Action No. 0901 – 12606

IN THE COURT OF QUEEN'S BENCH OF ALBERTA

JUDICIAL DISTRICT OF CALGARY

B E T W E E N:

EL GOLFO INVESTMENT CORPORATION by its receiver and manager, ERNST & YOUNG INC.

Plaintiff

-and-

DAVID HUMENIUK and ELIZABETH HUMENIUK

Defendants

STATEMENT OF CLAIM

The Parties

1. El Golfo Investment Corporation ("**El Golfo**") is a corporation incorporated pursuant to the laws of Alberta with a registered office in Calgary, Alberta.

2. Pursuant to an Order of the Court of Queen's Bench, Judicial District of Calgary in Action No. 0901-11048 granted on July 29, 2009 (the "**Receivership Order**"), Ernst & Young Inc. was appointed the receiver and manager (the "**Receiver**") of all of the current and future assets, undertakings and property and of every kind and nature of El Golfo with the power to initiate the prosecution of all proceedings with respect to El Golfo and its properties.

3. The Defendants, David and Elizabeth Humeniuk, as far as is known to the Receiver, reside in the City of Calgary, in the Province of Alberta.

4. The Defendant, David Humeniuk, is a director and owner of approximately 50% of the voting shares of El Golfo.

Background

5. On June 4, 2007, Santa Clara Real Estate Investment Fund Limited Partnership (the "**LP**") was formed for the purposes of making investments and holding, developing or selling land to be developed into the "**Santa Clara Project**" in Mexico.

6. Pursuant to the Limited Partnership Agreement ("**LP Agreement**"), El Golfo is the General Partner of the LP.

7. The material terms of the LP Agreement, *inter alia*, are:

(a) the authority and power is vested in the General Partner to manage, control and operate the business and affairs of the LP, including all authority necessary or incidental to carry out the objects, purposes and business of the LP;

(b) the General Partner has the power and authority to open and operate bank accounts for the LP and designate from time to time the signatories to such accounts, and to execute loan and credit agreements on behalf of the LP;

(c) the General Partner shall not commingle any other funds with the funds of the LP;

(d) Title to the assets of the LP shall be held in the name of the General Partner;

(e) the General Partner shall not take any action with respect to the property of the LP which is not for the benefit of the LP, provided that any loss of the LP and all documentation in support thereof shall specifically be deemed to be for the benefit of the LP;

(f) the General Partner is accountable to the LP as a fiduciary and consequently must exercise good faith and integrity in managing the business of the LP and act in the utmost fairness towards the LP;

(g) the General Partner has the sole power and exclusive authority to manage the business affairs of the LP, to make all decisions regarding the business of the LP and to bind the LP; and

(h) the General Partner is to exercise its powers and discharge its duties honestly, in food faith and in the best interests of the LP and shall exercise a degree of care, diligence and skill that a reasonably prudent manager of a partnership would exercise in similar circumstances.

8. The Defendant, David Humeniuk, at all material times, was the President and director of the General Partner.

9. The Defendant, David Humeniuk's roles and responsibilities in relation to El Golfo and the LP were to:

(a) produce and provide necessary documents under securities legislation;

(b) arrange the acquisition of properties for and on behalf of the LP ("**Properties**");

(c) organize and monitor development of the Properties;

(d) complete the accounting for the Properties;

(e) arrange refinancing or mortgages in relation to the Properties, if required;

(f) produce financial documents, including audited financial statements pursuant to the LP Agreement;

(g) manage the movement of funds to and from accounts, and perform all treasury functions including directions and control over all bank accounts;

(h) arrange for annual general meetings in accordance with the LP Agreement; and

such other duties and responsibilities that related to the general and financial administration of the General Partner and the LP (collectively, the "**Humeniuk Duties**").

10. Funds were raised for the Santa Clara Project from private investors to be held in trust by El Golfo in trust account # 526390103616 at the Bank of Nova Scotia branch #52639 ("**El Golfo Trust Account**") as General Partner through a May 26, 2008 Offering Memorandum, among other offerings, that offered partnership units in the LP ("**LP Units**") at a price of $10,000.00 per unit.

Approximately 2400 units were sold for a total of $24 million. Attached hereto as Exhibit "**D**" is a copy of the May 26, 2008 Offering Memorandum.

11. Pursuant to the Offering Memorandum, the funds raised from the sale of the LP Units were to be used by the General Partner on behalf of the LP to acquire and develop two parcels of beachfront property in the northeast corner of the Sea of Cortez in the State of Sonora, Mexico (the "**Property**"), create a master plan for the Property, create infrastructure and sell portions of the Property to generate a return for LP Unit holders and finance the next phase of the Santa Clara Project.

<u>The Purchase of the Mexican Condominium</u>

12. On or about August 17, 2007, the Defendants, David and Elizabeth Humeniuk entered into an Offer to Purchase Agreement ("**Purchase Agreement**") to purchase from Daniel and Sandra Scott ("**Vendors**") the property described as:

> Condominio La Cima 111
> Trolongacion Paseo de Las Conchinas Chinas #179
> Departmental 11-A, Colonia Amapas
> Puerto Vallarta
> Jalisco, Mexico
>
> (the "**Mexican Condominium**")

13. The Purchase Agreement was entered into by David and Elizabeth Humeniuk in their personal capacities.

14. The purchase price for the Mexican Condominium was US$1,050,000 to be paid by way of non-refundable deposit (the "**Deposit**") of US$100,000 to the Vendors' account #10020 016 775105070 at HSBC Bank Canada in Vancouver, British Columbia ("**Vendors' Account**") with the balance due on November 28, 2007.

15. On or about August 17, 2007, the Defendants caused the transfer of $100,106.00 to be transferred from the El Golfo Trust Account to the Vendors' Account on account of the Deposit.

16. On or about October 30, 2007, the Defendants caused the transfer of $912,106.00 (the "**Balance**", collectively with the Deposit, the "**Purchase Funds**") from the El Golfo Trust Account to the Vendors' Account.

17. On or about December 11, 2007, the Defendants caused the transfer of $5,000.00 ("**December 11 Transfer**") from the El Golfo Trust Account to Kelly Douglas Nelson of Puerto Vallarta, Mexico ("**Nelson**") for Mexican Condominium expenses.

18. On or about January 11, 2008, the Defendants caused the transfer of $2,530.07 ("**January 11 Transfer**") from the El Golfo Trust Account to Nelson for Mexican Condominium expenses.

19. On or about April 22, 2008, the Defendants caused the transfer of $10,308.00 ("**April 22 Transfer**", collectively with the December 11 Transfer and the January 11 Transfer, the "**Condo Fees**") from the El Golfo Trust Account to Nelson for Mexican Condominium expenses.

20. Collectively the Condo Fees and the Purchase Funds shall herein be referred to as the "**Trust Funds**".

21. Since the granting of the Receivership Order, the Receiver discovered that the Respondents had purchased the Mexican Condominium and paid for expenses related thereto with funds from the El Golfo Trust Account.

<u>The Defendants' Wrongful Conduct</u>

22. David Humeniuk, in breach of the terms of the LP Agreement, caused funds of the LP to be dealt with in a manner that was not for the benefit of the LP by transferring the Trust Funds from the El Golfo Trust Account to the Vendors to acquire and maintain the Mexican Condominium for the personal benefit of the Defendants and not for the benefit of the LP.

23. Without juridical reason, the Defendants caused the transfer of the Trust Funds being held in trust for the LP from the El Golfo Trust Account to purchase and maintain the Mexican Condominium in their personal capacity.

24. In addition, or in the alternative, the Defendants met, planned and conspired to knowingly made use of the funds held in trust of the LP in a manner calculated to cause injury to El Golfo. As a

result, the Defendants have committed acts of which have caused damages to El Golfo, as further particularized below.

25. In addition, or in the alternative, the Receiver states that the Defendants' hold the Trust Funds and the Mexican Condominium in trust for the benefit of El Golfo and that the Defendants have perpetrated a breach of trust.

26. In the further alternative, Elizabeth Humeniuk participated in and had actual knowledge of, or in the alternative was reckless or wilfully blind to, David Humeniuk's breach of trust.

27. In addition, or in the alternative, the Defendants have been unjustly enriched to the detriment of El Golfo without juridical reason and El Golfo is entitled to restitution on a *quantum meruit* basis of the value of the Trust Funds and the amount of all profits the Defendants have earned as a result of improperly using the Trust Funds.

28. In addition and in the alternative, the Defendants David Humeniuk and Elizabeth Humeniuk individually and collectively, knowingly assisted, with the knowledge of the wrongful conduct, in a breach of trust against El Golfo.

29. In addition and in the alternative, the Defendants David Humeniuk and Elizabeth Humeniuk individually and collectively, received the Trust Funds, for their own use and benefit with the actual knowledge, wilful blindness to the obvious, without making reasonable inquiry or with knowledge of the circumstances that would reasonably cause inquiry into the nature of the funds received or a breach of trust.

30. As a result of the Defendants' wrongful conduct, El Golfo has suffered damages in the amount of $1,030,050.07, plus interest and costs.

31. El Golfo pleads and relies on the *Judgement Interest Act*, R.S.A. 2000 c. J-1, the *Judicature Act*, R.S.A. c. J-2, *Civil Enforcement Act*, R.S.A. 2000, C. c-15, as amended, the *Business Corporations Act* (Alberta), R.S.A. 2000, c. B-9, as amended, and the Alberta *Rules of Court,* Alta. Reg. 390/1968.

32. The Plaintiff does not anticipate the length of this trial will exceed 25 days.

33. The Plaintiff proposes that the trial of this action shall be heard at the Court House, in the City of Calgary, in the Province of Alberta.

WHEREFORE THE PLAINTIFF CLAIMS AGAINST THE DEFENDANTS JOINTLY AND SEVERALLY:

(a) Judgement in the amount of $1,030,050.07, together with interest thereon until payment in full;

(b) An order, pursuant to the *Civil Enforcement Act*, R.S.A. 2000, C. c-15, s. 17, that all exigible property of the Defendants located in Alberta be attached;

(c) An order in the nature of a world-wide *Mareva* injunction enjoining the Defendants from encumbering, transferring, selling, assigning, or otherwise dealing with any of their property, or alternatively the Mexican Condominium, until further order of the Court;

(d) An accounting and tracing for all funds transferred by the Defendants from the El Golfo Trust Account, including a detailed description of the funds received, a detailed description of any profits earned on such funds and the return of such funds plus any profits earned;

(e) An Order requiring the Defendants, and any other person who received any portion of the Purchase Funds, to disgorge such portion of the Purchase Funds as they received;

(f) A declaration that all amounts described in subparagraph (b) above are impressed with, and being held by the Defendants under a constructive or resulting trust in favour of El Golfo;

(g) An Order directing the Defendants to pay all amounts described in subparagraphs (b) and (c) above to the Receiver;

(h) In the alternative, immediate sale to El Golfo or otherwise, or foreclosure and in either case, possession of the Mexican Condominium;

(i) In the event that there is any deficiency in the amount payable or deemed to be available for satisfaction of El Golfo's claim hereunder following sale and possession of the Mexican Condominium, judgment against the Defendants for the amount of such deficiency as determined by this Honourable Court, together with interest, until payment in full, at such rate as the Court shall order;

(j) Costs on a solicitor and his own client basis;

(k) Such further and other relief as this Honourable Court deems just.

DATED at the City of Calgary, in the Province of Alberta, this 21 day of August, 2009, **AND DELIVERED** by **McCARTHY TÉTRAULT LLP**, Barristers and Solicitors, Solicitors for the Plaintiff herein whose address for service is in care of the said Solicitors at 3300, 421 – 7th Avenue SW, Calgary Alberta T2P 4K9,.

ISSUED out of the office of the Clerk of the Court of Queen's Bench of Alberta, Judicial District of Calgary, this 21 day of August, 2009.

V.A. BRANDT COURT SEAL

Clerk of the Court

125264-414327
McCarthy Tétrault LLP DOCS #605769 v. 2

0901-12606

No. ~~12606~~ A.D. 2009

IN THE COURT OF QUEEN'S BENCH
OF ALBERTA
JUDICIAL DISTRICT OF CALGARY

BETWEEN:

EL GOLFO INVESTMENT CORPORATION by its receiver and manager, ERNST & YOUNG INC.

Plaintiff

- and -

DAVID HUMENIUK and ELIZABETH HUMENIUK

Defendants

STATEMENT OF CLAIM

To the Defendants:

DAVID HUMENIUK and ELIZABETH HUMENIUK

You have been sued. You are the Defendants. You have only **fifteen (15) days** to file and serve a Statement of Defence or Demand of Notice. You or your lawyer must file your Statement of Defence or Demand of Notice in the Office of the Clerk of the Court of Queen's Bench in Calgary, Alberta. You or your lawyer must also leave a copy of your Statement of Defence or Demand of Notice at the address for service for the Plaintiff named in this Statement of Claim.

WARNING: If you do not do both things within **fifteen (15) days**, you may automatically lose the law suit. The Plaintiff may get a Court Judgement against you if you do not file, or do not give a copy to the Plaintiff, or do either thing late.

CLERK OF THE COURT
AUG 21 2009
CALGARY, ALBERTA

McCARTHY TÉTRAULT LLP
Barristers & Solicitors
Suite 3300, 421-7th Avenue S.W.
Calgary AB T2P 4K9

Sean Collins/Renee Reichelt
Phone: (403) 260-3531/3630
Fax: (403) 260-3501

File No. 125264-414327