

CITATION: Original Traders Energy Ltd., (Re) 2024 ONSC 325
COURT FILE NO.: CV-23-00693758-00CL
DATE: 20240116

SUPERIOR COURT OF JUSTICE – ONTARIO (COMMERCIAL LIST)

**RE: 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.**

BEFORE: KIMMEL J.

COUNSEL: *Martin Henderson*, for the Applicants, Original Traders Energy Ltd. and 2496750
Ontario Inc.

Richard Swan, Raj Sahni and Shaan Tolani, for the Monitor, KPMG

Monique Jilesen, Bonnie Greenaway and Jonathan Chen, for Glenn Page and
2658658 Ontario Inc.

Jessica Orkin and Natai Shelsen, for Mandy Cox

Massimo Starnino, for OTE USA LLC

Edward Park, for The Attorney General of Canada on behalf of His Majesty the
King in Right of Canada as represented by the Canada Revenue Agency (the
“CRA”)

Laura Brazil and Steven Groeneveld, for His Majesty the King in Right of Ontario
as Represented by the Ministry of Finance (“Ontario Minister of Finance”)

HEARD: December 21, 2023

ENDORSEMENT
(MONITOR’S MOTION FOR MAREVA INJUNCTION)

This Motion

[1] KPMG Inc., in its capacity as the court-appointed monitor (the “Monitor”) of the Applicants, Original Traders Energy LP (“OTE”), and OTE Logistics LP (collectively, the “OTE Group”), seeks an interim or interlocutory Mareva Injunction Order against Glenn Page (“Page”), 2658658 Ontario Inc. (“265”) and Mandy Cox (“Cox”). These responding parties (sometimes referred to as the “Mareva Respondents”) oppose the requested order. The Mareva injunction is sought in the context of a proceeding under *Companies’ Creditors Arrangement Act*, RSC 1985, c. C.36. (“CCAA”). The request for a Mareva injunction is supported by the Applicants.

[2] The two most significant creditors of the applicants are the CRA and the Ontario Minister of Finance. These tax authorities have issued significant Notices of Assessment for taxes claimed to be owing, estimated to be in excess of \$310 million (about \$20,630,068 in 2019, \$47,615,974 in 2020, \$107,497,231 in 2021, and \$134,103,437 in 2022). While they are neither moving nor responding parties on this motion, they are significant economic stakeholders that appeared on this motion with instructions to advise the court that they appreciate the preservation measures that the Monitor is taking.

[3] OTE USA LLC (“OTE USA”) is controlled by Page and his brother Brian. Counsel for OTE USA appeared and advised the court of certain steps it is taking in the CCAA proceedings in parallel with the Monitor’s efforts, including a motion that has since been scheduled to be heard on March 22, 2024 by which OTE USA will seek leave to present a proposed Plan of Arrangement to the other stakeholders of the applicants.

[4] The Monitor presented this motion as a logical extension of an earlier Mareva order that was granted by Osborne J. on March 21, 2023 at the request of the applicants (supported by the Monitor at that time), based on a finding of a strong *prima facie* case that the respondents had misappropriated funds from the OTE Group to purchase a yacht and fraudulently prepared and executed documents to do so (the “Yacht Mareva Order”). This order restrained Page, his spouse Cox, and their jointly owned and/or controlled company 265, and those acting on their behalf or in conjunction with them, from directly or indirectly selling, transferring, encumbering or dealing with a 70 foot yacht bearing the name “Cuz We Can” or “Home South” (the “Yacht”).

[5] The broader Mareva Injunction Order now requested is based on:

- a. further confirmation of concerns previously identified by the Monitor about the alleged fraudulent activities of the Mareva Respondents and their dealings with the assets of the applicants (such as payments made for personal expenditures claimed to have been Page’s share of equity distributions, which were made without formal approvals and were accounted for as expenses at times when OTE may have had significant outstanding tax remittances, and the falsification of accounting and financial records);
- b. more recently discovered concerns, such as: (i) transfers of the Yacht to two different offshore companies owned by Page five months prior to the Yacht Mareva Order that were not disclosed by them at the time of that order; and (ii) admissions regarding the ownership of the fractional interests in AirSprint jets, originally claimed to be owned by 265 and now acknowledged to belong to the OTE Group);
- c. recent dealings with their own assets, such as the sale of their primary residence in Ontario (the “Ontario Home”) coupled with their acknowledged ties to St. Lucia, where they have a residence, businesses and bank accounts; and
- d. the Monitor’s further expanded obligations and powers that were granted pursuant to a consent order of the court made on October 12, 2023 (the “October 2023 Order”).

[6] The broader Mareva Injunction Order is primarily objected to by both of the Mareva Respondents because they say that the Monitor's delay and alleged lack of any new evidence since the Yacht Mareva Order was granted should lead the court to conclude that there is not any real risk of dissipation or removal of assets, particularly in light of their willingness to allow more than \$13 million in estimated or known net sale proceeds of: their home (the "House Sale Proceeds"), the yacht (the "Yacht Sale Proceeds") and certain fractional interests in private jets ("AirSprint Proceeds") to be frozen pending further court order (the "Frozen Assets"). Without a finding of such risk, the granting of a further Mareva Injunction Order is not warranted. Cox has raised some other grounds for opposing the broader Mareva Injunction Order against her.

[7] Pursuant to a consent order dated July 17, 2023 (the "Frozen Funds Order"): (i) the Yacht remains under the Monitor's control and is undergoing a sales process which is expected to recover up to USD\$3.2 million (CAD\$4,281,200 when converted as of December 15, 2023); and (ii) Page agreed that USD\$5,482,779.85 (and any interest accrued, which totalled CAD\$7,331,079.78 when converted as of December 15, 2023) was to be remitted to the Monitor pending judicial determination of entitlement to the AirSprint Proceeds. In the course of this motion, it was acknowledged that AirSprint fractional interests purchased in the name of 265 (using an estimated CAD\$9 million transferred from OTE) that 265 had been asserting it owned are, in fact, owned by (and held in trust for) OTE.

[8] The Monitor served this motion on November 8, 2023 after it learned about an impending closing of the Ontario Home of Page and Cox (later confirmed to be scheduled for November 30, 2023). The next day, on November 9, 2023, Page and Cox offered to place proceeds of sale of their Ontario Home into the trust account of Page's counsel. Initially, the Monitor rejected this proposal although it was later agreed to as a term of the first adjournment of this motion. The sum of \$1,874,058.28 (representing the net proceeds of the sale on closing) was paid into Page's lawyer's trust account on November 30, 2023 pursuant to the court's November 10, 2023 endorsement.

Summary of Outcome

[9] For the reasons that follow, the requested Mareva Injunction Order is granted against Page and 265. A limited order for delivery of a statement of worldwide assets is granted as against Cox at this time.

Factual and Procedural Background

[10] OTE functions as a wholesale fuel supplier which services mainly First Nations' petroleum stations and First Nation communities across Ontario. OTE has serviced or currently services many gas stations throughout Southern Ontario. OTE LP is in the business of blending and selling gasoline to independent gas stations on First Nation reserves. OTE LP has three blending sites, all located on First Nation reserve lands.

[11] OTE has a partnership structure, in which the Mareva Respondents hold a direct or indirect 33% interest. In particular, 265 (a company in which Page and Cox are the only shareholders) is one of three limited partners of OTE LP. OTE is the general partner of OTE LP. The other two limited partners are Scott and Miles Hill, who are described as status Indians.

[12] 2584861 Ontario Inc. (“CCD”) was one of the original partners of OTE. Its principals, Nick Capretta, Brian de Nobriga and Lou Cerutti, were active in the OTE Group’s business. They also ran Claybar Contracting Inc., a supplier to the business. CCD’s units in OTE LP were reassigned in 2019 but, according to Page, CCD and certain of its principals continued to be involved with OTE.

[13] Page was the one who determined the timing and quantum of distributions to the limited partners. It was also Page’s responsibility to ensure OTE met its tax remittance obligations for the Ontario and Federal governments, including those involving taxes payable under the *Gasoline Tax Act*, *Fuel Tax Act*, and *Excise Tax Act*. Page was the President of OTE (the general partner) and the senior executive in charge of operating the business of OTE LP.

[14] In late 2021, OTE LP’s financial situation became precarious. The relationship between Miles and Page began to deteriorate. Page left the OTE Group in July 2022. In October 2022, the OTE Group and Miles and Scott Hill initiated an action against Page, 265, Cox and others in which various allegations of unjust enrichment, fraud, breach of fiduciary duty and other causes of action were asserted. By this time, KPMG had been engaged by the OTE Group to provide advisory services.

[15] The applicants sought protection under the CCAA and an initial order was made on January 30, 2023 (the “Initial Order”) that was amended and restated on February 9, 2023 (the “ARIO”) as a result of the serious financial difficulties the OTE Group was facing by that time.

[16] Shortly afterwards, concerns came to light about the source of funds used to purchase the Yacht and the applicants sought and obtained the Yacht Mareva Order. Following the hearing of a contested motion, Osborne J. made certain findings at that time that are repeated here for ease of reference:

[3] ...I appointed KPMG as Monitor [by the Initial Order], with certain investigatory powers in the circumstances, given that the Applicants were unable to locate all books and records, said to be as a result of alleged misconduct of certain former executives, including Mr. Glenn Page...

...

[16] The Respondents control the Yacht, and the evidence on this motion was to the effect that it was up for sale with multiple Boat Brokers (with active listings at the time of the hearing of the motion).

[17] Moreover, the evidence of the OTE Group is that the Respondents have caused a deregistration of the Yacht from Canada, changed its name and taken other steps all in an attempt to remove the asset from the control or reach of the OTE Group, have forged certain documents to fund the purchase of the Yacht, and are otherwise acting in an attempt to frustrate the efforts of the OTE Group and the Monitor to investigate the use of OTE Group funds, the purchase of the Yacht and the whereabouts of the Yacht.

...

[33] The evidence is to the effect that the Respondents transferred funds or permitted and authorized the transfer of funds from OTE accounts, inappropriately and without the right to do so, and used those funds to purchase the Yacht, in part through the alleged misuse of the signing authority of Page at OTE Logistics. The OTE Group received no benefit or consideration for these fund transfers. It appears the Respondents further fraudulently executed and forged signatures on documents to Essex, the party that provided financing for the Yacht.

[34] The Respondents filed no evidence on this motion, perhaps not surprisingly given that they had received only two days-notice. In submissions, counsel for the Respondents submitted not that the transfers of funds did not occur, but rather that they were not improper, or at least they did not constitute *prima facie* evidence of fraud, since they could be said to be distributions of profits to which the Respondents were entitled.

[35] I cannot accept the submission, however, in the complete absence of any evidence to corroborate the suggestion. The books and records of the OTE Group are incomplete and lacking. There is no evidence before me of resolutions, meeting minutes, correspondence or any documents demonstrating or even suggesting that these transfers were in fact, or were even intended to be, distributions of profit or income. There is also no evidence of any corresponding distributions, at the same time or in the same amount, to the other partners who presumably would have been entitled to the same distribution.

[36] Finally, there is no evidence that the partnership had, at the time of the impugned transfers, sufficient profits to fund such distributions in any event.

[37] Even if the Respondents were entitled to distributions of profit at the relevant time, it does not follow that they are somehow entitled to simply take funds and apply them for their own uses.

[38] In short, I am satisfied that the moving parties have established, with sufficient particulars, a strong *prima facie* case.

...

[45] In my view, and as submitted by the OTE Group, the objective facts support my conclusion that there is a serious risk that the asset will be removed from the jurisdiction (in the sense of the jurisdiction and reach of this Court) and/or will be dissipated.

[46] The Yacht was, and apparently still is, listed for sale although it has been listed for sale in at least two locations (Palm Beach, Florida and Bimini, Bahamas). It has been delisted from Canadian registries. It has been renamed, and listed on the websites of the Boat Brokers as being for sale in Hollywood, Florida. Its GPS locator, whether intentionally disabled or simply malfunctioning, is not active, with the result that the exact location of the vessel cannot be determined.

[47] I am satisfied there is a risk of dissipation of assets. Different jurisdictions are, on the face of the evidence, involved. Proof of the risk of removal/dissipation may be inferred from the surrounding circumstances of the responding parties' misconduct. (See *Ontario Professional Fire Fighters Association v. Atkinson et al*, 2019 ONSC 3877 at para. 6-8, quoting with approval from *Sibley v. Ross*, 2011 ONSC 2951 at paras. 63, 64 and *Amphenol Canada Corp. v. Sunadrum*, 2019 ONSC 849).

...

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

The Test for a Mareva Injunction

[17] The test for granting a Mareva injunction in a case of alleged fraud and breach of fiduciary duty is the same on this motion as the test that was applied by Osborne J. when the Yacht Mareva Order was granted, as follows:

[20] The test for a Mareva injunction is well established. This Court has jurisdiction to grant an interlocutory injunction, including a Mareva injunction, pursuant to section 101 of the *Courts of Justice Act*, where it appears just or convenient to do so. Pursuant to Rule 40.01, an interlocutory injunction or mandatory order under section 101 may be obtained on motion to a judge. The order may include such terms as are just, and may be sought on motion made without notice for a period not exceeding 10 days.

[21] That said, the relief is extraordinary. As numerous courts have observed, the harshness of such relief, usually issued ex parte, is mitigated or justified in part by the requirement that the defendant have

an opportunity to move against the injunction immediately. The relief remains extraordinary even in circumstances such as are present here, where the relief was not sought *ex parte*, but rather on notice to the Respondents, albeit brief.

[22] The factors to be considered in determining whether to grant Mareva relief include whether the moving party has established the following:

- (a) a strong *prima facie* case;
- (b) particulars of its claim against the defendant, setting out the grounds of its claim and the amount thereof, and fairly stating the points that could be made against it by the defendant;
- (c) some grounds for believing that the defendant has assets in Ontario (although this requirement has been modified by more recent jurisprudence discussed below, such that it is perhaps better expressed as: some grounds for believing that the defendant has assets within the jurisdiction of the Ontario Court);
- (d) some grounds for believing that there is a serious risk of defendant's assets being removed from the jurisdiction or dissipated or disposed of before the judgment or award is satisfied;
- (e) proof of irreparable harm if the injunctive relief is not granted;
- (f) the balance of convenience favours the granting of the relief; and
- g) an undertaking as to damages.

(See *Aetna Financial Services Ltd. v Feigelman*, [1985] 1 S.C.R. 2 ("Aetna") at paras. 26, 30; *Chitel v. Rothbart*, 1982 CANLII 1956 (ONCA) at para. 60; and *Lakhani et al v. Gilla Enterprises Inc. et al*, 2019 ONSC 1727 at para. 31).

[23] A strong case that a defendant has committed fraud against the plaintiff can be important evidence in support of the relief sought. The "reluctance" of the common law toward allowing execution before judgment has recognized exceptions, including circumstances where the relief is necessary for the preservation of assets, the very subject matter in dispute, or where to allow the adversarial process to proceed unguided would see their destruction before the resolution of the dispute. (See *Aetna*, at para. 9).

[24] The test as to whether a strong *prima facie* case exists has been expressed by the courts as the question of whether the Plaintiff would succeed "if the court had to decide the matter on the merits on the basis

of the material before it" (See *Petro-Diamond Inc. v. Verdeo Inc.*, 2014 ONSC 2917 at para. 25).

[25] The following elements are required for the tort of civil fraud: a false representation by the defendant; some level of knowledge of the falsehood of the representation by the defendant (i.e., knowledge or recklessness); the false representation caused the plaintiff to act; and, the plaintiff's actions resulted in a loss: *Bruno Appliance and Furniture, Inc. v Hryniak*, 2014 SCC 8 at paras. 17-21.

[18] The Mareva Respondents are right to emphasize that a Mareva injunction is an extraordinary remedy and should only be imposed in the clearest of cases. See *Shaw Communications Inc. v. Young*, 2021 ONSC 7918, at para. 9. It is available to freeze assets where there is a serious risk of harm through either dissipation or removal of assets to avoid judgment. See *Promo-Ad v. Keller*, 2013 ONSC 1633, at para. 51.

[19] Ultimately, as a Mareva is an equitable and discretionary remedy, the court may refuse to grant an order if it has concerns about the case. See *Allen v. Gerstel*, 2023 ONSC 107, at para. 4.

Analysis

[20] In considering the factors relevant to the determination of whether the broader requested Mareva Injunction Order should be granted, the court has also taken into account the following differences in the circumstances now that did not exist when the Yacht Mareva Order was made:

- a. Further explanations have been provided by the Mareva Respondents in respect of the distributions that Page claims the OTE LP Partners were entitled to, said to provide an answer to the earlier findings of a strong *prima facie* case of fraud and breach of fiduciary duty;
- b. Many of the concerns that underly the allegations of fraud, breaches of duty, knowing receipt, unjust enrichment etc. were first asserted in October 2022 and repeated in March 2023; the delay in seeking a broader Mareva Injunction Order predicated on these facts in the absence of any new facts is alleged to be indicative of an absence of any legitimate apprehension of immediate risk of dissipation or removal of assets said to be relevant to the existence of irreparable harm;
- c. The Mareva Respondents have been ordered, or have agreed, to freeze proceeds from the sale of other assets (the Frozen Assets) said to be valued at approximately \$13 million, also said to be relevant to the existence of any irreparable harm; and
- d. The Mareva Injunction Order is not limited to a single asset alleged to be owned by the OTE Group (the Yacht), but is sought in respect of all assets of the Mareva Respondents, said to be relevant to the balance of convenience.

Is there a Strong Prima Facie Case?

[21] This needs to be analyzed for the Mareva Respondents separately.

The Case Against Page and 265 for Misrepresentation and Fraud

[22] The Monitor has further substantiated through the documents and records it has collected and reviewed to date, as well as through its cross-examinations of both Page and Cox on this motion, many of the concerns raised about the conduct of Page (and 265, the company through which he carried out various activities). These concerns are the subject of the 2022 civil action and were among the concerns cited at the time the Initial Order and Yacht Mareva Order were made. Page's answer to the concerns about amounts seemingly paid from OTE for Page and Cox's personal benefit remains unchanged from the Yacht Mareva Injunction: he says they were all legitimate distributions to him, despite the absence of corporate and accounting records to back this up.

[23] Page has, in the course of his response to this motion, attempted to reconcile and substantiate the seemingly disproportionate distributions that he received from OTE that were previously identified. He relies upon the informal processes (said to be reflected in emails) that he says were adopted in order to explain the lack of supporting corporate or financial records documenting the distributions and is critical of the Monitor for not making inquiries of third parties (for example, Scott and Miles Hill and/or principals of CCD) about the distributions they received and/or signed off on.

[24] The applicants had previously disclosed that each of Scott and Miles Hill and Page had received estimated profits of \$3 million from the OTE Group, based on the last available financial statement of OTE for the year ended December 31, 2020, dated June 11, 2021. According to Page and 265, while the available records are incomplete to determine the exact payment to each of Scott, Miles and Page, Page has reconstructed through emails and banking and other records that each of the three of the partners received roughly equal amounts of: approximately \$1 million in 2019, \$2 million in 2020, \$1.5 million in 2021 and \$100,000 in 2022. Page also points to a spreadsheet of income collected by CCD said to have been prepared by Nick Capretta, which indicates consistent amounts having been received by the limited partners between 2019 and 2022, with CCD also being noted to have received \$3.8 million from OTE LP.

[25] Page acknowledges that he was the one who determined the amounts and timing of the distributions but all partners were aware of the distributions and signed off on them, including some that were paid directly to other parties rather than to the partners themselves. He relies heavily on the alleged equivalency of the distributions to each of the partners and the historic informality of their accounting and approval processes.

[26] However, these practices could not be reconciled with the wire transfers from OTE's accounts between March of 2021 and June of 2022 of over \$10 million to AirSprint. These funds were used primarily to purchase fractional aircraft interests held in the name of 265. The Mareva Respondents affirmatively asserted through their counsel starting in the fall of 2022 and continuing into the fall of 2023 that the AirSprint fractional interests were not the property of the OTE Group and fell outside the scope of the Monitor's mandate. They continued to affirmatively reserve 265's purported rights in respect of the AirSprint Proceeds when the Frozen Funds Order was made (freezing the AirSprint Proceeds) in the summer of 2023. By way of example, in an October 20, 2022 letter, former counsel for Page and 265 asserted: "None of the travel credits or entitlements

held by AirSprint on GPMC's¹ account should be returned to or held to be used by OTE LP. They are rightfully the property of GPMC.”

[27] The import of these earlier assertions would have meant that Page had received distributions far in excess of the other partners. Even if the other partners knew and signed off on some of this because of the informal way they conducted the business and affairs of the OTE Group, it is unlikely that they would have agreed to Page receiving three times as much as them in distributions. When cross-examined on this motion and confronted with this inconsistency in the amounts of distributions, Page disavowed the previous positions taken by counsel and now says that the AirSprint fractional interests were always being held by 265 for OTE.

[28] The Mareva Respondents concede that the \$10 million paid by OTE for the purchase of the fractional airline interests in the name of 265 cannot be justified as legitimate partnership distributions to Page. This change in the position of the Mareva Respondents avoids the otherwise inescapable conclusion that Page received disproportionately higher distributions than to the other partners. While this may be a convenient way of rationalizing what happened, it is difficult to accept that these funds were not initially misappropriated by Page, having regard to the aggressive positions that the Mareva Respondents were taking in respect of the AirSprint fractional interests earlier that are now said to have been based on positions taken by their lawyers without their instructions or knowledge.

[29] The shift in positions is facilitated by the lack of any proper corporate books of accounts and records to substantiate either version of events. Page, by his own admission, was the one responsible for creating and keeping these records. The informality of the corporate record keeping and accounting has also been used to try to rationalize significant payments from OTE to pay for personal expenses of the Mareva Respondents (said to be on account of distributions) even though they were at the time improperly accounted for as corporate expenses. There are email records of instructions provided by Page to accounting personnel to record profit distributions as corporate expenses. It appears that, for reasons not explained, at least some of the distributions to the partners were intentionally mischaracterized in the OTE financial records.

[30] For example, in various emails sent by Page in 2019, he instructed that cheques be made payable to various contractors working on their Ontario Residence and be characterized as “Blending Repairs & Maintenance”, “Consulting Blending” and “Consulting” and provided similar instructions for how to account for distributions to the Hills and CCD as well (for example, as “professional fees”, “maintenance” or “consulting”). There is evidence of this practice continuing in later years and Page admitted on cross-examination that the payments to contractors working on their Ontario Residence that he says were his share of distributions continued to be characterized as company expenses on the OTE Group’s financial statements (the example provided being for the financial year ended December 31, 2020).

[31] While this mischaracterization of distributions as expenses appears to have been done in respect of distributions made to the other partners as well, these misleading accounting practices

¹ GPMC is how the parties sometimes refer to 265, using the initials of Page and Cox.

are particularly troubling when considered in the context of other misleading financial information that Page provided to the OTE Group's bank.

[32] When questioned on May 5, 2022 by RBC's wire investigations group about a payment from the OTE Group's corporate bank account to RJB Hotel supplies in St. Lucia, Page responded: "Yes it is correct and it is for a facility we are building." Page admits that this was a payment for new appliances for the house he and Cox own in St. Lucia. When cross-examined he stated that the "facility" they were building was a reference to the house that was already built and that they were renovating for their personal use. To suggest that appliances for a personal residence are legitimate and approved corporate expenses associated with a facility being built by the entity whose bank account was being questioned is blatantly misleading.

[33] Furthermore, it is beyond doubt that the OTE financial statements for the year ended December 31, 2021 are a complete fabrication. Page has now admitted (during his cross-examination on this motion) that the 2021 year-end financial statements that were provided by him to the OTE Group's bank were entirely falsified — that is, made up and placed on the accounting firm's letterhead without its knowledge or approval or involvement. Page claims that this was done without his knowledge by an unnamed accounting clerk. Page acknowledges that he was the one responsible for the financial books, records and accounting for the OTE Group and offers no possible reason for why an accounting clerk would falsify financial statements for the company. It is entirely implausible that Page was not involved in, or at least aware of, this fraud.

[34] This case is not solely about fraud on OTE's limited partners (those who Page says received proportionate distributions and condoned the informal and irregular accounting practices). The accounting fraud and irregularities, for which there is a very strong *prima facie* case, go beyond the equity stakeholders and must be viewed in its full context as a fraud on OTE creditors and other stakeholders.

[35] The Monitor further argues that, given the state of the accounting records, and Page's own admission that he did not do any type of solvency analysis prior to deciding to make the distributions, there was no basis upon which Page could have determined his (or the other partners') entitlement to any profit distributions from OTE in financial years 2021 or 2022. Nevertheless, Page caused millions of dollars to be distributed to himself (or his companies) and the other partners from OTE over that period. He did this while he was (admittedly) intentionally withholding tax remittances. For example, Page stated the following in a March 23, 2022 email:

CRA are still holding back payments However I am holding back equivalent Carbon Tax and Fed Excise Tax funds to force the departments to pressure each other.

...

I have the Ministry of Finance (Ontario) also pushing on the IRS as we owe them approximately \$9 million Cdn but they understand the dilemma.

The OTE Group is now facing claims from the tax authorities of in excess of \$300 million.

[36] The Monitor's sixth report filed in support of this motion contained some evidence involving historic records it received, reviewed and interpreted that the Monitor considers to be confirmatory of concerns previously identified. That report supplements the evidence that was before the court at the time of the Yacht Mareva Order, when the court found a strong *prima facie* case to have been demonstrated by the Monitor in respect of many of the same impugned transactions as are relied upon for this motion.

[37] Page's explanations about the impugned transactions identified by the Monitor are unsatisfactory (examples of which have shown them to be sometimes inconsistent with the records or other testimony and sometimes implausible) and his shifting positions reinforce the records relied upon by the Monitor as evidence of financial fraud and irregularities. Much of the evidence of the strong *prima facie* case of fraud and breach of fiduciary duty against Page (and 265, the corporate vehicle through which various fraudulent transactions were implemented) comes from Page himself: his actions, his emails and his sometimes shifting, sometimes conflicting and sometimes implausible explanations when confronted with them on cross-examination. Where there is strong evidence of fraud from a paper trail, as there is in this case, the Monitor is not obligated (as the Mareva Respondents appear to suggest) to conduct extensive witness interviews, including of the persons implicated in the fraud, before bringing a motion for a Mareva injunction.

[38] I am satisfied that the onus for establishing a strong *prima facie* case in respect of the claims for misrepresentation, fraud, breach of fiduciary duty and unjust enrichment against Page (and 265, where implicated as the beneficiary) has been met, in that the Monitor has satisfied me that it is "almost certain to win" on these claims based on the evidence presented, even though the full extent of the damages is not yet known. See *10390160 Canada Ltd. v. Casey*, 2022 ONSC 628, at para. 3; see also *R. v. Canadian Broadcasting Corp.*, 2018 SCC 5, [2018] 1 S.C.R. 196, at para. 17. See also *Petro-Diamond Inc. v. Verdeo Inc.*, 2014 ONSC 2917, 13 C.B.R. (6th) 211, at para. 25).

[39] Page argues, in the alternative, that the identified impugned transactions (said to have been legitimate distributions, but even if that is not established) only add up to a total of approximately \$16,500,000:

- a. AirSprint: \$9,032,298;
- b. Direct Cheques and Bank Wires: \$1,281,426;
- c. Pride Marine: \$4,227,335 (\$1.3 million of which the Mareva Respondents say was transferred into the OTE bank account by a financing company, Essex Financial, and never belonged to OTE, but has since been repaid by a company related to Page), so the amount in question for the Yacht may actually be approximately \$2.9 million;
- d. Alleged Personal Expenses: \$1,963,002; and
- e. Receiver General/CRA: \$79,000.

Thus, Page and 265 suggest that, even if there is a strong *prima facie* case of misrepresentation, fraud, breach of fiduciary duty and/or unjust enrichment in respect of them, the Mareva Injunction

Order should not cover all of their assets, but should only cover (or should be capped at) assets representing the value of the impugned transactions.

[40] Their position is that it is unfair to tie up all of their assets when the value of those assets is well beyond the values of the known claims against Page and 265. See *Massa v. Sualim*, 2013 ONSC 7926, at para. 23. There are a few problems with this. First, the total value of their assets is not known as they have not produced a statement of their worldwide assets.

[41] Second, the estimated value of the known claims does not account for the Notices of Assessment. CRA's notice of assessment was for taxes as at September 30, 2023 of \$170 million and the Ontario Minister of Finance's notice of assessment was for unremitted fuel and gas taxes of \$127 million. Page faces personal liability for some of these tax claims as an officer and director (and the directing mind) of OTE during most of the periods in which the taxes are claimed. If Page breached his fiduciary or other duties to the OTE Group in respect of tax remittances, any amounts for which he is found liable directly to the tax authorities, or to the OTE Group for the value of distributions he improperly received or authorized, would reduce OTE liability to the tax authorities.

[42] In response to this, Page argues that these are as of yet unproven unsecured claims against OTE and they remain under review and are not sufficient to form the basis for finding a strong *prima facie* case against Page personally. While these tax claims may still be unproven, Page admitted under cross examination that it was his responsibility to collect and remit any taxes owing. He also admitted that he did no solvency or tax analysis when he informally announced and implemented distributions to the partners, which further calls into question the legitimacy of all distributions, including even those that he claims were legitimately made pursuant to an informal and oral "approval" process among the three partners in the 2019 to 2022 timeframe.

[43] The failure to undertake a solvency analysis is a breach of the Ontario *Limited Partnerships Act*, R.S.O. 1990, c. L.16, which provides at section 11(2): No payment of a share of the profits or other compensation by way of income shall be made to a limited partner from the assets of the limited partnership or of a general partner if the payment would reduce the assets of the limited partnership to an amount insufficient to discharge the liabilities of the limited partnership to persons who are not general or limited partners.

[44] The third problem is that Page and 265 are essentially saying that they should only be held accountable for the misconduct associated with the transactions they have so far been confronted with, and that they should be left to do what they please with their remaining assets, at least until the Monitor discovers something else that can then be addressed. This is unacceptable in a situation such as this where there has been a demonstrated pattern of failing to keep proper books, records and accounts, financial mismanagement, disproportionate distributions and changing positions to retroactively reconcile them, after the fact re-characterizations of payments now said to be distributions but originally accounted for as expenses, falsification of financial statements, misleading information provided to the bank and significant tax claims.

[45] Having established a strong *prima facie* case against Page and 265 for fraud and breach of fiduciary duty (and unjust enrichment), it would not be in the interests of justice to limit the Mareva Injunction Order to the already frozen assets associated with the fraudulent transactions that have

been identified thus far. This is discussed again in the section dealing with the balance of convenience, which allows for the possibility of a cap being reintroduced at a later time.

[46] This situation is distinguishable from *Massa* relied upon by the Mareva Respondents. In that case, the court was not prepared to freeze assets beyond those sufficient to satisfy the plaintiff's compensatory damages claimed (and some additional amounts for costs and punitive damages) where there existed only the potential at that time for other future similar compensatory claims being brought in the future by other parties. See *Massa*, at paras. 9, 10 and 20.

[47] The concern in *Massa* was about issuing an "uncapped" Mareva injunction on a theoretical or punitive basis. Here the concern is not theoretical or punitive; the full scope of it and the extent of the damages that may have been caused by the breaches is just not yet known, largely due to Page's own breaches of duties with respect to corporate accounting and tax remittances. The full extent of the benefits that Page and his company 265 have received are known only to them right now because of their failure to maintain proper books, records and accounts and because of their fraudulent and misleading accounting practices and reporting.

[48] At least until the disclosure of worldwide assets and accounting contemplated by the Mareva Injunction Order have been provided, it is not in the interests of justice for there to be a cap that is limited to only what has been uncovered by the applicants and the Monitor to date. The Monitor of the OTE entities that are under CCAA protection has an obligation to preserve the assets of potential sources of recovery and the Mareva Injunction Order is in furtherance of that mandate.

The Case Against Cox for Fraud or Knowing Assistance

[49] This is the Monitor's motion. In support of it, the claims asserted against Cox are for 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 cause of action. See *Shaw Communications*, at para. 10; *Christian-Philip v. Rajalingam*, 2020 ONSC 1925, 58 C.P.C. (8th) 146, at paras. 8–9.

[50] Each of the asserted causes of action against Cox has a required element of knowledge — knowledge that the funds or benefits she received or benefitted from were not legitimate distributions to the partners of the OTE LP. It is in this respect that the elements of the claims against Cox are lacking.

[51] The Monitor must establish that Cox had actual knowledge or was reckless or willfully blind to the wrongful conduct to make out a case for knowing assistance. Mere suspicion is not enough. See *Caja Paraguava de Jubilaciones y Pensiones del Personal de Itaipu Binacional v. Garcia*, 2020 ONCA 412, at paras. 33 and 34, leave to appeal refused 2021 CanLII 13274 (SCC). This is a subjective standard of fault that depends on the stranger's actual state of mind, and cannot be based on "constructive knowledge". See *Garcia* at paras. 37 and 38.

[52] To satisfy the "knowledge" element of the test for knowing receipt, the Monitor must establish either that 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". See *Garcia*, at para. 57 and *Citadel General Assurance Co. v. Lloyds Bank*

Canada, [1997] 3 S.C.R. 805, at para. 49. To the contrary, Cox’s evidence is that she believed that the lifestyle that she shared with Page was entirely consistent with his (and their) income and wealth. Her situation is quite different from other cases in which one might reasonably inquire as to “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?” Constructive knowledge requires some basis for questioning the source of funds. See *Cambrian Excavators Ltd, et al v. Taferner and Taferner*, 2006 MBQB 64, 202 Man. R. (2d) 94, at para. 52 and *Vancouver Coastal Health Authority v. Mascipan*, 2019 BCCA 17, 20 B.C.L.R. (6th) 303, at paras. 30–35, 62–63.

[53] The knowledge requirement for knowing receipt is subject to the same parameters. 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.” See *DBDC Spadina Ltd v. Walton*, 2018 ONCA 60, 56 C.B.R. (6th) 173, 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.

[54] It is not sufficient to simply lump Cox in with Page because she was married to him. See *Bank of Montreal v. Garasymovich*, 2023 ONSC 3630, 8 C.B.R. (7th) 136, at para. 33; see also *Royal Bank of Canada v. Korman*, 2010 ONCA 63, 264 O.A.C. 355, at para. 25. The *Rules of Civil Procedure*, RRO 1990, Reg 194, require fraud to be pleaded with particularity: see r. 25.06(8). Nor is it sufficient to implicate her simply because she was a director and minority shareholder of 265, the company that Page controlled and sometimes carried out impugned transactions through, absent some demonstration of independent tortious conduct on her part. *ScotiaMcLeod Inc. v. Peoples Jewellers Ltd.* (1995), 26 O.R. (3d) 481 (C.A.), at p. 491.

[55] There is no evidence that Cox had actual knowledge of the activities that Page was engaged in that form the basis of the claims against him. Cox testified that she was generally aware that 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. She believed that the lifestyle that she shared with Mr. Page was entirely consistent with his (and their) income and wealth.

[56] Cox argues that her unchallenged and uncontradicted evidence 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. She says she 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. She says she signed certain documents and authorized certain wire transfers at the request of Page.

[57] Cox also says she was not involved with OTE’s bookkeeping or finances, apart from approving banking transactions when requested. Following her 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. The few financial transactions that she did participate in (by approving wire transfers she considered to be consistent with prior distributions to Page and signing documents that Page asked her to sign) are not enough to establish actual

knowledge of any fraud or breach of fiduciary duty by Page, nor is this enough to implicate her directly in any fraud. She says that she did not suspect, and had no reason to suspect.

[58] The Monitor alleges that Page wrongfully directed OTE funds towards his personal expenses, and that Cox benefitted personally from these wrongful expenditures by virtue of her relationship with Page. The Monitor has generally identified the following categories of payments that Cox may have benefitted from personally: (a) \$90,000 in “suspicious” transactions directed towards her personally or to her consulting company, Picassofish; (b) payments for the construction of her Ontario Residence and various home renovation-related expenses; (c) a payment to BodyHoliday for a lengthy vacation enjoyed by her and Page and friends and family members; (d) a payment for certain appliances for their St. Lucia home; (e) payments for expenses relating to her wedding in Italy; (f) payments toward the purchase of an RV; and (g) flights taken on the AirSprint airplanes.

[59] The specific transactions that Cox is alleged to have been directly involved in, such as payments to her directly (category (a)), are explained as salary or other compensation for services she was retained to provide to the OTE Group. The payments to Cox and Picassofish, a company under her control, totalling \$90,557.74, have been shown, through the OTE Group’s own records, to have been made for services rendered by Cox and Picassofish. The cheques issued by OTE LP to Picassofish up to and including April 2020 have no connection to Ms. Cox. The Monitor has not established a strong *prima facie* case that these funds received by Cox were not legitimate payments for services rendered.

[60] With respect to the categories (b) through (f), the evidence proffered by the Monitor indicates that Page arranged for certain personal expenses to be paid using OTE funds. Cox does not deny that she benefitted personally from the goods and services that were purchased with these funds. Page and 265 maintain that the funds used to pay these personal expenses were distribution amounts to which Page 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. The Monitor has not established a strong *prima facie* case of that Cox was involved in any of the now challenged practices or decision-making with respect to the distributions that Page and 265 received.

[61] Cox had some peripheral involvement in one of these personal expense transactions, involving the payment to the BodyHoliday Spa. She mistakenly sent a wire transfer of USD \$1 million to BodyHoliday in St. Lucia for a deposit for a company 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. The deposit was supposed to be for \$100,000. 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.

[62] Cox tried to correct this error when it was identified. BodyHoliday eventually returned \$575,408, and kept \$424,592, corresponding to the value of the bookings that were at that time held by BodyHoliday in Page’s name. There is no evidence that Cox knew that the forfeited deposit towards which the balance of this wire transfer was applied was not a legitimate business expense given that there had been a plan for a company retreat that others were planning to attend before

the pandemic shut things down. There is no evidence that Cox was involved in any of the subsequent bookkeeping or accounting entries regarding her and Page's extended stay at the BodyHoliday Spa in 2020.

[63] The Monitor has also failed to establish a strong *prima facie* case against Cox in respect of the last category, flights taken by Cox on the AirSprint airplanes. It is not contested that she took flights on the AirSprint airplanes, both for business and personal reasons. Cox has 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.

[64] The evidence indicates that Cox also had no involvement in the purchase of the AirSprint interests by 265, was not aware 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. 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.

[65] Further, although Cox was shown on paper to have some involvement in the Yacht, she testified that she signed documents that Page asked her to sign believing they were purchasing the Yacht for a separate business to be operated from St. Lucia.

[66] Cox's alternative position is that if a Mareva Order is granted against her, its quantum should be capped at \$385,499.95, which is the amount of the harm that can be attributed to her, accepting the Monitor's record against her at its highest.

[67] Insofar as Cox's interests may be tied up with Page's, her counsel advised that she does not object, if the court so orders, to assets she jointly owns with Page (including 265) being subject to any Mareva Injunction Order made against Page and 265. In that regard, she has agreed to allow the House Sale Proceeds to remain frozen, which would cover her share of any benefits she received if it is established that payments from the OTE Group for work done or purchases made in respect of the Ontario Home that Page and 265 seek to characterize as distributions were improper. Similarly, to the extent she has any interest in the Yacht, she has consented to the Yacht Sale Proceeds remaining frozen. She does not claim, and has not indicated to have, any interest in the AirSprint fractional interests, but they are in the name of 265 and she would thus not assert any entitlement or interest in or to the proceeds of the sale of those interests through her interest in 265.

[68] The applicants argued at the hearing of this motion that the claim for unjust enrichment against Cox does not have a knowledge requirement and could be relied upon as a foundation for a broader Mareva Injunction Order to freeze her solely assets as well. This was not one of the causes of action that the Monitor's motion had focused on. Cox raised a concern about the procedural fairness of having to respond to this argument, raised for the first time at the hearing by the applicants, not the Monitor, as a basis for justifying a full-blown freezing order in respect of her assets. See *2038724 Ontario Ltd. v. Quizno's Canada Restaurant Corporation*, 2008 CanLII 5978 (Ont. S.C.), at para. 10: "Due process underlies rule 37.06 of the Rules of Civil Procedure, which directs that a notice of motion shall contain the precise relief sought and the grounds to be

argued, and due process requires that a party be given fair notice of the case he or she must meet and a fair opportunity to answer that case.”

[69] This type of irregularity cannot be saved by the Notice of Motion indicating reliance upon “such further and other grounds”. See *Foster Wheeler Canada Ltd. v. MBB Power Services Inc.*, 2007 CanLII 8017 (Ont. S.C.), at paras. 4–6.

[70] On a Mareva injunction motion a party should be on notice in advance of all causes of action that are relied upon to support the strong *prima facie* case requirement. There may be a claim for unjust enrichment asserted against Cox, but it is not a justification at this time to freeze all of her assets.

[71] The net proceeds of sale from the Ontario Home of \$1,874,058.28 are currently being held in trust by Page and 265’s counsel. Cox’s share of the matrimonial home proceeds (one half interest) amounts to \$937,029.14, which is more than the value of the impugned transactions that Cox is even alleged to have been involved in. She is prepared to allow these funds to remain in trust. The existing freezing orders, and her consent to their continuation in respect of jointly held assets, are sufficient at this time to address the current concerns that the Monitor has raised, as against Cox.

[72] The Monitor can come back to court if something is discovered that would warrant a Mareva injunction against Cox. In the meantime, however, the court is concerned that there be transparency and disclosure about all assets that might ultimately be shown to have benefitted from improper distributions from the OTE Group, given the historic pattern that has been demonstrated, in which, even if unknowingly, Cox has benefitted from and been unjustly enriched by distributions controlled by Page. Further, insofar as assets jointly owned by Page and Cox will be covered by the Mareva Injunction Order against Page, those jointly owned assets need to be identified.

[73] Cox is therefore ordered to deliver a statement of her worldwide assets and she remains obligated to co-operate with the Monitor if it seeks information or documents from her. That may include any requested interview by the Monitor.

Are There Grounds for Believing that the Mareva Respondents Have Assets in Ontario?

[74] This ground is not seriously contested. The Mareva Respondents admit to having assets in Ontario, including but not limited to the now frozen net House Sale Proceeds. Given their evidence about their other business interests and ties to Canada, it is reasonable to infer that they have other assets in Ontario.

Are There Grounds for Believing that there is a Serious Risk of Dissipation of Assets or their Removal out of the Reach of the Ontario Court?

[75] The Monitor asks the court to infer from the conduct of the Mareva Respondents that there is a real risk of dissipation of assets. Such an inference may indeed be made when a strong *prima facie* case of fraud is established. See for example, *663309 Ontario Inc. v. Bauman* (2000), 190 D.L.R. (4th) 491 (Ont. S.C.), at para. 41; *Sibley & Associates LP v. Ross*, 2011 ONSC 2951, 106 O.R. (3d) 494, at paras. 63–65.

[76] As was noted by Osborne J. (at para. 47 of the endorsement for the Yacht Mareva Order): "Proof of the risk of removal/dissipation may be inferred from the surrounding circumstances of the responding parties' misconduct. (See *Ontario Professional Fire Fighters Association v. Atkinson et al*, 2019 ONSC 3877 at para. 6-8, quoting with approval from *Sibley v. Ross*, 2011 ONSC 2951 at paras. 63, 64 and *Amphenol Canada Corp. v. Sunadrum*, 2019 ONSC 849)."

[77] However, the court must carefully take into account the surrounding circumstances to decide whether such an inference is supportable. See *Voysus Connection Experts Inc. v. Shaikk*, 2019 ONSC 6683, 58 C.C.E.L. (4th) 192, at paras. 86–97.

[78] Further, this inference is permissive, not mandatory or inevitable. In *HZC Capital Inc. v. Lee*, 2019 ONSC 4622, despite finding that a strong *prima facie* case of misappropriation of corporate funds had been made out against one of the defendants (para. 66), 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 motion for a Mareva injunction (para. 83).

[79] While the circumstances are different now than at the time of the Yacht Mareva Order, when it had been discovered that the Yacht was up for sale, had been deregistered in Canada and was on the move, the strength of the *prima facie* case against Page for fraud, misrepresentation, breach of fiduciary duty and unjust enrichment has increased through the further records and his own evidence. The strong *prima facie* case that has been established against him, combined with the sale of the Ontario Home of Page and Cox and their known ties to St. Lucia, is sufficient for me to infer, as I do, that there is a real risk of Page himself (and 265) dissipating assets or removing them from the reach of this court.

[80] While the inference is permissive, I find that it is warranted here.

[81] The Mareva Respondents ask the court to consider their personal, family and business ties to Ontario as part of the full context, before inferring that there is a risk of removal or dissipation of assets in Ontario, including that:

- a. Page states in his affidavit: He is a citizen of Canada and St. Lucia. He is a tax-paying resident of Canada and was in the country when his affidavits were sworn on this motion. He has many familial and financial ties to Ontario and sub-leases a condo. He manages and operates businesses across Ontario, including certain Gen 7 fuel stations.
- b. Cox states in her affidavit that 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 is only 55 years old, continues to operate businesses in Ontario, and clearly stated that she does not plan to retire any time soon.

[82] Given the unreliability of Page's testimony (based on changes in his testimony and implausible explanations previously noted in this endorsement), his testimony is not sufficient to rebut the presumption that there is a risk that he will relocate himself and/or his or 265's assets to St. Lucia (or elsewhere) and out of the reach of this court.

[83] The Mareva Respondents primarily rely upon the delay in bringing this motion to rebut any inference of a risk of removal or dissipation of assets from Ontario. They maintain that all, or virtually all, of the allegations made on this motion were made: (a) in the OTE Statement of Claim in October 2022 (the “Statement of Claim”) which asserts various causes of action including breach of fiduciary duty, theft and misappropriation of funds; (b) in Scott Hill’s Affidavit on the Initial CCAA Application in January 2023; and (c) on OTE’s motion for a Mareva Injunction in respect of the Yacht in March 2023.

[84] The Mareva Respondents have prepared a timeline dating back to October 2022 identifying the evidence and allegations that KPMG knew about prior to or at the time of its appointment as Monitor. Since its appointment, as Monitor KPMG has had enhanced investigative powers to obtain any supporting evidence it needed. The Monitor had enhanced investigative powers from the outset under the Initial Order that gave it the right to investigate and compel production of information and to examine witnesses under oath, beyond the normal powers that are typically granted under the Commercial List model initial CCAA order.

[85] It is well-established that delay can be fatal to any injunction application if the plaintiff fails to act in a reasonable time, and injunctions should not be awarded to parties who show no sense of urgency. As stated in Robert J. Sharpe, *Injunctions and Specific Performance* (Toronto: Thomson Reuters, 2023) at § 1:28:

On interlocutory applications, delay has somewhat different implications. The evidentiary factor becomes much more significant. To succeed, the plaintiff must show a substantial risk of irreparable harm in the period leading up to trial. The very fact of delay by the plaintiff, quite apart from any question of prejudice to the defendant, may often serve as evidence that the risk is not significant enough to warrant interlocutory relief.

See also: *Lee v. Chang*, 2018 ONSC 2091, at para. 3 (Div Ct.); *Erie Manufacturing Co. (Canada) v. Rogers*, 1981 CarswellOnt 417 (Ont. H.C.), at paras. 2-4; *Hollinger Inc. et al. v. Radler et al.*, 2006 BCSC 1712, at para. 26, aff’d 2006 BCCA 539, at para. 31; *Union Bank of Switzerland v. Batky*, 1998 CanLII 14887, at paras. 33, 76 (Div Ct.); *Chiu v. Jao*, 1998 CanLII 6693, at paras., 15-16 (BCSC).

[86] In *Hollinger*, the court concluded that an eleven-month delay in bringing the motion for a Mareva order was evidence from which an inference could be drawn that the risk of dissipation of assets was not immediate or significant enough to warrant relief. In *Lee*, a delay of six weeks (pending a motion for leave to appeal) was enough for the court to conclude (at paras. 1 and 3) that “[i]f harm was urgently feared, it would have happened by now [...] There is nothing an injunction can do to help the plaintiffs today.”

[87] The Mareva Respondents contend that the fact that no motion was brought long ago and that Page has been an active participant in these proceedings, including having recently agreed to the orders freezing a total of approximately \$13 million in sale proceeds, demonstrates that there is no risk of dissipation.

[88] Each case will depend on its own circumstances in terms of when there has been enough delay to cause the court to infer that there is no urgency to a Mareva injunction request. In this case, the process has been iterative. KPMG's role has evolved, as has its authority and powers. It was only at the time of the October 2023 Order that the Monitor obtained "super-monitor" powers and was mandated to "preserve and protect" the property of the OTE Group. It brought this motion on November 8, 2023.

[89] It is not clear to me that the Monitor (as opposed to the applicants) even had the authority or power to bring a motion for a Mareva injunction prior to the October 2023 Order. The Yacht Mareva Order was made on a motion by the applicants after the Monitor had been appointed. But even if the Monitor could have done so, the trigger for this motion was the discovery, shortly after the October 2023 Order, of the sale of the Ontario Home of Page and Cox (one of their residences that was improved through renovations and accoutrements paid for by OTE directly that Page now seeks to justify as his legitimate distributions) and the closing was imminent. The sale of the Ontario Home is not something that the Mareva Respondents disclosed, but rather they say it was "discoverable" through public listing records.

[90] With its enhanced powers, and having learned of the imminent closing of the Ontario Home of Page and Cox, the Monitor considered some of the other (previously known) concerns that had been identified in a different light, such as that Page and Cox:

- a. have another home in, and are both citizens of, St. Lucia;
- b. have companies and bank accounts in St. Lucia; and
- c. have confirmed that they did receive the benefit of the significant payments from OTE previously identified by the Monitor (in the Statement of Claim and the Monitor's sixth report previously filed) as having been for their personal expenses — for their homes, wedding, private jets, pool, stays at resorts — and that these benefits are not denied, but rather should be accounted for as legitimate profit distributions.

[91] In the latter respect, and as discussed earlier in this endorsement, the Monitor's focus has now shifted from establishing that these were payments applied towards personal uses of the Mareva Respondents (now admitted by them, for the most part) to verifying the legitimacy of the distributions in the face of the shifting positions that Page has taken, for example in respect of the ownership of the AirSprint fractional interests, the accounting for distributions and the complete falsification of the 2021 financial statements (originally denied and now blamed on an accounting clerk).

[92] Each time a sale or potential transaction was identified, steps were taken by the Monitor that have led to the pool of approximately \$13 million in Frozen Assets (the House Sale Proceeds, Yacht Sale Proceeds and AirSprint Proceeds). However, it is not unreasonable for the Monitor, now in possession of the assets and undertaking of the applicants and now charged expressly with the responsibility of identifying, preserving and protecting those assets for the benefit of all stakeholders under the October 2023 Order, to carry through with this motion even after Page and Cox agreed to freeze their net House Sale Proceeds.

[93] The Monitor has determined that it must be proactive, rather than reactive. That is not an unreasonable determination having regard to the past conduct of Page, in particular. But this is not a case of over a year of "delay" by the Monitor in bringing this motion, but is rather a case of cumulative concerns finally coming to a head. Unlike in the *Hollinger* case relied on by the Mareva Respondents, the requested Mareva Injunction Order in this case is not based only on previously identified misconduct, but on that conduct considered in light of new events and evolving positions.

[94] As detailed earlier in this endorsement, there are still questions about the alleged distributions that Page claims were legitimate and approved, for the benefit of all of the OTE Group partners. Some of the details only came to light through the review of documents and examinations of Page and Cox on this motion. Since, by his own admission, Page was the one who called all of the shots with respect to the distributions, it is not unreasonable for the Monitor to want to have his version of what happened pinned down before asking others who may have been involved, including the other partners and third parties.

[95] Conversely, it is not reasonable to suggest, as the Mareva Respondents do, that the Monitor should fully exhaust its investigative powers before seeking a Mareva Injunction Order, in the face of the identified concerns and the evolving events and explanations so far provided. As discussed earlier in this endorsement, it only came out or was confirmed in the context of the development of the evidentiary record for this motion that:

- a. OTE, and not 265, owned the AirSprint fractional interests. This was a complete reversal of earlier positions asserted on behalf of all of the Mareva Respondents (at the time, made to purportedly justify their continued use of the corporate private jets after the Initial CCAA Order was made); and
- b. the OTE 2021 year-end financial statements were falsified. While there were concerns about this much earlier, it was only in the face of the confirmation from the accountants that they did not prepare these financial statements (which had been presented on their letterhead) that Page acknowledged that they were falsified and pivoted to try to blame a former employee in the OTE accounting group.

[96] In the circumstances of this case, I do not find that the considered actions of the Monitor in identifying, isolating and challenging known suspicious transactions and eventually determining that a Mareva injunction was necessary when the alarm bells went off that Page and Cox may be imminently relocating to St. Lucia where they have citizenship, a residence, businesses and assets, to reflect undue delay in the pursuit of this Mareva Injunction Order.

[97] It is also a relevant consideration that Page and 265 have led no evidence of prejudice to them caused by the timing of bringing this motion. Such failure to establish prejudice can be fatal to an asserted delay defence on a Mareva motion. See, for example, *Sabourin and Sun Group of Companies v. Laikin*, 2006 CanLII 32915 (Ont. S.C.), at para. 14; *Henenghaixin Corp v. Deng*, 2021 ABQB 168, at para. 83. See also, *United States Securities and Exchange Commission v. Sharp*, 2023 BCSC 425, 528 C.R.R. (2d) 66, where the plaintiff brought a Mareva injunction in British Columbia one year after filing a related complaint in the US. The BC Supreme Court held at para. 95: “[E]ach case must be decided on its own facts and the issue of delay must be considered

in the context of the case as a whole. In the circumstances of this case, given the seriousness of the fraud alleged, I cannot find that the delay undermines the real risk that assets will be depleted such as to impair the ability of the plaintiff to collect on a future judgment in the U.S. Proceeding.”

[98] I agree with the Monitor that, in this case, the seriousness of the strong *prima facie* case of fraud and misappropriation against Page and 265 gives rise to a legitimate apprehension of immediate risk of dissipation of assets by them that offsets any delay.

[99] While the same risk may exist for Cox, her circumstances are one-step removed from the alleged fraud and breaches by Page. Since I have not found that there is a strong *prima facie* case against her directly for fraud or breach of fiduciary duty or knowing assistance in the facilitation of Page's misconduct, there is not a strong inference that can be drawn against her. See *1773907 Alberta Ltd. v. Davidson*, 2016 ABQB 2 at paras. 86, 89–91, *aff'd* 2017 ABCA 267.

[100] Nor can that inference be drawn from Cox's refusal to answer broad questions about her assets while being cross-examined on this motion, as the Monitor suggested it be. That is the relief that this motion seeks, if successful. She should not be penalized for waiting for the court's decision about whether to order that aspect of the relief sought. In any event, the inference of a risk would not have been a ground to grant an injunction against Cox in the absence of proof of a strong *prima facie* case against her.

Will the Applicants Suffer Irreparable Harm if the Mareva Injunction Order is not Granted?

[101] In this case, the alleged irreparable harm is tied to the risk of dissipation or removal of assets in Ontario. In the case of Page and 265, irreparable harm has been established for the reasons outlined in the previous section of this endorsement.

Does the Balance of Convenience Favour Granting of the Mareva Injunction Order?

[102] The court must balance the established risk of dissipation or removal of assets and the corresponding irreparable harm to the Monitor (and other OTE stakeholders) if that risk were to become a reality against the inconvenience to the affected parties in having their assets frozen. As noted earlier in this endorsement, the Mareva Respondents have not led any evidence of prejudice, aside from the speculative concern that the existence of a Mareva Injunction Order against them might cause third parties with whom they deal in their other businesses (such as the Gen 7 Gas Stations, some of whose shares will be frozen by the Mareva Injunction Order if held by Page or 265) to treat them differently because of the stigma of the Mareva Injunction.

[103] Page and 265 have not offered any concrete evidence that the banks or other third parties will change their manner of dealing with Gen 7 Gas Stations — nor is there any evidence of personal guarantees or cross-collateralization or default provisions that might provide a foundation for the theoretical concerns raised. There have already been two freezing orders in this case (the Yacht Mareva Order and the Frozen Funds Order) and no evidence of stigma-related prejudice or inconvenience to the Mareva Respondents arising out of those orders. This theoretical concern is not a reason not to grant a Mareva injunction.

[104] The absence of proof of prejudice to the Mareva Respondents is also discussed earlier in this endorsement, in connection with the alleged delay. On a related point, Page and 265 have not

advanced any justification for the court declining to exercise its discretion to grant the requested Mareva Injunction.

[105] The balance of convenience is what typically drives the standard exception to Mareva injunction orders, that the affected parties be afforded the right to seek access to their frozen assets to cover reasonable living and legal expenses. This exception is provided for in the proposed Mareva Injunction Order in this case.

[106] Another consideration in the balance of convenience is whether there should be a cap on the assets to be frozen. In this case, the Mareva Respondents propose that the cap be limited to the \$13 million pool of already Frozen Assets.

[107] The already Frozen Assets are said to represent a viable alternative remedy to protect the assets about which concerns have been raised. Page and 265 contend that when the subject asset is already protected that alone is a reason not to grant the Mareva Injunction. See *Access Human Resources v. Earl*, 2018 BCSC 2347, at para. 38. This again is tied to the assumption that the only concerns that can be raised for the court's consideration are the ones that have been admitted to, and that there is no legitimate basis for a concern that there have been other instances of misconduct.

[108] For the reasons previously outlined in this endorsement, I do not consider the proposed cap for the Mareva Injunction Order, limiting it to the Frozen Assets, to be in the interests of justice. In this case, imposing a Mareva cap equal to the frozen assets would not serve 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 (*Massa*, at paras. 6–10) when court has found that the fraud is likely broader than what the Monitor has thus far been able to untangle and discover from the woefully deficient accounting and other records that were maintained when Page was in control of the business of the OTE Group.

[109] The Monitor raises an important consideration about the inextricable joint ownership of assets and bank accounts that Cox has with Page, requiring that any freezing order must cover their joint assets. As outlined previously in this endorsement, Cox has agreed to allow her share to remain frozen of any jointly owned assets or assets subject to a joint interest that she may assert if a freezing/Mareva injunction order is made against Page and 265 and their assets.

Should the Monitor be Required to Provide an Undertaking as to Damages?

[110] The undertaking as to damages is typically required to mitigate against the potential prejudice to the parties affected by a Mareva injunction, as a part of the balance of convenience. Page and 265 argue that it is patently unfair for there to be no undertaking as to damages from the Monitor.

[111] The situation as it relates to this undertaking as to damages remains essentially the same as existed when Osborne J. determined that one was not required for purposes of the Yacht Mareva Injunction Order.

[112] Osborne J. concluded in his endorsement on the Yacht Mareva Order (at para. 51) that:

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

[113] More information has come to light, as a result of which, more assets have been frozen, but the situation remains unchanged. If anything, the solvency concerns in respect of the OTE Group have gotten worse. I consider it to be appropriate to dispense with the requirement for an undertaking as to damages from the Monitor in the context of the Mareva Injunction Order that I am granting against Page and 265, in the circumstances of this case.

Final Order and Costs

[114] The requested Mareva Injunction is granted as against the respondents Page and 265. The only order made at this time against the respondent Cox is for her to provide a statement of her worldwide assets, which is required, in part, as a result of the acknowledged benefits that she has enjoyed from the misconduct of Page (whether knowingly or otherwise), the extent of her jointly owned assets with the other Mareva Respondents and the concession made by her that if an order is not made against her but is made against the others, she would agree that assets she jointly owns with the others can remain subject to the Mareva Injunction Order if made. The Monitor and the court require transparency and a full appreciation of the jointly held assets of the Mareva Respondents and what they claim to be their separate assets so that the court's order can be put into effect and can be properly monitored.

[115] All other terms of the proposed draft order submitted by the Monitor are approved, with the necessary modifications.

[116] The parties agreed to exchange cost outlines and submissions by January 5, 2023. That exchange occurred and the parties subsequently confirmed in an email to the court that a costs arrangement satisfactory to the Monitor, Page and Cox has been settled through their respective counsel. Unless further directions are requested, the court does not expect to review or consider the costs outlines that were exchanged and does not expect to receive any further submissions or make any other direction or order as to costs at this time.

[117] The Monitor shall submit a revised form of order to reflect the above first for approval as to form and content by the Mareva Respondents and then for the court's signature. If the parties have difficulty settling the form of order, a case conference before me may be requested through the Commercial List Office.

A handwritten signature in cursive script that reads "Kimmel J." is positioned above a horizontal line.

Kimmel J.

Date: January 16, 2024