Court File No. CV-23-00693758-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

BETWEEN:

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED

AND IN THE MATTER OF THE COMPROMISE OR ARRANGEMENT OF ORIGINAL TRADERS ENERGY LTD. and 2496750 ONTARIO INC.

Applicants

FACTUM OF THE MOVING PARTY, THE MONITOR
(Mareva Injunction Motion, returnable November 10, 2023)

November 9, 2023

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TABLE OF CONTENTS

PART I: OVERVIEW

1. KPMG Inc. ("**KPMG**"), in its capacity as the Court-appointed monitor (in such capacity, the "**Monitor**") of the Applicants, OTE Logistics LP and Original Traders Energy LP (collectively, the "**OTE Group**") in these proceedings pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "**CCAA**") is seeking an interim Mareva Order in the general form of the proposed draft Order in the motion record. [1]

2. To uphold its duty to protect OTE Group stakeholders in this CCAA proceeding, and to preserve and protect assets that either belong to or are traceable to the OTE Group or would ultimately be exigible in its favour, the Monitor seeks interim Mareva injunctive relief as against former OTE executive Glenn Page ("**Page**"), his wife Mandy Cox ("**Cox**"), and a company owned or controlled by them, 2658658 Ontario Inc. ("**265**", and the three collectively, the "**Mareva Respondents**").

3. This Court (Osborne J.) earlier this year granted a Mareva injunction over a yacht as against these Mareva Respondents in this proceeding, finding a strong *prima facie* case of fraud or impropriety regarding these Respondents' misuse of OTE Group funds of over $3.6 million to purchase that yacht.

4. However, the misuse of OTE funds by the Mareva Respondents goes well beyond the purchase of the yacht. The Monitor's investigation into misconduct by Page and others uncovered that Page directed millions of dollars of funds from the OTE Group to fund often lavish personal purchases and expenses for himself and his wife Cox both domestically and internationally. To cover their tracks, Page undermined access to and quality of the internal

[1] Capital terms not otherwise defined herein have the meanings ascribed to them in the Sixth Report of the Monitor.

records at the OTE Group, forged documents, and effected transactions through related companies.

5. After engaging in this series of improper transaction using OTE Group funds, including funds apparently used in the renovation of their home and installation of a swimming pool, two months ago Page and Cox sold their home for CA$3.8 million. Closing will take place imminently (counsel for Page, after receiving the Monitor's motion record yesterday, advised that the closing of the home is scheduled for November 30, 2023).

6. To uphold its duty to preserve and protect OTE Group assets, assets that will be subject to proprietary claims and assets that will be exigible in its favour, for the benefit of its stakeholders, the Monitor seeks an interim Mareva injunction to freeze and preserve the assets of the Mareva Respondents (based on the Commercial List Model Mareva Order, as adjusted for the circumstances of this case) and to prevent the movement, dissipation or secreting of such assets, pending the return of an interlocutory Mareva hearing following the exchange of responding materials and cross-examinations.

7. Given: (a) the Mareva Respondents' misuse of millions of dollars of OTE corporate funds, including multiple offshore payments and purchases, a yacht, a fractional interest in a private jet, and multiple other payments, (b) the conduct of the Mareva Respondents *inter alia* in making two different ownership transfers in respect of the yacht within a few days and later directing the yacht from Florida to the Bahamas at the time of the initial Mareva order, and (c) very importantly, given the Mareva Respondents' knowledge that an interlocutory Mareva is sought by the Monitor, an interim Mareva order is essential to preserve the subject assets. Such an order would be in place for a short period of time (2-3 weeks, presumably), and the Monitor is

agreeable that an amount for legal and living expenses can be exempted and made available pending the return of the interlocutory hearing, such as for example by depositing an amount in the Mareva Respondents' lawyers trust account (such as $100,000).

8. In view of the multiple instances of fraudulent or improper misuse of corporate funds of the OTE Group by the Mareva Respondents for their personal benefit (including as so found on a strong *prima facie* basis as it relates to the yacht by Osborne J), the serious risk of harm to the OTE Group and its stakeholders in this CCAA proceeding that the Mareva Respondents' assets will be moved, dissipated or secreted, and therefore put beyond the reach of any ultimate remedy, order or judgment of the court, the balance of convenience strongly favour interim injunctive relief pending the return of the interlocutory injunction hearing in 2-3 weeks. It is just, equitable and appropriate that such relief be granted in the circumstances.

PART II: SUMMARY OF FACTS

A. Background to CCAA Proceeding

9. The OTE Group functions as a wholesale fuel supplier which services mainly First Nations' petroleum stations and First Nations' communities across Ontario. The OTE Group has serviced or currently services many gas stations throughout Southern Ontario – most of which are situated across nine different First Nations reserves in Southern Ontario.[2]

10. The OTE Group faced serious financial difficulties, leading to Osborne J granting an initial order under the CCAA (the "**Initial Order**"). Among other things, the Initial Order provided a stay of proceedings in respect of the OTE Group under the CCAA.[3]

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[2] Sixth Report of the Monitor dated November 8, 2023 ("**Sixth Report**"), Motion Record of the Monitor dated November 8, 2023 ("**MMR**"), Tab 5, p. 61, ¶4-5.

[3] Amended Endorsement of Justice Osborne dated March 21, 2023 ("**Osborne J Endorsement**"), MMR, Tab 2, p. 27, ¶3.

11. The serious financial difficulties facing the OTE Group, and the resulting CCAA proceedings, were triggered in part by significant executive misconduct.[4] The primary executive misconduct is attributable to the former President of OTE GP, Page, to the benefit of himself, his wife Cox, and 265 and other Page and in some cases Cox related corporations.[5]

12. As detailed below, part of Page's misconduct involved him significantly compromising the OTE Group's business records, many of which are now missing as a result.[6] Given the missing and/or compromised books and records, KPMG was granted certain investigatory powers in the Initial Order.[7] The Monitor has used – and continues to use – these investigatory powers to investigate to the OTE Group's past transactions and payments, including suspicious and potentially fraudulent transactions in order to help the creditors and other stakeholders of the OTE Group.[8]

13. As the business operations of the OTE Group became unsustainable due to the loss of key customers and, the Court ordered a bid process for the sale of the OTE Group's moveable assets and also provided the Monitor with enhanced powers of a "super monitor".[9] Accordingly, on October 12, 2023, the Court issued the following additional Orders (among others): (a) an Order providing the Monitor with enhanced powers in connection with the business and property of the OTE Group, including to manage and operate the business of the OTE Group and to "preserve

[4] Osborne J Endorsement, MMR, Tab 2, p. 27, ¶3.
[5] Osborne J Endorsement, MMR, Tab 2, p. 27, ¶3. The Mareva Respondents', and their related entities', misconduct is detailed throughout this Factum.
[6] Sixth Report, MMR, Tab 5, p. 67-68, ¶23-24.
[7] Osborne J Endorsement, MMR, Tab 2, p. 27, ¶3
[8] Sixth Report, MMR, Tab 5, p. 67, ¶23. The OTE Group accounting records that are available may be unreliable.
[9] Endorsement of Justice Kimmel dated October 12, 2023, ¶17-18, 28. The super-monitor order was granted without opposition on a motion brought by the Monitor in response to a motion brought by the Mareva Respondents for the appointment of a CRO in the context of allegations made by them against Scott Hill, who agreed to resign. The motion for the appointment of CRO was withdrawn by the Mareva Respondents and the Monitor was given the enhanced powers order, all unopposed.

and protect" the property of the OTE Group;[10] and (b) an Order extending the stay period and approving the activities of the Monitor.[11]

14. Given the results of its investigation, and to uphold its duties to OTE Group's stakeholders, the Monitor with its enhanced powers and duties to preserve and protect the property of the OTE Group, and with its investigation in that role deepening, believed it necessary and appropriate to bring the present motion to preserve the subject assets.[12]

B. The Initial Mareva Order Over the Yacht

15. Before filing for CCAA protection, the OTE Group and others commenced an action in this Court against Page, Cox and twenty-two other defendants (the "**Page Claim Defendants**") alleging, among other things, unjust enrichment, fraud, breach of fiduciary duty, breach of statutory duty and breach of contract (the "**Page Claim**").[13]

16. In 2021, Page and Cox purchased, through 265, a seventy-foot yacht from the Italian shipbuilder Azimut Benetti, named "Cuz We Can" (the "**Yacht**"), using funds wire transferred from OTE LP's account, and caused OTE Logistics to guarantee a chattel mortgage secured by the Yacht. In addition, 265 caused OTE Logistics to authorize its guarantee of a chattel mortgage in respect of the purchase of the Yacht.[14]

17. On March 15, 2023, Osborne J heard the motion for the Initial Mareva Order and granted a Mareva Order as against the Mareva Respondents in respect of the Yacht.[15] Justice Osborne

[10] Sixth Report, MMR, Tab 5, p. 64, ¶16; Monitor's Enhanced Powers and Amended Bid Process Approval Order, MMR, Tab 4, p. 49-51, ¶3(b).
[11] Sixth Report, MMR, Tab 5, p. 64, ¶16.
[12] Sixth Report, MMR, Tab 5, p. 86-87, ¶77-80; Osborne J Endorsement, MMR, Tab 2, p. 36, ¶53.
[13] Osborne J Endorsement, MMR, Tab 2, p. 28, ¶9. The claim was filed under court file no. CV-22- 00688572-0000.
[14] Osborne J Endorsement, MMR, Tab 2, p. 28, ¶10
[15] Osborne J Endorsement, MMR, Tab 2, p. 27, ¶1. The Monitor supported the OTE Group's application for a Mareva injunction in respect of the Yacht. See Osborne J Endorsement, MMR, Tab 2, p. 36, ¶53.

found that the OTE Group had established a strong *prima facie* case that the Mareva Respondents fraudulently misused and misappropriated OTE Group funds for their own benefit (*i.e.*, to purchase the Yacht).

18. The OTE Group's evidence on that motion, and Justice Osborne's findings, are germane to the issues before this Court:

(a) At least US$3,675,687.05 of OTE Group funds were used by the Mareva Respondents to purchase the Yacht, owned by 265.[16]

(b) The Mareva Respondents controlled the Yacht, which was up for sale with multiple brokers, without the OTE Group's permission, and with active listings at the time of the motion.[17]

(c) The Mareva Respondents caused a deregistration of the Yacht from Canada, changed its name, and had taken other steps all to try to remove the asset from the control or reach of the OTE Group. Further, on the date of hearing the motion for the Initial Mareva Order, counsel for Page confirmed the Yacht was at sea and being sailed from Florida to the Bahamas at the time of the hearing.[18]

(d) The Mareva Respondents forged certain documents to fund the purchase of the Yacht, and were otherwise trying to frustrate the efforts of the OTE Group and the Monitor to investigate the use of OTE Group funds, the purchase of the Yacht and the whereabouts of the Yacht.[19]

[16] Osborne J Endorsement, MMR, Tab 2, p. 28, ¶12.
[17] Osborne J Endorsement, MMR, Tab 2, p. 28, ¶13-16.
[18] Osborne J Endorsement, MMR, Tab 2, p. 28, ¶17.
[19] Osborne J Endorsement, MMR, Tab 2, p. 28, ¶17.

19. In granting the Mareva Order, Osborne J accepted the Applicants' position and evidence, and based on such evidence, held that a strong *prima facie* case of fraud or impropriety was made out against the Mareva Respondents.[20]

20. On the motion, Osborne J also rejected outright the Mareva Respondents' argument that the transfers of funds did not constitute strong *prima facie* evidence of fraud, "since they could be said to be distributions of profits to which the Respondents were entitled."[21]

> I cannot accept the submission, however, in the complete absence of any evidence to corroborate the suggestion. The books and records of the OTE Group are incomplete and lacking. There is no evidence before me of resolutions, meeting minutes, correspondence or any documents demonstrating or even suggesting that these transfers were in fact, or were even intended to be, distributions of profit or income. There is also no evidence of any corresponding distributions, at the same time or in the same amount, to the other partners who presumably would have been entitled to the same distribution.
>
> Finally, there is no evidence that the partnership had, at the time of the impugned transfers, sufficient profits to fund such distributions in any event.
>
> Even if the Respondents were entitled to distributions of profit that the relevant time, it does not follow that they are somehow entitled to simply take funds and apply them for their own uses.
>
> In short, I am satisfied that the moving parties have established, with sufficient particulars, a strong *prima facie* case.[22]

21. Since the Initial Mareva Order, the Monitor learned of more evidence of fraud on the part of the Mareva Respondents with respect to the Yacht. In particular, in October 2022 Page had used his related companies (including 265, of which Cox is also a director) to obtain the Yacht, *and then transfer it twice within 24 hours to two different offshore companies owned and/or directed by Page and Cox* and encumber the Yacht with a significant non-arms length mortgage (see footnote below).[23]

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[20] Osborne J Endorsement, MMR, Tab 2, p. 31, ¶32.
[21] Osborne J Endorsement, MMR, Tab 2, p. 31, ¶34.
[22] Osborne J Endorsement, MMR, Tab 2, p. 31-32, ¶35-37.
[23] According to Page's counsel, Page caused 265 to transfer title and mortgage to the Yacht to his related entities, GPMC Holdings International Inc. ("**GPMC International**") and CWC International, Inc. ("**CWC**"). In particular, Page caused 265 to transfer title to the Yacht on October 20, 2022 to GPMC International for US$3,150,000. The very next day, GMPC International transferred the Yacht to CWC for US$3,000,000, pursuant to a transaction in which GPMC International purportedly loaned CWC the amount of USD$2,700,000 to

C. The Mareva Respondents' Broader Impropriety Involving OTE Group Funds

22. Beyond the yacht, the Monitor has uncovered evidence of significant additional apparent fraud or impropriety on the part of the Mareva Respondents involving multiple millions of dollars of OTE Group funds and assets. The details of this misconduct are outlined below and in the Sixth Report.

1. Other Suspected Fraudulent, Improper or Suspicious Transactions involving the Mareva Respondents or Some of Them

(a) AirSprint Proceeds

23. The Monitor has determined that between March 2021 and June 2022, approximately US $6,864,425 and CA$1,057,681 was wired by OTE Group entities to AirSprint Inc. (approximately CA$10,469,495 total) – a private jet company based in Toronto.

24. Most of the total amount appears to be fractional ownerships of private jets, and other non-business travel on such jets. The Monitor has tied approximately CA$9,032,298 of OTE Group funds to fractional ownership purchase agreements between AirSprint and 265/GPMC Holdings Inc. (*i.e.*, a company owned or controlled by Page and Cox).[24] Accordingly, the Mareva Respondents took ownership of the private jet interests in companies held or controlled by them even though those private jet interests were paid for using the OTE Group's funds.

25. In connection with its investigation and pursuant to the Information Order granted by this Court, the Monitor received information from AirSprint, including certain flight manifests

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facilitate the purchase of the Yacht and placed a mortgage against the Yacht in November 2022. The loan agreement is executed by Page as director of GPMC International and by Cox as director of CWC. See Sixth Report, MMR, Tab 5, p. 78, ¶61. See also, Appendix A, p. 92 and Appendix B, including p. 113. In July 2023, this Court authorized the Monitor to engage in a sales process for the Yacht. The sales process is ongoing. See Sixth Report, MMR, Tab 5, p. 64, 77, ¶14, ¶59

[24] Sixth Report, MMR, Tab 5, p. 81, ¶69. Osborne J found that Page and Cox own and/or control 265, and are both directors of 265. See Osborne J Endorsement, MMR, Tab 2, p. 28, ¶5.

As outlined in the Sixth Report, the remaining CA$1,437,196 relates to operating costs paid by the OTE Group in connection with passenger travel.

identifying individuals who travelled with AirSprint from April 20, 2021 to February 23, 2023.[25] Page and Cox were on multiple of the relevant flights.[26]

26. The flight manifests outlined multiple flights to luxury tourist (and other) destinations in which the OTE Group does not have any operations, such as St. Lucia, Turks and Caicos, and the Balearic Islands that the passengers flied to. The Monitor is unaware of any legitimate business reason why an aircraft paid for with the OTE Group's funds would have been used for travel to these and many of the other listed locations.[27]

(b) BodyHoliday Spa

27. The Monitor discovered that in August 2021, Page and Cox authorized the transfer of US$1,000,000 from OTE Group to BodyHoliday Spa – a luxury wellness resort in St. Lucia (which is a location in the AirSprint flight manifests). Of course, the Monitor is unaware of any legitimate business purpose for Page and Cox authorizing the wire transfer from the OTE Group to a spa and resort in St. Lucia.[28]

28. BodyHoliday Spa has since indicated to the Monitor that allegedly only US$100,000 should have been sent. The Monitor was advised that the amount of US$575,408 was wired back to the OTE Group once the error was discovered. The Monitor was also advised that the remaining amount of USD $424,592 was held by BodyHoliday Spa to cover the additional

[25] Sixth Report, MMR, Tab 5, p. 71, ¶36.
[26] Sixth Report, MMR, Tab 5, p. 72-73, ¶39-40
[27] Sixth Report, MMR, Tab 5, p. 72-73, ¶41-42. During the Monitor's investigation, the Mareva Respondents tried to frustrate the Monitor's ability to obtain further information from AirSprint. In particular, in late September 2023, the Monitor received letters from counsel to the Mareva Respondents asserting that the Monitor does not have the powers to compel the production of information certain letters to AirSprint because such information does not constitute "Requested Information" as set out in the Amended and Restated Initial Order. The Monitor has disputed this position. See Sixth Report, MMR, Tab 5, p. 74-75, ¶44-46.
[28] Sixth Report, MMR, Tab 5, p. 78-79, ¶62-66.

deposits that would have otherwise been required to be paid by the OTE Group on their booking.[29]

(c) Suspected Fraudulent, Improper, or Suspicious Transactions

29. To date, the Monitor has identified many other improper, likely fraudulent, or suspicious transactions involving the Mareva Respondents or some of them (and in some cases, their related entities), to fund personal purchases or expenses (*i.e.*, that do not appear to be for any legitimate business purpose). A summary of these payments and transfers, and the beneficiary(ies) to whom the payments were made or in respect of whom the benefits thereof were apparently received, is in the Sixth Report.[30]

30. The evidence plainly ties the Mareva Respondents to multiple of these transactions. To identify beneficiaries tied to the suspicious transactions, the Monitor relied on additional documents located in its investigation. The evidence the Monitor identified is also outlined in the Sixth Report, and excerpted in part below.

> *Direct cheques and bank wires to Glenn Page:* The Monitor understands that approximately $1.3 million was paid directly to Glenn Page. The Monitor is continuing to investigate these disbursements to ascertain the nature and rationale for same to determine if they were made for legitimate business purposes of the OTE Group. Those transactions are identified in the Detailed Summary in **Appendix "C"**.
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> *Marine-related transactions:* Over $207,000 of marine-related transactions were funded from OTE Group accounts. This includes wire transfer to NorthCove Marina and to Azimut Benetti, the builder of the Italian Yacht. Glenn Page also instructed that payments be made to Bayland Enterprises, a marine systems provider, from OTE, and for the amounts to be charged to "**R&D**". Finally, payments were made from OTE Group accounts in respect of several invoices from ICBM, Inc. Based on emails between Page and G.L. Harvie, it appears that ICBM, Inc. is an operating company for G.L. Harvie and relate to a scope of work through which Harvie was to maintain and captain the Italian Yacht. All transactions are identified in the Detailed

[29] Sixth Report, MMR, Tab 5, p. 78-79, ¶62-66. As outlined in the Sixth Report, BodyHoliday Spa has indicated to the Monitor that only USD $100,000 should have been sent. The Monitor was advised by that the amount of USD $575,408 was wired back to the OTE Group once the error was discovered. The Monitor was also advised that the remaining amount of USD $424,592 was held by BodyHoliday Spa to cover the additional deposits that would have otherwise been required to be paid by the OTE Group on their booking.

[30] Sixth Report, MMR, Tab 5, p. 79-85, ¶66-71. Notably, these payments and transfers were made at a time when the OTE Group entities were likely insolvent as they were not meeting their tax obligations (based upon claims that have been asserted by the Minister of Finance and the Canada Revenue Agency as part of the Court-ordered claims procedure in these CCAA Proceedings).

Summary. The correspondence and receipts related to Bayland Enterprises are attached hereto at **Appendix "D"**, and the correspondence and invoices related to ICBM, Inc. are attached hereto at **Appendix "E"**.

Custom home builders: Page and Cox's home address is 118 Main Street North, Waterdown, Ontario ("**118 Main Street**"). Over $500,000 of OTE Group funds have been paid to Tru Custom Homes Inc. ("**Tru Custom**") in respect of work completed on 118 Main Street. Correspondence and documents identified by the Monitor include a Construction Management Agreement between Page and Tru Custom contemplating the construction of 118 Main Street; a progress payment schedule in respect of same; emails from Page indicating that he had made payments from the OTE Group's business account; and emails from Page instructing OTE Group employees to charge cheques to Tru Custom to "Blending Repairs & maintenance" and to "Repairs", despite these clearly being personal expenses. The transactions are each identified in the Detailed Summary, and the correspondence and related documents are attached hereto at **Appendix "F"**.

Furnishing, Pool, Decking, Fence and Contracting Companies: Payments totaling over $325,000 were made from OTE Group accounts to the following companies:

- Oasis Pools Ltd.: Emails from Oasis Pools Ltd. addressed to "Ms. Cox & Mr. Page" or to "Cox / Page Residence" show Page agreeing to make payments in respect of a pool and related add-ons. In other emails, Page instructed that these payments be charged to OTE Group accounts. The relevant emails are attached hereto at **Appendix "G"**.

- Subzero-Wolf Canada: Emails from Page indicate that Page ordered a delivery from Subzero-Wolf Canada, a luxury appliance store, to 118 Main Street. That email is attached hereto at **Appendix "H"**.

- Closet Envy: In emails with Closet Envy, Page indicates that he wants to convert "the cabinet in the master walking" [*sic*], indicating that the closet installation will take place in his home. That email is attached hereto at **Appendix "I"**.

- Other: In an email dated June 24, 2020, Page tells an OTE Group employee that "We will be doing a distribution this week but I need cheques as usual", and goes on to request cheques for Home Leisure, The Deck Store, and Rustic Design. Similarly, in an email dated August 19, 2020, in connection with another distribution, Page requests cheques for Rosehill Cellars (a wine cellar company) and Eden Tile (among others). All of these amounts were ultimately paid by the OTE Group. The Monitor is not aware of any legitimate business purpose for these payments. The June 24 email is attached hereto at **Appendix "J"**, and the August 19 email is attached hereto at **Appendix "K"**.

St. Lucia Resorts: Over $638,000 was paid in respect of resorts in St. Lucia. The payments to BodyHoliday are discussed in detail above. Payment was also made to RJB Hotel Supplies. In an email to RBC, Page indicated that the payment was in respect of a facility being built in St. Lucia. The Monitor is unaware of any OTE Group operations or facilities in St. Lucia. The email from Page is attached hereto at **Appendix "L"**.

Italian Wedding: Over $147,000 was spent in respect of a wedding in Italy. The Monitor understands that Page and Cox were married in Italy on or about June 18, 2022, and has reviewed email correspondence from Page sent in advance of this time coordinating the wedding and an order confirmation with the restaurant, Davittorio. An Instagram post by Varna Studios Ltd., a

destination wedding photographer, shows a picture from that wedding. Various vendors in Italy received payments from the OTE Group during this time, and most of these vendors were tagged in another Instagram post by Varna Studios Ltd. The correspondence, order confirmation, and Instagram posts are attached hereto at **Appendix "M"**.

RV Camping / Cottage Resorts: Payments totaling over $142,000 were made to Parkbridge Lifestyle. Email correspondence and the related invoice appear to indicate that these payments were made in respect of an RV/cottage for Page. The correspondence and invoice are attached hereto at **Appendix "N"**.

Payments made to Receiver General/CRA: The Monitor understands that a payment of $79,000 was made directly to the Receiver General/CRA on behalf of Glenn Page, likely pertaining to his income taxes owing to the CRA. This was identified by the Monitor through the related wire details which referenced Page's social insurance number. The wire details are attached hereto at **Appendix "O"**.

Payments made to companies related to Glenn Page: In total, over $1.1 million was paid to 265, IMA Enterprises Inc., 2772618 Ontario Inc., and 2693472 Ontario Inc. for which the Monitor is continuing to investigate the nature and rationale for payments to determine if it was paid for legitimate business purposes. Glenn Page is listed as a director and officer of each of these entities (and Cox is also a director of 265). These transactions are identified in the Detailed Summary, and the corporate profile reports for each of these entities are attached hereto at **Appendix "P"**.

Payments to Brian Page and related parties: In total, over $222,000 was paid from OTE Group accounts to Page's brother Brian Page and two companies of which he is a director, 11222074 Canada Ltd. and 7069847 Canada Inc. Corporate profile searches for these companies are attached hereto at **Appendix "Q"**. The Monitor is continuing their investigation to better understand the nature and reason for payments to determine if it was paid for legitimate business purposes.

Payments to Cox and related parties: In total, over $90,000 was paid from OTE Group accounts to Cox and Picassofish, a company of which Cox is a director and officer (along with Page). The corporate profile search for Picassofish is attached hereto at **Appendix "R"**. The Monitor is continuing to investigate these disbursements to ascertain the nature and rationale for same to determine if they were made for legitimate business purposes of the OTE Group.[31]

31. As the Monitor outlines in the Sixth Report (and as excerpted above), it is unaware of a legitimate business purpose for these transactions, and most on their face could have no legitimate business purpose.

32. Moreover, it is doubtful that the summary above and in the Sixth Report is exhaustive. The payments and transfers noted above are only those for which the Monitor has been able to

[31] Sixth Report, MMR, Tab 5, p. 81-84, ¶69-70. Payments related to the Yacht and other items discussed above were omitted from this excerpt, but are outlined in the Sixth Report.

identify a beneficiary based on a preliminary review of payments from the OTE Group's bank accounts covering the relevant period. The Monitor's investigation is ongoing.[32]

33. Indeed, even with the books and records eventually recovered by the Monitor, it has identified a list of other disbursements related to 493 transactions in the amount of approximately $59 million (separate from the summary above and in the Sixth Report) for which no supporting documentation has been located by the OTE Group or the Monitor. Page and those directed by him played a role in the dearth of documentation, although the Monitor cannot (yet) say whether these addition 493 transactions are improper transactions.[33]

2. The Applicants' Books and Records

34. Based on the Monitor's investigation, Page played a central role in undermining the quality and availability of the OTE Group's books and records.

(a) Page Compromised the OTE Group's Books and Records

35. The Monitor's investigation uncovered evidence that Page compromised access to and the quality of the OTE Group's books and records. In particular, the Page: (1) held custody over records at a remote location that he withheld access to by other OTE Group personnel; (2) frustrated and delayed efforts by OTE Group personnel to get the necessary credentials and authorizations to control and maintain their business information systems (including by terminating their credentials and authorizations); and (3) deleted the contents of his and other email inboxes for OTE LP and OTE Logistics.[34]

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[32] Sixth Report, MMR, Tab 5, p. 79, ¶68.
[33] Sixth Report, MMR, Tab 5, p. 85, ¶71.
[34] These antics are outlined in greater detail in the Sixth Report. See Sixth Report, MMR, Tab 5, p. 67-68, ¶24. The Monitor understands that the Ontario Provincial Police (the "**OPP**") is conducting an investigation in relation to Page and missing computer data. The Monitor does not currently have further details regarding the OPP's investigation. See Sixth Report, MMR, Tab 5, p. 70, ¶31.

(b) Fictitious Financial Statements

36. Through its investigation efforts to receive a more complete set of records, the Monitor discovered that Page appears to have created certain fictitious documents related to the OTE Group's financial affairs to provide to third parties (and further obscure the nature of the OTE Group's transactions). For example, the Monitor understands that in June 2022, Page provided Royal Bank of Canada ("**RBC**"), a secured creditor of the OTE Group, with fictitious unaudited statements of OTE LP dated December 31, 2021 in response to its request for financial disclosure ("**Fictitious Financial Statements**"). Assisting with their apparent authenticity, the Forged Financial Statements were issued on the letterhead of the OTE Group's auditor, Pettinelli Mastroluisi ("**Pettinelli**").[35]

37. To determine the veracity of the document, the Monitor contacted Pettinelli. A Pettinelli partner confirmed to the Monitor that Pettinelli never issued the Fictitious Financial Statements. The Monitor therefore believes, with compelling reason, that the Fictitious Financial Statements are indeed fraudulent.[36] Consistent with the misconduct and the Monitor's belief, Osborne J found that the Mareva Respondents also fraudulently executed and forged signatures on documents to Essex, the party that provided financing for the Yacht.[37]

D. Page and Cox Sell Their Home

38. The Monitor recently discovered that Page and Cox sold their home, the closing of which is imminent (since receiving the Motion Record, Page's counsel advised on November 9, 2023 that the closing date is November 30, 2023).[38]

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[35] Sixth Report, MMR, Tab 5, p. 20, ¶31.
[36] Sixth Report, MMR, Tab 5, p. 70-71, ¶30.
[37] Osborne J. Endorsement, MMR, Tab 2, p. 31, ¶33.
[38] Sixth Report, MMR, Tab 5, p. 85, ¶74. Page's counsel advised the Monitor of the closing date in response to this motion.

39. Public sources state that Page's and Cox's home – located at 118 Main Street North, Waterdown, Ontario – was listed for sale on August 14, 2023. They also state that the home was sold for $3.8M on September 4, 2023.[39]

40. The Monitor is very concerned that, once Page and Cox receive the closing funds, there is a significant risk, based on their past conduct and their knowledge this motion, that they will endeavour to move, dissipate, or attempt to secret those (and other) funds.[40]

41. Indeed, there was a similar risk at play before Justice Osborne in connection with the Initial Mareva Order, where the Mareva Respondents were actively trying to sell the Yacht (with the Yacht at sea during the hearing itself). Only now, the relevant sale has happened (but has not yet closed).

PART III: ISSUES, LAW & ARGUMENT

42. The issues to be decided in this motion are:

(a) Whether the Court should grant an interim Mareva injunction against the Mareva Respondents pending the return of the interlocutory Mareva hearing.

(b) Whether the requirements of Rule 40.03 ought to be dispensed with given the circumstances of this case – particularly given the Monitor's status as a court-appointed officer.

[39] Sixth Report, MMR, Tab 5, p. 85, ¶74. The Monitor reviewed the parcel register for the home, which as at November 8, 2023, states that the home is still under Page's and Cox's name. The parcel register also indicates that home was purchased by Page and Cox in June 2019 for $650,000. The parcel register further states that the RBC charge that Page and Cox had registered against the home in October 2020 was discharged in November 2022, and a new charge in favour of the Bank of Nova Scotia in the face amount of $3 million was then registered in November 2022.

[40] Sixth Report, MMR, Tab 5, p. 86, ¶76.

A. The Monitor May Seek a Mareva Injunction against the Mareva Respondents

43. An interim injunction under section 101 of the *Courts of Justice Act* may be obtained on a motion to a judge by a party to a proceeding or an intended proceeding.[41] An officer of the Court (such as the Monitor) may seek a Mareva injunction, including against a non-party to the proceeding.[42] For example, the Ontario Court of Appeal recognized in *Business Development Bank of Canada v Aventura II Properties Inc* ("***BDBC***") that the Court may grant a Mareva injunction (including against a non-party) in aid of a court-appointed officer (there, a monitor turned receiver):

> In the typical "Mareva" case, the moving party seeks security for a future judgment, where neither liability nor the amount of the judgment has been determined. Here, however, the order granted was contemplated by and expanded upon powers granted to the Receiver under the Receivership Order. Those powers authorize the Receiver to take possession and control of the Debtors' property and proceeds from such property, receive and collect all monies owing to the Debtors, and apply to the court for assistance in carrying out its duties: see especially paras. 2, 3(a), 3(f), 12 and 28 of the Receivership Order. The Receiver had the duty and right to collect the HST Refund, and Revital was in breach of the Receivership Order when she placed it beyond the Receiver's reach and failed to disclose its existence. Indeed, the misappropriation of the HST Refund precipitated the appointment of the Receiver and part of the Receiver's mandate was to find and recover the HST Refund.[43]

44. Like the receiver in *BDBC*, the Monitor has a duty to investigate and recover funds in the name of and on behalf of the OTE Group. To do so, among other things, the Monitor is empowered to: "preserve and protect the Property, or any parts thereof"; "apply to the Court for advice and direction or for any further orders in the CCAA Proceedings"; and "take any steps reasonably incidental to the exercise by the Monitor of [these and other] powers…or the performance of any statutory obligations."[44]

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[41] *Courts of Justice Act*, RSO 1990, c C43, ss 101(1), (2).
[42] *Business Development Bank of Canada v Aventura II Properties Inc*, 2016 ONCA 300, ¶21, 26-29.
[43] *Business Development Bank of Canada v Aventura II Properties Inc*, 2016 ONCA 300, ¶28.
[44] Monitor's Enhanced Powers and Amended Bid Process Approval Order dated October 12, 2023, MMR, Tab 4, p. 49-51, ¶3. Section 23(1)(k) of the CCAA also empowers the Monitor to "carry out any other functions in relation to the company that the court may direct".

45. The Monitor may therefore apply to the Court to obtain a Mareva injunction against the Mareva Respondents. Indeed, although the Monitor was not the moving party in the previous Mareva motion, Osborne J granted a Mareva injunction against these very same respondents.

B. The Monitor Satisfies the Test for a Mareva Injunction

46. As an equitable remedy, a Mareva injunction is dependent on the particular facts and circumstances before the Court.[45] As Justice Osborne set out in connection with the previous Mareva injunction, the factors ordinarily to be considered in determining whether to grant Mareva relief include whether the moving party has established the following:

a) a strong prima facie case;

b) particulars of its claim against the defendant, setting out the grounds of its claim and the amount thereof, and fairly stating the points that could be made against it by the defendant;

c) some grounds for believing that the defendant has assets in Ontario (although this requirement has been modified by more recent jurisprudence discussed below, such that it is perhaps better expressed as: some grounds for believing that the defendant has assets within the jurisdiction of the Ontario Court);

d) some grounds for believing that there is a serious risk of defendant's assets being removed from the jurisdiction or dissipated or disposed of before the judgment or award is satisfied;

e) proof of irreparable harm if the injunctive relief is not granted;

f) the balance of convenience favours the granting of the relief; and

g) an undertaking as to damages.[46]

47. While the Court ought to consider these factors, since a Mareva injunction is an equitable remedy, ultimately the Court must consider what is just or convenient in all the circumstances.[47]

48. Mareva injunctions have been granted by Ontario courts in respect of assets outside Ontario on the basis that the Court has unlimited jurisdiction *in personam* against any person

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[45] *SFC Litigation Trust (Trustee of) v Chan*, 2017 ONSC 1815, ¶29.
[46] Osborne J Endorsement, MMR, Tab 2, p. 30, ¶22.
[47] *SFC Litigation Trust (Trustee of) v Chan*, 2017 ONSC 1815, ¶36

connected to the jurisdiction.[48] Canadian courts have awarded Mareva injunctions to restrain a party who is properly subject to the jurisdiction of the Court from transferring or dealing with assets, including assets *ex juris*, where necessary to prevent the frustration of an order or possible future order of the Court.[49]

49. The Court's *in personam* jurisdiction is well established in Canadian law.[50] As the Mareva Respondents are residents of Ontario, this Court can assert *in personam* jurisdiction against them with respect to their assets wherever located.

50. Ontario courts have granted Mareva injunctions affecting assets outside the jurisdiction in a number of cases. For example, in *SFC Litigation Trust v Chan*, such a Mareva injunction was granted, and upheld on appeal, when the defendant was a foreign resident who was not present in the jurisdiction and did not have assets in the jurisdiction, but over whom the Court still exercised *in personam* jurisdiction.[51]

51. And even more germane to these circumstances, in granting the Initial Mareva Order, Osborne J has already held that the Mareva Respondents "are residents of Ontario and this Court has *in personam* jurisdiction over them." Osborne J then held that the Court has authority to grant an injunction even with no evidence of Ontario assets:

> Moreover, the earlier requirement that a moving party establish that a respondent have assets in Ontario before Mareva relief could be granted (whether restricted to Ontario or beyond) no longer exists. Rather, this Court has discretionary jurisdiction to grant a Mareva junction where circumstances merit, even absent any evidence of assets in Ontario: Associated Foreign Exchange Inc. et al v. MBM Trading, 2020 ONSC 4188 at para. 54.[52]

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[48] Sharpe, JA, Injunctions and Specific Performance, Looseleaf ed (Aurora: Canada Law Book, 2004), pp 2-73 & 2-74; Spry, ICF, The Principles of Equitable Remedies: Specific Performance, Injunctions, Rectification and Equitable Damages, 7th ed (Agincourt, Ontario; Carswell Co, 2007), 532,; *SFC Litigation Trust (Trustee of) v Chan*, 2017 ONSC 1815, ¶27-31

[49] *Mooney v Orr*, 1994 CanLII 1779 (BCSC), ¶11-13.

[50] *Google Inc v Equustek Solutions Inc*, 2017 SCC 34, ¶38.

[51] *SFC Litigation Trust (Trustee of) v Chan*, 2017 ONSC 1815.

[52] Osborne J Endorsement, MMR, Tab 2, p. 32, ¶39.

52. Of course, the Mareva Respondents Page and Cox do have assets in Ontario, including without limitation their home in Waterdown.

53. In this case, the Monitor satisfies the test for a Mareva injunction.

1. A Strong *Prima Facie* Case

54. The Supreme Court of Canada has recently held that the test for establishing a strong *prima facie* case is that "upon a preliminary review of the case, the application judge must be satisfied that there is a strong likelihood on the law and the evidence presented that, at trial, the applicant will be ultimately successful in proving the allegations set out in the originating notice."[53]

55. Here, there is a strong *prima facie* case of fraud, breach of fiduciary duty, or knowing assistance or knowing receipt as against the Mareva Respondents.

(a) There is a Strong *Prima Facie* Case of Fraud

56. To establish the tort of civil fraud in Ontario, a party must satisfy the following elements:

(a) a false representation made by the defendant;

(b) some level of knowledge of the falsehood of the representation on the part of the defendant (whether through knowledge or recklessness);

(c) the false representation caused the plaintiff to act; and

(d) the plaintiff's actions resulted in a loss.

[53] *R v Canadian Broadcasting Corp*, 2018 SCC 5, ¶17.

57. The evidence amassed by the Monitor, set out above, demonstrate a strong *prima facie* case of fraud against the Mareva Respondents. The evidence shows that the Mareva Respondents or some of them, among other things:

(a) Concealed the relationships between themselves and other related, non-arm's length parties.

(b) Directed, caused and/or facilitated prohibited payments and transfers to be made by the OTE Group to such related, non-arm's length parties, including payments and transfers for lavish personal expenses, for which no goods or services, or no good or service of any material value, were provided to the OTE Group.

(c) Diverted funds from the OTE Group, including to obtain improper benefits for themselves.

(d) Knowingly received, retained and used funds, which rightfully belonged to the OTE Group.

(e) Undermined access to and the quality of the OTE Group's internal books and records to conceal their fraudulent activity.

(f) Falsified documents and provided them to OTE Stakeholders to further mask their affairs, including the Fictitious Financial Statements.

58. All of the above conduct severely harmed the OTE Group and its stakeholders.

(b) There is a Strong *Prima Facie* Case of Breach of Fiduciary Duty

59. To establish a breach of fiduciary duty under Ontario law, a plaintiff must establish the following elements:

(a) proof of the duty, including that the fiduciary has scope for the exercise of some discretion or power, the fiduciary can unilaterally exercise that power or discretion so as to affect the beneficiary's legal or practical interests, and the

beneficiary is peculiarly vulnerable to or at the mercy of the fiduciary holding the discretion or power; and

(b) breach of the duty, including concealment or failure to advise of material facts, breach of a trust, making a secret profit or acting in a conflict of interest, a causal connection between the breach and the alleged damages and the fiduciary's profit from its action.[54]

60. There is no credible dispute that Page owed a fiduciary duty to the OTE Group, as a director and senior officer of OTE Group entities. By engaging in his fraudulent or improper transfer of funds – misappropriating company funds to bankroll his own lavish personal expenses, and covering his tracks by obscuring or undermining the OTE Group's financial affairs – Page breached that fiduciary duty. Moreover, he did so deceitfully and dishonestly.

(c) There is a Strong *Prima Facie* Case of Knowing Assistance and Knowing Receipt against Cox and 256

61. There is a strong *prima facie* case against *all* of the Mareva Respondents for fraud. Even if there were not, there is nevertheless a strong *prima facie* case against Cox and 256 for knowing assistance and knowing receipt, based on Page's fraudulent conduct and breach of fiduciary duty.

62. To establish a cause of action for knowing assistance:

(a) There must be a fiduciary duty between the perpetrator and the victim.

(b) The fiduciary must have breached that duty dishonestly.

[54] *Hodgkinson v Simms*, [1994] 3 SCR 377, ¶16, 30, 44, 58, 79, 80, 108; *Sharbern Holding Inc v Vancouver Airport Centre Ltd*, 2011 SCC 23, ¶131.

(c) The stranger to the fiduciary relationship must have had actual knowledge of both the fiduciary relationship and the fiduciary's breach of that duty.

(d) The stranger must have participated in or assisted the fiduciary's dishonest conduct.[55]

63. As outlined above, Page breached his fiduciary duties to the OTE Group, and did so dishonestly. The Monitor's evidence establishes that Cox was not only aware of Page's conduct, but helped advance the impropriety. In addition, Page and Cox are both directors of 256, and used the company to support some of the impropriety.

64. With respect to knowing receipt, a third-party to a fiduciary relationship may be liable if the third party receives trust property in their own personal capacity with constructive or actual knowledge of the breach of fiduciary duty.[56] Cox received the benefit of funds misappropriated by Page (and herself) from the OTE Group to fund their lavish lifestyles. 265, the couple's holding corporation, did the same.

65. Based on the evidence of the monitor, a strong *prima facie* case of fraud, breach of fiduciary duty, knowing assistance, and/or knowing receipt is made out as against the Mareva Respondents.

2. Assets *Ex Juris*

66. The Mareva Respondents have shown evidence of the existence of assets *ex juris* that justifies an order extending to assets potentially outside Ontario.

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[55] *DBDC Spadina Ltd v Walton*, 2018 ONCA 60, ¶41.
[56] *DBDC Spadina Ltd v Walton*, 2018 ONCA 60, ¶37.

(a) During the hearing for the Initial Mareva Order, the Yacht was at sea, leaving port from Florida to the Bahamas.

(b) Page and Cox have taken scores of flights with AirSprint, including multiple flights to St. Lucia and other exotic destinations.

(c) Page caused the OTE Group to wire significant sums of money to a spa in St. Lucia.

(d) Page and Cox own and/or control a company based in St. Lucia, GPMC Holdings International Inc. and a company in Cayman, CWC International Inc.[57]

67. Moreover, Page and Cox appear to have a series of related companies, that obscure where the OTE Group funds they misappropriated are ultimately being used.

1. Risk of Imminent Dissipation or Movement of Assets amounting to Irreparable Harm

68. The applicant must persuade the court that there are some grounds for believing that there is a serious risk of the respondents' assets being moved or dissipated or disposed of before the judgment or award is satisfied.[58]

69. The court can infer from the Mareva Respondents' fraudulent conduct a sufficient risk of dissipation of assets to render the possibility of future tracing of assets remote and that the defendant will thereby frustrate the enforcement of any judgment the moving party may obtain.[59]

70. The court can look to the evidence as a whole relating to the fraudulent conduct of a defendant, which can in itself suggest a real risk that the defendant may dissipate or dispose of his assets in a manner clearly distinct from the ordinary course of business, such as to render the

[57] Sixth Report, MMR, Tab 5, Appendix A, p. 92.
[58] Osborne J Endorsement, MMR, Tab 2, p. 30, ¶22.
[59] *663309 Ontario Inc v Bauman,* 2000 CanLII 22640 (ONSC), ¶41; *Sibley & Associates LP v Ross*, 2011 ONSC 2951, ¶39-40.

possibility of making it impossible, or at least significantly more difficult, to trace and realize upon such assets in enforcing any judgment in favor of the moving party.[60]

71. There is strong evidence of fraudulent conduct, which gives rise to an inference that the Mareva Respondents may attempt to move, dissipate or secret their assets to put them beyond the reach of OTE Group. Indeed, with respect to the Initial Mareva Order, Osborne J held:

> Different jurisdictions are, on the face of the evidence, involved. Proof of the risk of removal/dissipation may be inferred from the surrounding circumstances of the responding parties' misconduct.
>
> In my view, and notwithstanding the able submissions of counsel for the Respondents, I have little difficulty in concluding that there is a risk of removal or dissipation of the asset here and such is easily inferable from the circumstances.[61]

72. Moreover, there is direct evidence of attempts to move, dissipate or hide assets already.

(a) The Yacht was actively for sale at the time of the previous Mareva motion as against the Mareva Respondents, and indeed was being moved to the Bahamas during the first Mareva hearing itself.

(b) The Mareva Respondents transferred the Yacht between multiple companies controlled by them in a short space of time.

(c) Page was responsible for obscuring or undermining OTE accounting documents to make it considerably more difficult to detect his conduct and trace the location of funds improperly moved from OTE Group.

73. OTE Group stakeholders will suffer irreparable harm, and will be prevented from recovering its misappropriated funds and assets, and assets traceable thereto, or other exigible assets, if the Mareva Respondents are not prevented from further moving, dissipating or

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[60] *Bank of Montreal v Misir,* 2004 CanLII 48172 (ONSC (Commercial List)), ¶38.
[61] Osborne J Endorsement, MMR, Tab 2, p. 35, ¶47.

otherwise attempting to put their assets beyond the reach of the OTE Group. Indeed, "the probability of irreparable harm increases as the probability of recovering damages decreases".[62]

2. Balance of Convenience

74. The court must weigh the consequences which will flow to each party should the injunction be granted or refused and come to a conclusion as to where the balance of convenience lies. There is overlap between the balance of convenience and the issue of a strong prima facie case in a Mareva case.[63] Therefore, the analysis set out above with respect to a strong *prima facie* case remains relevant to the determination of this portion of the test in this case.

75. If the Mareva injunction is refused, the Monitor believes that there is a significant risk that assets that either belong to the OTE Group, that are traceable to the OTE Group, or that might be exigible by the OTE Group will be moved, dissipated or hidden, and that the OTE Group will therefore be unable to satisfy any remedy, order or judgment against the Mareva Respondents, and irreparable harm will be suffered. Given the complex, egregious and extensive nature of the Mareva Respondents' misconduct, and the strong evidence related to the causes of action outlined above, refusal of the Mareva injunction would be extremely harmful to the OTE Group and its chance of recovery.

76. On the other hand, this interim Mareva injunction is sought for a matter of a few weeks to permit the filing of responding material and cross-examinations, and provision can be made for interim funds for living and legal expenses during this period, as proposed above.

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[62] Osborne J Endorsement, MMR, Tab 2, p. 35, ¶49, citing *Christian-Philip v.Rajalingam*, 2020 ONSC 1925, ¶49.
[63] *Atlas Copco Canada Inc v Hillier*, 2011 ONSC 2277, ¶47.

3. Disclosure of Information

77. The Proposed Mareva Order stipulates that the Mareva Respondents prepare and provide a sworn affidavit or statement with respect to their worldwide assets within 10 days of service of the Order, and submit to examinations under oath within 15 days of delivery of that affidavit or statement.

78. Such relief is part of the Ontario model Mareva order as it is necessary to give effect to the purpose of a Mareva injunction, and has been ordered in other cases alongside a Mareva order.[64] It is all the more necessary here, where accounting records have been compromised or undermined, and fictitious documents have been created, such as the financial statements on Pettinelli letterhead.

C. An Undertaking as to Damages Ought Not to be Required

79. Given the particular circumstances of this case, including the strength of the moving party's case and in particular the CCAA Monitor's status as a Court-appointed officer in respect of the OTE Group, an undertaking as to damages should not be required.

80. In *BDBC*, van Rensburg JA rejected that the court-appointed officer (there, a monitor turned receiver) should be required to provide an undertaking as to damages in similar circumstances:

> As for the failure to require the Receiver to provide an undertaking as to damages, the motion judge rejected this argument, on the basis that the order was made in a court-appointed receivership. The purpose of such an undertaking is "to protect the defendant from the risk of granting a remedy before the substantive rights of the parties have been determined": Robert J. Sharpe, Injunctions and Specific Performance, loose-leaf (2015-Rel. 24), 4th ed. (Toronto: Canada Law Book, 2012), at para. 2.470. The Receiver is not a self-interested party. A receiver is an officer of the court with a fiduciary duty to comply with the powers granted in the

[64] See eg, *First Majestic Silver Corp v Santos*, 2014 BCSC 1564. According to Fenlon J. at ¶68, "[t]he list and value of the defendants' worldwide assets is necessary to breathe life into the Mareva injunction because without it the plaintiffs will have no knowledge of the assets subject to the extended freezing order." See also, *SFC Litigation Trust (Trustee of) v Chan*, 2017 ONSC 1815.

> receivership order and to act honestly and in the best interests of all parties, including the debtor: Toronto Dominion Bank v. Usarco Ltd. (2001), 2001 CanLII 24004 (ON CA), 196 D.L.R. (4th) 448 (Ont. C.A.), at para. 30, leave to appeal refused, [2001] S.C.C.A. No. 217. The Receiver has a duty to recover the property of the Debtors, including the HST Refund, and the order sought was in aid of powers granted to the Receiver by court order. The motion judge, under r. 40.03, was entitled to grant the Mareva Order without requiring an undertaking as to damages, and he did so for good reason in this case.[65]

81. Moreover, on the Initial Mareva Order in this case, Osborne J. did not require an undertaking as to damages even where the motion was brought by the Company and not the Monitor (there, before the Monitor had expanded powers under the October 12, 2023 Enhanced Powers Order). Osborne J. wrote:

> Finally, pursuant to Rule 40.03, I am persuaded that the requirement for an undertaking, although provided by the moving parties here, should be dispensed with in the circumstances. The case put forward by the OTE Group is strong, and the OTE group is insolvent and in ongoing CCAA protection from its creditors. In my view, it is appropriate to dispense with the requirement for an undertaking as to damages where, as here, the case of the moving parties is strong and they are insolvent: Sabourin & Sun Group of Cos. v. Laiken, [2006] OJ No. 3847 at para. 16.[66]

82. The Monitor should therefore be relieved of the requirement to provide an undertaking as to damages pursuant to Rule 40.03. If the Court were to conclude otherwise, the Monitor would seek leave to address the court further on this point.

PART IV: ORDER REQUESTED

83. Accordingly, the Monitor seeks an interim Mareva Order in the general form of the proposed draft Order in the motion record.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 9th day of November, 2023.

BENNETT JONES LLP

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[65] *Business Development Bank of Canada v Aventura II Properties Inc*, 2016 ONCA 300, ¶25, upholding Hainey J's decision in *Business Development Bank of Canada v Aventura II Properties Inc*, 2016 ONSC 1545.

[66] Osborne J Endorsement, MMR, Tab 2, p. 35, ¶51.

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SCHEDULE "A"
LIST OF AUTHORITIES

1. *Business Development Bank of Canada v Aventura II Properties Inc*, 2016 ONCA 300
2. *SFC Litigation Trust (Trustee of) v Chan*, 2017 ONSC 1815
3. *Mooney v Orr*, 1994 CanLII 1779 (BCSC)
4. *Google Inc v Equustek Solutions Inc*, 2017 SCC 34
5. *R v Canadian Broadcasting Corp*, 2018 SCC 5
6. *Hodgkinson v Simms*, [1994] 3 SCR 377
7. *Sharbern Holding Inc v Vancouver Airport Centre Ltd*, 2011 SCC 23
8. *DBDC Spadina Ltd v Walton*, 2018 ONCA 60
9. *663309 Ontario Inc v Bauman,* 2000 CanLII 22640 (ONSC)
10. *Sibley & Associates LP v Ross*, 2011 ONSC 2951
11. *Bank of Montreal v Misir,* 2004 CanLII 48172 (ONSC (Commercial List))
12. *Christian-Philip v Rajalingam*, 2020 ONSC 1925
13. *Atlas Copco Canada Inc v Hillier*, 2011 ONSC 2277
14. *First Majestic Silver Corp v Santos*, 2014 BCSC 1564
15. *Business Development Bank of Canada v Aventura II Properties Inc*, 2016 ONSC 1545

SCHEDULE "B"
RELEVANT STATUTES, REGUALTIONS AND BY-LAWS

***Courts of Justice Act,* R.S.O. 1990, c C.43, subsection 101(1) and (2)**

Injunctions and receivers

101 (1) In the Superior Court of Justice, an interlocutory injunction or mandatory order may be granted or a receiver or receiver and manager may be appointed by an interlocutory order, where it appears to a judge of the court to be just or convenient to do so. R.S.O. 1990, c. C.43, s. 101 (1); 1994, c. 12, s. 40; 1996, c. 25, s. 9 (17).

Terms

(2) An order under subsection (1) may include such terms as are considered just.

***Rules of Civil Procedure,* R.R.O. 1990, Reg. 194, Rules 40.01 and 40.03**

Undertaking

40.03 On a motion for an interlocutory injunction or mandatory order, the moving party shall, unless the court orders otherwise, undertake to abide by any order concerning damages that the court may make if it ultimately appears that the granting of the order has caused damage to the responding party for which the moving party ought to compensate the responding party.

***Companies' Creditors Arrangement Act,* R.S.C. 1985, c C.36**

Duties and functions

23 (1) The monitor shall

(k) carry out any other functions in relation to the company that the court may direct.

IN THE MATTER OF *THE COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, C. C-36, AS AMENDED
AND IN THE MATTER OF THE COMPROMISE OR ARRANGEMENT OF ORIGINAL TRADERS ENERGY LTD. and 2496750 ONTARIO INC.
Court File No. CV-23-00693758-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

Proceeding commenced at Toronto

Factum of the Monitor
(Mareva Injunction)

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