, and the response to that is already listed
8 in the executive director's submissions on
9 liability from paragraphs 172 to 178. But
10 essentially what I would like to draw the
11 attention of the panel to is that the commission
12 staff indeed uncovered evidence that took this
13 case well beyond the balance of probabilities.
14 The investigator in this case took several steps,
15 apart from obtaining a list of investors from Mr.
16 Wharram, not once, not twice, three times. She
17 questioned Wharram about the amount in detail in
18 the compelled interview and he confirmed the
19 amounts raised. The investigator analyzed
20 subscription agreements and compared these to the
21 list that Wharram provided. The investigator
22 spoke to investors and what they said corresponded
23 with what Wharram had provided.

24 Now, that was not the only source of
25 information. Wharram definitely wasn't the only

1 source of information available to commission
2 staff. The investigator took extra steps to
3 review the loans in the Falls and Deercrest. She
4 obtained from PWC all claims for the Falls, for
5 the bare trustees, for West Karma, all the claims
6 that were filed in the Blackburn CCAA proceedings.
7 And of course these are independent of Mr.
8 Wharram. He submitted those claims. Those claims
9 are scrutinized. Some were approved, some were
10 returned. These were parts of the investigation
11 that Chan took.

12 Chan had discussions with PWC about the
13 Companies' Creditors Arrangement Act to build up
14 the reliability of the amounts that was not
15 advanced to the developer. Chan had discussions
16 with Street Wise about the sale of claim
17 proceedings, and she issued a demand to Street
18 Wise, obtained Street Wise agreements, and
19 questioned Wharram about it, and he admitted to
20 what the expenditures were for. The investigator
21 obtained bank statements and support for all the
22 transactions. She had two full days of interview
23 with Wharram. She spoke to 60 investors. She
24 spoke to Wellsby and different entities, including
25 banks and accounting firms. She reviewed volumes

1 of materials received voluntarily and those she
2 demanded. Full tracing was not done based on the
3 volume of the materials we received and
4 scrutinized and analyzed and the admissions that
5 Wharram made in the interview.

6 Now, repeatedly Wharram has indicated that
7 the funds that were not advanced to the developer
8 with used for the benefits of the Falls and
9 Deercrest investors. I know that this panel tries
10 on evidence. There's absolutely no evidence that
11 the funds that was not advanced was used to the
12 benefit of the Deercrest or Falls investors.
13 There's no evidence before this panel no
14 residential units were built. If any were built,
15 only two.

16 Now, going to other business expenses. The
17 approach that staff have taken is that if you look
18 at the offering memorandums of the Falls and
19 Deercrest, and expenses are not allowed in those
20 OMs, there's no reason why those expenses should
21 be brought forward. If those expenses are brought
22 forward the respondents have an obligation to lead
23 evidence in that regard, to cross-examine on that
24 point, to take the stand. They did not. They had
25 the opportunity to take the stand, they chose not

1 to take the stand.

2 If you go to BCSC 168, and this is with
3 respect to the other business expenses, that's the
4 first interview that the commission investigator
5 had with Mr. Wharram, and in that interview Mr.
6 Wharram made it clear that West Karma was located
7 in his house, Falls office was located at his
8 residence, Deercrest also was located at his
9 residence. The joint ventures had no building,
10 they were not the developer, Blackburn was the
11 developer, and there was no evidence of the
12 business that these entities were conducting out
13 of, yet they had business expenses, but they're
14 not willing to take the stand to speak to it, to
15 these business expenses and be cross-examined on
16 those points. Our position is that those business
17 expenses cannot be let in in submissions, they
18 have to take the stand and they have to be
19 cross-examined on that point. They chose not to.

20 Now, with respect to the interest payments,
21 and this is also going in towards the offering
22 memorandums approved for the Falls. Falls did not
23 allow for interest payments to be paid to
24 investors. There's no provision for that in the
25 offering memorandum. Now, Schacher testified on

1 day four of the hearing, Schacher was one of the
2 Falls investors. Schacher testified that he
3 received interest payments. The Falls did OM did
4 not allow for interest payments to be made from
5 investor funds, and there's no evidence that has
6 been led -- he did not -- Mr. Wharram did not lead
7 any -- I'm sorry.

8 THE CHAIR: I'm sorry, I just want to interrupt. You said two
9 different things. You said first that the
10 offering memorandum said that no interest could be
11 paid.

12 MR. FAGBAMIYE: Falls OM did not --

13 THE CHAIR: Are you saying that it couldn't be paid out of
14 investor funds?

15 MR. FAGBAMIYE: Falls OM did not allow for interest payments to
16 be made from investor funds. The Deercrest OMs
17 allowed that, yes.

18 THE CHAIR: Okay.

19 MR. FAGBAMIYE: And our position is that expenses that are not
20 allowable should not go in. The offering
21 memorandums provides a charter. It's a guide for
22 the investor to know what they are going into when
23 they are investing, and it's also a document that
24 provides a check on the issue when they are
25 conducting their business. And in this case we

1 said repeatedly the respondents departed from the
2 provisions of the offering memorandum.

3 Now, Mr. Wharram brings the issue with
4 respect to Mr. Schacher loaning him some funds.
5 During direct examination Mr. Schacher was asked
6 what was the reason he provided Wharram with
7 \$50,000 in 2013, in March of 2013, and his
8 response was clear that Wharram at that time was
9 trying to put the Deercrest project together so
10 they finished properties and gave investors their
11 money. That was the evidence of Mr. Schacher on
12 the stand.

13 Now, if you go to BCSC 154, this is the third
14 affiliate of the investigator in this case. Madam
15 hearing officer please bring up BCSC 154. And if
16 you go to paragraphs 10 -- that's on the next
17 page. If you go to paragraphs 10, 11 and 12, that
18 details for the panel the attempts that Mr.
19 Wharram was making to his funds, and the following
20 steps that the investigator took. And
21 particularly if you go to paragraph 11 you see
22 deposits and cheques to Deercrest, cheques to
23 Deercrest Construction for emergency funding in
24 11 B, and Schacher is referenced in 10 E was the
25 transfers to the investors. Essentially Schacher

1 and all the investors were approached by Mr.
2 Wharram, and he was trying to raise funds in 2013,
3 2012 and 2013. The investigator speaks to that.
4 So the question that he wasn't trying to raise
5 funds at that time or that some of the funds
6 belonged to friends or friends giving a loan will
7 not stand.

8 Now, next I will go to Exhibit 273. This was
9 referred to in the executive director's reply
10 submissions. We have a summary of interest
11 payments, and at the time this was introduced into
12 evidence we made it clear that panel should
13 attribute no weight to these documents, because we
14 didn't know who created these documents, we didn't
15 know how they were prepared, we didn't know the
16 source, and when they were prepared and an
17 explanation of what they tried to show. Basically
18 the respondents brought these documents forward to
19 justify the fact that they paid some interest
20 payments, but we are saying without taking the
21 stand and without being cross-examined on these
22 issues and there are difficulties, and that
23 evidence that should not be led through
24 submissions, it should go in through the witnesses
25 or through the respondents themselves being

1 cross-examined at this time.

2 Now, Mr. Wharram indicated that West Karma
3 did owe him some commission. Again we did not
4 have any evidence of that before this panel, and
5 so there would no reason to have those funds paid
6 to Mr. Wharram. And the other issue about the
7 grocery store, the investors made it clear that
8 they didn't know that their funds would be used
9 for the grocery store business, and there is
10 distinction between a grocery store business and
11 real estate development. And the fact that
12 interest was paid on the grocery store loan
13 outlines the fact it was a loan from investors'
14 funds and there was no reason in the first
15 instance to have advanced that loan out of the
16 investors funds.

17 Now, the tables prepared by the investigator,
18 the investigator prepared quite a number of tables
19 and she walked the panel members through some of
20 those tables, through all the tables as a matter
21 of fact. The specific table I would like to draw
22 the attention of the panel to is BCSC 01115, and
23 in that table it shows what the OMs allow and what
24 the OMs didn't allow. That table was made through
25 rigorous analysis by the investigator and we rely

1 on the figures presented in that table, which is
2 back to the commissions paid and with respect to
3 amounts advanced and amounts not advanced through
4 the Falls to the joint -- amounts advanced and
5 amounts not advanced by the Falls and Deercrest to
6 the developer.

7 Now, with respect to the interpretation of
8 the OMs, it is our position that the OMs have to
9 be read in their entirety to understand the
10 meaning with respect to net proceeds and also with
11 respect to the majority of funds advanced, and
12 that's already covered this morning in the
13 executive director's submissions.

14 Again the respondents indicated that they
15 advanced the majority of funds to the developer in
16 his reply. Once again there is no evidence before
17 this panel. That's the majority of funds were
18 advanced to the developer.

19 Now, particularly with respect to the cheques
20 that we have in the new evidence, the respondents
21 have raised an issue that there's no issue with
22 these cheques. But, yes, there is an issue with
23 these cheques. When you are advancing cheques
24 initially the developer, the respondents were
25 meant to be advancing money to the joint ventures.

1 They advanced some money to the joint ventures,
2 then they stopped and they began to advance money
3 directly to Blackburn. The what I say is clear,
4 in advancing money to the joint ventures who are
5 not the developer there should be a tracing or
6 there should be something to show us that the
7 money did not just go to the joint ventures, but
8 it also left the joint venture and went to the
9 developer. There's nothing before this panel to
10 show that any of these cheques eventually ended up
11 with Blackburn which is the developer. And
12 because those cheques were not scrutinized it is
13 our position that no weight should be attached to
14 it.

15 Now, Mr. Wharram indicated that some payments
16 were made into the Falls bank account, some
17 payments were made for the 45,000 that he took out
18 initially, or the fact of the case is that some of
19 these payments were made well after the proof of
20 claims had been submitted. Some of these payments
21 were made in 2012. The proofs of claim was August
22 18, 2011, so really it is well beyond the period.
23 And the only other thing I would say in conclusion
24 is that I will say to the panel that repeatedly
25 throughout this hearing we've heard the

1 respondents trying to lead evidence through
2 submissions, and that must not -- that must fail.
3 And those would be the response of the executive
4 director.

5 THE CHAIR: Any questions? That concludes this hearing. We
6 are adjourned. Thank you.

7 **(PROCEEDINGS ADJOURNED AT 3:36 P.M.)**

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