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

ONTARIO
SUPERIOR COURT OF JUSTICE COMMERCIAL LIST

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

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

FACTUM OF RESPONDENT MANDY COX
Motion for *Mareva* Injunction Returnable December 21, 2023

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TO: **SERVICE LIST**

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PART I - OVERVIEW

1. A *Mareva* injunction is a harsh, intrusive and extraordinary remedy that should only be imposed in the clearest of cases.[1] An order of this kind reverses the bedrock rule that execution cannot be obtained prior to judgment and judgment cannot be recovered prior to trial.[2] The burden on the moving party seeking a *Mareva* injunction is rightly onerous and exacting.

2. In this case, the Monitor seeks as against Ms. Cox personally a *Mareva* order in respect of her worldwide assets. Ms. Cox is one of three "*Mareva* Respondents" on this motion, along with her husband Glenn Page and 2658658 Ontario Inc ("265"), a corporation in which Ms. Cox is a director and minority shareholder, but in respect of which she has a limited role in practice. The Monitor's allegations against Ms. Cox are scant and unparticularized. The Monitor instead relies on liberal references to the catch-all term "*Mareva* Respondents" to mask its complete failure to articulate or substantiate Ms. Cox's alleged involvement in or knowledge of the alleged wrongdoing that founds the request for *Mareva* relief.

3. While the Monitor asserts claims against Ms. Cox on the basis of fraud, knowing assistance and knowing receipt, its materials contain very limited allegations of conduct that is specifically attributable to her. The Monitor has not made out a strong *prima facie* case against Ms. Cox. Moreover, several of the allegations against Ms. Cox relate to claims over assets (the yacht and the AirSprint proceeds) that are already subject to freezing orders, and in respect of which any claim by OTE is already fully protected.

4. Even if this record manages to raise a *prima facie* case against Ms. Cox (which is denied), the Monitor has not met its burden on the other elements of the *Mareva* test. A risk of dissipation

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[1] *Shaw Communications Inc v Young et al*, 2021 ONSC 7918 at para 9 [*Shaw Communications*].
[2] *Aetna Financial Services v Feigelman*, [1985] 1 SCR 2 at page 10 [*Aetna Financial*].

of assets has not been demonstrated, particularly in light of the inordinate delay in bringing this motion, which relies upon the same allegations that OTE raised in its statement of claim filed in October 2022. The relief sought against Ms. Cox is also grossly disproportionate as compared to the allegations against her, and the balance of convenience is strongly in her favour.

PART II - FACTS

5. Ms. Cox began working as an employee of OTE LP in May 2018. She was unfairly terminated from that employment in March 2019, but continued providing services to OTE LP on a contract basis thereafter, first through 265, and then via a management services company that she continues to operate, 2745384 Ontario Inc.[3]

6. Prior to the start of their romantic relationship, Ms. Cox had known Mr. Page for decades. She had observed his lifestyle and wealth, and knew that he was a successful entrepreneur who had sold a previous company for millions of dollars. When Ms. Cox and Mr. Page became romantically involved in summer 2018, began living together and then married in 2021, Ms. Cox shared in Mr. Page's lifestyle, which was fully consistent with his (and their) income and wealth.[4]

7. Following Ms. Cox's termination from OTE and a transition period, she eventually had very little role in OTE's operations, and had never been involved in its financial management or bookkeeping.[5] Ms. Cox has and had no substantive involvement in and very limited knowledge of the business and financial management of 265, in which she is a director and minority shareholder.[6] She signed certain documents and authorized certain wire transfers at the request of

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[3] Affidavit of Mandy Cox sworn November 24, 2023 ["**Cox Affidavit**"], paras 11-23 and Ex. A-H and J, Compiled Motion Record of Mandy Cox dated December 19, 2023 ["**Cox MR**"], Tab 2, p. 222-226, 232-309, 313-320.
[4] Cox Affidavit, paras 8-10, 32, 34, 43-45 [Cox MR, Tab 2, p. 221-222, 228-229, 230-231].
[5] Cox Affidavit, paras 28-30 [Cox MR, Tab 2, p. 227-228]. See also paras. 11-30 for an overview of Ms. Cox's responsibilities vis-à-vis OTE [Cox MR, Tab 2, p.222-228].
[6] Cox Affidavit, para 16 and Ex. C [Cox MR, Tab 2, p. 223-224, 239].

Mr. Page. She did not suspect, and had no reason to suspect, that there was anything untoward in those requests.[7]

8. Additional facts relevant to the claims made by the Monitor against Ms. Cox are detailed in the course of argument below. Ms. Cox also relies on the facts set out by Mr. Page and 265.

PART III - STATEMENT OF ISSUES, LAW & AUTHORITIES

9. Ms. Cox submits that the Monitor has not established grounds for a *Mareva* injunction against any of the Respondents, Glenn Page, 2658658 Ontario Inc or Mandy Cox.

10. The present factum focuses solely on the relief sought against Ms. Cox. From her perspective, there is one issue on this motion: Has the Monitor met its burden of establishing, on the basis of the specific allegations it has made against Ms. Cox, that this Court ought to grant a *Mareva* injunction over Ms. Cox's worldwide assets?

11. The moving party's onerous burden must be met in respect of each and every person against whom a *Mareva* injunction is sought, for each element of the *Mareva* test. The evidence adduced by the Monitor in relation to Ms. Cox is entirely inadequate to meet that heavy burden.

A. THE TEST FOR A *MAREVA* INJUNCTION

12. To obtain a *Mareva* injunction over Ms. Cox's worldwide assets, the Monitor must:

a. Make full and frank disclosure of all material matters within its knowledge;
b. Establish a strong *prima facie* case on the merits, as a condition precedent to any order;
c. Give particulars of the claim against Ms. Cox stating the grounds of the claim and the amount thereof, and the points fairly made against it by Ms. Cox;
d. Give grounds for believing that Ms. Cox has assets in the jurisdiction;
e. Give grounds for believing that there is a real risk of assets being removed out of the jurisdiction or disposed of within the jurisdiction or otherwise dealt with so that OTE LP

[7] Cox Affidavit, para. 8-10, 32, 34, 41, 43-45 [Cox MR, Tab 2, p. 221-222, 228-229, 230-231]; Cross-examination of Ms. Cox by the Monitor on December 11, 2023 ["**Cox Cross**"], p. 53 (Q244-250), p. 62 (Q301-302), p. 72 (Q341-342) [Monitor's Brief of Transcripts ["**Transcripts**"], Tab 2].

and/or the Monitor will be unable to satisfy a judgment awarded against Ms. Cox;

f. Establish irreparable harm if the relief is not granted;

g. Show that the balance of convenience favours the granting of the injunction pending trial on the issues between the parties; and

h. Give an undertaking as to damages.[8]

13. The Monitor bears the onus not only of establishing a strong *prima facie* case, but also demonstrating that there is a "genuine" risk that the defendant will dissipate its assets to avoid judgment.[9] The Supreme Court has described the dissipation of assets criterion as "a second and much higher hurdle" that a plaintiff seeking a *Mareva* injunction must meet.[10] A *Mareva* injunction should only issue where "it is probable that unless the defendant is restrained, wrongful acts will be done which will do the plaintiff irreparable injury."[11] The Monitor bears the burden to establish this element, as against each party against whom a *Mareva* order is sought.

B. THE ALLEGATIONS AND EVIDENCE AGAINST MS. COX ARE INSUFFICIENT TO GROUND A *MAREVA* INJUNCTION

14. The Monitor has asserted three causes of action against Ms. Cox: civil fraud, knowing assistance and knowing receipt. To obtain a *Mareva*, the Monitor has the burden of establishing a strong *prima facie* case against Ms. Cox on at least one of these articulated causes of action.

15. The Monitor's allegations against Ms. Cox are scant and unparticularized. She appears to be an after-thought in the Monitor's pleadings, drawn in because she is Mr. Page's wife and because of her historical (and legitimate) involvement in OTE LP's administration. With limited exceptions, throughout its materials, the Monitor uses the catch-all "*Mareva* Respondents" to pull Ms. Cox into allegations of fraud while utterly failing – or even attempting – to articulate or

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[8] *Shaw Communications*, *supra* note 1 at para 10; *Christian-Philip v Rajalingam*, 2020 ONSC 1925 at paras 8-9.
[9] *Aetna Financial*, *supra* note 2 at page 25.
[10] *Ibid* at pages 10, 12.
[11] *Ibid* at page 10.

substantiate her alleged involvement.

16. It is improper to seek to ensnare an individual through unparticularized pleadings that simply "lump[] the defendants together", without specificity regarding the separate conduct that is attributable to each defendant.[12] This rule applies with particular force in relation to allegations of fraud, which "must be proven with clear and conclusive evidence rather than boilerplate pleading."[13] It is "not good enough" to "scatte[r] here and there […] some allegations which might be construed as amounting to some of [the requisite] elements".[14]

17. It is also improper to "lump in" a director together with the corporation and seek personal liability without "any particulars of tortious conduct separate from that of the companies".[15] It is well-established that a director will not be found liable for a corporation's wrongdoing "unless it can be shown that their actions are themselves tortious or exhibit a separate identity or interest from that of the company so as to make the act or conduct complained of their own".[16]

18. The Monitor's allegations against Ms. Cox "lump" her together with Mr. Page and 265 on the basis that she is Mr. Page's wife and a director of 265. Rather than particularizing and substantiating its claims against Ms. Cox, the Monitor grounds its allegations against her in her marital relationship, her status as director and the fact that she benefited from some of the allegedly misappropriated funds. Notwithstanding its derisive characterization of Ms. Cox's position as a "Sgt Schultz" defence, the Monitor is at base arguing that a *prima facie* case of fraud against Ms.

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[12] *Burns v RBC Life Insurance Company*, 2020 ONCA 347 at para 17; *Martin v Astrazeneca Pharmaceuticals Plc*, 2012 ONSC 2744 at paras 109, 116, 120; *Lana International Ltd v Menasco Aerospace Ltd* (1996), 28 OR (3d) 343 (ONSC) at page 351 [*Lana International*], Cox Book of Authorities ["**Cox BoA**"], Tab 1.
[13] *Bank of Montreal v Garasymovych*, 2023 ONSC 3630 at para 33; see also *Royal Bank of Canada v Korman*, 2010 ONCA 63 at para 25.
[14] *Lana International*, *supra* note 12 at page 350; *Rules of Civil Procedure*, RRO 1990, Reg 194, rule 25.08.
[15] *McDowell v Fortress Real Capital Inc*, 2019 ONCA 71 at para 57.
[16] *ScotiaMcLeod Inc v Peoples Jewellers Ltd* (1995), 26 OR (3d) 481 (CA) at page 491 [*ScotiaMcLeod*], Cox BoA, Tab 2; *McDowell v Fortress Real Capital Inc*, *supra* note 15 at para 54.

Cox should be found based on conjecture and speculation that runs contrary to the evidence – that the requisite knowledge on Ms. Cox's part should be presumed because she is married to Mr. Page and is a director of 265. The Monitor's claim against her is essentially, "How could she not know?" This is insufficient to ground a *prima facie* case for fraud-based causes of action.[17]

19. The following is an exhaustive list of the conduct alleged by the Monitor that is specifically attributable to Ms. Cox. As noted below, the vast majority of the allegations against Ms. Cox have been known to OTE since at least October 2022.

a. Ms. Cox and Picassofish, a company within her control, received transfers from OTE LP and OTE Logistics of approximately $90,000. This is the only allegation against Ms. Cox in this motion that does not relate to issues that were raised by OTE in the October 2022 Claim. In fact, these transfers were legitimate payments for employment income and services rendered, and have all been accounted for in Ms. Cox's responding materials.[18] Moreover, had the Monitor made even minimal inquiries regarding these transfers within the documents already in its possession (which it failed to disclose in its moving materials), its suspicions about these payments would have readily been dispelled.

b. In August 2021, Ms. Cox approved a transfer of $1,000,000 from OTE LP's account to BodyHoliday. As explained below, the Monitor's own materials,[19] and Ms. Cox's responding materials,[20] confirm that a mistake was made in entering the amount of this transfer, which was not noticed by Ms. Cox when she approved it. The transfer to BodyHoliday was specifically referenced in OTE's October 2022 Claim.[21]

c. In August 2021, Ms. Cox approved a transfer of $1,000,000 from OTE LP's account to Pride Marine for the purchase of the yacht. Ms. Cox understood that Mr. Page used his distributions from OTE and his personal wealth to pay for the yacht.[22] Ms. Cox did not know at the time that the yacht was purchased by 265, was not involved in the purchase of the yacht by 265 and has no recollection of this transfer.[23] Her evidence on this point is uncontradicted.[24] Later, in October 2022, Ms. Cox signed a sale and loan agreement

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[17] *Caja Paraguaya de Jubilaciones y Pensiones del Personal de Itaipu Binacional v Garcia*, 2020 ONCA 412 [*Garcia*] leave to appeal ref'd 2021 CanLII 13274 (SCC); *1773907 Alberta Ltd v Davidson*, 2016 ABQB 2 at paras 86, 89-90 [*Davidson*], aff'd 2017 ABCA 267.
[18] Cox Affidavit, paras 20-27, and Ex. E-O [Cox MR, Tab 2, p. 224-227, 249-353].
[19] Monitor's Motion Record dated November 8, 2023 ["**MMR**"], Sixth Report of the Monitor KPMG ["**Sixth Report**"], para. 63 [MMR, Tab 5, p. 78].
[20] Cox Affidavit, paras. 40-42 [Cox MR, Tab 2, p. 230].
[21] Statement of Claim filed by OTE LP and OTE Logistics LP dated October 12, 2022, para. 62(a) ["**October 2022 Claim**"], Affidavit of Keely Kinley sworn November 10, 2023 ["**Kinley Affidavit**"], Ex. R [Responding Record of Glenn Page and 265 dated November 24, 2023 ["**First Page Record**"], Tab 2, p. 743].
[22] Cox Affidavit, para. 34 [Cox MR, Tab 2, p. 229].
[23] Cox Affidavit, paras 34-35 [Cox MR, Tab 2, p. 229].
[24] Cox Cross, p. 64 (Q311- 313); p. 68 (Q326-328) [Transcripts, Tab 2].

between GPMC Holdings International and CWC International relating to the yacht.[25] The allegation regarding the yacht, including the wire transfer to Pride Marine approved by Ms. Cox, was specifically referenced in OTE's October 2022 claim.[26] Further, the alleged wrongdoing relating to the yacht is already subject to a *Mareva* injunction.[27]

d. In respect of the AirSprint fractional airplane interests, in November 2022 (some 18 months after the interests had been acquired), Ms. Cox signed a Notice of Sale of Fractional Interest on behalf of 1000267493 Ontario Inc ("-493") relating to the offering for sale of one of the AirSprint fractional ownership interests.[28]

e. The Monitor alleges that Mr. Page wrongfully directed OTE funds towards his personal expenses, and that Ms. Cox benefited personally from these wrongful expenditures by virtue of her relationship with Mr. Page. This allegation was raised by OTE in its October 2022 claim. Ms. Cox was generally aware that Mr. Page on occasion directed that his OTE distribution funds be used directly to pay for personal expenses, and believed that this was appropriate and legitimate; she had no involvement in OTE's bookkeeping or financial arrangements in respect of these payments or the distribution payments owed to 265. She was also generally aware that the other partners of OTE (Miles Hill, Scott Hill and CCD) received regular distribution payments.[29] She believed that the lifestyle that she shared with Mr. Page was entirely consistent with his (and their) income and wealth.

C. NO STRONG *PRIMA FACIE* CASE AGAINST MS. COX

i. The "Suspicious Transfers" involving Ms. Cox are legitimate and accounted for

20. In the Sixth Report, the Monitor identifies a number of allegedly "suspicious" payments to Ms. Cox and Picassofish, a company within her control, totaling $90,557.74. In actual fact, the OTE Group's own records confirm that these payments were made for services rendered by Ms. Cox and Picassofish. The information required to determine the legitimate nature of these payments was readily available to the Monitor from OTE's own business records, and ought to have been uncovered in the context of a minimally competent and diligent investigation. Instead of making inquiries of Ms. Cox (as the Monitor is empowered to do) or reviewing the business records available to it, the Monitor elected to include these payments in its motion record and to

[25] Cox Affidavit, para 37 [Cox MR, Tab 2, p. 229].
[26] October 2022 Claim, para 60(a) [First Page Record, Tab 2, p. 742].
[27] Order of Justice Osborne dated March 15, 2023 [MMR, Tab 3, p. 39].
[28] Cox Cross, p. 53 (Q 244-251) [Transcripts, Tab 2].
[29] Cox Affidavit, para 21 [Cox MR, Tab 2, p. 225].

describe them as "suspicious", "improper" and "misappropriation". It has not resiled from that position.[30]

21. The Monitor's materials identify four "suspicious" transactions directed towards Ms. Cox amounting to $13,156.81. It is apparent from OTE's own business records – that were produced to Ms. Cox by the Monitor in the context of this *Mareva* injunction, and that were not disclosed in the Monitor's moving motion materials – that three of these four transactions were for weekly pay to Ms. Cox in the context of her employment by OTE in May 2018, and the fourth was a bonus for her continued work as a service provider in 2019.[31] For three of the payments, the purpose of the payment is clearly described on the face of the cheque, scans of which form part of the OTE bank statements which were produced by the Monitor to Ms. Cox in the context of this motion: the "memo" line on cheques 1007, 1011 and 1027 each include the word "Pay-period", followed by a week-long date range.[32] Cheque 1877, dated December 2, 2019 and deposited January 16, 2020, does not have a "memo" line, but OTE correspondence in the possession of the Monitor confirms that OTE LP paid Ms. Cox a $10,000 bonus at the end of 2019.[33] Scott Hill, then-Vice President of OTE, was one of the two signatories on all four cheques.[34]

22. The Monitor's materials also identify 26 "suspicious" transfers to Picassofish between April 2019 and September 2021, totaling $77,401.00. Prior to March 2020, Picassofish was a business operated by an individual unrelated to Ms. Cox, that provided branding and other services to OTE and OTE Logistics.[35] In March 2020, 2745384 Ontario Inc. (a company operated by Ms.

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[30] Monitor's factum dated December 16, 2023, para. 27.
[31] Cox Affidavit, paras. 12, 22 and Ex. I [Cox MR, Tab 2, p. 222, 225, 310-312].
[32] Affidavit of Elizabeth Lalonde sworn December 5, 2023 ["Second Lalonde Affidavit"], Ex. A, B [Cox MR, Tab 3, p. 361-371].
[33] Cox Affidavit, Ex. I [Cox MR, Tab 2, p. 310].
[34] Second Lalonde affidavit, Ex A, B, K [Cox MR, Tab 3, p. 364, 365, 371, 524].
[35] Cox Affidavit, para. 13, 24 and Ex. K, L [Cox MR, Tab 2, p. 222-223, 226, 321-331].

Cox) purchased the business of Picassofish, including specifically an assignment of the company's registered name as well as its client list. Following the purchase of Picassofish, 2745384 Ontario Inc proceeded to carry on certain business initiatives as Picassofish, including providing marketing services to OTE LP.[36] OTE LP's banking records confirm that all of the Picassofish cheques are addressed to 62 Berkley Cres in Simcoe, Ontario, the registered address of Atomic Beaver, the original owner and operator of Picassofish.[37] The cheques issued by OTE LP to Picassofish up to and including April 2020 have no connection to Ms. Cox; OTE's banking records show that these cheques were deposited in a CIBC account, whereas the later payments to Picassofish from June 2020 onwards were received in 2745384 Ontario Inc's RBC account.[38]

23. With respect to the payments that occurred following 2745384's acquisition of Picassofish, Ms. Cox has produced corresponding invoices for each.[39] These business records and Ms. Cox's testimony confirm that these payments were for services rendered. This evidence is uncontested.

24. The evidence clearly establishes that the above transactions were legitimate, and there was no concealment or fraud associated with them. The Monitor has failed to establish a strong *prima facie* case against Ms. Cox with respect to these transfers.[40] Further, all of these payments occurred between 2018 and 2021 and, as such, any claim relating to them is presumptively statute-barred.[41]

ii. No strong *prima facie* case of fraud against Ms. Cox

25. To establish that Ms. Cox committed civil fraud, the Monitor must demonstrate that (1) Ms. Cox made a false representation to OTE LP and/or OTE Logistics LP; (2) she had some level

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[36] Cox Affidavit, para. 24-25, and Ex. K, L, M, N [Cox MR, Tab 2, p. 226, 321-341]; Affidavit of Elizabeth Lalonde sworn November 10, 2023 ["**First Lalonde Affidavit**"], Ex. C [Cox MR, Tab 1, p. 9-16].
[37] Second Lalonde Affidavit, Ex. C-O [Cox MR, Tab 3, p. 372-594]; Cox Affidavit, Ex. K [Cox MR, Tab 2, p. 321-323].
[38] Cox Affidavit, para 27 [Cox MR, Tab 2, p. 227]; Second Lalonde affidavit, Ex A-O [Cox MR, Tab 3, p. 361-594].
[39] Cox Affidavit, para 27 and Ex. O [Cox MR, Tab 2, p. 227, 342].
[40] *HZC Capital Inc v Lee*, 2019 ONSC 4622 at paras 69-70.
[41] *Limitations Act, 2002*, SO 2002, c 24, Schedule B, ss. 4-5.

of knowledge of the falsehood of the representation on the part of Ms. Cox (whether through knowledge or recklessness); (3) the false representation caused OTE LP and/or OTE Logistics LP to act; and (4) OTE LP or OTE Logistics LP's actions resulted in a loss.[42]

26. The Monitor has failed to identify let alone prove a false representation allegedly made by Ms. Cox. On this basis alone, it has failed to meet its burden of establishing a strong *prima facie* case of fraud against Ms. Cox. Fraud and misrepresentations must be pled with "full particulars"[43] and a high degree of specificity, or the cause of action is doomed to fail.[44] In *Hryniak*, a leading case on the test for civil fraud, the Supreme Court dealt with this very issue. It found there was a triable issue and overturned the order for summary judgment on the basis that, among other things, the moving party had failed to sufficiently establish that any alleged false statements were attributable to Mr. Hyrniak.[45]

27. Any allegation of fraud against Ms. Cox also fails on the knowledge element. The evidence regarding Ms. Cox's knowledge is reviewed in the context of the next section.

iii. No strong *prima facie* case of knowing assistance by Ms. Cox

28. To establish liability for knowing assistance, the Monitor must establish that (1) Mr. Page owed a fiduciary duty to the OTE Group; (2) that there was a fraudulent and dishonest breach of the duty by Mr. Page; (3) that Ms. Cox, as the stranger to the fiduciary relationship, had actual knowledge of both the fiduciary relationship and the fiduciary's fraudulent and dishonest conduct; and (4) that Ms. Cox participated in or assisted with Mr. Page's fraudulent and dishonest conduct.[46]

29. The Monitor has failed to establish a strong *prima facie* case of breach by Mr. Page of his

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[42] *Bruno Appliance and Furniture, Inc v Hryniak*, 2014 SCC 8, [2014] 1 SCR 126 at para 21 [*Hryniak*].
[43] *Rules of Civil Procedure*, r. 25.06(8).
[44] *Bank of Montreal v Garasymovych*, *supra* note 13 at para 56; *Lana International*, *supra* note 12 at page 350.
[45] *Hryniak*, *supra* note 42 at paras 25-28.
[46] *Garcia*, *supra* note 17 at para 32.

fiduciary duties towards the OTE Group. Ms. Cox defers to the submissions by Mr. Page and 265 on this point. However, in the alternative that this Court finds that such a breach by Mr. Page occurred (which is strenuously denied), the Monitor has failed to proffer any evidence of Ms. Cox's actual knowledge of a fraudulent breach such that she knowingly participated in or assisted with the alleged breach.

30. The tort of knowing assistance is concerned with the furtherance of fraud.[47] The accessory's liability is "fault-based"[48] and the cause of action thus "requires an intentional wrongful act on the part of the 'stranger' or accessory to knowingly assist in the fraudulent and dishonest breach of fiduciary duty."[49] Both actual knowledge of the fraudulent breach and conduct in the nature of concrete assistance to that breach are essential to make out a claim of knowing assistance, as it is these elements that ground the "want of probity" that is required to "bind the stranger's conscience so as to give rise to personal liability".[50]

31. Thus, for the participation element, the Monitor must show that Ms. Cox, in her own right, undertook specific harmful conduct that furthered a breach of fiduciary duty by Mr. Page.[51] To satisfy the "knowledge" element of the test, "[i]t is not enough for the stranger to know or suspect in some unspecified way that the fiduciary was up to no good."[52] The Monitor must establish that Ms. Cox had actual knowledge or was reckless or willfully blind to the wrongful conduct.[53] This is a subjective standard of fault that depends on the stranger's actual state of mind, and is to be

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[47] *Citadel General Assurance Co v Lloyds Bank Canada*, [1997] 3 SCR 805 at para 48 [*Citadel*].
[48] *Ibid* at para 46.
[49] *DBDC Spadina Ltd v Walton*, 2018 ONCA 60 at para 216(*per* van Rensburg JA dissenting, whose dissent was adopted in its entirety by the SCC on appeal: *Christine DeJong Medicine Professional Corp v DBDC Spadina Ltd*, 2019 SCC 30, [2019] 2 SCR 530 at para 1).
[50] *Air Canada v M & L Travel Ltd*, [1993] 3 SCR 787 at page 812.
[51] *DBDC Spadina Ltd v Walton*, *supra* note 49 at para 217 (*per* van Rensburg JA dissenting).
[52] *Garcia*, *supra* note 17 at para 33.
[53] *Ibid* at para 34.

distinguished from objective standards of fault that are based on what the stranger ought to have known.[54] Constructive "knowledge of facts sufficient to put reasonable people on notice or inquiry" is insufficient to ground liability for knowing assistance.[55]

32. The Monitor has made no effort to identify the specific conduct by Ms. Cox that is alleged to have occurred with actual knowledge of Mr. Page's wrongdoing and to have furthered that wrongdoing, as is required to establish a strong *prima facie* case against Ms. Cox for knowing assistance. A careful parsing of the Monitor's record reveals limited evidence of specific acts by Ms. Cox in relation to three of the alleged instances of misappropriation of OTE funds by Mr. Page. The identifiable acts by Ms. Cox consist of: approving a wire transfer to BodyHoliday; approving a wire transfer for funds that contributed to the purchase of the yacht, and more than a year later signing documentation that effected a transfer of the yacht from one corporation to another; and signing documentation to authorize the sale of certain Airsprint interests. As shown in the subsections that follow, these allegations fail to make out a *prima facie* case of knowing assistance, as they are lacking on both the knowledge and assistance elements.

a. BodyHoliday

33. On August 26, 2021, at the request of Mr. Page, Ms. Cox approved a transfer of US$1,000,000 of OTE funds to BodyHoliday Spa in St. Lucia. Contemporaneous correspondence confirms Ms. Cox's evidence that the amount of the transfer was intended to be $100,000, but $1,000,000 was instead entered and transferred in error.[56] Ms. Cox was copied on an email exchange on August 26, 2021 between a GPMC Holdings employee and BodyHoliday regarding the error; further to that exchange, BodyHoliday returned $575,408, and kept $424,592,

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[54] *Ibid* at para 37.
[55] *Ibid* at para 38; *Citadel*, *supra* note 47 at para 48.
[56] Cox Affidavit, para. 41 [Cox MR, Tab 2, p. 230]; Cox Cross, p. 62 (Q301-303) and Ex. 5 [Transcripts, Tab 2, 2.5].

corresponding to the value of the bookings that were at that time held by BodyHoliday in Mr. Page's name.[57] There is no support in the record for the Monitor's specious assertion that "Cox's false claim of a 'mistake' in the wire amount is a [sic] intended to cover her and Page's tracks".[58] Apart from Ms. Cox's approval of the transfer in the mistaken amount of $1,000,000, the Monitor has adduced no evidence of any act by Ms. Cox that furthered the alleged wrongdoing on the part of Mr. Page (the alleged misappropriation of OTE funds that were paid to BodyHoliday).

34. At the time that she approved the wire transfer on August 26, 2021, Ms. Cox understood that the transfer was for a deposit for a corporate retreat for OTE LP, OTE Logistics LP and their related companies which was to take place at the BodyHoliday Spa in St. Lucia in early 2022, and which was to be attended by Mr. Page, Brian Page, Scott Hill, Nick Capretta and Brian de Nobriga, the principals of the OTE Group.[59] Contemporaneous documentation confirms that until at least mid-December 2021, Mr. Hill, Mr. Capretta and Mr. de Nobriga and their spouses were expected to attend for stays of one or two weeks at BodyHoliday, and rooms had been booked for them.[60] All ultimately canceled due to the COVID-19/Omicron outbreak in late December 2021;[61] Ms. Cox testified that by the time they canceled, it was too late to receive refunds for their rooms.[62]

35. For the purposes of the cause of action of knowing assistance, Ms. Cox's knowledge of and alleged assistance to Mr. Page's alleged wrongdoing involving BodyHoliday must be assessed in relation to the specific act in which she participated: the approval of the transfer on August 26, 2021. Ms. Cox understood that she was approving a wire transfer for $100,000 as a deposit for a

[57] Cox Cross, Ex. 5 [Transcripts, Tab 2.5].
[58] Monitor's factum dated December 16, 2023, para. 37.
[59] Cox Affidavit, para. 40-41 [Cox MR, Tab 2, p. 230].
[60] Cox Cross, Ex. 4 [Transcripts, Tab 2.5].
[61] Cox Affidavit, para. 42 [Cox MR, Tab 2, p. 230].
[62] Cox Cross, p. 106 (Q533-538) [Transcripts, Tab 2].

corporate retreat involving OTE.[63] She does not dispute that that a portion of the BodyHoliday stay for which payment was ultimately made was a personal expense, and it was not her understanding (when approving the transfer or later) that OTE would be responsible for paying for the entire stay that was planned for her and Mr. Page.[64] There is no evidence that Ms. Cox participated in subsequent instructions to BodyHoliday about the amount of the refund, or in instructions regarding OTE bookkeeping entries for the payment; all available evidence is to the contrary.[65] It is illogical and inappropriate to seek to impugn Ms. Cox's evidence based on subsequent events or based on subsequent acts by others in which she did not participate.

b. Yacht

36. The Monitor's central allegation relating to the yacht is that it was purchased at least in part with funds that were misappropriated from OTE. To the extent that OTE has a valid claim to any portion of the yacht, this interest has been fully protected since March 15, 2023, first under the terms of the order issued by Justice Osborne, and subsequently pursuant to the sales process order to which Ms. Cox (and Mr. Page and 265) consented.[66] Thus, even if *arguendo* Ms. Cox's conduct knowingly assisted in furthering the alleged breach of fiduciary duty by Mr. Page that arose from the purchase by 265 of the yacht (which is denied), the funds related to that alleged wrongdoing (and more) are already subject to a freezing order. There is no basis for the Monitor to claim double interlocutory recovery in respect of the yacht allegation.

37. Quite apart from the fact that the asset in question is already subject to a freezing order, the identified conduct by Ms. Cox is insufficient to establish the requisite assistance and knowledge

[63] Cox Cross, p. 101 (Q501-502) and p. 110 (Q557) [Transcripts, Tab 2].
[64] Cox Cross, p. 102 (Q503) and p. 111 (Q562) [Transcripts, Tab 2].
[65] Cox Affidavit, para. 40-41 [Cox MR, Tab 2, p. 230]; Cox Cross, Ex. 5 [Transcripts, Tab 2.5].
[66] Order of Justice Osborne dated March 15, 2023 [MMR, Tab 3, p. 39]; Order of Justice Kimmel dated July 17, 2023 [First Page Record, Tab 2, Ex. N, p. 586].

elements. The record reveals involvement by Ms. Cox in two acts relating to the yacht. First, Ms. Cox approved the release of a US$1,000,000 wire transfer from OTE LP to Pride Marine.[67] Second, in late October 2022, Ms. Cox, acting in her capacity as director of a Cayman Islands-based company CWC International, signed agreements to purchase the yacht and to borrow funds for the purpose of that purchase, from GPMC Holdings International (on whose behalf Mr. Page signed).[68] Ownership of the yacht had previously been transferred by Mr. Page from 265 to GPMC Holdings International, without any involvement on the part of Ms. Cox.[69]

38. With respect to the wire transfer approved in August 2021, Ms. Cox has no recollection of approving this transfer.[70] Regardless, the evidence is entirely insufficient to make out the knowledge element that is required for knowing assistance. Based on her discussions with Mr. Page as well as her past observations of distributions paid by OTE to Scott Hill and Miles Hill, Ms. Cox believed that it was appropriate for Mr. Page to direct OTE funds to pay for a portion of the yacht, as she understood that this was consistent with his practice in relation to his OTE distributions.[71] The purchase of a yacht was also consistent with her understanding of Mr. Page's lifestyle, wealth and income. Ms. Cox had observed Mr. Page's wealthy lifestyle for many years, was aware he had sold a prior company for millions of dollars, and knew that he was earning substantial income from OTE as well as other sources.[72] This evidence has not been challenged or contradicted. Thus, even if Mr. Page's use of OTE funds to pay for part of the yacht was a breach of his duties (which is denied), Ms. Cox's participation lacks the requisite knowledge element.

39. Furthermore, the nature of any alleged assistance resulting from Ms. Cox's approval of the

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[67] Cox Affidavit, para. 35 [Cox MR, Tab 2, p. 229].
[68] Sixth Report, App. B [Monitor MR, p. 100-113].
[69] Sixth Report, App. B [Monitor MR, p. 113].
[70] Cox Affidavit, para. 35 [Cox Record, Tab 2, p. 229].
[71] Cox Affidavit, para. 34 [Cox Record, Tab 2, p. 229].
[72] Cox Affidavit, para. 8-9 [Cox Record, Tab 2, p. 221-222].

wire transfer must be considered in light of the fact that this money has been repaid to the OTE Group. The evidence shows that Essex loaned US$1,000,000 toward the purchase of the yacht, which funds were initially deposited into OTE Logistics' account, and then transferred to OTE LP's account.[73] The Essex loan has been discharged by Gen7 Brands International, a company owned by Mr. Page and Ms. Cox.[74] While Ms. Cox was not involved in arrangements for the Essex loan and had no knowledge of the transaction or related transfers when they occurred,[75] the fact that the funds have been repaid to the OTE Group is relevant to the assessment of whether her conduct in approving a wire qualifies as "assistance".

40. With respect to the documents signed by Ms. Cox on behalf of CWC International in October 2022, it is unclear how the signing of these document by Ms. Cox is alleged by the Monitor to further the alleged breach of fiduciary duty by Mr. Page in relation to OTE funds. Moreover, even if this assistance element is made out (which is denied), the knowledge element is not. Ms. Cox explained that she signed these documents at the request of Mr. Page and on the understanding, based on discussion with him, that the transfer of ownership of the yacht to CWC was a necessary step for the purposes of chartering the yacht in the Caribbean. She had no role in the preparation or coordination of the documents; she signed what was placed before her by Mr. Page, on the strength of the information received from Mr. Page.[76] While the Monitor is at pains to emphasize that the ownership transfer was completed after Mr. Page and Ms. Cox became aware of the claim against them by OTE, it is clear that this was but one step in the execution of a plan (Mr. Page's plan to charter out the yacht) that had been put in motion long before OTE's statement

[73] First Page Affidavit, paras. 132-134 and Exhibit VV [First Page Record, Tab 1, p. 39, 249]; Affidavit of Glenn Page dated Dec 6, 2023 ["**Second Page Affidavit**"], para 42-43 and Exhibit S [Supplementary Record of Glenn Page and 265 dated Dec 6, 2023 ["**Second Page Record**"], p. 13, 159-168].
[74] First Page Affidavit, para. 135 and Exhibits WW, XX [First Page Record, p. 39, 452-455].
[75] Cox Affidavit, para. 35 [Cox MR, p. 229].
[76] Cox Affidavit, para. 37 [Cox MR, p. 229]; Cox Cross, p. 30 (Q122-125) [Transcripts, Tab 2].

of claim was served. Tellingly, CWC was incorporated on October 6, 2022, before the initiation of the OTE litigation, and the necessary instructions for that incorporation and the preparation of the relevant paperwork must necessarily have preceded that date.[77] Ms. Cox testified that discussions between her and Mr. Page about the chartering business plan had occurred at least months earlier, during the summer of 2022.[78]

41. The Monitor gestures to Ms. Cox's role as director and minority shareholder of 265.[79] But Ms. Cox's status as a director or shareholder cannot fill in for the applicable subjective knowledge requirement. As the Court of Appeal stated in *Garcia,* "it is an error to construct liability of knowing assistance based on the status of the stranger as an officer in a corporation that has received trust property when what is required is a finding of actual knowledge, personal recklessness or wilful blindness."[80] In *Garcia*, the director in question, the wife of the party responsible for the fraud, was the sole director and shareholder of the corporation, but the Court found that her husband was the *de facto* controlling mind and will of the company and made virtually all financial decisions in relation to the company as well as managing arrangements for its books and controlling its banking; the wife-director testified that she just signed whatever her husband put in front of her.[81] The Court of Appeal concluded that it was an error to hold her liable for knowing assistance, as actual knowledge had not been established.

42. Ms. Cox's evidence – which was not challenged and is uncontradicted – is that she played little to no role in the day-to-day operations or decision-making relating to 265, in which Mr. Page is the President and majority shareholder.[82] She also was not involved with OTE's bookkeeping

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[77] First Page Affidavit, para. 148 [First Page Record, Tab 1, p. 42].
[78] Cox Affidavit, para. 34 [Cox MR, Tab 2, p. 229].
[79] Monitor's factum dated December 16, 2023, para. 69; Cox Cross, Ex. 2 [Transcripts, Tab 2].
[80] *Garcia*, *supra* note 17 at para 42.
[81] *Ibid* at paras 14-15, 26, 40, 44, 50.
[82] Cox Affidavit, para. 16 [Cox MR, p. 223-224]; First Page Affidavit, para. 1 [First Page Record, Tab 1, p. 1].

or finances, apart from approving banking transactions when requested.[83] The Monitor has not identified any records or concrete evidence to contest Ms. Cox's testimony on this issue. Ms. Cox was also not aware at the time of the purchase that Mr. Page had purchased the yacht via 265. She was not involved in the purchase of the yacht or in the decision-making regarding how the purchase would be funded.[84] In the absence of any conduct by her on behalf of 265 in the purchase of the yacht, her status as a director is insufficient to alone ground personal liability.[85] The limited conduct by Ms. Cox identified by the Monitor in relation to the yacht is also insufficient to make out a *prima facie* case of knowing assistance.

c. AirSprint fractional interests

43. The Monitor's central allegation relating to the AirSprint fractional interests is that funds from the OTE Group were used by Mr. Page to purchase fractional airplane ownership interests, and that those interests were wrongfully placed in the name of 265.[86] The proceeds from the sale of these AirSprint interests are already subject to a freezing order, to which Ms. Cox (as well as Mr. Page and 265) consented.[87] Thus, even if *arguendo* Ms. Cox's conduct knowingly assisted in furthering the alleged breach of fiduciary duty by Mr. Page that arose from the acquisition by 265 of the AirSprint Interests (which is denied), the funds related to that alleged wrongdoing are already subject to a freezing order. There is no basis for the Monitor to claim double interlocutory recovery in respect of the AirSprint allegation.

44. Apart from the fact of the existing freezing order over the property in question, the Monitor has not identified any act by Ms. Cox that could constitute participation in the arrangements for

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[83] Cox Affidavit, paras. 28-30 [Cox MR, p. 8-9].
[84] Cox affidavit, para. 35 [Cox MR, p. 229].
[85] *ScotiaMcLeod*, *supra* note 16 at page 491; *McDowell v Fortress Real Capital Inc*, *supra* note 15 at para 54.
[86] Monitor's factum dated Dec 16, 2023, paras. 7 (bullet 5), 29.
[87] Order of Justice Kimmel dated July 17, 2023 [First Page Record, Tab 2, p. 586].

purchase of the Airsprint interests in the name of 265, or assistance in the purchase of the Airsprint interests using OTE funds. Ms. Cox's evidence, entirely unchallenged and uncontradicted by the Monitor, is that she had no involvement in the purchase of the AirSprint interests by 265, was not aware at the time of purchase that 265 had purchased the AirSprint interests, and was not involved in any decision-making relating to the purchase of the AirSprint interests or regarding how the purchase would be funded.[88] Apart from generally derisive expressions of incredulity, the Monitor has not identified any concrete evidence to cast doubt on Ms. Cox's explanation of her entirely non-involved role. Given the complete absence of any evidence of personal involvement by Ms. Cox in the conduct that is alleged to be wrongful, Ms. Cox's status as a director of 265 is also insufficient to ground personal liability.[89]

45. The only concrete evidence adduced by the Monitor of a specific act on the part of Ms. Cox in relation to the AirSprint interests is a Notice of Sale signed by Mr. Page and Ms. Cox on November 10, 2022, which appears to authorize AirSprint to seek a purchaser for the interest held by 1000267493 Ontario Inc ("493") in one of the AirSprint airplanes. The Notice indicates that Ms. Cox signed it in her capacity as Vice-President of 493. Ms. Cox's evidence is that she signed this document at Mr. Page's request. She was told by Mr. Page that the purpose of the incorporation of 493 was to enable a transfer of the AirSprint interests out of 265, so as to separate 265's investments in the Gen7 Fuel gas stations from the ownership of the AirSprint interests; she understood based on what she was told by Mr. Page that signature of the Notice was necessary as part of this process.[90] Mr. Page provided similar evidence on this point.[91] It is entirely unclear how

[88] Cox Affidavit, para. 38 [Cox MR, Tab 2, p. 229-230].
[89] *Garcia*, *supra* note 17 at para 42; *ScotiaMcLeod*, *supra* note 16 at page 491.
[90] Cox Cross, p. 49 (Q222-231) [Transcripts, Tab 2].
[91] Cross-Examination of Glenn Page by the Monitor on Dec 11, 2023 ["**Page Cross**"], p. 9 (Q15-17) [Transcripts, Tab 3].

the signing of this Notice of Sale document by Ms. Cox is alleged by the Monitor to further the alleged breach of fiduciary duty by Mr. Page in relation to OTE funds. Moreover, even if this assistance element is made out (which is denied), the requisite knowledge element is not.

iv. No strong *prima facie* case of knowing receipt by Ms. Cox

46. To establish Ms. Cox's liability for knowing receipt, the Monitor must establish that (1) Ms. Cox received trust property (2) for her own benefit or in her personal capacity, (3) with actual or constructive knowledge that the trust property was being misapplied. Whereas the basis for liability for knowing assistance is fault-based, liability for knowing receipt is receipt-based and restitutionary in nature.[92]

47. The Monitor alleges that Mr. Page wrongfully directed OTE funds towards his personal expenses, and that Ms. Cox benefited personally from these wrongful expenditures by virtue of her relationship with Mr. Page. The Monitor has made no effort to identify with any clarity the specific payments and amounts for which Ms. Cox is alleged to be liable by way of knowing receipt. Careful parsing of the Monitor's record suggests that the Monitor may intend to rely upon the following categories of payments for the purposes of this argument against Ms. Cox: (a) the $90,000 in "suspicious" transactions directed towards her personally and to Picassofish; (b) payments for the construction of the Waterdown Property and various home renovation-related expenses; (c) the payment to BodyHoliday; (d) a payment for certain appliances for the St. Lucia vacation home; (e) payments for expenses relating to the wedding celebration in Italy; (f) payments toward the purchase of an RV; and (h) flights taken on the AirSprint airplanes.

48. With respect to category (a), the $90,000 in "suspicious" transactions, these transfers are

[92] *Citadel*, *supra* note 47 at paras 25, 30-31, 46; *Garcia*, *supra* note 17 at paras 56-57.

fully addressed above. Some of the payments were not in fact received by Ms. Cox, but rather by the previous owner of Picassofish. For the payments received by Ms. Cox or by Picassofish when it was operated by Ms. Cox, the funds in question were not "trust property", but rather were entirely legitimate payments to Ms. Cox for wages and a bonus, and to Picassofish for services rendered.

49. With respect to the categories (b) through (f), the evidence proffered by the Monitor indicates that Mr. Page arranged for certain personal expenses to be paid using OTE funds. Ms. Cox does not deny that she benefited personally from the goods and services that were purchased with these funds. Mr. Page and 265 maintain that the funds used to pay these personal expenses were distribution amounts to which he was entitled as a partner of OTE LP and/or OTE Logistics, that he directed these distributions to payments for personal expenses, and that all OTE partners were aware of these practices. Ms. Cox defers to these submissions by Mr. Page and 265, which are relevant to the "trust property" prong the knowing receipt test.

50. In the event that the payments in question involved the misapplication of trust property by Mr. Page (which is denied), the required knowledge element on Ms. Cox's part is nevertheless absent. To satisfy the "knowledge" element of the test, the Monitor must establish either that Ms. Cox had actual knowledge or that she had "knowledge of facts which would put a reasonable person on inquiry [and] fail[ed] to inquire as to the possible misapplication of the trust property".[93] This is an objective standard which asks whether a reasonable person in the shoes of the recipient would have known that trust funds were being misapplied.

51. Prior to the start of their romantic relationship in summer 2018, Ms. Cox had known Mr. Page for decades. She had observed his lifestyle and wealth. She knew he was a successful

[93] *Garcia*, *supra* note 17 at para 57; *Citadel*, *supra* note 47 at para 49.

entrepreneur and consultant and that he had sold a previous company (Burloak) for millions of dollars.[94] In 2019, a year into their romantic relationship, Mr. Page earned a salary from OTE of $425,000 with an annual year-end bonus of up to 50% of his base salary.[95]

52. When Ms. Cox and Mr. Page became romantically involved, began living together, and then married, Ms. Cox shared in Mr. Page's lifestyle and wealth. Mr. Page was generally responsible for the financial management of their personal and business affairs, and he generally arranged for bills to be paid for their personal expenses.[96] Ms. Cox was generally aware that Mr. Page on occasion directed that his OTE distribution funds be used directly to pay for personal expenses, and believed that this was appropriate and legitimate;[97] she had no involvement in OTE's bookkeeping or financial arrangements in respect of these payments or the distributions to 265.[98] She was also generally aware that the other partners of OTE (Miles Hill, Scott Hill and CCD) received regular distribution payments.[99] She believed that the lifestyle that she shared with Mr. Page was entirely consistent with his (and their) income and wealth.

53. Prior to the levelling of the allegations against Mr. Page in OTE's statement of claim in October 2022, a reasonable person in Ms. Cox's shoes would have had no reason to inquire regarding this spending.

54. Ms. Cox's situation is entirely different from that of the spouse of the fraudster-bookkeeper whose luxury lifestyle is unreasonably out-of-sync with their modest earnings, or whose expenditures evidently and regularly exceed their means. That very different fact pattern might

[94] Cox Affidavit, para. 9 [Cox MR, Tab 2, p. 222].
[95] First Page Affidavit, Ex R [First Page Record, Tab 1, p. 192].
[96] Cox Affidavit, para. 31-32, 44, 45 [Cox MR, Tab 2, p. 228, 231].
[97] Cos Affidavit, para. 32, 34, 44 [Cox MR, Tab 2, p. 228, 229, 231].
[98] Cox Affidavit, para. 28-30 [Cox MR, Tab 2, p. 227-228].
[99] Cox Affidavit, para. 21 [Cox MR, Tab 2, p. 225]

support a finding of knowing receipt on the part of the spouse, as "how could a reasonable person think that their minor salary increments and the scanty earnings from [their] side jobs could support the lifestyle they enjoyed?"[100] By contrast, such constructive ascription of knowledge is not available on the evidence in Ms. Cox's case (even assuming that a misappropriation of trust property by Mr. Page could be established, which is denied).

55. In addition, for many of the expenses, the Monitor's allegation of knowing receipt fails to establish a strong *prima facie* case because any such claim against Ms. Cox is presumptively statute-barred. OTE filed its claim against Mr. Page, Ms. Cox and other on October 12, 2022. The applicable statute of limitations is 2 years; events that occurred on or before October 12, 2020 are therefore presumptively statute-barred. Many of the expenses identified by the Monitor date from 2019 and the first part of 2020, including in particular all of the expenses relating to the Waterdown Property and the RV. The Monitor has pleaded no material facts to meet its burden in respect of these presumptively statute-barred expenditures.[101] In this regard, it should be noted that OTE's bank statements confirm that Scott Hill signed each and every one of the cheques for the identified expenditures for the Waterdown Property and related home renovations, as well as for the RV. OTE's asserted claim against Ms. Cox in respect of her alleged knowing receipt of the benefit of these expenditures was discoverable at that time.[102]

56. With respect to category (h), flights taken by Ms. Cox on the AirSprint airplanes, the Monitor has failed to establish a *prima facie* case of knowing receipt. It is not contested that Ms. Cox took flights on the AirSprint airplanes, both for business and personal reasons. Ms. Cox has

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[100] *Cambrian Excavators Ltd, et al v Taferner and Taferner*, 2006 MBQB 64 at para 52 [*Cambrian*]; see also *Vancouver Coastal Health Authority v Moscipan*, 2019 BCCA 17 at paras 30-35, 62-63 [*Moscipan*].
[101] *Limitations Act, 2002*, SO 2002, c 24, Schedule B, ss. 4-5; *Wong v Adler* (2004), 70 OR (3d) 460.
[102] *Cataraqui Cemetery Company v Cyr*, 2017 ONSC 5819 at para 225.

explained her understanding, at the time of these flights, regarding the availability of the AirSprint airplanes for use by the OTE partners, and regarding the payments that she understood were being made by 265 or other entities for her use of these planes. The evidence indicates that she also had no involvement in the purchase of the AirSprint interests by 265, was not aware at the time of purchase that 265 had purchased the AirSprint interests, and was not involved in any decision-making relating to the purchase of the AirSprint interests or regarding how the purchase would be funded.[103] The required knowledge of misapplication of trust moneys cannot be established in the face of this evidence, which has not been contradicted or contested by the Monitor.

57. Moreover, the Monitor has not identified AirSprint flights that it alleges were taken by Ms. Cox *and* can demonstrate were paid for using OTE funds that are not already accounted for in the existing AirSprint freezing order. In its Sixth Report, the Monitor reports that some $1.4 million was paid by OTE for "AirSprint – Estimated operating costs" (separate from the payments to AirSprint for acquisition of the fractional interests); the Monitor describes this AirSprint operating costs expense as one of the "disbursements to unknown beneficiaries", and indicates in respect of these disbursements that "[t]he 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".[104] This is insufficient to establish a strong *prima facie* case.

D. NO RISK OF DISSIPATION OF ASSETS

58. The Monitor has failed to show there is a genuine risk of dissipation of assets for the purpose of evading judgment as it relates to Ms. Cox, relying instead on speculation and conjecture to create the appearance of a risk that does stand up to scrutiny.

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[103] Cox Affidavit, para. 38 [Cox MR, Tab 2, p. 230].
[104] Sixth Report, para 69(xv) and table below para 68 [Monitor MR, Tab 5, p. 80, 82].

59. The Monitor points to Ms. Cox's St. Lucia citizenship, her vacation home and the outstanding allegations against her as indicators that she intends to dissipate her assets and abscond to St. Lucia. This account ignores entirely Ms. Cox's strong ties to Ontario. Ms. Cox has plainly stated she has no plans to leave Ontario. She has significant ties to Canada, including, notably, her two children who continue to reside with her, and her aging mother for whom she provides care. She operates a chain of Gen7 Fuel on-reserve gas stations, and her role with this business requires her time, attention and presence in Canada.[105] The Monitor suggests she intends to retire imminently to St. Lucia, but she is only 55 years old, continues to operate businesses in Ontario, and clearly stated that she does not plan to retire any time soon.[106]

60. Ms. Cox's connection to St. Lucia is grounded in legitimate business dealings that predate the dispute with OTE. As Ms. Cox explained in cross-examination, she obtained St. Lucia citizenship to start up a business there.[107] That business provides support services to the Gen7 gas stations that are located in Ontario (a fact of which the Monitor has been aware since March 8, 2023 when counsel for Ms. Cox explained the services provided by Gen7 Brands International in response to an Information Request).[108]

61. The Monitor's theory also glosses over the fact that Ms. Cox has been aware of the allegations against her since October 2022 and has not fled the country. Instead, she has retained counsel, filed a Notice of Intent to Defend in the October 2022 Claim (which has been stayed since the initiation of the CCAA proceedings), cooperated with the Monitor's investigation by providing thousands of documents, participated in the CCAA proceeding by filing claims on behalf of

[105] Cox Affidavit, para. 7 [Cox MR, Tab 2, p. 221].
[106] Cox Cross, p. 47 (Q214).
[107] Cox Cross, p. 42 (Q188-190).
[108] First Lalonde Affidavit, Ex. I [Cox MR, Tab 1, p. 147-154].

27453864 Ontario Inc (GPMC Management Services)[109], and, significantly, is defending herself in these proceedings. These are not indicators of an individual intending to flee the country.

62. The Monitor asks this Court to infer from the conduct of "the *Mareva* Respondents" that there is a real risk of dissipation of assets. An inference of such risk may indeed be made when a strong *prima facie* case of fraud is established, but this inference is permissive, not mandatory or inevitable. When it applies, the inference arises from the circumstances of the fraud itself in the particular case, and the risk of dissipation is established by inference from those circumstances, rather than from direct evidence.[110]

63. In the context of the allegations and evidence against Ms. Cox in this case, it is not appropriate to rely upon the inference. As set out above, Ms. Cox's involvement in Mr. Page's alleged fraudulent scheme is, at its highest, minimal. She authorized certain transfers and signed certain documents, upon request by Mr. Page. She is married to Mr. Page, and is a director of 265. Taken at its highest, the alleged fraudulent conduct ascribed to Ms. Cox by the Monitor is not sufficiently strong to justify application of the inference. In *HZC Capital Inc v. Lee*, despite finding that a strong *prima facie* case of misappropriation of corporate funds had been made out against two of the defendants, the court refused to apply the inference, holding that it was not warranted in the circumstances, given the defendants' roots in the jurisdiction, the initiation of legal action by the defendants against the plaintiff, and the plaintiff's delay in bringing the *Mareva*.[111] These same considerations apply with equal force in Ms. Cox's case.

64. Moreover, Ms. Cox submits that the inference is simply not available when the *Mareva* motion is based upon knowing receipt. Unlike fraud and knowing assistance, knowing receipt is a

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[109] First Lalonde Affidavit, Ex. H [Cox MR, Tab 1, p. 48].
[110] *Sibley & Associates LP v Ross*, 2011 ONSC 2951 at para 52; *ICBC v Patko*, 2008 BCCA 65 at para 28.
[111] *HZC Capital Inc v Lee*, *supra* note 40 at para 83.

receipt-based tort.[112] As such, the circumstances of the fraud itself that may justify an inference of risk of dissipation in such cases are not present for knowing receipt. The reasoning of the Alberta Court of Queen's Bench in *Davidson* – a case addressing a motion seeking an attachment order against a wife (accused of fraud) and husband (accused of knowing receipt and unjust enrichment) – is apposite here. The Court in *Davidson* applied the inference to the wife but not the husband, citing, among other things, the paucity of evidence linking him to the alleged fraud.[113] In the event that this Court concludes that the Monitor has established a strong *prima facie* case of knowing receipt against Ms. Cox, it is submitted that the Monitor must establish through direct evidence, not inference, that there is a genuine risk that she will dissipate her assets to avoid judgment.

65. The Monitor asks this Court to draw an adverse inference from the fact that Ms. Cox refused to answer certain questions relating to her existing assets on cross-examination.[114] The Monitor is seeking an order that the *Mareva* Respondents provide an affidavit relating to their worldwide assets and submit to cross-examination on that affidavit. A pending *Mareva* motion does not provide a basis to treat the respondent as judgment debtor. The authority to demand information about Ms. Cox's assets is an aspect of the order that is sought by the Monitor if it is successful on this motion; cross-examination on an affidavit filed by Ms. Cox on the pending motion does not entitle the Monitor to a undertake wide-ranging and open-ended inquiries into Ms. Cox's assets.[115] It was not improper to refuse to answer such questions, and no adverse inference ought to be drawn.

66. Finally, Ms. Cox relies upon the submissions by Mr. Page and 265 regarding the Monitor's

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[112] *Citadel*, *supra* note 47 at para 46.
[113] *Davidson*, *supra* note 17 at paras 86, 90-91.
[114] Monitor's factum dated Dec 16, 2023, para. 63
[115] *Edmonton (City) v Gosine*, 2020 ABQB 546 at paras 36-41

failure to move with haste on this *Mareva* motion. OTE has been aware of the transactions underlying this motion against Ms. Cox since at least October 2022. This lack of urgency weighs heavily against a genuine risk of dissipation of assets for the purpose of evading judgment.

E. OTE WILL NOT SUFFER IRREPARABLE HARM AND THE BALANCE OF CONVENIENCE WEIGHS STRONGLY IN FAVOUR OF MS. COX

67. To obtain *Mareva* relief against Ms. Cox, the Monitor must demonstrate that the harm it will suffer "either cannot be quantified in monetary terms or […] cannot be cured" because it will be unable to collect damages from her.[116] The "harm" the Monitor attributes to Ms. Cox is not irreparable as its quantum is small relative to these proceedings, and can be recovered from Ms. Cox's share of the sale proceeds of the Waterhouse Property which are currently held in trust by Lenczner Slaght.

68. As outlined in Schedule C to these submission, putting aside the yacht and AirSprint funds that are already frozen, the harm the Monitor attributes to Ms. Cox personally amounts to $1,581,067.27 or, alternatively, $1,739,800.95, taken at its highest.[117] This sum derives entirely from personal expenditures on goods and services the benefit of which was shared between Ms. Cox and Mr. Page. The authorities indicate that, where a spouse has knowingly received trust property in the form of shared personal expenses, it is appropriate to attribute one half of those amounts to the spouse who is found liable on the basis of knowing receipt.[118] As such, given the nature of the expenses at issue, one half of the total ought to be attributed to Ms. Cox, that is $790,533.64 or, alternatively, $869,900.48. Moreover, if the presumptively statute-barred

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[116] *RJR-MacDonald Inc v Canada (Attorney General)*, [1994] 1 SCR 311 at page 341.

[117] As outlined in Schedule C, the figure of $1,581,067.27 reflects a reduced amount related to the BodyHoliday transfer, as two weeks had been booked for the OTE corporate retreat and cancellations occurred too late for refunds: Cox Affidavit, para. 42; Cox Cross, p. 106, l. 5-19. The figure of $1,739,800.95 reflects the total amount of the BodyHoliday transfer identified in Appendix C to the Monitor's Sixth Report.

[118] *Treaty Group Inc. (c.o.b. Leather Treaty) v. Simpson* (2001), 103 A.C.W.S. (3d) 1027 (ONSC) at para 27, Cox BoA, Tab 3; *Cambrian*, *supra* note 100 at paras 54-56; *Moscipan*, *supra* note 100 at paras 72-76.

expenditures related to the Waterdown Property and the RV purchase are excluded, Ms. Cox's half-share is reduced to $306,133.11 or, alternatively, $385,499.95.

69. The proceeds of sale from the Waterdown Property – a total of $1,874.058.28 – are currently held in trust by Lenczner Slaght. Ms. Cox's share of the matrimonial home proceeds (one half interest) amounts to $937,029.14.

70. The balance of convenience weighs heavily in favour of Ms. Cox. If a *Mareva* injunction is ordered over Ms. Cox's worldwide assets, it would severely hinder her ability to continue to operate her businesses, including the Gen7 Fuel gas stations located on First Nation reserves across Ontario.[119] An order could have far-reaching and unintended impacts on the Indigenous partners and employees of those stations.[120] Ordering a freezing of Ms. Cox's worldwide assets would in the circumstances be grossly disproportionate to the harm attributable to her, and inconsistent with the extraordinary nature of a remedy that is to be reserved for the clearest of cases, which the Monitor has failed to make out against Ms. Cox.

71. Finally, the Monitor has asked this court to dispense with the need for an undertaking under Rule 40.03. In the circumstances, this greatly increases the risk to Ms. Cox, as it increases the risk of irreparable harm against *her*. As the Alberta Court of Appeal has stated (in the context of a *Mareva* order sought by a receiver), "[a] meaningful undertaking as to damages is a vital part of the balance of inconvenience; without it, an interlocutory injunction may well work irreparable harm, not prevent it."[121] The Monitor's failure to provide an undertaking further tips the balance of convenience scale towards Ms. Cox.

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[119] Cox Affidavit, para. 6 [Cox MR, Tab 2, p. 221].
[120] First Page Affidavit, para. 55 [First Page Record, Tab 1, p. 16].
[121] *Vue Weekly (Vue Magazine) v See Magazine Inc*, 1995 ABCA 461 at para 24.

F. IN THE EVENT THAT A *MAREVA* IS ORDERED AGAINST MS. COX, IT SHOULD BE CAPPED

72. In the event that a *Mareva* order is granted against Ms. Cox, its quantum should be capped at $306,133.11 or alternatively at $385,499.95, the amount of the harm that can be attributed to Ms. Cox, accepting the Monitor's record at its highest (see paragraph 68 and Schedule C). Despite the limited "harm" that the Monitor has alleged against Ms. Cox personally, the Monitor seeks to freeze all of her worldwide assets, without limitation. To this end, it has specifically removed the cap that is typically included at paragraph 3 of the standard model *Mareva* order.[122] This approach is inconsistent with the fundamental principle that a *Mareva* order is meant to protect a moving party's ability to recover the fruits of the judgment it can demonstrate that it might obtain.[123]

PART IV – ORDERS REQUESTED

73. Ms. Cox requests that the Court dismiss the Monitor's *Mareva* Motion as against her, with costs at the appropriate scale.

74. In the alternative, Ms. Cox requests that the assets to be frozen by any *Mareva* Order issued against her personally be capped at $306,133.11, or such other amount as this Court may determine based upon the above submissions.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 19th day of December, 2023.

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[122] Monitor's Blackline Draft Order [MMR, Tab 7, p. 305].
[123] *Massa v Sualim*, 2013 ONSC 7926 at paras 6-10.

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Lawyers for the Respondent,
Mandy Cox

SCHEDULE A

Tab	Title
1	*1773907 Alberta Ltd v Davidson*, 2016 ABQB 2, aff'd 2017 ABCA 267
4	*Aetna Financial Services v Feigelman*, [1985] 1 SCR 2
5	*Air Canada v M & L Travel Ltd*, [1993] 3 SCR 787
6	*Bank of Montreal v Garasymovych*, 2023 ONSC 3630
7	*Bruno Appliance and Furniture, Inc v Hryniak*, 2014 SCC 8, [2014] 1 SCR 126
8	*Burns v RBC Life Insurance Company*, 2020 ONCA 347
9	*Caja Paraguaya de Jubilaciones y Pensiones del Personal de Itaipu Binacional v Garcia*, 2020 ONCA 412, leave to appeal ref'd 2021 CanLII 13274 (SCC)
10	*Cambrian Excavators Ltd, et al v Taferner and Taferner*, 2006 MBQB 64
11	*Cataraqui Cemetery Company v Cyr*, 2017 ONSC 5819
12	*Christian-Philip v Rajalingam*, 2020 ONSC 1925
13	*Christine DeJong Medicine Professional Corp v DBDC Spadina Ltd*, 2019 SCC 30, [2019] 2 SCR 530
14	*Citadel General Assurance Co v Lloyds Bank Canada*, [1997] 3 SCR 805
15	*DBDC Spadina Ltd v Walton*, 2018 ONCA 60
16	*Edmonton (City) v Gosine*, 2020 ABQB 546
17	*HZC Capital Inc v Lee*, 2019 ONSC 4622
18	*ICBC v Patko*, 2008 BCCA 65
19	*Lana International Ltd v Menasco Aerospace Ltd* (1996), 28 OR (3d) 343 (ONSC) [**Cox BoA, Tab 1**]
20	*Martin v Astrazeneca Pharmaceuticals Plc*, 2012 ONSC 2744
21	*Massa v Sualim*, 2013 ONSC 7926
22	*McDowell v Fortress Real Capital Inc*, 2019 ONCA 71
23	*RJR-MacDonald Inc v Canada (Attorney General)*, [1994] 1 SCR 311
24	*Royal Bank of Canada v Korman*, 2010 ONCA 63
25	*ScotiaMcLeod Inc v Peoples Jewellers Ltd* (1995), 26 OR (3d) 481 (CA) [**Cox BoA, Tab 2**]
26	*Shaw Communications Inc v Young et al*, 2021 ONSC 7918
27	*Sibley & Associates LP v Ross*, 2011 ONSC 2951
28	*Treaty Group Inc. (c.o.b. Leather Treaty) v. Simpson* (2001), 103 A.C.W.S. (3d) 1027 (ONSC) [**Cox BoA, Tab 3**]
29	*Vancouver Coastal Health Authority v Moscipan*, 2019 BCCA 17
30	*Vue Weekly (Vue Magazine) v See Magazine Inc*, 1995 ABCA 461
31	*Wong v Adler* (2004), 70 OR (3d) 460

SCHEDULE B

Limitations Act, 2002, S.O. 2002, c. 24, Sched. B, s. 4-5

Basic Limitation Period

Basic limitation period
4 Unless this Act provides otherwise, a proceeding shall not be commenced in respect of a claim after the second anniversary of the day on which the claim was discovered. 2002, c. 24, Sched. B, s. 4.

Discovery
5 (1) A claim is discovered on the earlier of,

(a) the day on which the person with the claim first knew,

(i) that the injury, loss or damage had occurred,

(ii) that the injury, loss or damage was caused by or contributed to by an act or omission,

(iii) that the act or omission was that of the person against whom the claim is made, and

(iv) that, having regard to the nature of the injury, loss or damage, a proceeding would be an appropriate means to seek to remedy it; and

(b) the day on which a reasonable person with the abilities and in the circumstances of the person with the claim first ought to have known of the matters referred to in clause (a). 2002, c. 24, Sched. B, s. 5 (1).

Presumption
(2) A person with a claim shall be presumed to have known of the matters referred to in clause (1) (a) on the day the act or omission on which the claim is based took place, unless the contrary is proved. 2002, c. 24, Sched. B, s. 5 (2).

Demand obligations
(3) For the purposes of subclause (1) (a) (i), the day on which injury, loss or damage occurs in relation to a demand obligation is the first day on which there is a failure to perform the obligation, once a demand for the performance is made. 2008, c. 19, Sched. L, s. 1.
Same
(4) Subsection (3) applies in respect of every demand obligation created on or after January 1, 2004. 2008, c. 19, Sched. L, s. 1.

SCHEDULE C: AMOUNTS ATTRIBUTABLE TO MS. COX (MONITOR'S CASE AT ITS HIGHEST)

Expense	Total transferred (CAD)[1]	Amount representing 1/2 interest	Statute-barred amounts (1/2 interest)	Total claimable against Ms. Cox
BodyHoliday - Reduced amount[2] - Full amount[3]	 $423,424.41 $582,158.09	 $211,712.21 $291,079.05		 $211,712.21 $291,079.05
Waterdown home construction	$500,306.07	$250,153.04	$250,153.04	
Waterdown home-related expenses	$325,627.48	$162,813.74	$162,813.74	
Vacation house appliances	$41,150.00	$20,575.00		$20,575.00
Italian Wedding	$147,691.81	$73,845.91		$73,845.91
RV Camping	$142,867.50	$71,433.75	$71,433.75	
TOTAL (incl. BodyHoliday reduced amount)	**$1,581,067.27**	**$790,533.64**	**$484,400.53**	**$306,133.11**
TOTAL (incl. BodyHoliday full amount)	**$1,739,800.95**	**$869,900.48**	**$484,400.53**	**$385,499.95**

Notes

1. Figures obtained from Appendix C of Monitor's Motion Record dated November 8, 2023, with the exception of BodyHoliday - reduced amount.
2. Appendix C identifies a total of $582,158.09 transferred to BodyHoliday. Ms. Cox's evidence is that this stay was intended to include an OTE corporate retreat: Cox Affidavit, para. 42. According to Exhibit 5 to Ms. Cox's cross-examination, the amount transferred to BodyHoliday includes two weeks of bookings related to the OTE corporate retreat (Jan 30-Feb 6 and Feb 6-13, 2022). The costs associated with these two weeks ($115,864 USD according to Exhibit 4 to Ms. Cox's cross-examination) have been removed from the amount transferred. The same currency conversion rate applied in Appendix C (1.37) was used to determine the corresponding amount in CAD ($158,733.68). This sum was then deducted from the total of $582,158.09 CAD, for a remainder of $423,424.41.
3. This is the full amount identified by the Monitor in relation to the BodyHoliday transfer.

ORIGINAL TRADERS ENERGY LTD.
Applicant

GLENN PAGE et al.
Respondents

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

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SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

PROCEEDING COMMENCED AT TORONTO

RESPONDING FACTUM
MOTION RETURNABLE DECEMBER 21, 2023

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