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 APPLICANTS
(Returnable July 17, 2023)

July 13, 2023

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PART I – INTRODUCTION

1. On or about January 30, 2023, Original Traders Energy Ltd. ("**OTE GP**") and 2496750 Ontario Inc. ("**249**" and with OTE GP, the "**Applicants**") obtained an initial order (the "**Initial Order**") before the Ontario Superior Court of Justice (Commercial List) (the "**Court**") pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "**CCAA**") granting the Applicants protection under the CCAA and other related relief, with a view to allowing the Applicants an opportunity to restructure its business and affairs. The Applicants' CCAA proceedings are referred to herein as the "**CCAA Proceedings**".

2. While OTE Logistics LP ("**OTE Logistics**") and Original Traders Energy LP ("**OTE LP**") are not Applicants in this proceeding, relief was extended to both OTE Logistics and OTE LP (together, the "**Limited Partnerships**"), which are related to and carry on operations that are integral to the business of the Applicants. The terms "**OTE Group**" and "**Applicants**" throughout this factum refer to the Applicants and Limited Partnerships collectively. The Initial Order also appointed KPMG Inc. as the CCAA monitor in these CCAA Proceedings (in such capacity, the "**Monitor**").

3. On or about February 9, 2023, the Court issued an amended and restated initial order (the "**ARIO**") under the CCAA which, *inter alia*, expanded certain charges and extended the Stay Period (as defined in the Initial Order) to April 28, 2023.

4. On March 15, 2023, this Court issued an injunctive order (the "**Injunctive Order**") which, *inter alia*, restrained Glenn Page ("**Page**"), Mandy Cox ("**Cox**") and 26586558 Ontario Inc. ("**265**", a corporation that Page controls with Cox, his spouse, who is also a former employee of the OTE Group) from selling, removing, dissipating, alienating, transferring, assigning, encumbering or similarly dealing with a seventy-foot yacht from the Italian ship builder Azimut Benetti, named "Cuz We Can", more particularly described at Schedule "A" to the Injunctive Order (the "**Italian Yacht**").

5. On April 28, the Honourable Justice Osborne granted an Order extending the stay of proceedings to August 4, 2023 and an Order authorizing and directing the Monitor to carry

out the claims process as described therein (separately, the "**Stay Extension Order**" and the "**Claims Procedure Order**").

6. An Information Order was also granted on April 28, 2023 (the "**Information Order**"), by which AirSprint Inc. was directed to provide to the Monitor or its counsel any requested information in connection with the ARIO issued by this Court on February 9, 2023 and any other Order of the Court, related to the OTE Group, the OTE Group Affiliates (as defined in the Information Order) or any third party owned, controlled by, or otherwise related to the OTE Group Affiliates.

7. Chapter 15 proceedings under the US Bankruptcy Code, 11 U.S.C. §§ 101-1532 (the "**US Bankruptcy Code**") were also commenced by US counsel to the Monitor. As a result:

(a) On May 15, 2023, the United States Bankruptcy Court Southern District of Florida (Fort Lauderdale Division) (the "**US Court**") granted a motion for provisional relief under s. 1519 and 1520 of the US Bankruptcy Code which entered an order for provisional relief to protect assets of the OTE Group and to impose an automatic stay of proceedings in the United States in accordance with the ongoing Canadian proceedings; and

(b) On May 31, 2023, the US Court granted an order recognizing the Canadian proceedings as a "foreign main proceeding" within the meaning of 11 U.S.C. § 1502 of the US Bankruptcy Code, *inter alia* certain other relief.

8. On July 11, 2023, counsel to the Mareva Respondents (as defined herein) served a motion record (the "**Mareva Respondents' Record**") seeking relief for: (i) an Order setting aside the Injunctive Order; or, (ii) in the alternative, an extension of the deadline to file sworn statements in accordance with the Injunctive Order.

9. This factum is submitted to this Honourable Court to support the OTE Group, who is requesting the following relief:

(a) An order (the "**Second Stay Extension Order**"), substantially in the form included in the Motion Record, *inter alia,* which:

(i) approves the Fourth Report of the Monitor (as defined herein) and the activities set out therein (the "**Fourth Report**");

(ii) extends the stay period to November 3, 2023 (the "**Stay Period**"); and

(iii) authorizes and directs the addition of OTE GP as a loss payee on the current Insurance Policy (as defined in the Sixth Hill Affidavit) for the Italian Yacht; and

(b) scheduling assistance from this Honourable Court to deal with, *inter alia*, issues arising from the Injunctive Order and the Mareva Respondents' Record.

PART II – THE FACTS

A. Background

10. The OTE Group functions as a wholesale fuel supplier which services mainly First Nations' petroleum stations and First Nations' communities across Ontario.

11. The OTE Group services a total of over 30 gas stations throughout Southern Ontario, with a majority of these gas stations situated on 9 different First Nations reserves in Southern Ontario.

12. The liabilities faced by the OTE Group were triggered by alarming executive misconduct which threatens the survival of the OTE Group, arising from the actions of the former president of OTE GP, Page, and other of his associates and entities, including Cox.

13. The OTE Group is missing significant portions of their books and records due to Page's and others' alleged misconduct. Financial information and records of the OTE Group for the entire period from January of 2021 to August of 2022 are unreliable and incomplete.

14. While the OTE Group's investigation is still ongoing, and the full magnitude of their losses are unknown, millions of dollars effectively disappeared from the OTE Group's control under Page's watch, which triggered the OTE Group's ongoing insolvency. The Italian Yacht was further inexplicably diverted from the OTE Group's control through 265.

15. The OTE Group has since been granted a *Mareva* injunction against Page, Cox and 265 (collectively, the "**Mareva Respondents**") in respect of the Italian Yacht pursuant to the Injunctive Order. The Mareva Respondents' conduct has exposed the OTE Group to significant liabilities and losses. The OTE Group continues to work extensively to recover and track down all of the millions misappropriated by the Mareva Respondents. The scope, nature and duration of Page and Cox's scheme to defraud the OTE Group, along with their concerted efforts with other parties, may have transferred these millions of dollars out of the control of the OTE Group, beyond even the egregious purchase of the Italian Yacht itself.

16. Following the date of the Initial Order, the OTE Group has continued its business operations in the ordinary course. In addition to the OTE Group's ongoing efforts to canvass viable restructuring options with key stakeholders and finalize the requested Order, the OTE Group has, *inter alia*:[1]

(a) continued to maintain regular communications with various regulators across Canada. The OTE Group remain committed to working cooperatively with regulators as the CCAA and Chapter 15 proceedings progress;

(b) engaged in active negotiations with various suppliers to enable the going concern of the OTE Group;

(c) worked extensively with its counsel, US counsel to the Monitor, and the Monitor's counsel to seek and obtain the above-noted relief before the US Court;

(d) continued working with the Monitor to trace, investigate and review missing books and records of the OTE Group, and assist the Monitor in investigating assets of the OTE Group;

(e) contacted criminal authorities for various meetings with the Monitor to investigate, *inter alia,* potential fraud that may have occurred as a result of the missing books, records and assets of the OTE Group; and

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[1] Affidavit of Scott Hill sworn on July 10, 2023, Motion Record Tab 3 at para 33 ["Sixth Hill Affidavit"].

(f) operated the business in normal course with a view to maximizing the value of the OTE Group for the benefit of all stakeholders.

17. The OTE Group has continued to work with the Monitor in good faith to respond to numerous creditor and stakeholder inquiries on a daily basis.[2]

18. Further information with respect to the OTE Group's business, operations, products and causes of insolvency is contained within the various affidavits of Scott Hill and Miles Hill which are available on the Monitor's website.

B. The Extension of the Stay

19. The existing stay of proceedings expires on August 4, 2023. The OTE Group seeks, *inter alia,* an extension of the stay of proceedings to November 3, 2023.[3]

20. It is necessary to extend the stay to enable the Monitor to implement and carry out the steps contemplated by the Claims Procedure Order and Information Order, and continue to address other estate matters as the OTE Group operates as a going concern.

PART III – ISSUES AND THE LAW

21. The substantive issues to be adjudicated by the Court on the OTE Group's motion are as follows:

(a) Should the extension to the Stay Period be granted?

(b) Should the Monitor's Fourth Report and past activities be approved?

(c) Should OTE GP be added as loss payee to the Insurance Policy?

(d) Should the relief requested by the Mareva Respondents be granted?

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[2] *Ibid* at para 11.
[3] Second Stay Extension Order, Motion Record Tab 2.

A. Should the Extension to the Stay Period Be Granted?

22. Section 11.02(2) of the CCAA empowers a court to extend the stay of proceedings granted to a debtor company. In considering whether to grant a stay extension, the Court must consider (i) whether the order sought is appropriate in the circumstances; and (ii) whether the applicant has been acting in good faith and with due diligence.[4]

23. Appropriateness "is assessed by inquiring whether the order sought advances the policy objectives underlying the CCAA."[5] The OTE Group respectfully submits that extending the stay period would be appropriate as it would allow the Monitor, in cooperation with the OTE Group, to carry out the Claims Procedure by evaluating all Claims (terms as defined in the Claims Procedure Order).

24. The OTE Group, with the supervision and assistance of the Monitor, has also been operating as a going-concern in good faith and with due diligence. Since the Initial Order in late January of 2023, the OTE Group has been working diligently with the Monitor and various stakeholders to piece together their books and records and best understand the financial position of the company. The OTE Group has also been working with the Monitor in an effort to trace the various allegations of Page's misappropriation of the OTE Group's funds.[6]

25. In this case, the Stay Extension Order is requested in order to afford the OTE Group time to, among other things:

(a) continue to work with the OTE Group's stakeholders in an effort to better understand the OTE Group's assets and liabilities;

(b) continue to trace and investigate the OTE Group's funds as they relate to certain alleged misconduct; and

(c) implement the proposed Claims Procedure, to be administered by the Monitor, for the timely and efficient determination of claims against the OTE Group.

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[4] *Companies' Creditors Arrangement Act*, RSC 1985, c C-36, ss 11.02(2)–(3); *9354-9186 Québec Inc v Callidus Capital Corp,* 2020 SCC 10 at para 49 [*Callidus*].
[5] *Callidus*, *supra* note 4 at para 50.
[6] Sixth Hill Affidavit, *supra* note 1 at para 33.

26. Furthermore, the Monitor supports the Stay Extension Order and believes the extension of the stay is appropriate in the circumstances.[7] The Fourth Report also states that, based on the Extended Cash Flow Forecast, as defined therein, the Monitor believes the OTE Group will have sufficient liquidity to fund both operating costs and the costs of the CCAA Proceedings through to November 3, 2023.[8]

27. This Honourable Court has routinely approved stay extensions of similar or longer time periods than the proposed stay extension,[9] and the OTE Group submits that the test to extend the a stay of proceedings under section 11.02(2) and 11.02(3) of the CCAA, as requested, is met.

B. Should the Fourth Report and Activities of the Monitor Be Approved?

28. In *Target Canada Co. (Re)* ("***Target Canada***"), this Honourable Court noted that there are good policy and practical reasons to grant the approval of a Monitor's reports and activities, including (a) allowing a Monitor to bring its activities before the Court; (b) allowing an opportunity for stakeholders' concerns to be addressed; (c) enabling the Court to satisfy itself that a Monitor's activities have been conducted in prudent and diligent manners; (d) providing protection for a Monitor not otherwise provided by the CCAA; and (e) protecting creditors from delay that may be caused by re-litigation of steps or potential indemnity claims by a Monitor.[10] The principles set out in *Target Canada* were reaffirmed by Chief Justice Morawetz in *Laurentian University of Sudbury*.[11]

29. If a Monitor has met the objective test of demonstrating that it has acted reasonably, prudently and not arbitrarily, this Honourable Court should approve its past activities and reports. The OTE Group continues to work with the Monitor during these CCAA Proceedings and understands that the Monitor's activities were carried out in accordance with the orders

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[7] Fourth Report of the Monitor dated July 12, 2023 at para 30 [Fourth Report].
[8] *Ibid* at para 29.
[9] See generally *Lydian International Limited*, 2020 ONSC 7979; *US Steel Canada Inc (Re)*, 2017 ONSC 1967; *Cline Mining Corp (Re),* 2015 ONSC 622.
[10] 2015 ONSC 7574 at paras 2, 22–23.
[11] 2022 ONSC 2927 (May 18, 2022) CV-21-656040-00CL (Endorsement) at paras 13–14.

appointing them, were consistent with their respective mandates, and were done in furtherance of the objective of developing a potential restructuring strategy for the OTE Group. The OTE Group submits that relief approving the activities of the Monitor to-date should be granted.

C. Should OTE GP Be Added as Loss Payee to the Insurance Policy?

30. An insured party must have an insurable interest in the subject property at a potential time of loss to receive compensation under an insurance policy. Under the "factual expectancy test", a moral certainty of profit or loss constitutes a sufficient interest.[12] The Supreme Court of Canada (the "**SCC**") has held that under this test, an insurable interest can be determined to exist by evaluating three key questions:[13]

(a) Whether the party benefits from the existence of the asset;

(b) Whether the party would experience prejudice from its destruction; and

(c) Whether there is a certain benefit or advantage derived from the assets for said party, bar the risks insured against it.

31. Courts have previously held that the judiciary should lean in favour of an insurable interest where property or land is inappropriately conveyed to other parties. Where an insurance policy is in full force and effect, where property was conveyed to third parties via misconduct, despite the original owners not having "legal title to the property at the time of the loss", insurable interest in property is not confined to absolute legal ownership. Instead, "any person who is so situated that he will suffer loss as the proximate result of damage to or destruction of the property has an insurable interest in it."[14]

32. Otherwise, an insurance contract will be void if it assists or encourages the insured or insurer to commit an illegal act or if it preserves property that is used by the insurer inappropriately for the purpose of potentially illegal risks or acts. As held by the Ontario

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[12] *Lucena v Craufurd* (1806), 2 Bos & PNR 269, 127 ER 630 (HL) at 643.
[13] *Kosmopoulos v Constitution Insurance Co of Canada,* 1987 CanLII 75 (SCC) at paras 42–43 [*Kosmopoulos*].
[14] *Abric v Commercial Union Assurance Co of Canada,* 1986 CanLII 5676 (NB KB) at paras 19, 21.

Court of Appeal (the "**ONCA**") in *Assaad v. Economical Insurance Group*,[15] the ONCA has previously concluded that where the insured party "did not know or did not care about the origins of the [insured property] […] [which] should be viewed with suspicion", that "[s]uspicions combined with blindness adds up to an absence of good faith."[16]

33. There are three reasons for mandating an insurable interest in property: (1) the policy against wagering; (2) the principle of indemnity (i.e. that the insured should not profit upon a loss occurring); and (3) the policy of preventing the insured from being tempted to intentionally destroy the insured property.[17] However, these reasons do no necessitate a restrictive approach to insurable interest and courts must determine the existence of an insurable interest on a case-by-case basis, employing a flexible test based on the "actual relationship between a particular individual and the item or risk insured rather than on the basis of a predetermined indicator, such as legal title".[18]

34. At hand, the OTE Group's position is that at least $3,675,687.05 of their funds were used to purchase the Italian Yacht, which was then listed for sale by various boat brokers in Hollywood, Florida,[19] without the permission of the OTE Group, who maintains a security interest registered over the asset.[20]

(a) **Existence:** Funds used to purchase the Italian Yacht came from the OTE Group, and this Honourable Court found that funds were inappropriately moved from the OTE Group's accounts through the misuse of signing authority and via fraudulent execution of signatures, and the OTE Group has established a strong *prima facie* case with sufficient particulars;[21]

(b) **Prejudice from Destruction:** This Honourable Court has previously held that there was a serious risk that the Italian Yacht could be removed from the

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[15] 2002 CarswellOnt 1980, 214 DLR (4th) 655.
[16] *Ibid* at paras 17, 19.
[17] *Kosmopoulos*, *supra* note 13 at para 30.
[18] *Ibid* at para 42; *Rochon v Rochon*, 2015 ONCA 746 at para 57.
[19] *Original Traders Energy Ltd*, 2023 ONSC 1887 (March 21, 2023) Toronto, Ont Sup Ct [Commercial List] CV-23-693758-00CL (Endorsement) at para 13 [*Original Traders*].
[20] Sixth Hill Affidavit, *supra* note 1 at para 31.
[21] *Original Traders*, *supra* note 19 at paras 33, 38.

jurisdiction and dissipated, such that the OTE Group would suffer "irreparable harm" if the Italian Yacht "cannot be located or attached, or if it is sold and proceeds cannot be traced";[22] and

(c) **Benefit for Insuring:** Adding OTE GP as a loss payee to the Insurance Policy would serve to protect the Italian Yacht against the high risk of hurricane season in Florida.[23]

35. As previously stated by this Honourable Court, "[t]he Monitor's own review of the evidence of the OTE Group supports the conclusion that the Yacht was purchased substantially using funds wired directly from the bank accounts of the OTE Group and further that 265 caused OTE Logistics to guarantee a chattel mortgage held by Essex, secured on the Yacht."[24]

36. Adding OTE GP as loss payee to the Insurance Policy, in light of the above jurisprudence and facts, should be viewed as uncontroversial relief. OTE Group funds were used to purchase the Italian Yacht and the existing Injunctive Order effects the property. OTE GP also intends to pay all relevant premiums associated with their addition to the Insurance Policy on a go-forward basis.[25] Given the evidence before this Honourable Court, the OTE Group has a clear insurable interest in the subject property of the Italian Yacht, and a declaration ought to be made in favour of adding OTE GP as loss payee under the terms of the Insurance Policy.

D. Should Relief Sought by the Mareva Respondents Be Granted?

37. As stated above, counsel to the Mareva Respondents have filed a competing motion record which seeks: (i) an Order setting aside the Injunctive Order; or, (ii) in the alternative, an extension of the deadline to file sworn statements in accordance with the Injunctive Order.

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[22] *Ibid* at para 49.
[23] Sixth Hill Affidavit, *supra* note 1 at para 30.
[24] *Original Traders*, *supra* note 19 at para 54.
[25] Sixth Hill Affidavit at para 32.

38. For the preliminary reasons outlined below, both of the Mareva Respondents' arguments must fail. The OTE Group instead respectfully requests that this Honourable Court schedule a hearing to address these concerns at a later date, as a thirty minute hearing is procedurally insufficient timing to argue these matters.

Should the Injunctive Order Be Set Aside?

39. The Mareva Respondents have submitted that a *Mareva* injunction can only be set aside on a full hearing *de novo*. Canadian courts have extensively held, however, that *de novo* judges must not substitute their view "for that of the originating judge on the ground that [they] would have exercised [their] discretion differently".[26]

40. The Mareva Respondents claim that, in light of their new evidence: (a) there is no strong *prima facie* case; (b) there is no risk of dissipation of assets; (c) there is no irreparable harm to the OTE Group should the *Mareva* injunction not continue; and (d) on a balance of convenience, the *Mareva* injunction should not continue.

41. No new evidence has been raised or shared by the Mareva Respondents which alters the prior information shared with this Honourable Court. For the reasons outlined below, all of these arguments fail.

(a) There Remains a Strong *Prima Facie* Case

42. The Mareva Respondents rely on an isolated case, *10390160 Canada Ltd. et al. v. Casey et al.* ("***Casey***") where this Honourable Court has commented that a strong *prima facie* case means "in this context, that the plaintiffs are clearly right, or even that they are almost certain to win".[27] The language used in *Casey* is uncommon and fact specific. As recent as June of 2023, this Honourable Court has upheld judgments using the prevailing and more commonly cited test for a strong *prima facie* case, which is whether the case will probably prevail or is likely to succeed at trial.[28]

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[26] *Netolitzky v Barclay*, 2002 BCSC 1098 at para 20.
[27] 2022 ONSC 628 at para 3.
[28] *Neville v Sovereign Management Group Corp*, 2022 ONSC 3466 at para 33; *Carbone et al v Boccia et al,* 2023 ONSC 3625 and para 17.

43. Furthermore, innocent non-disclosure from haste or oversight is not enough to halt an injunction.[29] Even a material non-disclosure does not give an enjoined party the automatic right to have an injunction discharged: the court retains its discretion to continue an injunction if it is just and convenient to do so.[30] It is trite law that a fact is only material if it ought to have been weighed by the motions judge. Examples of significant and pressing material facts which have overturned injunctions include non-disclosure of limitation periods[31] or property ownership rights.[32] These facts were so vital that the undisclosed information "*may* have affected the result" of the original motions court.

44. The Mareva Respondents allege that:

(a) The Mareva Respondents have now provided certain financial documents in support of their claims filed with the Monitor pursuant to the Claims Procedure Order which show payments to Miles Hill and Scott Hill in 2021 (the "**Hill Payments**");

(b) The Hill Payments were not disclosed to this Honourable Court previously; and

(c) No claim is being pursued by the Monitor or the OTE Group in regards to the Hill Payments.

45. These allegations are false. As stated at para 48 of the fourth affidavit of Scott Hill sworn March 12, 2023 (the "**Fourth Hill Affidavit**"), the three limited partners earned a profit share of over CAD $3,165,000, which was appropriately disclosed to this Honourable Court prior to the decision leading to the Injunctive Order. Osborne J.'s reference to "no evidence […] to show that other partners received distributions" is a limited comment which only refers to any new evidence provided by the Mareva Respondents, who failed to, at that time, prove to this Honourable Court that transfers relating to the Italian Yacht were intended to be distributions of profit or income.

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[29] *Rust Check Canada Inc v Buchowski*, 1994 CanLII 7416 (ON SC) at para 31.
[30] *Edmonton Northlands v Edmonton Oilers Hockey Corp*, 1993 CarswellAlta 224, 147 AR 113 at para 41.
[31] *Maesbury Homes Inc v Hutchens*, 2011 ONSC 6198.
[32] *Bardeau Ltd v Crown Food Service Equipment Ltd et al*, 1982 CanLII 1773 (ON SC), 38 OR (2d) 411 at para 8.

46. The OTE Group maintains a strong *prima facie* case against the Mareva Respondents, and there are no new material facts which alter this Honourable Court's prior finding.

(b) There is Risk of Dissipation of the Italian Yacht

47. *Mareva* injunctions are issued to freeze assets, but also function as "a form of prejudgment security" in the face of potential fraud, so that victims can recover appropriately.[33] The risk of dissipation of an asset can be established through inference from historical actions of misconduct, as seen in the 2022 Ontario Superior Court of Justice case of *A.J. Lanzarotta Wholesale Fruits & Vegetables Ltd.*:[34]

> The Mareva requirement that there be risk of removal or dissipation of assets, can be established by inference, as well as by direct evidence. Inference can arise from the circumstances of the fraud itself, taken in the context of all the surrounding circumstances […] The facts as presented allow me to draw an inference that the Defendants will attempt to hide any monies that they may have to satisfy this debt. Their conduct between August 2020 and March 2021, show an active effort to mislead the Plaintiff as to who their real clients were and to provide any real accounting of when they expect to be able to satisfy the debt. […] I also find that there is a risk that [the] real property assets may be transferred but for this injunction.

48. Risk of dissipation can be reasonably inferred from material facts supporting a strong *prima facie* case of fraud.[35] As is detailed extensively throughout the Fourth Hill Affidavit, the Italian Yacht was purchased through misappropriation of millions of dollars of OTE Group funds, and then moved interjurisdictionally throughout North America and the Caribbean islands, including the Bahamas. Furthermore, the Fourth Hill Affidavit establishes that:

(a) The Italian Yacht was not registered in the United States;

(b) The Italian Yacht was removed from the Canadian formal registration system;

(c) The Italian Yacht was listed under different names with various boat brokers for the purpose of a sale; and

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[33] *Access Human Resources Inc v Earl*, 2018 BCSC 2347 at para 13 [*Access Human*].
[34] 2022 ONSC 1147 at paras 60–61.
[35] *Woods v Jahangiri,* 2020 ONSC 7404 at para 29.

(d) The GPS of the Italian Yacht was likely purposefully turned off to hide the asset from the OTE Group.

49. The Italian Yacht could easily be captained and moved out of the control of the OTE Group, as has occurred previously. Even with a preservation order, the OTE Group requires the assistance of this Honourable Court in understanding and investigating the fraudulent movement of funds used by the Mareva Respondents to purchase the Italian Yacht. Given the past history of misconduct, there is still an ongoing, pressing and significant risk that the Italian Yacht will be dissipated without the protection of this Honourable Court.

(c) There Is Irreparable Harm If the Mareva Is Set Aside

50. If a party has not presented a court with a means to satisfy a judgment if the asset is then dissipated, a party has established irreparable harm.[36]

51. The Mareva Respondents have failed to establish or present any new evidence of judgment satisfaction which would support their position that there is "no harm" to the OTE Group.

52. The OTE Group will suffer irreparable harm if the Injunctive Order is set aside. A preservation order over the Italian Yacht is insufficient. The OTE Group requires the ongoing assistance of this Honourable Court to continue to understand how funds were used by the Mareva Respondents to purchase the Italian Yacht, and to investigate misconduct by the Mareva Respondents relating to the Italian Yacht.

53. No new evidence has been provided by the Mareva Respondents which establishes their position that there is "no harm" to the OTE Group if the *Mareva* injunction over the Italian Yacht is set aside.

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[36] *Ibid*.

(d) The Balance of Convenience Favours the Injunctive Order

54. The Mareva Respondents claim that "where there is an alternative measure available to protect the interests of stakeholders, a *Mareva* injunction is not necessary", although they cite no law for this statement. Furthermore, they allege that the case of *Access Human Resources v. Earl* ("***Access Human***") is a precedent for the proposition that other measures, such as certificates of pending litigation, should nullify the need for *Mareva* orders. This is a fundamental misstatement of the existing jurisprudence.

55. In *Access Human*, the *Mareva* order was set aside because there was no evidence that the parties "had any direct knowledge of […] fraud."[37] A certificate of pending litigation was helpful but not determinative. In fact, it is well established by Canadian courts that the existence of filed certificates of pending litigation on property are "not meant as some sort of black-letter prohibition against a *Mareva* order wherever a certificate of pending litigation is in place."[38]

56. *Mareva* injunctions cannot be replaced by simple preservation orders or on-consent agreements with parties, and there is no case law before this Court which supports this claim. The balance of convenience requires that, given the history of attempting to obfuscate the Italian Yacht between jurisdictions and the lengthy evidence before this Honourable Court as to misconduct by the Mareva Respondents, that the *Mareva* injunction remain in place.

The Deadline to File a Sworn Statement Should Be Extended

57. Justice delayed is justice denied. The Mareva Respondents have not submitted any evidence as to why they are being prejudiced by being required to swear an affidavit under the terms of the Injunctive Order, which has already been extended on consent by the OTE Group and the Monitor.

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[37] *Access Human*, *supra* note 33 at para 36.
[38] *Vidcom Communications Ltd v Rattan,* 2022 BCSC 1379 at para 41.

58. Without additional evidence before this Honourable Court, the Mareva Respondents should be held to account to the terms of the Injunctive Order, in light of the numerous extensions previously granted to them by the impacted parties.

PART IV – RELIEF SOUGHT

59. The OTE Group respectfully requests the granting of relief substantially in the form contained in its Motion Record.

ALL OF WHICH IS RESPECTFULLY SUBMITTED as of the date first written above.

Tamie Dolny on behalf of Steven Graff

S. Graff / M. Henderson / T. Dolny / S. Hans

SCHEDULE "A"
LIST OF AUTHORITIES

1	*9354-9186 Québec Inc. v. Callidus Capital Corp.*, 2020 SCC 10
2	*Lydian International Limited,* 2020 ONSC 7979
3	*U.S. Steel Canada Inc. (Re),* 2017 ONSC 1967
4	*Cline Mining Corp. (Re),* 2015 ONSC 622
5	*Target Canada Co. (Re),* 2015 ONSC 7574
6	*Laurentian University of Sudbury,* 2022 ONSC 2927 (May 18, 2022) CV-21-656040-00CL (Endorsement)
7	*Lucena v. Craufurd* (1806), 2 Bos & PNR 269, 127 ER 630 (HL)
8	*Kosmopoulos v. Constitution Ins. Co. of Canada,* 1987 CanLII 75 (SCC), [1987] 1 SCR 2
9	*Abric v. Commercial Union Assurance Co. of Canada,* 1986 CanLII 5676 (NB KB)
10	*Assaad v. Economical Insurance Group,* 2002 CarswellOnt 1980, 214 D.L.R. (4th) 655
11	*Rochon v. Rochon*, 2015 ONCA 746
12	*Original Traders Energy Ltd*, 2023 ONSC 1887 (March 21, 2023) Toronto, Ont Sup Ct [Commercial List] CV-23-693758-00CL (Endorsement)
13	*Netolitzky v. Barclay*, 2002 BCSC 1098
14	*10390160 Canada Ltd et al. v. Casey et al.*, 2022 ONSC 628
15	*Neville v. Sovereign Management Group Corp.*, 2022 ONSC 3466
16	*Carbone et al. v. Boccia et al.*, 2023 ONSC 3625
17	*Rust Check Canada Inc. v. Buchowski*, 1994 CarswellOnt 177
18	*Edmonton Northlands v. Edmonton Oilers Hockey Corp.*, 1993 CarswellAlta 224, 147 AR 113
19	*Maesbury Homes Inc. v. Hutchens*, 2011 ONSC 6198
20	*Bardeau Ltd. v. Crown Food Service Equipment Ltd. et al*, 1982 CanLII 1773 (ON

	SC), 38 OR (2d) 411
21	*Access Human Resources Inc. v. Earl*, 2018 BCSC 2347
22	*A.J. Lanzarotta Wholesale Fruits & Vegetables Ltd.*, 2022 ONSC 1147
23	*Woods v. Jahangiri,* 2020 ONSC 7404
24	*Vidcom Communications Ltd. v. Rattan,* 2022 BCSC 1379

SCHEDULE "B"
RELEVANT STATUTES

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

General power of court

11 Despite anything in the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*, if an application is made under this Act in respect of a debtor company, the court, on the application of any person interested in the matter, may, subject to the restrictions set out in this Act, on notice to any other person or without notice as it may see fit, make any order that it considers appropriate in the circumstances.

Stays, etc. — other than initial application

(2) A court may, on an application in respect of a debtor company other than an initial application, make an order, on any terms that it may impose,

> **(a)** staying, until otherwise ordered by the court, for any period that the court considers necessary, all proceedings taken or that might be taken in respect of the company under an Act referred to in paragraph (1)(a);
>
> **(b)** restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and
>
> **(c)** prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.

Burden of proof on application

(3) The court shall not make the order unless

> **(a)** the applicant satisfies the court that circumstances exist that make the order appropriate; and
>
> **(b)** in the case of an order under subsection (2), the applicant also satisfies the court that the applicant has acted, and is acting, in good faith and with due diligence.

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

Proceedings commenced at Toronto

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