

**ONTARIO**  
**SUPERIOR COURT OF JUSTICE**  
**COMMERCIAL LIST**

B E T W E E N:

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 RESPONDENTS,**  
**GLENN PAGE AND 2658658 ONTARIO INC.**  
(MOTION FOR MAREVA INJUNCTION - RETURNABLE NOVEMBER 10, 2023)

**LENCZNER SLAGHT LLP**  
130 Adelaide Street West, Suite 2600  
Toronto, ON M5H 3P5

Monique J. Jilesen (43092W)

Tel: (416) 865-2926

Email: [mjilesen@litigate.com](mailto:mjilesen@litigate.com)

Jonathan Chen (63973A)

Tel: (416) 865-3553

Email: [jchen@litigate.com](mailto:jchen@litigate.com)

Bonnie Greenaway (77318M)

Tel: (416) 865-6763

Email: [bgreenaway@litigate.com](mailto:bgreenaway@litigate.com)

Keely Kinley (84224G)

Tel: (416) 238-7442

Email: [kkinley@litigate.com](mailto:kkinley@litigate.com)

Lawyers for the Respondents, Glenn Page and  
2658658 Ontario Inc.

TO: **BENNETT JONES LLP**  
3400 One First Canadian Place  
P.O. Box 130  
Toronto, ON M5X 1A4

Richard Swan (#32076A)  
Tel: (416) 777-7479  
Email: swanr@bennettjones.com  
Raj Sahni (#42942U)  
Tel: (416) 777-4804  
Email: sahnir@bennettjones.com  
Shaan P. Tolani (#80323C)  
Tel: (416) 777-7916  
Email: tolanis@bennettjones.com  
Thomas Gray (#82473H)  
Tel: (416) 777-7924  
Email: grayt@bennettjones.com

Lawyers for The Monitor, KPMG Inc.

AND TO: **AIRD & BERLIS LLP**  
Brookfield Place  
181 Bay Street, Suite 1800 Toronto, ON M5J 2T9

Steven Graff  
Tel: (416) 865-7726  
Email: sgraff@airdberlis.com  
Martin Henderson  
Tel: (416) 865-7725  
Email: mhenderson@airdberlis.com  
Samantha Hans  
Tel: (437) 880-6105  
Email: shans@airdberlis.com

Lawyers for the Applicants

AND TO: **GOLDBLATT PARTNERS LLP**  
Barristers & Solicitors  
1039-20 Dundas Street West  
Toronto, ON M5G 2C2

Jessica Orkin  
Tel: (416) 979-4381  
Email: jorkin@goldblattpartners.com  
Natai Shelsen  
Tel: (416) 979-4384  
Email: nshelsen@goldblattpartners.com

Lawyers for the Respondent, Mandy Cox

## **PART I - OVERVIEW**

1. One day ago, KPMG Inc., the Court-appointed Monitor (the “**Monitor**”), suddenly and without prior notice brought a motion seeking a *Mareva* injunction over the worldwide assets of the Respondents, Mr. Glenn Page, Ms. Mandy Cox and 2658658 Ontario Inc. (“**265**”).

2. It is apparent from the factum that the Monitor has not met the strong *prima facie* test for a *Mareva* injunction. The Monitor relies upon “suspicious and potentially fraudulent transactions<sup>1</sup>” or “apparent fraud or impropriety<sup>2</sup>” to found its motion. The motion should be dismissed on this basis alone.

3. In addition to failing to meet the strong *prima facie* test requirement, the Monitor has not made full and frank disclosure which is required when short notice is given on a *Mareva* injunction.<sup>3</sup>

4. There is no evidence of risk of dissipation of assets. KPMG has tied the urgency of this motion to the impending closing of the property located at 118 Main Street North in the City of Hamilton (the “**Property**”) where Mr. Page and Ms. Cox reside. No such urgency exists.

5. The Property was publicly listed for sale and was sold on August 28, 2023. There is nothing suspicious about the public sale of a residential property. The Property is not scheduled to close until November 30, 2023.

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<sup>1</sup> Factum of the Monitor, para. 12.

<sup>2</sup> Factum of the Monitor, para. 2.

<sup>3</sup> See [Mfc v Mady Collier](#), 2015 ONSC 2111 at [para. 20](#).

6. Mr. Page and Ms. Cox are prepared to have the net proceeds from the sale of the Property be held Lenczner Slaght, in trust, pending the resolution of any issues relating to the *Mareva* injunction. This obviates the need for any order of the Court.

7. Given the lack of any risk of dissipation, the motion should only proceed on a proper timetable. Ms. Cox seeks the same relief as set out in her factum.

## **PART II - SUMMARY OF FACTS**

8. This case is a highly unusual one for a Mareva Injunction. Mr. Page has been an active participant in these CCAA Proceedings since January 20, 2023. He has:

- (a) produced requested documents;
- (b) consented to a sale of his yacht in the Yacht Sale and AirSprint Proceeds Order;
- (c) consented to the holding of trust of the AirSprint Property and to the AirSprint Proceeds Order;
- (d) proposed an experienced and well-respected Chief Restructuring Officer;
- (e) negotiated with the Monitor for an order granting the Monitor “Super Monitor” powers;
- (f) retained a respected restructuring and advisory firm, KSV Advisory; and
- (g) is participating in the bid process with a recently delivered term sheet;

9. This is not the conduct of a person who is seeking to dissipate assets away from the estate.

### **(i) *The CCAA Proceedings***

10. On January 30, 2023, Justice Osborne granted an initial order (the “**Initial Order**”), which, among other things, provided protection to the OTE Group under the *Companies’ Creditors*

*Arrangement Act*, R.S.C. 1985, c. C-36.<sup>4</sup> On February 9, 2023, Justice Osborne granted an Amended and Restated Initial Order (the “**ARIO**”).<sup>5</sup>

11. Under the Initial Order, KPMG was appointed the Monitor and granted expansive investigatory powers. On February 6, 2023, the Monitor requested production of certain broad categories of information related to the OTE Group from Mr. Page (the “**Page Monitor Document Request**”)<sup>6</sup>.

12. Since that time, Mr. Page and 265 have worked diligently to satisfy its productions obligations:

By Glenn Page and 265:

- (a) Mr. Page and 265’s former counsel discussed the scope of the production request with the Monitor on February 17, 2023 and followed up with a letter dated March 8, 2023.<sup>7</sup> In that letter from Mr. Page and 265, the Monitor was provided with a ShareFile link to access certain responsive records. In light of the broad request, Mr. Page’s former counsel asked for clarification on the types of documents being requested and advised that additional time would be needed to undertake a comprehensive search. The Monitor did not respond.
- (b) On June 5, 2023, Mr. Page and 265 produced additional documents to the Monitor in response to the Monitor Document Request. In the covering correspondence, counsel for Mr. Page and 265 followed up for further particulars regarding the specific types of documents being sought by the Monitor.<sup>8</sup> No response was received.
- (c) On July 5, 2023, Mr. Page and 265’s counsel wrote to counsel for the OTE Group and the Monitor to advise that Mr. Page located a copy of his email account with the Original Traders Energy domain name in the course of his review and to

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<sup>4</sup> Affidavit of Keely Kinley (“**Kinley Affidavit**”), Exhibit “**A**” (Order of Osborne J. dated January 30, 2023) (“**Initial Order**”), Motion Record of the Respondents dated November 10, 2023 (“**Respondents’ MR**”), Tab 1.

<sup>5</sup> Kinley Affidavit, Exhibit “**B**” (Amended and Restated Initial Order of Osborne J. dated February 9, 2023) (“**ARIO**”), Respondents’ MR, Tab 1.

<sup>6</sup> Kinley Affidavit, Exhibit “**C**” (Monitor Document Request), Respondents’ MR, Tab 1.

<sup>7</sup> Kinley Affidavit, Exhibit “**D**” (Correspondence from Thornton Grout Finnigan LLP dated March 8, 2023), Respondents’ MR, Tab 1.

<sup>8</sup> Kinley Affidavit, Exhibit “**E**” (Correspondence from Lenczner Slaughter LLP dated June 5, 2023), Respondents’ MR, Tab 1.

determine whether the Monitor objected to Mr. Page's counsel reviewing the email account for responsive records.<sup>9</sup>

On July 7, 2023, the Monitor objected to the review and requested a copy of the email account.<sup>10</sup>

On July 8, 2023, Mr. Page and 265's counsel provided the Monitor with a copy of the email account and reiterated that counsel had not reviewed any of its contents.<sup>11</sup>

- (d) On September 8, 2023, Mr. Page and 265's counsel provided further responsive documentation to the Monitor.<sup>12</sup>

**(ii) The Mareva Order**

13. On March 15, 2023, Justice Osborne granted the *Mareva* injunction over the Yacht (the "**Mareva Order**").<sup>13</sup> The Mareva Order, at paragraphs 6 and 7, also required that the Mareva Respondents file sworn statements providing information related to the Yacht within 30 business days of the date of service of the Mareva Order.<sup>14</sup>

14. On March 28, 2023, the OTE Group returned before the Application Judge to in part obtain further information respecting the Yacht.<sup>15</sup> On March 30, 2023, Mr. Page and 265's counsel provided the OTE Group and the Monitor with the required information.<sup>16</sup>

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<sup>9</sup> Kinley Affidavit, Exhibit "**F**" (Correspondence between Lenczner Slaght LLP and Monitor's counsel dated July 5-7, 2023), Respondents' MR, Tab 1.

<sup>10</sup> Kinley Affidavit, Exhibit "**F**" (Correspondence between Lenczner Slaght LLP and Monitor's counsel dated July 5-7, 2023), Respondents' MR, Tab 1.

<sup>11</sup> Kinley Affidavit, Exhibit "**F**" (Correspondence between Lenczner Slaght LLP and Monitor's counsel dated July 5-7, 2023), Respondents' MR, Tab 1.

<sup>12</sup> Kinley Affidavit, Exhibit "**G**" (Correspondence between Lenczner Slaght LLP and Monitor's counsel dated September 8, 2023), Respondents' MR, Tab 1.

<sup>13</sup> Order of Osborne J. dated March 15, 2023, ("**Mareva Order**"), Motion Record of the Moving Party, Tab 3, pp. 39-44.

<sup>14</sup> Order of Osborne J. dated March 15, 2023, ("**Mareva Order**"), Motion Record of the Moving Party, Tab 3, p. 41.

<sup>15</sup> Kinley Affidavit, Exhibit "**H**" (Endorsement of Osborne J. dated March 28, 2023) ("**March 28 Endorsement**"), paras. 5-7, Respondents' MR, Tab 2.

<sup>16</sup> Kinley Affidavit, Exhibit "**I**" (Email from Stockwoods LLP dated March 30, 2023), Respondents' MR, Tab 2.

15. On April 28, 2023, the Application Judge extended the deadline for delivery of sworn statements to within 30 days of the endorsement, or on a date agreed to in writing.<sup>17</sup> The OTE Group, the Monitor and the Mareva Respondents then agreed to extend the deadline for the delivery of sworn statements to July 18, 2023.<sup>18</sup>

16. On July 5, 2023, the Mareva Respondents, through counsel, advised counsel for the OTE Group and the Monitor that the Injunctive Order should no longer be necessary because Mr. Page consented to sale of the Yacht.<sup>19</sup> Specifically, the letter advised as follows:

At [the July 17, 2023] motion, we understand that the OTE Group will be seeking, among other relief, an order for the approval of a sale process for the subject yacht and a continuation of the Injunctive Order as modified by the March 28, 2023 and April 28, 2023 Endorsements.

The Mareva Respondents' position on that motion will be in part that the Injunctive Order is no longer necessary. As you know from our discussions over the last few months, the Mareva Respondents consent to a preservation of and sale of the yacht, provided that the sales process is managed by an experienced boat broker and handled in a commercially reasonable manner, and the determination of the proceeds of the sale is reserved to a later date. In these circumstances, there is no need to continue the Injunctive Order. The yacht will be preserved and no risk of dissipation exists.

We believe it is beneficial and economical to all parties to resolve this motion on a consent basis. Should the OTE Group maintain its relief for a continuation of the Injunctive Order despite our clients' position set out above, we intend to rely on this letter at the return of the motion on July 17, 2023.<sup>20</sup>

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<sup>17</sup> Kinley Affidavit, Exhibit "J" (Endorsement of Osborne J. dated April 28, 2023) ("**April 28 Endorsement**"), para. 18, Respondents' MR, Tab 1.

<sup>18</sup> Kinley Affidavit at para. 13, Respondents' MR, Tab 1.

<sup>19</sup> Kinley Affidavit, Exhibit "K" (Correspondence from Lenczner Slaght LLP dated July 5, 2023), Respondents' MR, Tab 1.

<sup>20</sup> Kinley Affidavit, Exhibit "K" (Correspondence from Lenczner Slaght LLP dated July 5, 2023), Respondents' MR, Tab 1.

17. On July 17, 2023, Justice Kimmel approved the sale process for the Yacht (“**Yacht Sale Process and AirSprint Proceeds Order**”).<sup>21</sup>

18. On October 4, 2023, in the face of Mr. Page’s motion to set aside the Mareva Order, the parties consented to the Order deleting the paragraphs of the Mareva Order requiring sworn affidavits and statements of assets.<sup>22</sup> It is entirely unclear what has changed between October 4, 2023 when the Monitor consented to the order and the hearing of this motion which now requires the draconian impact of a Mareva injunction.

*(iii) The Mareva Respondents Move to Appoint a Chief Restructuring Officer*

19. On September 29, 2023, the OTE Group<sup>23</sup> brought a motion for a sales process for the business and property of the OTE Group (the “**Bid Process**”) and other relief.<sup>24</sup>

20. On October 2, 2023, Lenczner Slaght served a motion returnable on October 4, 2023, seeking an order, among other things, appointing a Chief Restructuring Officer as CRO of the OTE Group and directing Scott Hill and Miles Hill to fully cooperate with the CRO.<sup>25</sup>

21. Following the October 4, 2023 attendance, Lenczner Slaght participated in negotiations with counsel for the Monitor with respect to Bid Process, the proposed CRO Order, and the expanded powers of the Monitor which ultimately resulted in the consent Order of October 12, 2023.<sup>26</sup>

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<sup>21</sup> Kinley Affidavit, Exhibit “V” (Order), Respondents’ MR, Tab 1.

<sup>22</sup> Kinley Affidavit, Exhibit “S” (Notice of Motion), Respondents’ MR, Tab 1.

<sup>23</sup> Original Traders Energy Ltd. (“**OTE GP**”) and 2496750 Ontario Inc. (“**OTE Logistics GP**”, together with Original Traders Energy LP and OTE Logistics LP, the “**OTE Group**”).

<sup>24</sup> Kinley Affidavit, Exhibit “S” (Notice of Motion), Respondents’ MR, Tab 1.

<sup>25</sup> Kinley Affidavit, Exhibit “T” (Aide Memoire of Glenn Page and 265), Respondents’ MR, Tab 1.

<sup>26</sup> Kinley Affidavit, at para 23, Respondents’ MR, Tab 1.



22. On behalf of Glenn Page and 265, Lenczner Slaght attended at a meeting with the Monitor on October 10, 2023 to address various issues in the restructuring including the Bid Process, and document production.<sup>27</sup> In addition to Lenczner Slaght, in attendance were the Monitor and Monitor's counsel, counsel for OTE USA, Brian Page, counsel for Mandy Cox, and KSV as advisors to Glenn Page.<sup>28</sup>

**(iv) Bid Process and Proposed Plan**

23. Mr. Page is an indirect shareholder of OTE USA which is proposing a plan of arrangement for OTE LP. Such conduct is not consistent with a party seeking to dissipate its assets.

24. On October 12, 2023, OTE USA counsel, Mr. Max Starnino, wrote to counsel for the Monitor to make a request for the form of NDA required for the data room for the Bid Process, as well as an initial information request list.<sup>29</sup>

25. On October 18, 2023, Mr. Starnino wrote to counsel for the Monitor requesting confirmation that the Monitor has taken steps to take control and secure OTE LP's Bookworks Account. Mr. Starnino reiterated that his client has had concerns regarding the Monitor's report that accounting information in respect of OTE LP is missing.<sup>30</sup>

26. On October 20, 2023, Mr. Starnino provided counsel for the Monitor with a copy of the NDA signed by Glenn Page and 265 for access to the data room.<sup>31</sup>

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<sup>27</sup> Kinley Affidavit, at para 25, Respondents' MR, Tab 1.

<sup>28</sup> Kinley Affidavit, at para 25, Respondents' MR, Tab 1.

<sup>29</sup> Kinley Affidavit, Exhibit "FF" (October 12, 2023 email), Respondents' MR, Tab 1.

<sup>30</sup> Kinley Affidavit, Exhibit "GG" (October 18, 2023 email), Respondents' MR, Tab 1.

<sup>31</sup> Kinley Affidavit, Exhibit "HH" (October 20, 2023 email), Respondents' MR, Tab 1.

27. On October 27, 2023, KSV, advisors to Glenn Page, 265, and OTE USA sent the Monitor a list of information requests.<sup>32</sup>

28. On November 1, 2023, Mr. Starnino wrote to counsel to the Monitor enclosing copies of prior information requests which had not yet been answered.<sup>33</sup>

29. On November 2, 2023 counsel for the Monitor wrote to respond to the requests expressing the view that “the information requests go well beyond what is required in the Bid Process.”<sup>34</sup> Nevertheless, the Monitor advised that it had responded to certain of the requests:

The Monitor has now updated the Bid Process data room to provide documents responsive to the questions relevant to the Bid Process, including: 1) a summary of the proofs of claim filed pursuant to the Claims Procedure; 2) a description of the fuel blending equipment that the Monitor understands is situated on the leased premises; and 3) redacted 2023 sales and volume data summarized by customer.<sup>35</sup>

30. On November 6, 2023, OTE USA’s counsel responded to the November 2, 2023 letter and delivered a draft CCAA Plan Term Sheet on a confidential and without prejudice basis. For the purposes of this motion, redactions have been made to the draft CCAA Plan Term Sheet.<sup>36</sup>

31. On November 7, 2023, Mr. Brian Page and a representative of KSV Advisory, an advisory and restructuring firm, attended at the Monitor’s offices to review proofs of claim filed in this CCAA Proceeding.<sup>37</sup>

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<sup>32</sup> Kinley Affidavit, Exhibit “II” (October 27, 2023 information request), Respondents’ MR, Tab 1.

<sup>33</sup> Kinley Affidavit, Exhibit “JJ” (November 1, 2023 email), Respondents’ MR, Tab 1.

<sup>34</sup> Kinley Affidavit, Exhibit “JJ” (November 1, 2023 email), Respondents’ MR, Tab 1.

<sup>35</sup> Kinley Affidavit, Exhibit “KK” (Bennett Jones’ November 2, 2023 letter), Respondents’ MR, Tab 1.

<sup>36</sup> Kinley Affidavit, para. 40, Respondents’ MR, Tab 1.

<sup>37</sup> Kinley Affidavit, para. 41, Respondents’ MR, Tab 1.

### **PART III - STATEMENT OF ISSUES, LAW & AUTHORITIES**

#### **A. THE ISSUE**

32. There are two issues on this motion:

- (a) Should the Respondents' adjournment request be granted?
- (b) If not, is a *Mareva* injunction appropriate and necessary in the circumstances?

33. The Respondents submit that an adjournment is fair and reasonable in the circumstances.

In the alternative, a *Mareva* injunction is not appropriate or necessary on this record.

#### **B. THE LAW AND APPLICATION**

##### ***(i) An Adjournment is Fair and Reasonable in the Circumstances***

34. Granting or refusing an adjournment is a discretionary decision that depends on the circumstances of each case. Some of the factors that may be considered include:

- (a) the overall objective of a determination of the matter on its substantive merits;
- (b) the principles of natural justice;
- (c) the particular circumstances of the request for an adjournment and the reasons and justification for the request;
- (d) the practical effect or consequences of an adjournment on both substantive and procedural justice;
- (e) whether the ability of the party requesting the adjournment to fully and adequately defend the proceeding would be significantly compromised if the adjournment were refused.<sup>38</sup>

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<sup>38</sup> *Trade Capital Finance Corp v Cook*, 2016 ONSC 3511/2016 ONSC 3511 at paras. [9-11](#).

35. Having regard to the principles of natural justice and the appearance that justice shall be done, a court should tend to be generous rather than overly strict in granting indulgences, particularly where the request would promote a decision on the merits.<sup>39</sup>

36. The Respondents were effectively left with one day to review and respond to the allegations raised in the Notice of Motion and Sixth Report of the Monitor. KPMG delivered its Motion Record on November 8, 2023 at 10:56 p.m. with a return date of November 10, 2023 at 11:30 a.m. Any attempt to suggest that the timing of this delivery serves as providing notice is hollow.

37. Practically, in light of the number of allegations being lodged and the quantum at issue, the Respondents simply cannot provide a meaningful response to the request in the time provided. An adjournment is necessary to preserve the principles of natural justice and to ensure that the Respondents have an opportunity to properly respond on the merits before this Court is to decide whether the draconian remedy of a *Mareva* injunction should be imposed.

38. KPMG ties the urgency of its motion on the assumption that the Property, which was marketed publicly and searchable on popular real estate websites<sup>40</sup>, has been sold and the transaction is to close imminently. Specifically, in light of the pending sale of the Property, the Sixth Report of the Monitor says that “[t]he need for relief from this Court is therefore urgent”.<sup>41</sup> There is no basis for that statement.

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<sup>39</sup> *Trade Capital Finance Corp v Cook*, 2016 ONSC 3511/2016 ONSC 3511 at para. [11](#).

<sup>40</sup> 6<sup>th</sup> Report of the Monitor, para. 74, Tab 5 of Moving Party MR, p. 85.

<sup>41</sup> 6<sup>th</sup> Report of the Monitor, para. 40, Tab 5 of Moving Party MR, p. 22.

39. Following receipt of the motion record, the Respondents immediately wrote to KPMG and provided the APS and Amendment to the APS in an effort to resolve the need for an urgent motion.

The Respondents stated in part as follows:<sup>42</sup>

From our preliminary review of the motion materials, the Monitor has scheduled the hearing of the motion on an urgent basis because the Monitor believes that the purchase and sale transaction of the property located at 118 Main Street in the City of Hamilton (the “**Property**”) is scheduled to close imminently and that the proceeds from the sale of the Property may be at risk of dissipation.

We disagree that there is any actual urgency requiring a hearing of the merits tomorrow. As your materials have identified, the Property was listed publicly and readily searchable on at least one mainstream Canadian real estate marketplace about three months ago on August 14, 2023. Our clients have advised that the purchase and sale transaction is scheduled to close on November 30, 2023 (the “**Closing Date**”). Enclosed to this letter are copies of an Agreement of Purchase and Sale (“**APS**”) and an Amendment to the APS reflecting the Closing Date.

While our clients strongly disagree with the concerns raised in the motion materials, **they are nevertheless prepared to agree that the net proceeds of the sale be paid to Lenczner Slaght, In Trust, pending the resolution of any issues relating to the Mareva injunction. In exchange, the motion scheduled for tomorrow is to be adjourned to permit the responding parties to fully investigate the alleged issues and prepare responding materials.** We do not yet have the full details on the quantum of the net proceeds but the parcel contained in your materials show that there remains a significant charge in favour of the Bank of Nova Scotia. (emphasis added)

40. Given that the Respondents have agreed to direct the net proceeds of the sale to be held in trust by Lenczner Slaght until resolution of the issues on the *Mareva* injunction, there can be no risk of dissipation and in turn, no risk of irreparable harm. KPMG’s initial concern respecting urgency has been addressed through the promptness and continued cooperation of the Respondents.

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<sup>42</sup> Kinley Affidavit, Exhibit “NN” (November 9, 2023 from Lenczner Slaght LLP), Respondents’ MR, Tab 1.

41. Beyond the concern with the sale transaction, which has now been addressed, KPMG generally impugns various categories of “suspected” improper transactions from the Yacht to home building renovations.<sup>43</sup> There is no urgency requiring an injunction with effectively no notice arising from any of these suspected transactions. KPMG has not provided much insight into its suspicions and produced little if any documentation to enable the Respondents to properly understand the concerns.

42. It would appear that whatever concerns KPMG says it has, they failed to or chose not to act on them at an earlier time. That is telling. It reveals the minimal, if any, concern arising from these transactions and KPMG has not pointed to any material change in circumstances that would now raise any red flags justifying a *Mareva* injunction.

43. Importantly, as far as the Respondents can tell, KPMG has been in possession of the documents that it attaches to the Sixth Report of the Monitor for a lengthy period of time. Except for perhaps the sale transaction, KPMG is not acting on new information. It has instead delayed, only now choosing to move on an urgent basis for a *Mareva* injunction. The Respondents do not have insight into this decision. Coincidentally, however, OTE USA very recently delivered a draft CCAA Plan Term Sheet to the Monitor.<sup>44</sup>

44. Equally important, KPMG in many instances is commenting on transactions relying on documents that were *produced by* Mr. Page or 265 months ago. For example, the Monitor reproduces documents that were provided to the Monitor by Mr. Page and 265 related to the Yacht (see Appendix “A” and “B” of the Six Report). In most of the remaining appendices (see Appendix

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<sup>43</sup> Factum of the Monitor, paras. 23, 29.

<sup>44</sup> Kinley Affidavit, para. 40, Respondents’ MR, Tab 1.

“D”, “E”, “F”, “G”, “H”, “I”, “J”, “K”, “L”, “M”, and “N”), the Monitor appears to be drawing from emails originating from Glenn Page’s Original Traders Energy e-mail account that Glenn Page, through counsel, provided directly to the Monitor back in July 2023 in compliance with his obligations. Since before that time and after, Mr. Page has continued to cooperate with and participate in the CCAA Proceeding.

45. Mr. Page’s assistance does not end with the provision of documents to the Monitor. Mr. Page assisted the Monitor with the Yacht Sale Process, including proposing the boat broker that was ultimately selected.<sup>45</sup> While the Monitor canvassed boat brokers itself to sell the Yacht, the Monitor chose to proceed with the boat broker (Marine Max) recommended by Mr. Page in light of the value offered by Marine Max.<sup>46</sup> As set out in the Yacht Sale Process Order, the proceeds of the sale of the yacht will be held in trust with the Monitor until there is a judicial determination over those funds.<sup>47</sup>

46. Subsequently, Mr. Page raised a number of concerns and issues with the sales process initially proposed by the Monitor. These were set out in the Aide Memoire of Mr. Page and 265.<sup>48</sup> Those issues and concerns ultimately resulted in the expanded powers of the Monitor and the advancement of the sales process.

47. Considering the totality of the circumstances described above, Mr. Page and 265 should not be denied the opportunity to properly respond to KPMG’s motion for an extraordinary remedy

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<sup>45</sup> Kinley Affidavit, paras. 17-18, Respondents’ MR, Tab 1.

<sup>46</sup> Kinley Affidavit, paras. 17-18, Respondents’ MR, Tab 1.

<sup>47</sup> Kinley Affidavit, Exhibit “M” (Yacht Sale Process Order), Respondents’ MR, Tab 1.

<sup>48</sup> Kinley Affidavit, Exhibit “T” (Aide Memoire of Glenn Page and 265), Respondents’ MR, Tab 1.

brought with no notice. Further, in these circumstances, KPMG should not be rewarded with any interim relief.

**(ii) *A Mareva Injunction is Not Appropriate or Necessary in the Circumstances***

48. In any event, if this Court does not grant an adjournment, KPMG has not met the test for a Mareva injunction on this record.

49. The objective of a *Mareva* injunction is well established. A *Mareva* injunction is available to freeze assets where there is a risk of harm through either dissipation or removal of assets to avoid judgment.<sup>49</sup> A *Mareva* injunction is an extraordinary remedy and should only be imposed in the clearest of cases.<sup>50</sup>

50. The test for granting a *Mareva* injunction is to be applied flexibly. Each case is to be decided on its own factual matrix and the relevant factors to be considered may differ from one case to another.<sup>51</sup>

51. The Applicants bear the onus of proving each aspect of the test, even in cases where they are the responding party on a motion to set aside an existing *Mareva* injunction.<sup>52</sup>

52. To obtain a *Mareva* injunction, the Applicant must:

- (a) establish a strong *prima facie* case on the merits;
- (b) provide particulars of the claim, the grounds of the claim, and the amount thereof, and fairly stating the points that could be made by the defendant;
- (c) provide grounds for believing that the defendant has assets in the jurisdiction;

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<sup>49</sup> [Promo-Ad v Keller](#), 2013 ONSC 1633 at [para 51](#).

<sup>50</sup> [Shaw Communications Inc. v. Young](#), 2021 ONSC 7918 at [para 9](#).

<sup>51</sup> [Shakeri-Saleh v Estate of Ahmadi-Niri](#), 2022 BCSC 700 at [para 13](#).

<sup>52</sup> [Trade Capital Finance Corp. v. Cook](#), 2015 ONSC 3745 at [para 55](#).



- (d) give grounds for believing that there is a real risk of the asset being removed out of the jurisdiction or disposed of within the jurisdiction or otherwise dealt with so that the plaintiff will be unable to satisfy a judgment awarded to him or her;
- (e) establish irreparable harm if the relief is not granted;
- (f) show in all circumstances that the balance of convenience favours the granting of the injunction pending trial of the issues between the parties; and
- (g) provide an undertaking as to damages.<sup>53</sup>

53. Regardless of whether the above factors have been met, as a *Mareva* injunction is an equitable and discretionary remedy, the Court may refuse to grant an order if it has concerns about the case.<sup>54</sup>

**(iii) No Strong Prima Facie Case**

54. The Commercial List has recently interpreted a “strong *prima facie* case” to mean that the Applicants are “clearly right, or even that they are almost certain to win.”<sup>55</sup> On this record, the Monitor has not put forward sufficient evidence to reach or even come close to reaching that high standard. Simply put, KPMG is not “clearly right” that fraud was committed.

55. KPMG was appointed the Monitor on January 30, 2023 with expansive investigatory powers. Since that time, it has taken significant steps to effect that investigation including sending out over 38 information request letters for a broad array of information. Despite that effort and work, KPMG has brought this injunction motion without any concrete evidence of the alleged fraud.

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<sup>53</sup> [Neville v. Sovereign Management Group Corp.](#), 2022 ONSC 3466 at [para 30](#).

<sup>54</sup> [Allen v. Gerstel](#), 2023 ONSC 107 at [para. 4](#).

<sup>55</sup> [10390160 Canada Ltd. v. Casey](#), 2022 ONSC 628 at [para 3](#); see also *R. v. Canadian Broadcasting Corp.*, 2018 SCC 5 at [para. 17](#).

56. Rather, KPMG itself describes the impugned transactions as “*Suspected* fraudulent, improper, or *suspicious* payments or transfers”.<sup>56</sup> KPMG should be lauded for being careful with its language and the limits of its information to date. A suspected fraud does not rise to the high threshold of a strong *prima facie* case.

**(iv) No Full and Frank Disclosure**

57. In applying for a Mareva injunction, the plaintiff must make full and frank disclosure of all materials within its knowledge.<sup>57</sup> It must also fairly state the points that could be made by the defendant.<sup>58</sup> This should be especially true in the case of a Court appointed officer.

58. The Monitor’s record does not describe the production of documents from Mr. Page nor does it “fairly state” that Mr. Page has consented to the sale of the Yacht or the freezing of the AirSprint assets.

59. Neither does the Monitor “fairly state” that the Monitors enhanced powers arose after Mr. Page proposed a CRO, following which he negotiated a consent order for enhanced powers for the Monitor. Instead the Monitors factum reads “as the business operations of the OTE Group became unsustainable...the Court ordered a bid process....and also provided the Monitor with enhanced powers.”<sup>59</sup>

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<sup>56</sup> 6<sup>th</sup> Report of the Monitor, Tab 5 of Moving Party MR, p. 80.

<sup>57</sup> *Shaw Communications Inc. v. Young et al.*, 2021 ONSC 7918 (CanLII), at para 10

<sup>58</sup> *Neville v. Sovereign Management Group Corp.*, 2022 ONSC 3466 at [para 30](#).

<sup>59</sup> Monitor’s factum, para. 13

60. It is a material fact that Mr. Page has been engaging cooperatively with the Monitor through counsel. The Monitor has failed to state so in the record before this Court. As a result, it has failed to make full and frank disclosure.

61. The 6<sup>th</sup> Report of the Monitor refers to many documents the Monitor relies upon to base its suspicions. Although a Monitor's report may be sufficient evidence, to be the basis for a Mareva injunction, the requirement to make full and frank disclosure still requires that those documents be appended to the report. Although some documents are appended to the report, there is not supporting documentation for every allegation made against Mr. Page. For example, there are no documents whatever produced with respect to the "BodyHoliday Spa." Again, this is a failure of full and frank disclosure.

*(v) No Risk of Dissipation*

62. As described above, KPMG appears to have only raised urgency and a risk of dissipation with respect to the future proceeds from the sale of the Property. That concern should no longer exist as the Respondents have agreed to direct those proceeds to Lenczner Slaght in trust until the issues surrounding the *Mareva* injunction are resolved. While the future proceeds are secured under this arrangement, it is nevertheless important to highlight that the sale of the Property was not undertaken in any clandestine fashion. The Property was marketed publicly with the assistance of a reputable real estate brokerage, Re/Max.

63. To suggest that there is a risk of dissipation with respect to any other assets is not supportable on this record. If there was an actual concern that funds were being dissipated by Mr. Page and/or 265, KPMG would have moved well before this injunction. Respectfully, what this

demonstrates is that the trigger for this injunction was the concern over the proceeds from the Property and not any other assets.

64. The Sixth Report of the Monitor tries to establish risk of dissipation through a vague reference to alleged past conduct of Mr. Page and 265 as well as “their likely knowledge that the Monitor conducting further investigation and seeking information and protective orders”.<sup>60</sup>

65. From the start of the CCAA Proceedings, Mr. Page was well aware of the Monitor’s investigatory powers and their mission to seek as much information as possible. As detailed above, Mr. Page assisted and cooperated with the Monitor. To now suggest that Mr. Page has for some reason developed dishonest intentions to dissipate or move funds because the Monitor is still conducting investigations is reaching and not consistent with his historical cooperative conduct.

**(vi) No Irreparable Harm**

66. KPMG has not demonstrated that it will suffer irreparable harm. Irreparable harm is harm which either cannot be quantified in monetary terms, or which cannot be cured, usually because one party cannot collect damages from the other. The probability of irreparable harm increases as the probability of recovering damages decreases.<sup>61</sup>

67. As noted, the Property will be sold and the proceeds will be held by Lenczner Slaght in trust. Inability to collect is not a concern anymore.

68. Regarding the other assets, KPMG has not shown that there is a meaningful risk of dissipation. Without a risk of dissipation, there is no irreparable harm.

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<sup>60</sup> 6<sup>th</sup> Report of the Monitor, Tab 5 of Moving Party MR, p. 89.

<sup>61</sup> [PPI Management Inc. v. Zhou](#), 2023 ONSC 3603 [at para 88](#).

**(vii) Balance of Convenience Does Not Favour an Injunction**

69. A *Mareva* injunction is a drastic remedy. Where there is an alternative measure available to protect the interests of stakeholders, a *Mareva* injunction is not necessary. In *Access Human Resources v. Earl*, an existing *Mareva* order was set aside particularly because the Applicant had filed a Certificate of Pending Litigation, which already protected the subject asset.<sup>62</sup> Here, the Respondents have already agreed to direct the Property proceeds to Lenczner Slaght in trust. Those funds are at no risk of the funds being dissipated. Beyond those assets, KPMG has not substantiated that there is any risk of the other assets being dissipated.

70. The Respondents will be severely prejudiced if a *Mareva* injunction is imposed on their assets. As submitted above, KPMG has not shown a strong *prima facie* case. This high threshold exists given the seriousness of a *Mareva* injunction. The high threshold is not lessened even where the request is for an interim injunction for a few weeks to permit the filing of responding material and to conduct cross-examinations. KPMG must satisfy each element of the legal test.

71. In its request for an adjournment, the Respondent has outlined the cooperation and assistance that Mr. Page has provided throughout the CCAA Proceeding. His conduct simply does not exemplify behaviour that is typically seen in cases where a *Mareva* injunction is justified.

**(viii) Undertaking as to Damages**

72. Although an undertaking as to damages may not be required in the context of a Monitor or Receiver seeking a *Mareva* injunction, the failure to deliver an undertaking as to damages must be considered in the context of the balance of convenience.

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<sup>62</sup> [Access Human Resources v. Earl](#), 2018 BCSC 2347 at [para 38](#).

73. Here, the balance of convenience does not favour the granting of a Mareva Order.

74. The Monitor already has the following assets frozen or agreed to be frozen:

- (a) AirSprint Property;
- (b) Yacht Sale Proceeds;
- (c) 118 Main Street sale proceeds.

75. A *Mareva* injunction is an extraordinary remedy. There is a presumption of inconvenience to any person who is subject to a Mareva injunction. In most cases, an undertaking as to damages is strictly required precisely because it can have a devastating impact.

76. Here, Mr. Page has agreed to the freezing of certain assets, but nevertheless the Monitor proposes to put Mr. Page at risk of significant damage without the benefit of an undertaking as to damages. It is patently unfair and does not meet the balance of convenience test.

#### **PART IV - ORDER REQUESTED**

77. The Respondents request an adjournment of the Monitor's *Mareva* injunction to a date to be set in accordance with a fixed timetable. In the alternative, the Monitor's request for a *Mareva* injunction should be dismissed.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED** this 10<sup>th</sup> day of November, 2023.



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**LENCZNER SLAGHT LLP**

## SCHEDULE “A” - LIST OF AUTHORITIES

1. [10390160 Canada Ltd. v. Casey](#), 2022 ONSC 628
2. [Access Human Resources v. Earl](#), 2018 BCSC 2347
3. [Allen v. Gerstel](#), 2023 ONSC 107
4. [Mfc v Mady Collier](#), 2015 ONSC 2111
5. [Neville v. Sovereign Management Group Corp.](#), 2022 ONSC 3466
6. [Pavao v. Ferreira](#), 2018 ONSC 1573
7. [PPI Management Inc. v. Zhou](#), 2023 ONSC 3603
8. [Promo-Ad v Keller](#), 2013 ONSC 1633
9. [R. v. Canadian Broadcasting Corp.](#), 2018 SCC 5
10. [Shakeri-Saleh v Estate of Ahmadi-Niri](#), 2022 BCSC 700
11. [Shaw Communications Inc. v. Young](#), 2021 ONSC 7918
12. [Trade Capital Finance Corp. v. Cook](#), 2015 ONSC 3745
13. [Trade Capital Finance Corp v Cook](#), 2016 ONSC 3511

## **SCHEDULE “B” - TEXT OF STATUTES, REGULATIONS & BY-LAWS**

### **R.R.O. 1990, Reg. 194: RULES OF CIVIL PROCEDURE**

#### **Evidence by Affidavit**

##### **Generally**

39.01 (1) Evidence on a motion or application may be given by affidavit unless a statute or these rules provide otherwise.

##### **Contents — Motions**

(4) An affidavit for use on a motion may contain statements of the deponent’s information and belief, if the source of the information and the fact of the belief are specified in the affidavit.

##### **Full and Fair Disclosure on Motion or Application Without Notice**

(6) Where a motion or application is made without notice, the moving party or applicant shall make full and fair disclosure of all material facts, and failure to do so is in itself sufficient ground for setting aside any order obtained on the motion or application.

#### **Interlocutory Injunction or Mandatory Order**

##### **How Obtained**

40.01 An interlocutory injunction or mandatory order under section 101 or 102 of the Courts of Justice Act may be obtained on motion to a judge by a party to a pending or intended proceeding.

#### **Costs of Proceedings**

##### **General Principles**

##### **Factors in Discretion**

57.01 (1) In exercising its discretion under section 131 of the Courts of Justice Act to award costs, the court may consider, in addition to the result in the proceeding and any offer to settle or to contribute made in writing,

(0.a) the principle of indemnity, including, where applicable, the experience of the lawyer for the party entitled to the costs as well as the rates charged and the hours spent by that lawyer;

(0.b) the amount of costs that an unsuccessful party could reasonably expect to pay in relation to the step in the proceeding for which costs are being fixed;

(a) the amount claimed and the amount recovered in the proceeding;

(b) the apportionment of liability;

(c) the complexity of the proceeding;

(d) the importance of the issues;

(e) the conduct of any party that tended to shorten or to lengthen unnecessarily the duration of the proceeding;

(f) whether any step in the proceeding was,

(i) improper, vexatious or unnecessary, or



- (ii) taken through negligence, mistake or excessive caution;
- (g) a party's denial of or refusal to admit anything that should have been admitted;
- (h) whether it is appropriate to award any costs or more than one set of costs where a party,
  - (i) commenced separate proceedings for claims that should have been made in one proceeding, or
  - (ii) in defending a proceeding separated unnecessarily from another party in the same interest or defended by a different lawyer;
- (h.1) whether a party unreasonably objected to proceeding by telephone conference or video conference under rule 1.08; and
- (i) any other matter relevant to the question of costs.

### **Costs Against Successful Party**

(2) The fact that a party is successful in a proceeding or a step in a proceeding does not prevent the court from awarding costs against the party in a proper case.

### **COURTS OF JUSTICE ACT, R.S.O. 1990, C. C.43**

#### **Interlocutory Orders**

#### **Injunctions and receivers**

101 (1) In the Superior Court of Justice, an interlocutory injunction or mandatory order may be granted or a receiver or receiver and manager may be appointed by an interlocutory order, where it appears to a judge of the court to be just or convenient to do so.

#### **Terms**

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

ORIGINAL TRADERS ENERGY LTD. et al.  
Applicants

GLENN PAGE et al.  
Respondents

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

**ONTARIO  
SUPERIOR COURT OF JUSTICE  
COMMERCIAL LIST**

PROCEEDING COMMENCED AT TORONTO

**FACTUM OF THE RESPONDENTS,  
GLENN PAGE AND 2658658 ONTARIO INC.  
(MOTION FOR MAREVA INJUNCTION - RETURNABLE  
NOVEMBER 10, 2023)**

**LENCZNER SLAGHT LLP**  
130 Adelaide Street West  
Suite 2600  
Toronto, ON M5H 3P5

Monique J. Jilesen (43092W)

Tel: (416) 865-2926

Email: [mjilesen@litigate.com](mailto:mjilesen@litigate.com)

Jonathan Chen (63973A)

Tel: (416) 865-3553

Email: [jchen@litigate.com](mailto:jchen@litigate.com)

Bonnie Greenaway (77318M)

Tel: (416) 865-6763

Email: [bgreenaway@litigate.com](mailto:bgreenaway@litigate.com)

Keely Kinley (84224G)

Tel: (416) 238-7442

Email: [kinley@litigate.com](mailto:kinley@litigate.com)

Lawyers for the Respondents, Glenn Page and 2658658  
Ontario Inc.