

**ONTARIO  
SUPERIOR COURT OF JUSTICE  
COMMERCIAL LIST**

**B E T W E E N:**

**ASTRAZENECA CANADA INC.**

**Plaintiff**

**and**

**SAMEH SADEK also known as Sam Sadek, ST. MAHARIAL PHARMACY INC.  
DBA MD HEALTH PHARMACY, ST. MAHARIAL CLINIC INC., SRX  
INVESTMENT INC., SHEPHERD RX PHARMACY INC. and LILIAN FAM**

**Defendants**

**MOVING PARTY LILLIAN FAM'S FACTUM**

**April 9, 2019**

**O'CONNOR MACLEOD HANNA LLP**  
Barristers and Solicitors  
700 Kerr Street  
Oakville ON L6K 3W5

Orie Niedzwiecki (LSUC# 42087U)  
orie@omh.ca  
Tel: 905-842-8030 ext. 3342  
Fax: 905-842-2460

Lawyers for the Defendant,  
Lilian Fam

TO: **BLAKE, CASSELS & GRAYDON LLP**

Barristers and Solicitors  
199 Bay Street  
Suite 4000  
Box 25  
Commerce Court West  
Toronto ON M5L 1A9

R.S.M. Woods (LSUC# 30169I)

Tel: 416-863-3876

Tel: 416-863-2400

Fax: 416-863-2653

Lawyers for the Plaintiff

TO: **AIRD BERLIS**

Lawyers  
181 Bay Street  
Suite 1800  
Brookfield Place  
Toronto ON M5J 2T9

Kyle Plunkett

Tel: 416-865-3406

Fax: 416-863-1515

Lawyers for the Receiver, Alvarze & Marsal Canada Inc.

## **PART I - OVERVIEW**

1. This Motion is for an Order setting aside the noting in default of the Defendant and Moving Party Lilian Fam (“Ms. Fam”) and an Order varying or setting aside the Orders of Justice Dunphy dated August 9 and August 17, 2018.

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

2. Ms. Fam is a single mother of three children.<sup>1</sup> Ms. Fam had no knowledge of, nor did she participate in, the alleged fraud set out in the Statement of Claim.<sup>2</sup>

3. The Plaintiff Astrazeneca Canada Inc.’s (“Astrazeneca” or the “Plaintiff”) claim concerns an alleged scheme that supposedly began in early 2017.<sup>3</sup>

4. Ms. Fam may have received some of the proceeds of any such scheme from Sameh Sadek in the form of child and spousal support, and she is willing to account for same if those proceeds are proven to have been obtained inappropriately.<sup>4</sup>

5. In Astrazeneca’s Motion Record<sup>5</sup>, it is alleged that Ms. Fam is a 50% shareholder of the defendant corporation, St. Maharial Pharmacy Inc. This is not accurate. Ms. Fam ceased being a shareholder in this corporation as of June 10, 2016 when she transferred the shares to Sameh Sadek as part of a settlement between them that arose from their separation – prior to the beginning of the alleged scheme. Those shares comprised the entirety of her shareholding interest, such that since

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<sup>1</sup> Motion Record: Tab 2: Lillian Fam’s February 28, 2019 Affidavit (“Fam’s Affidavit”) at para 4.

<sup>2</sup> *Ibid* at para 5.

<sup>3</sup> *Ibid* at para 6.

<sup>4</sup> *Ibid* at para 7.

<sup>5</sup> *Ibid*: Ex. B Plaintiff’s Notice of Motion and supporting Affidavits (without exhibits).

that time, Ms. Fam ceased to have any shareholding interest whatsoever in St. Maharial Pharmacy Inc. Ms. Fam was paid for those shares as part of her separation agreement with Sameh – and all of this took place before the events Astrazeneca complains of.<sup>6</sup>

6. Sameh Sadek and Ms. Fam have been separated and have not resided together since October 2015. A separation agreement was entered into in April 2016. Ms. Fam resided at 5045 Churchill Meadows Boulevard, Mississauga, Ontario (“home”), and purchased her home in December 2016. Ms. Fam purchased her home with the funds from her sale of her interest in St. Maharial Pharmacy Inc. to Sameh – again, all before the event the Plaintiff complains of.<sup>7</sup>

7. Furthermore, Ms. Fam ceased working at St. Maharial Pharmacy Inc. on or about April 2016 and ceased attending the premises. Ms. Fam was doing pharmacist relief work at other arms-length pharmacies around the Greater Toronto Area, for which she issued invoices for her services. Accordingly, it is impossible for her to have participated in any of the alleged conduct set out in the plaintiff’s Statement of Claim and Motion Record, nor did she do so.<sup>8</sup>

8. On August 3, 2018, the Plaintiff commenced a claim against Ms. Fam, her estranged husband, Sameh Sadek, and some of his companies alleging involvement in a fraudulent scheme concerning various patient-choice programs (the “Claim”).<sup>9</sup>

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<sup>6</sup> Motion Record: Tab 2: Fam’s Affidavit at para 8.

<sup>7</sup> *Ibid* at para 9 and Ex. B: August 2, 2018 Affidavit of Tim Rutherford (“Tim’s Affidavit”), at para 48, Ex. X parcel abstract.

<sup>8</sup> Motion Record: Tab 2: Fam’s Affidavit at para 10.

<sup>9</sup> *Ibid* at para 10, Ex. A. Statement of Claim.

### **The Mareva Order**

9. Astrazeneca brought a motion on August 9, 2018 for an Order for a Mareva injunction against the Defendants.<sup>10</sup>

10. Notably, the supporting affidavits of the Plaintiff for the Mareva injunction and subsequent motions do not contain any real evidence of Ms. Fam's involvement in the alleged fraud.<sup>11</sup>

11. Ms. Fam became aware of the pending motion on August 8, 2018. Her estranged husband, Sameh Sadek, said he would take care of it. He retained Blainey McMurtry LLP to represent both of them on the motion. Ms. Fam had no part in retaining them and provided them with a very short affidavit at their request.<sup>12</sup>

12. On August 9, 2018, the Honourable Justice Dunphy made the order granting the Mareva injunction against Ms. Fam (the "Mareva Order").<sup>13</sup>

13. On August 10, 2018, Astrazeneca placed a Certificate of Pending Litigation on Ms. Fam's home.<sup>14</sup>

14. The Mareva Order turned Ms. Fam's life upside down. All of sudden she had no access to any funds whatsoever as Astrazeneca had served the Mareva Order on all her banking institutions thereby freezing all of her accounts.<sup>15</sup>

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<sup>10</sup> *Ibid* at para 12, and Ex. B Notice of Motion and Tim's Affidavit.

<sup>11</sup> *Ibid* at para 13.

<sup>12</sup> *Ibid* at para 14, Ex. C: Copy of Ms. Fam's Affidavit.

<sup>13</sup> *Ibid* at para 15, Ex. D: Mareva Order.

<sup>14</sup> *Ibid* at para 16.

15. The Mareva Order requires or prohibits Ms. Fam with respect to the following:
- (a) Provide a sworn statement to the Plaintiff by August 16, 2018 listing any assets, worldwide – Paragraph 4;
  - (b) By August 16, 2018, prepare and provide to the Plaintiff a sworn statement enclosing copies of her accounting records, bank account statements, financial statements and tax returns for the period June 1, 2017 to the present – Paragraph 5(a);
  - (c) By August 16, 2018, prepare and provide to the Plaintiff a sworn statement enclosing any records related to the patient choice programs – Paragraph 5(b);
  - (d) Submit to examinations under oath before September 14, 2018 – Paragraph 6;
  - (e) Prohibits her from leaving Ontario – Paragraph 10; and
  - (f) Requires that she surrender her passport to the court register – Paragraph 11.<sup>16</sup>
16. Ms. Fam was served with the Mareva Order on or about the same day and she panicked.<sup>17</sup>
17. Ms. Fam did not know and had never heard that a civil court could seize her passport or prevent her from leaving Ontario. Her only significant support network was her family in Egypt and the thought of not having any funds and not being able to go to her family who could support her was more than she could bear. She did not know what to do or how to support her three children.<sup>18</sup>
18. Ms. Fam was already being treated for anxiety and the Mareva Order and ensuing panic pushed her into fleeing Ontario on or about August 14, 2018. She took her youngest child – her

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<sup>15</sup> *Ibid* at para 17.

<sup>16</sup> *Ibid* at para 18.

<sup>17</sup> *Ibid* at para 19.

<sup>18</sup> *Ibid* at para 20.

daughter – with her. She left one son who is high school age with his uncle. The third son lives at his university.<sup>19</sup>

19. On August 17, 2018, the Mareva Order was continued.<sup>20</sup>

20. Blaney McMurtry LLP was no longer representing Ms. Fam after that court date and she had no counsel.<sup>21</sup>

### **The Receivership Order**

21. On or about September 10, 2018, Astrazeneca brought a motion to appoint a receiver over Ms. Fam. That motion was served with one day's notice and was returnable on September 11, 2018.<sup>22</sup>

22. On September 11, 2018, Justice Dunphy granted the Receivership Order over Ms. Fam, thereby depriving her of absolutely everything – her home, her car, all her funds (which were already frozen), even access to her clothing.<sup>23</sup>

23. Ms. Fam has no funds to her name anymore. Everything was seized by the Receiver. She is currently living off the charity of family in Egypt, who are supporting her.<sup>24</sup>

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<sup>19</sup> *Ibid* at para 21.

<sup>20</sup> *Ibid* at para 22, Ex. E: Further Order of Justice Dunphy of August 17, 2018.

<sup>21</sup> *Ibid* at para 23.

<sup>22</sup> *Ibid* at para 24, Ex. F: Notice of Motion and supporting affidavit without exhibits.

<sup>23</sup> *Ibid* at para 25, Ex. G: Receivership Order.

<sup>24</sup> *Ibid* at para 26.

24. Since September, the Receiver has taken steps to liquidate everything of value that she owned. All of this has happened to Ms. Fam without any determination that Ms. Fam was, in fact, liable under the claim – though she accepts her responsibility for initially violating the Mareva Order.<sup>25</sup>

25. No matter how much Ms. fam wanted to come back and comply with the Mareva Order, as a result of the Mareva and Receivership Orders, there was no way she could return to Ontario as she would have no place to live, no method of transportation, no funds whatsoever and had her daughter to take care of.<sup>26</sup>

26. In late September, Ms. Fam retained her current counsel, Mr. Niedzwiecki.<sup>27</sup>

#### **Requests to Set Aside the Noting in Default and Comply With the Mareva Order**

27. On September 21, 2018 Mr. Niedzwiecki e-mailed Plaintiff's counsel asking if they had noted Ms. Fam in default. He was told yes by opposing counsel.<sup>28</sup>

28. On September 28, 2018, Mr. Niedzwiecki made a proposal to Plaintiff's counsel regarding many of the issues, including that Ms. Fam's noting in default be set aside. This was refused.<sup>29</sup>

29. On or about September 21, 2018, Mr. Niedzwiecki asked counsel for Astrazeneca to vary the Mareva Order to permit Ms. Fam to have some access to funds she earns herself or gifts she

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<sup>25</sup> *Ibid* at para 27.

<sup>26</sup> *Ibid* at para 28.

<sup>27</sup> *Ibid* at para 29.

<sup>28</sup> *Ibid* at para 30.

<sup>29</sup> *Ibid* at para 31.



received or receives and to let her use her home and car. They refused. Mr. Niedzviecki requested this same relief a number of times and each time they refused until Ms. Fam was in full compliance with the Mareva Order – despite the fact that she had nowhere to live or any means of transportation.<sup>30</sup>

30. On October 5, 2018, Orie Niedzviecki attended on a 9:30 appointment before the Honourable Justice Chiappetta requesting a date for the hearing of a motion to vary the Mareva Order and the Receivership Order.<sup>31</sup>

31. Justice Chiappetta refused to provide a date for such a motion as Ms. Fam was in violation of the terms of the Mareva Order.<sup>32</sup>

32. On October 24, 2018, Ms. Fam swore a statement that complied with Paragraphs 4, 5, and 6 of the Mareva Order. This statement was served on opposing counsel on October 29, 2018.<sup>33</sup>

33. The closest notary public that Ms. Fam could use was located 6 hours from where she was staying in Egypt.<sup>34</sup>

34. When Mr. Niedzviecki served the sworn statement on October 29, 2018 by e-mail on counsel for Astrazeneca, he advised Ms. Fam wished to rectify the breaches of the Mareva Order.<sup>35</sup>

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<sup>30</sup> *Ibid* at para 32.

<sup>31</sup> *Ibid* at para 33.

<sup>32</sup> *Ibid* at para 34.

<sup>33</sup> *Ibid* at para 35. Ex. H: Sworn Statement.

<sup>34</sup> *Ibid* at para 36.

<sup>35</sup> *Ibid* at para 37, Ex. I: Orie Niedzviecki's October 29, 2018 email to opposing counsel.

35. Mr. Niedzwiecki advised Plaintiff's counsel in a telephone conversation that Ms. Fam would return to Ontario and present herself for the examination required in the Mareva Order if they would agree she could retain her passport and let her have access to her car and her house. They refused.<sup>36</sup>

36. On November 11, 2018, Mr. Niedzwiecki asked counsel for Astrazeneca if they would simply permit Ms. Fam to retain her passport and remove the injunction against her leaving Ontario in exchange for her agreeing to come back and be examined. They refused even that.<sup>37</sup>

37. A further 9:30 attendance on December 14, 2018 took place before Justice Dunphy where Mr. Niedzwiecki was once again denied a date to bring a motion to vary the Mareva Order. The 9:30 request form stated that Ms. Fam would be seeking a date for a motion to vary the Mareva Order and set aside the noting in default.<sup>38</sup>

38. As Ms. Fam had no choice, she returned to Ontario and was examined by Plaintiff's counsel as per the Mareva Order on January 21, 2019. On the same day she deposited her passport with the registrar for the Commercial List court. Ms. Fam has now purged her contempt of the Mareva Order.<sup>39</sup>

39. The Plaintiff's examination of Ms. Fam focused almost exclusively on her assets breaches

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<sup>36</sup> *Ibid* at para 38.

<sup>37</sup> *Ibid* at para 39.

<sup>38</sup> *Ibid* at para 40.

<sup>39</sup> *Ibid* at para 41.

of the Mareva Order. There were literally no questions that went to the merits of the claim.<sup>40</sup>

40. A further 9:30 appointment took place on February 7, 2019 before Justice Conway wherein Ms. Fam was given the date of April 17, 2019 for a motion to set aside having been noted in default and to move for variations of the Mareva Order and Receivership Order. At that attendance, Plaintiff's counsel was asked by the court if they would agree to let her file a Statement of Defence. They refused saying they did not agree with the conditions attached. There were no conditions attached.<sup>41</sup>

41. On February 18, 2019, Mr. Niedzwiecki once again wrote to Plaintiff's counsel requesting that they simply permit Ms. Fam to file a Defence – no conditions attached. They refused.<sup>42</sup>

#### **Assets**

42. Ms. Fam has no income and no assets. All of her money has been and continues to be seized by the Receiver, even her child tax benefits from the government.<sup>43</sup>

43. Ms. Fam is requesting a monthly payment of \$5,000 to pay rent for an apartment for her and her children, lease a car, and pay for food, clothing and other expenses.<sup>44</sup>

44. Ms. Fam would like to work, but she currently has no ability to get paid as she is not allowed to have any assets.<sup>45</sup>

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<sup>40</sup> *Ibid* at para 42.

<sup>41</sup> *Ibid* at para 43.

<sup>42</sup> *Ibid* at para 44.

<sup>43</sup> *Ibid* at para 45.

<sup>44</sup> *Ibid* at para 46.

### **Opportunity to Defend**

45. Ms. Fam would like and deserves the opportunity to defend herself on the merits. She has a strong defence on the merits in that she had no involvement in this alleged scheme. She has always demonstrated a desire to defend herself and has been trying to do so despite being in Egypt and not in a major city, and being without funds entirely.

### **Effects of the Plaintiff's Actions**

46. Despite the lack of a strong claim against Ms. Fam, Astrazeneca has taken everything from her – including her right as a Canadian citizen to travel freely. They have:

- (a) destroyed Ms. Fam's reputation as a pharmacist by informing her professional college of the claim;
- (b) the Receiver has seized two paycheques from the pharmacy Ms. Fam was working at when the Orders were made – clearly not money that could be connected to any alleged scheme;
- (c) the Receiver seized her RRSP savings, leaving Ms. Fam without any prospect for retirement – most of which, if not all, are funds that were contributed long before the events the Plaintiff's complain of;
- (d) taken her house, that she purchased with money from her separation and by giving up her ownership in her estranged husband's business – the one she is now accused of still being a part of. This separation and payment took place before the alleged scheme the Plaintiff's accuse her of; and
- (e) caused her very significant mental anguish and a loss of belief in the justice system in Canada.<sup>46</sup>

47. There was no basis in any of the Plaintiff's material which strongly suggested Ms. Fam had any part in this alleged scheme, yet all of the above was done to her anyway. Now, they wish to obtain a judgment without proving any of the allegations against Ms. Fam.<sup>47</sup>

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<sup>45</sup> *Ibid* at para 47.

<sup>46</sup> *Ibid* at para 49.

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

48. Should this Court set aside Ms. Fam's noting of default?

49. Should the August 9 and 17, 2018 Orders of Justice Dunphy be varied?

#### *Setting aside a noting in default*

50. The *Rules of Civil Procedure* state:

19.03(1) The noting of default may be set aside by the court on such terms as are just.

51. When exercising its discretion to set aside a noting of default, a court should assess "the context and factual situation" of the case.<sup>48</sup>

52. It should particularly consider such factors as the behaviour of the plaintiff and the defendant; the length of the defendant's delay; the reasons for the delay; and the complexity and value of the claim. These factors are not exhaustive.<sup>49</sup>

53. Some decisions have also considered whether setting aside the noting of default would prejudice a party relying on it.<sup>50</sup>

#### *No defence on the merits required in setting aside default*

54. The test for setting aside a default judgment and the test for setting aside a noting of default

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<sup>47</sup> *Ibid* at para 50.

<sup>48</sup> *Sualim v Thomas*, 2019 ONSC 837 at para 4 citing *Intact Insurance Company v Kisel*, 2015 ONCA 205 at para 13.

<sup>49</sup> *Ibid*.

<sup>50</sup> *Ibid*.

differ in that, only in extreme circumstances, should the court require a defendant who has been noted in default to demonstrate an arguable defence on the merits.<sup>51</sup>

55. If the omission to file a statement of defence within the required time can be explained, the defendant should not be in a different position than a defendant who serves and files a statement of defence within the prescribed time. The plaintiff's proper course of action if there is a lack of merit in the statement of defence is to move for summary judgment.<sup>52</sup>

56. Motions to extend the time for delivery of pleadings and to relieve against defaults are frequently made and are typically granted on an almost routine basis. Usually, opposing counsel will consent to such relief as a matter of professional courtesy. Where there is opposition to a motion of this kind, it is usually related to additional terms which are sought as a condition to the indulgence being granted or to issues of costs. It is not in the interests of justice to strike pleadings or grant judgments based solely on technical defaults. Rather, the court will always strive to see that issues between litigants are resolved on their merits whenever that can be done with fairness to the parties.<sup>53</sup>

57. Only in extreme circumstances should the court require a defendant who has been noted in default to demonstrate an arguable defence on the merits. The "extreme circumstances" contemplated would apply where a defendant is unable to satisfy the other factors but has a defence on the merits that might justify allowing it to defend. Otherwise, if the plaintiff whose

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<sup>51</sup> *Ibid* at paras 5 and 6.

<sup>52</sup> *Ibid* at para 7 citing *Metropolitan Toronto Condominium Corp. No. 706 v Bardmore Developments Ltd.* [1991] CarswellOnt 828 (ONCA).

<sup>53</sup> *Ibid* at para 8 citing *Nobosoft Corp. v No Borders Inc.* [2007] CarswellOnt 3903 (ON CA) at para 7.

noting in default is challenged on procedural grounds seeks a summary disposition of the action on the merits, the appropriate course of action is a summary judgment motion.<sup>54</sup>

58. Therefore, even if this court finds Ms. Fam unable to satisfy the other factors of the test, this Court must still find that she has a strong defence on the merits in that she had no involvement in this alleged scheme.

*Conduct of the parties*

59. Consideration of the conduct of the parties is directed primarily to whether the defendant consistently displayed an intention to defend the action but also to whether the plaintiff contributed to any delay.<sup>55</sup>

60. It was evident early on the Plaintiff had an intention of defending herself in this action. The Plaintiff issued its Statement of Claim on August 3, 2018.<sup>56</sup> The Plaintiff brought a Motion for a Mareva injunction returnable on August 8, 2018.<sup>57</sup> Ms. Fam first defended herself on August 8, 2018 by swearing an Affidavit in response to the Plaintiff's motion for a Mareva injunction.<sup>58</sup>

61. The Plaintiff has contributed to the delay in failing to negotiate a reasonable resolution to Ms. Fam's return to Canada and to an amendment to the Mareva injunction so Ms. Fam could have funds to continue in her defence. The Plaintiff has also failed to consent to setting aside the default as a professional courtesy.

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<sup>54</sup> *Ibid* at para 32.

<sup>55</sup> *Ibid* at para 13.

<sup>56</sup> Motion Record: Tab A: Statement of Claim.

<sup>57</sup> *Ibid*: Tab B: Notice of Motion.

<sup>58</sup> *Ibid*: Tab C: Fam's August 8, 2018 Affidavit.

*Length of the delay and the reasons for the delay*

62. Ms. Fam initially was relying on her estranged husband to handle this matter as she had already given up her shareholding of the business in June 10, 2016. Since then, and since the Plaintiff obtained its Mareva injunction Ms. Fam has been attempting to survive.<sup>59</sup>

*Prejudice*

63. The Plaintiff would suffer no prejudice should the default judgment be set aside.

64. Yet, Ms. Fam would suffer significant prejudice if the judgment is not set aside, she would lose the ability to defend an action, and she would continue to have be subject to the Mareva Orders, which is depriving her of all her assents, including access to her home for her and her children.

*Costs*

65. Where a defendant is successful on a motion for relief which is ordinarily granted as a matter of professional courtesy, which a setting aside of noting in default is, a defendant shall have the costs of that motion.<sup>60</sup>

*No “strong likelihood” as against Ms. Fam*

66. Recently, in *R. v Canadian Broadcasting Corp.*,<sup>61</sup> a unanimous Supreme Court of Canada concluded that to obtain a mandatory interlocutory injunction, the moving party “must demonstrate a strong prima facie case that it will succeed at trial. This entails showing a *strong likelihood* on

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<sup>59</sup> *Ibid*: Ex. A: Statement of Claim at para 21.

<sup>60</sup> *Ferina Construction Ltd. v Labno Developments Corp.*, 2018 ONSC 125 at para 37.

<sup>61</sup> 2018 SCC 5 at para 17.



the law and the evidence presented that, at trial, the applicant will be ultimately successful in proving the allegations set out in the originating notice.”<sup>62</sup>

67. Applied to a request for a freezing order, usually brought in exigent circumstances when all the evidence has not been fully developed, this means the plaintiff must show a strong likelihood that it will be successful at trial in proving Ms. Fam committed a fraud.

68. Whether or not the Plaintiff has a strong *prima facie* or strong likelihood as against the other Defendants, a court should only look at its case as against Ms. Fam when deciding on the Mareva injunction as against her.

#### *Varying a Mareva injunction*

69. The Court in *Canadian Imperial Bank of Commerce v. Credit Valley Institute of Business & Technology*<sup>63</sup> set out the four part test to consider in determining whether to vary a Mareva injunction:

- a. Has the defendant established on the evidence that he has no other assets available to pay his expenses other than those frozen by the injunction?
- b. If so, has the defendant shown on the evidence that there are assets caught by the injunction that are from a source other than the plaintiff, i.e. assets that are subject to a Mareva injunction, but not a proprietary claim?
- c. The defendant is entitled to the use of non-proprietary assets frozen by the Mareva injunction to pay his reasonable living expenses, debts and legal costs. Those assets must be exhausted before the defendant is entitled to look to the assets subject to the proprietary claim.

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<sup>62</sup> *Ibid* at para 18.

<sup>63</sup> 2003 CanLII 12916 (ON SC) at para 26.

- d. If the defendant has met the previous three tests and still requires funds for legitimate living expenses and to fund his defence, the court must balance the competing interests of the plaintiff in not permitting the defendant to use the plaintiff's money for his own purposes and of the defendant in ensuring that he has a proper opportunity to present his defence before assets in his name are removed from him without a trial. In weighing the interests of the parties, it is relevant for the court to consider the strength of the plaintiff's case, as well as the extent to which the defendant has put forward an arguable case to rebut the plaintiff's claim.

70. Ms. Fam has no other assets available to her to pay her expenses, except for those frozen by the injunction, or the monies she could be earning from obtaining employment at this time.

71. Ms. Fam has shown that there are assets caught by the injunction that are from a source other than the Plaintiff. In her Affidavit Ms. Fam provides evidence that she purchased her home in December 2016<sup>64</sup>, before the allegations of early 2017 as set out in paragraph 21 of the Statement of Claim.<sup>65</sup> She provides evidence that all of her money has been and continues to be seized by the Receiver, even her child tax benefits from the government.<sup>66</sup>

72. Ms. Fam also provides evidence she ceased working for St. Maharial Pharmacy Inc. on or about April 2016, and worked for other arms' length pharmacies since then. Ms. Fam was paid by these arms' length pharmacies and yet the funds she made from them are also caught up by the injunction. In fact, the Receiver seized two paycheques from the pharmacy she was working at when the Orders were made, clearly not money that could be connected to any alleged scheme.<sup>67</sup>

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<sup>64</sup> Motion Record: Tab 2: Ms. Fam's Affidavit at para 9.

<sup>65</sup> *Ibid*: Tab A: Statement of Claim.

<sup>66</sup> *Ibid*: Tab 2: Fam's Affidavit at para 45.

<sup>67</sup> *Ibid* at para 49.

73. She is also not capable of opening up a bank account, and therefore is not able to pursue gainful employment while either this matter is ongoing or the Mareva injunction is not varied.

74. Ms. Fam has no non-proprietary assets frozen by the Mareva injunction to pay her reasonable living expenses, debts and legal costs. She testifies that she has no income and no assets. All of her money has been and continues to be seized by the receiver, even her child tax benefits from the government.<sup>68</sup>

75. Where a defendant puts forward credible evidence that she legitimately accrued at least of the subject assets on her own, and that they could not possibly be the property of the plaintiff, a court will be satisfied that those assets should be released.<sup>69</sup>

76. There is no legal basis to continue to prevent Ms. Fam from having freedom to leave Ontario at will or to have her passport. She cannot prejudice the Plaintiff if she chose to leave. It is her Charter right to have freedom of movement.

77. The balance of convenience favours amending the Mareva Orders as requested. This Court should examine the strength of the Plaintiff's case as against Ms. Fam's. Without the requested amendments Ms. Fam will not have a proper opportunity to present her defence.

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<sup>68</sup> *Ibid* at para 45.

<sup>69</sup> *Luong v Trinh*, 2014 ONSC 693 at para 25.

**PART IV - ORDER REQUESTED**

78. This Motion is for:

**Part 1**

- (a) An Order setting aside the noting in default of Lilian Fam;

**Part 2**

- (b) An Order varying or setting aside the Orders of Justice Dunphy dated August 9 and August 17, 2018, in the following manner:
  - (i) Removing Paragraph 10 of the August 9, 2018 Order with respect to Lilian Fam;
  - (ii) Removing Paragraph 11 of the August 9, 2018 Order with respect to Lilian Fam; and
  - (iii) Adding a paragraph permitting Lilian Fam to open and maintain a bank account in Ontario at a branch of her choosing for use in depositing and withdrawing any funds she receives from the date of this order onwards for use as she sees fit, subject to any further court order;
- (c) An order varying or setting aside the Order of Justice Dunphy dated September 11, 2018 in the following manner:
  - (i) Paragraph 36 be varied to insert the following language before the “(b)” and “(d)”, “save and except for as against the Defendant Lilian Fam”;
  - (ii) Paragraph 36 be further varied to require notice be made to Lilian Fam of any steps set out after the “(e)”; and
  - (iii) Paragraph 39 be varied to add the following language at the end “except as subsequently ordered by this Court”;
- (d) An Order that the Receiver, Alvarez & Marsal, provide the Defendant, Lilian Fam, the amount of \$5,000, on a monthly basis to cover expenses;
- (e) The costs of this Motion on the highest scale this Honourable Court deems just; and,
- (f) Such further and other Relief as to this Honourable Court may seem just.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED** this 9<sup>th</sup> day of April, 2019.

"Orie Niedzwiecki" as per E. Ry  
Orie Niedzwiecki

**O'CONNOR MACLEOD HANNA LLP**

Barristers and Solicitors

700 Kerr Street

Oakville ON L6K 3W5

Orie Niedzwiecki (LSUC# 42087U)

orie@omh.ca

Tel: 905-842-8030 ext. 3342

Fax: 905-842-2460

Lawyers for the Defendant,

Lilian Fam

## **SCHEDULE “A”**

### **LIST OF AUTHORITIES**

1. *Sualim v. Thomas*, 2019 ONSC 837.
2. *Ferina Construction Ltd. v. Labno Developments Corp.*, 2018 ONSC 125.
3. *R. v Canadian Broadcasting Corp.* 2018 SCC 5.
4. *Canadian Imperial Bank of Commerce v. Credit Valley Institute of Business & Technology*, 2003 CanLII 12916 (ON SC).
5. *Luong v. Trinh*, 2014 ONSC 693.

**SCHEDULE "B"**

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

***SETTING ASIDE THE NOTING OF DEFAULT***

**19.03** (1) The noting of default may be set aside by the court on such terms as are just.

ASTRAZENECA CANADA INC.  
Plaintiff

-and- SAMEH SADEK also known as Sam Sadek et al.  
Defendants

Court File No. CV-18-602745-00 CL

**ONTARIO  
SUPERIOR COURT OF JUSTICE  
COMMERCIAL LIST**

PROCEEDING COMMENCED AT  
TORONTO

**MOVING PARTY'S (LILIAN FAM) FACTUM**

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Oakville ON L6K 3W5

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Lawyers for the Defendant,  
Lilian Fam

RCP-E 4C (May 1, 2016)