

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

BETWEEN:

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

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

Applicants

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**FACTUM OF THE OTE GROUP**  
**(Returnable March 15, 2023)**

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March 13, 2023

**AIRD & BERLIS LLP**  
Brookfield Place  
181 Bay Street, Suite 1800  
Toronto, Ontario M5J 2T9

**Steven Graff** (LSO# 31871V)  
Email: [sgraff@airdberlis.com](mailto:sgraff@airdberlis.com)

**Martin Henderson** (LSO# 24986L)  
Email: [mhenderson@airdberlis.com](mailto:mhenderson@airdberlis.com)

**Tamie Dolny** (LSO# 77958U)  
Email: [tdolny@airdberlis.com](mailto:tdolny@airdberlis.com)

**Samantha Hans** (LSO# 84737H)  
Email: [shans@airdberlis.com](mailto:shans@airdberlis.com)

*Lawyers for the OTE Group*

## **PART I – INTRODUCTION**

1. In this motion, the OTE Group (term as defined herein) is seeking urgent injunctive relief of a worldwide *Mareva* order over the Italian Yacht (as defined herein) that was fraudulently purchased using at least USD \$3,675,687.05 in funds of the OTE Group, and then inappropriately transferred cross-jurisdictionally by Glenn Page (“**Page**”), Mandy Cox (“**Cox**”) and 2658658 Ontario Inc. (“**265**” and with Page and Cox, collectively referred to as the “**Mareva Respondents**”), for their own personal use and benefit.

2. There is no reasonable or logical explanation for why Page, the former president of various corporate entities that provide gasoline and fuel supply services to Southern Ontario First Nations communities, should be authorizing the use of the OTE Group’s funds to purchase a luxury Italian super-yacht.

3. While the OTE Group’s investigation is still ongoing, and the full magnitude of their losses are unknown, millions of dollars effectively disappeared from the OTE Group’s control under Page’s watch, which triggered the OTE Group’s ongoing insolvency. The Italian Yacht was further inexplicably diverted from the OTE Group’s control through 265 (a corporation that Page controls with Cox, his spouse, who is also a former employee of the OTE Group).

4. The Mareva Respondents’ conduct has exposed the OTE Group to significant liabilities and losses. The OTE Group, as further described below, continue to work extensively to recover and track down all of the misappropriated millions by the Mareva Respondents. The scope, nature and duration of Page and Cox’s scheme to defraud the OTE Group, along with their concerted efforts with other parties, may have transferred these millions of dollars out of the control of the OTE Group, beyond even the egregious purchase of the Italian Yacht itself.

5. The OTE Group will suffer irreparable harm if a worldwide *Mareva* injunction is not granted over the Italian Yacht in the form sought in this motion. Both the balance of convenience and the interests of justice favour the granting of this relief.

6. This factum is therefore submitted to this Honourable Court to support the OTE Group’s motion for the following order containing urgent injunctive relief, which:

- (a) Grants an interlocutory injunction restraining the Mareva Respondents and their servants, employees, agents, assigns, officers, directors and anyone else acting on their behalf or in conjunction with any of them from directly or indirectly, by any means whatsoever:
  - (i) selling, removing, dissipating, alienating, transferring, assigning, encumbering, or similarly dealing with a seventy foot yacht bearing the name “Cuz We Can” or “Home South” under serial number XAXS7047F122 (the “**Italian Yacht**”, as further described in Schedule “A” to the order sought herein), wherever situated;
  - (ii) instructing, requesting, counselling, demanding, or encouraging any other person to do so; and
  - (iii) facilitating, assisting in, aiding, abetting, or participating in any acts the effect of which is to do so;
- (b) Requires the Mareva Respondents to prepare and provide to the OTE Group and the Monitor (as defined herein) within thirty (30) business days of the date of service of the order sought herein, a sworn statement describing the nature, value, and location of the Italian Yacht, as well as an explanation for where funds used to purchase the Italian Yacht originated from;
- (c) Declares that Allied Marine, Inc., American Yacht Group LLC and Brewer Yacht Sales, LLC or any other boat broker who may hold, be assigned or be transferred the assets listed on Schedule “A” to the order sought herein (collectively, the “**Boat Brokers**”) forthwith freeze and prevent any removal or transfer of the Italian Yacht if held physically by the Boat Brokers;
- (d) Requires that the Boat Brokers forthwith disclose and deliver up to the OTE Group and the Monitor any and all records held by the Boat Brokers concerning the Italian Yacht, including but not limited to: (a) copies of registration or license details; and (b) copies of any location details;
- (e) Declares that the Boat Brokers may only sell or transfer the Italian Yacht upon receipt of express written consent by both the OTE Group and the Monitor, and that any funds received by the Boat Brokers will be held in trust on behalf of the OTE Group; and
- (f) Awards costs of this motion against the Mareva Respondents on a substantial indemnity basis.

## **PART II – FACTS**

7. Detailed information with respect to the OTE Group’s business, operations, products and causes of insolvency is contained within the Affidavit of Scott Hill sworn January 27, 2023 (the

“**Hill Affidavit**”), the Confidential Affidavit of Scott Hill sworn January 27, 2023 (under seal, the “**Confidential Affidavit**”), the Affidavit of Scott Hill sworn February 7, 2023 and the Affidavit of Scott Hill sworn March 12, 2023 (the “**Fourth Hill Affidavit**”). All capitalized terms used but not defined herein have the meanings ascribed to them in the Fourth Hill Affidavit, where appropriate.

8. Disturbing circumstances created by prior executives of the OTE Group, including the OTE Group’s past president, Page, have threatened the survival of the OTE Group’s business. Among other misconduct, Page and certain of his associates are alleged to have: (i) misappropriated millions of dollars of the OTE Group’s funds and misused its credit; (ii) falsified and destroyed the OTE Group’s books and financial records; and (iii) failed to pay or remit provincial gasoline and fuel taxes to the Ontario Ministry of Finance and the Canada Revenue Agency.<sup>1</sup>

9. The OTE Group’s current management has commenced an action against Page and other defendants<sup>2</sup> on the basis of their breaches of duty and other misconduct in connection with the business and affairs of the Applicants (the “**Page Claim**”).<sup>3</sup>

10. The Page Claim includes the following allegations, among others:

- (a) Another defendant, Page’s brother, Brian Page (“**Brian Page**”), posed as a director and officer of certain of the OTE Group entities to facilitate concealed dealings with third parties;
- (b) Page and Brian Page provided a fraudulent directors’ resolution of one of the OTE Group entities, authorizing its guarantee of debts in respect of the purchase of the Italian Yacht;
- (c) Page used more than \$15 million of the OTE Group’s funds and credit to finance the construction and operation of certain gas stations (the “**Gen 7 Stations**”), which Glenn Page controlled; and

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<sup>1</sup> Fourth Affidavit of Scott Hill sworn on March 12, 2023 (the “**Fourth Hill Affidavit**”); Motion Record dated March 13, 2023 at Tab 4.

<sup>2</sup> OTE USA LLC (“**OTE USA**”) and OT Energy Inc. (“**OT Michigan**”) are non-Applicant entities that are controlled by Glenn Page. OT Michigan is the majority shareholder of OTE USA. Both OTE USA and OTE Michigan are named as defendants in ongoing litigation in Ontario.

<sup>3</sup> Hill Affidavit at paras 70–76.

- (d) Page did not charge appropriate fuel tax on fuel purchases made by the Gen 7 Stations, to give the Gen 7 Stations a competitive advantage, for which the OTE Group may now face regulatory and taxation liability.

11. This urgent motion for injunctive relief therefore arises in the context of a larger application commenced by Original Traders Energy Ltd. (“**OTE GP**”) and 2496750 Ontario Inc. (“**249**” and with OTE GP, the “**Applicants**”) before the Ontario Superior Court of Justice (Commercial List) (the “**Court**”) on January 30, 2023 (the “**CCAA Application**”), pursuant to which an initial order (the “**Initial Order**”) was issued under the *Companies’ Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the “**CCAA**”). The Initial Order granted the Applicants protection under the CCAA and certain other related relief, with a view to allowing the OTE Group (as defined below) an opportunity to restructure its business and affairs. The Applicants’ CCAA proceedings are referred to herein as the “**CCAA Proceedings**”.

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

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

14. Key facts underlying the overarching CCAA Application are as follows:

- (a) The OTE Group is a wholesale fuel, gasoline, and diesel supplier which services primarily First Nations’ petroleum stations and First Nations’ communities across Ontario, and began operating in the First Nations fuel supply industry in 2018.<sup>4</sup>

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<sup>4</sup> Initial Affidavit of Scott Hill sworn January 27, 2023 (the “**Initial Hill Affidavit**”), at para 8; Application Record dated January 27, 2023 at Tab 4.

- (b) The OTE Group services more than 30 gas stations throughout Ontario. The majority of these gas stations are situated on First Nations reserves. The OTE Group is a significant supplier of gasoline, diesel and fuel products to a large number of First Nations communities.<sup>5</sup>
- (c) The OTE Group's total assets are estimated by the Monitor to be \$67,523,927 with total liabilities of \$91,392,669.<sup>6</sup>
- (d) In 2021, Page purchased the Italian Yacht using funds wire transferred from OTE LP's account and through his inappropriate control of OTE Logistics LP (under the former name Gen7 Logistics LP) funds, and caused OTE Logistics LP to guarantee a chattel mortgage secured by the vessel.<sup>7</sup>
- (e) The OTE Group is missing significant amounts of their books and records due to alleged misconduct by Page and Cox, among other parties. Financial information and records of the OTE Group from the period of January 2021 to August 2022 are largely unreliable and incomplete.<sup>8</sup>

15. As detailed in the Fourth Hill Affidavit, in total,<sup>9</sup> at least USD \$3,675,687.05 of the OTE Group's funds were used to purchase the Italian Yacht, which was later transferred and held by 265 from OTE Logistic's control under unknown circumstances. The exact whereabouts of the Italian Yacht are presently unknown, but it is currently listed for sale by the Boat Brokers without the permission of the OTE Group. The OTE Group has registered a security interest against 265 over the Italian Yacht, upon the discovery of its inappropriate purchase using funds misappropriated from the OTE Group's accounts.<sup>10</sup>

16. On or about October 18, 2022, OTE LP filed a verified complaint for warrant of maritime attachment against the Italian Yacht, which was dismissed due to jurisdictional concerns. The OTE Group and the Monitor intend to vigorously continue and pursue Cox, Page and 265's misappropriation of the Italian Yacht.

17. The purchase of the Italian Yacht is evidenced by Pride Marine Group Limited ("**Pride Marine**") purchase contracts dated September 20, 2020 and signed by Page and the documents

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<sup>5</sup> *Ibid* at para 9.

<sup>6</sup> *Ibid* at para 96.

<sup>7</sup> Fourth Hill Affidavit at paras 14 and 18.

<sup>8</sup> Initial Hill Affidavit at para 10.

<sup>9</sup> Fourth Hill Affidavit at para 30.

<sup>10</sup> *Ibid* at 34.

appended thereto (the “**Yacht Purchase Contracts**”).<sup>11</sup> Pride Marine is a boat vendor located in Bracebridge, Ontario which regularly sells yachts and boats to its customers throughout Canada, and primarily in Southern Ontario, and brokers the purchase of yachts and boats for its clients outside of its primary operating territory. As stated in the Yacht Purchase Contracts, the “Buyer” of the Italian Yacht is listed jointly as Glenn Page and Gen7 Logistics LP (“**Gen7**”) (a prior name of OTE Logistics). Per the Pride Correspondence, almost all other payments made towards the Deposit (as defined herein) are made by Gen7. Associated warranty certificates appended to the Yacht Purchase Contracts were signed by Page on August 15, 2021.<sup>12</sup>

18. In addition, Pride Marine confirmed that CAD \$4,176,000.40 in total was paid to Pride Marine for the Italian Yacht. This total included a deposit of USD \$3,318,500.00.<sup>13</sup> Wire transfers clearly show Page and Cox approving funds from the OTE Group’s bank account to help fund the purchase the Italian Yacht.<sup>14</sup>

19. Essex Lease Financial Corporation (“**Essex**”) provided financing to 265 for the purchase of the Italian Yacht in the amount of CAD \$1,230,000.00. Fraudulent guarantees and director’s resolutions were provided to Essex that were never appropriately executed by representatives of the OTE Group.<sup>15</sup>

20. Cox and Page also used the OTE Group’s funds to pay CAD \$601,561.91 (USD \$457,187.05) in taxes on the Italian Yacht (the “**Tax Payment**”).<sup>16</sup> The OTE Group continues to investigate why or upon whose direction these funds were released for the Tax Payment of the Italian Yacht. Furthermore, the OTE Group continues to work with the Monitor to investigate all wire transfers cited above, but based upon evidence discovered by the OTE Group and the Monitor, along with the Tax Payment, it is apparent that at least USD \$3,675,687.05 of the OTE

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<sup>11</sup> *Ibid* at para 21 and Exhibit “J”.

<sup>12</sup> *Ibid*.

<sup>13</sup> *Ibid* at para 24 and Exhibit “M”.

<sup>14</sup> *Ibid*.

<sup>15</sup> Fourth Hill Affidavit at para 18 and the Affidavit of Miles Hill sworn March 12, 2023 (the “**Miles Hill Affidavit**”) at paras 4-5; Motion Record dated March 13, 2023 at Tab 5.

<sup>16</sup> Fourth Hill Affidavit at para 29 and Exhibit “P”.

Group's funds were used to purchase the Italian Yacht and over CAD \$10,000,000 was wired from its account to Airsprint Inc. ("Airsprint") in 2021 and 2022.

### **PART III – ISSUES**

21. The main issue on this motion is whether the legal test for a worldwide *Mareva* injunction over the Italian Yacht is met.

### **PART IV- LAW & LEGAL AUTHORITIES**

#### **THE APPLICANTS MEET THE CRITERIA TO OBTAIN A WORLDWIDE MAREVA INJUNCTION OVER THE ITALIAN YACHT**

##### *i. Notice Obligations*

22. Rule 40.01 of the *Rules of Civil Procedure* provides that an interlocutory injunction under section 101 of the *Courts of Justice Act* may be obtained on a motion to a judge by a party to a proceeding or an intended proceeding. Section 101 of the *Courts of Justice Act* gives the court the jurisdiction to grant an interlocutory injunction by an interlocutory order where it appears to a judge of the court to be just or convenient to do so.<sup>17</sup>

23. In order to ensure that all material facts are before a judge, applicants have obligations to conduct reasonable investigations when seeking *ex parte Mareva* relief. Their disclosure obligations are, however, limited to *material* facts and the fruits of *reasonable* investigation, such that a fact is only considered material if its non-disclosure could affect the outcome of the eventual *Mareva* motion.<sup>18</sup>

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<sup>17</sup> *Courts of Justice Act*, RSO 1990, c C.43, s. 101(1).

<sup>18</sup> [Noreast Electronics Co. Ltd v. Danis](#), 2018 ONSC 879 at paras 24-25 [*Noreast Electronics*].



24. Rather than an *ex parte* motion, at hand, the OTE Group seeks injunctive relief *with notice* to impacted parties, albeit two business days. As a result of the exigency of the potential sale of the Italian Yacht, it is necessary for this motion to be brought on an expedited basis, and the OTE Group have acted commercially reasonably given the circumstances that they face.

25. Despite not proceeding on an *ex parte* basis, all material facts have been disclosed by the OTE Group. Any information regarding the Italian Yacht that is presently known by the OTE Group and would impact on this Court's determination is squarely before this Court for its consideration.

*ii. Legal Test for a Mareva Order*

26. A *Mareva* injunction freezes exigible assets when found within the jurisdiction of the Court, wherever the defendant may reside, providing that there is a cause of action between the plaintiff and the defendant in the jurisdiction of the court. The purpose of a *Mareva* injunction is to prevent the defendant from disposing of his or her assets from the jurisdiction and thereby defeating his or her creditors. If there is a genuine risk of disappearance of assets, either inside or outside the jurisdiction, the injunction will issue.

27. This Court has issued various *Mareva* orders over personal property.<sup>19</sup> As an example, in the 2020 case of *Total Traffic Services Inc.*,<sup>20</sup> this Court granted a *Mareva* over, among other assets, a speedboat where the plaintiff owned a contractor company and alleged that an employee had been inappropriately issuing numerous cheques to herself through the company's bank

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<sup>19</sup> *Sabourin & Sun Group of Cos. v Laiken*, [2006] OJ No 3847, 151 ACWS (3d) 686 (Ont Sup Ct) [*Sabourin*]; *Total Traffic Services Inc. v Kone*, 2020 ONSC 4402 [*Total Traffic Services*]; *Noreast Electronics*.

<sup>20</sup> [2020 ONSC 4402](#).

account, and further attempting to hide their issuance. The Court considered whether the employer had “shown an ability to conceal and mislead her employer over a prolonged period of time” and if the physical assets were disposed of, whether “there would appear to be no other way for the [company] to recoup their losses”.

28. In addition, a *Mareva* will be more readily justified where the innocent party’s legal rights are specifically related to a physical asset in question (rather than a liquid or non-physical asset).<sup>21</sup> If the innocent party provides an undertaking as to damages and will otherwise permanently lose their ability to regain the assets if they are disposed of, the *Mareva* should be granted.<sup>22</sup>

29. The test for a *Mareva* injunction is as follows:<sup>23</sup>

- (a) Whether there is a strong *prima facie* case in favour of the plaintiff;
- (b) Whether the defendant has assets in the jurisdiction (this element has been modified in recent caselaw discussed below);
- (c) Whether there is a risk of the assets being removed from the jurisdiction or otherwise put beyond the reach of the court;
- (d) Whether the plaintiff would suffer irreparable harm if the order is not made;
- (e) The balance of convenience; and

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<sup>21</sup> *Total Traffic Services* at para 18.

<sup>22</sup> *Ibid* at para 16.

<sup>23</sup> *Rana v Malik*, 2014 ONSC 701 at para 63, citing *Chitel v Rothbart*, [1982] 39 OR (2d) 513, 141 DLR (3d) 268 (Ont CA).

(f) The plaintiff must provide an undertaking as to damages.

30. The OTE Group has provided an undertaking as to damages, although has provided submissions to this Court later herein as to why the undertaking should only be considered in the alternative. An analysis of the remaining factors as applied to the Mareva Respondents and the Italian Yacht is outlined and summarized below for the convenience of this Court.

**(A) THERE IS A STRONG *PRIMA FACIE* CASE AGAINST THE MAREVA RESPONDENTS**

31. The test for demonstration of a strong prima facie case is “if the court had to decide the matter on the merits on the basis of the material before it, would the plaintiff succeed?”<sup>24</sup> The facts as set out above establish a strong *prima facie* case for both fraud by the Mareva Respondents, and a breach of fiduciary duty by Page, among other causes of action that may be sought against the Mareva Respondents at a later date.

32. To establish the tort of civil fraud, a plaintiff must satisfy the following elements:<sup>25</sup>

- (a) a false representation made by the defendant;
- (b) some level of knowledge of the falsehood of the representation on the part of the defendant (whether through knowledge or recklessness);
- (c) the false representation caused the plaintiff to act; and;

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<sup>24</sup> [Petro-Diamond Incorporated v Verdeo Inc.](#), 2014 ONSC 2917 at para 25.

<sup>25</sup> [Bruno Appliance and Furniture, Inc. v Hryniak](#), 2014 SCC 8 at paras 17–21.

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

33. The facts set out above establish a strong prima facie case of fraud, amongst other causes of action, against the Mareva Respondents, as well as a strong potential prima facie case of breach of fiduciary duty, amongst other causes of action, as against Page. Among other things, the Mareva Respondents:<sup>26</sup>

- (a) Inappropriately transferred OTE funds to purchase the Italian Yacht, while misusing Page's signing authority at OTE Logistics;
- (b) Fraudulently executed and forged signatures on documents to Essex in order to obtain financing of the Italian Yacht;
- (c) Directed and caused prohibited payments and transfers to be made on their behalf from funds of the OTE Group, including payments and transfers for which no goods or services of value were ever received by the OTE Group themselves; and
- (d) Diverted assets from the OTE Group's control to their own corporation to personally benefit.

34. All of the above has caused significant losses to the OTE Group.

35. Furthermore, there is no doubt that directors and officers are in *per se* fiduciary relationships with companies in respect of which they acted as directors and officers. To establish a breach of fiduciary duty, a party must establish that fiduciary duties were owed and a

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<sup>26</sup> Fourth Hill Affidavit at paras 21-30 and the Miles Hill Affidavit at paras 4-5.

breach occurred. The fiduciary duty owed by directors and officers is mandatory – it is their obligation to look to what is in the best interests of the corporation.<sup>27</sup> The law is clear that, as a director and officer, acting in a conflict of interest, engaging in self-dealing or making secret profits constitutes a breach of fiduciary duty.<sup>28</sup>

36. By virtue of Page’s prior role as executive and director of the OTE Group, Page breached the duties he owed the OTE Group when he decided to fraudulently purchase the Italian Yacht. This resulted in his failure to act in good faith and in the best interests of the OTE Group, including by attempting to enrich himself and parties related to him at the expense of the OTE Group and their creditors. Page’s actions caused the OTE Group to suffer significant losses, given that they parted with substantial amounts of money for effectively no consideration and no valid business reason.

37. While Page and 265 claim that some of the impugned wire transfers were 265’s partnership profit distributions, the wire transfers in 2021 and 2022 from the OTE Group’s account for the Italian Yacht and the Airsprint jets far exceed any plausible profit share.

**(B) THE MAREVA RESPONDENTS MEET THE TEST FOR JURISDICTIONAL ASSETS RELATING TO THE ITALIAN YACHT**

38. There is no longer a legal requirement that a party establish that a respondent to a *Mareva* must have assets in Ontario before a *Mareva* can be granted, whether in Ontario or worldwide. This Court has held that “the fact that there is no evidence of any assets in Ontario does not

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<sup>27</sup> *Business Corporations Act (Ontario)*, RSO 1990, c B.16, s. 134.

<sup>28</sup> *Canadian Aero Service Ltd v O'Malley*, [1974] SCR 592, 40 DLR (3d) 371 (SCC).

preclude the court from exercising its discretion to grant the *Mareva* where circumstances merit.”<sup>29</sup> Instead, the Ontario Divisional Court has held in *SFC Litigation Trust (Trustee of) v. Chan*<sup>30</sup> that a *Mareva* injunction is an equitable, “evolving” remedy that should transform as facts and circumstances merit.

39. Furthermore, worldwide *Mareva* injunctions may be granted in respect of assets outside of a jurisdiction, whether or not the assets are located within Ontario. These injunctions are granted on the basis that the Court asserts unlimited jurisdiction in personam against any person who is properly made a party to proceedings in the jurisdiction.<sup>31</sup> The less the value of the defendant’s assets in the jurisdiction, the greater the necessity for taking protective measures in relation to those assets outside the jurisdiction. Although it is not necessary to prove that the defendant does not have assets in the jurisdiction, the less the value of those assets, the more likely the Court is to grant relief with extra-territorial effect.<sup>32</sup>

40. At hand, the Italian Yacht was originally held by 256, and both Page and Cox reside in Ontario. The Italian Yacht’s present whereabouts are unknown, and it is possible that the Italian Yacht could be located in Ontario given the *Mareva* Respondents’ connections to this jurisdiction. All funds used to pay for the Italian Yacht were funded by the OTE Group, who operate within Ontario.

41. The Italian Yacht is reasonably connected to this jurisdiction, and a worldwide *Mareva* order should be granted over it.

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<sup>29</sup> [Associated Foreign Exchange Inc. et al v MBM Trading](#), 2020 ONSC 4188 at para 54.

<sup>30</sup> [2017 ONSC 1815](#) at paras 28-29.

<sup>31</sup> *Ibid* at paras 27-45.

<sup>32</sup> [Mooney v Orr](#), [1994] 98 BCLR (2d) 318, 33 CPC (3d) 13 at paras 8-13.

**(C) THERE IS A STRONG RISK OF REMOVAL OF THE ITALIAN YACHT**

42. The law is well-established that the Court can infer from a party's deceitful conduct a sufficient risk of dissipation of assets and that the party will thereby frustrate the enforcement of any judgment the moving party may ultimately obtain.<sup>33</sup>

43. The Italian Yacht is at high risk of being moved across international waters and given its capabilities as a luxury superyacht, is likely already in the process of being hidden or driven by Cox, Page, or any of their affiliates. The Italian Yacht has a lengthy history of being registered in various locations across international waters:<sup>34</sup>

- (a) **August 13, 2021:** The Italian Yacht was registered in Hamilton, Ontario;
- (b) **August of 2022:** The Italian Yacht is listed for sale in Palm Beach, Florida;
- (c) **August of 2022:** The Italian Yacht is again listed for sale but located in Bimini, Bahamas;
- (d) **September 2022:** The Italian Yacht is moved back to Palm Beach, Florida;
- (e) **November of 2022:** The Italian Yacht is delisted from Canadian registries;
- (f) **January of 2022:** The Italian Yacht is moved and located in Fort Lauderdale, Florida; and
- (g) **February of 2022:** The Italian Yacht is renamed and listed on the three Boat Brokers' websites as being for sale and located in Hollywood, Florida.

44. The *Mareva* requirement that there be a risk of removal or dissipation can be established by demonstration of a serious risk that the defendants will attempt to dissipate assets or put them

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<sup>33</sup> *Sibley & Associates LP v Ross et al.*, 2011 ONSC 2951 at paras 62-67 [*Sibley & Associates*].

<sup>34</sup> Fourth Hill Affidavit at paras 36-42.

beyond the reach of the plaintiff. The risk of removal or alienation can be inferred by evidence suggestive of the defendants' fraudulent criminal activity.<sup>35</sup> Strong proof of fraud is a strong factor in determining that a defendant will dissipate its assets.<sup>36</sup>

45. In light of the above timeline, there is an established risk that the Mareva Respondents will attempt to move the Italian Yacht out of reach of the OTE Group.

**(D) THE OTE GROUP WOULD SUFFER IRREPARABLE HARM WITHOUT THE RELIEF OF THE *MAREVA***

46. 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>37</sup>

47. Unless the protective injunction is granted, there is a real risk that the Mareva Respondents will further dissipate the Italian Yacht, and that they will persist in their deceitful conduct, in order to frustrate any judgment that may ultimately be obtained against them. This is a foreseeable risk based on, among other things, the facts set out above in support of the establishment of a strong *prima facie* case of fraud and breach of fiduciary duty.

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<sup>35</sup> *Sibley & Associates*, at paras 63-64.

<sup>36</sup> *Waters Estate v Henry*, 2022 ONSC 5485 at para 154.

<sup>37</sup> *Christian-Philip v Rajalingam*, 2020 ONSC 1925 at para 33.



**(E) THE BALANCE OF CONVENIENCE FAVOURS THE OTE GROUP**

48. The balance of convenience is a consideration of whether the harm suffered by the plaintiff if the order is not made exceeds the harm that will be suffered by the defendant if it is.<sup>38</sup>

49. The law is clear that the factors leading to irreparable harm are important in considering the balance of convenience. While, as noted, there would be irreparable harm to the OTE Group and their creditors if the sought relief is not granted, there is limited harm to the Mareva Respondents if interim relief is granted. Importantly, it is open to the Mareva Respondents to move to vary the injunction order at any time if any prejudice or harm should arise.

*iii. Ex Juris Consideration*

50. The test for a worldwide Mareva injunction further requires the existence of assets ex juris. However, evidence of the existence of the Defendants' assets need not be specific: indeed it may in some cases be unreasonable to expect a party seeking an injunction to have precise evidence of the assets of his adversary in litigation.<sup>39</sup> At hand, there is evidence that the Italian Yacht is likely located in Hollywood, Florida, but has significant and strong connections to Ontario, including its original place of registration prior to its delisting.

*iv. Undertaking Ought Not Be Required*

51. While the OTE Group has provided an undertaking enclosed with their motion materials if the below submissions are not accepted by this Court, given the exceptional circumstances of

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<sup>38</sup> [HZC Capital Inc. v Lee](#), 2019 ONSC 4622 at para 88.

<sup>39</sup> [Revenue & Customs v Cozens & Ors](#), [2011] EWHC 2782 (Ch).

this case as well as the ongoing CCAA proceedings and insolvency of the OTE Group, the undertaking should not be required and this Court should advise in an endorsement that the undertaking is not needed.

52. Rule 40.03 specifically contemplates the Court foregoing the requirement for an undertaking:

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

53. Courts have dispensed with the requirement for an undertaking where the plaintiff has a compelling case, does not have the financial means to make such an undertaking and/or other special circumstances exist that justify foregoing the requirement.<sup>40</sup>

54. Insolvency nullifies the requirement for an undertaking. As stated by this Court in *Sabourin*:<sup>41</sup>

Given the fact that [the moving party] is insolvent, it would be wrong to deny her a *Mareva* injunction to which she would otherwise be entitled on the grounds that her undertaking as to damages would be of little value. Accordingly, the necessity for an undertaking as to damages is dispensed with in this case.

55. In light of the OTE Group's strong case against the Mareva Respondents, the support of the Monitor, the limited funds that it has to advance these proceedings and its creditor concerns,

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<sup>40</sup> *Sabourin*; [Taseko Mines Limited v Phillips](#), 2011 BCSC 1675; [Benjamin v Toronto Dominion Bank](#), [2006] 80 OR (3d) 424, 23 ETR (3d) 149.

<sup>41</sup> *Sabourin*, at para 16.

an undertaking ought not be required from the OTE Group to pursue the relief sought herein.

**PART V- REQUESTED RELIEF**

56. The OTE Group respectfully requests an interim *Mareva* injunction in the form of Order sought herein, which is largely consistent with the Commercial List model Order, subject to certain exceptions, including the isolation of relief to the Italian Yacht asset and the timetable for a return hearing in light of the ongoing CCAA proceedings.

57. A blackline of the proposed draft Order to the Commercial List model Order is included in the motion record for the benefit of this Honourable Court.

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

*Tamie Dolny on behalf of Steven Graff*

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**S. Graff / T. Dolny / S. Hans**

**SCHEDULE “A”  
LIST OF AUTHORITIES**

1. [\*Noreast Electronics Co. Ltd v. Danis\*](#), 2018 ONSC 879
2. [\*Sabourin & Sun Group of Cos. v Laiken\*](#), [2006] OJ No 3847, 151 ACWS (3d) 686 (Ont Sup Ct)
3. [\*Total Traffic Services Inc. v Kone\*](#), 2020 ONSC 4402
4. [\*Rana v Malik\*](#), 2014 ONSC 701
5. [\*Chitel v Rothbart\*](#), [1982] 39 OR (2d) 513, 141 DLR (3d) 268 (Ont CA)
6. [\*Petro-Diamond Incorporated v Verdeo Inc.\*](#), 2014 ONSC 2917
7. [\*Bruno Appliance and Furniture, Inc. v Hryniak\*](#), 2014 SCC 8
8. [\*Canadian Aero Service Ltd v O'Malley\*](#), [1974] SCR 592, 40 DLR (3d) 371 (SCC)
9. [\*Associated Foreign Exchange Inc. et al v MBM Trading\*](#), 2020 ONSC 4188
10. [\*SFC Litigation Trust \(Trustee of\) v Chan\*](#), 2017 ONSC 1815
11. [\*Mooney v Orr\*](#), [1994] 98 BCLR (2d) 318, 33 CPC (3d) 13
12. [\*Sibley & Associates LP v Ross et al.\*](#), 2011 ONSC 2951
13. [\*Waters Estate v Henry\*](#), 2022 ONSC 5485
14. [\*Christian-Philip v Rajalingam\*](#), 2020 ONSC 1925
15. [\*HZC Capital Inc. v Lee\*](#), 2019 ONSC 4622
16. [\*Revenue & Customs v Cozens & Ors\*](#), [2011] EWHC 2782 (Ch)
17. [\*Taseko Mines Limited v Phillips\*](#), 2011 BCSC 1675
18. [\*Benjamin v Toronto Dominion Bank\*](#), [2006] 80 OR (3d) 424, 23 ETR (3d) 149

**SCHEDULE “B”  
RELEVANT STATUTES**

**Courts of Justice Act, RSO 1990, c C.43**

**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.

**Business Corporations Act (Ontario), RSO 1990, c B.16**

**Standards of care, etc., of directors, etc.**

**134 (1)** Every director and officer of a corporation in exercising his or her powers and discharging his or her duties to the corporation shall,

**(a)** act honestly and in good faith with a view to the best interests of the corporation; and

**(b)** exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances.

**Duty to comply with Act, etc.**

**(2)** Every director and officer of a corporation shall comply with this Act, the regulations, articles, by-laws and any unanimous shareholder agreement. R.S.O. 1990, c. B.16, s. 134 (2).

**Cannot contract out of liability**

**(3)** Subject to subsection 108 (5), no provision in a contract, the articles, the by-laws or a resolution relieves a director or officer from the duty to act in accordance with this Act and the regulations or relieves him or her from liability for a breach thereof.

**ONTARIO  
SUPERIOR COURT OF JUSTICE  
COMMERCIAL LIST**

**Proceedings commenced at Toronto**

**FACTUM OF THE OTE GROUP**

**AIRD & BERLIS LLP**

Barristers and Solicitors  
Brookfield Place  
181 Bay Street  
Suite 1800  
Toronto, ON M5J 2T9

**Steven Graff (LSO# 31871V)**  
**Martin Henderson (LSO# 24986L)**  
**Tamie Dolny (LSO# 77958U)**  
**Samantha Hans (LSO# 84737H)**

Tel: 416.863.1500  
Fax: 416.863.1515

*Lawyers for the OTE Group*