SUPERIOR COURT OF JUSTICE
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COUNSEL SLIP / ENDORSEMENT

COURT FILE NO.: **CV-22-00685133-00CL** **DATE:** **August 29 2023**

NO. ON LIST: **5**

TITLE OF PROCEEDING: **CHRISCWE HOLDINGS INC. v. OASIS GLOBAL INC. *ET AL.***

BEFORE JUSTICE: **P. OSBORNE**

PARTICIPANT INFORMATION

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For Defendant, Respondent, Responding Party, Defence:

Name of Person Appearing	Name of Party	Contact Info
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Name of Person Appearing	Name of Party	Contact Info
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ENDORSEMENT OF JUSTICE OSBORNE:

1. The Plaintiff, Chriscwe Holdings Inc. (Chriscwe or the Plaintiff), moves for an order appointing Crowe Soberman Inc. as receiver with possession but without security of the assets, undertaking and property of the Defendants Oasis Global Inc., Mark Rivers, and 2833713 Ontario Inc. (Oasis, Rivers, and 283 respectively, or collectively, the Defendants), and an order unsealing the First Report of the Interim Receiver dated January 24, 2023. As further explained below, Crowe Soberman (the "Receiver") has already been appointed as non-possessory receiver over the property and assets of Rivers and Oasis.

2. The Defendants oppose the full receivership motion of the Plaintiff and move by way of cross-motion for an order pursuant to section 106 of the *Courts of Justice Act*, temporarily staying the payment obligation arising from the Order of Steele J. dated February 24, 2023, pending determination of their counterclaim.

3. The Receiver moves for an order approving the First Report dated July 18, 2023 and the activities described therein, a sealing order in respect of Confidential Appendix "E", and further relief in respect of its powers and the scope of the receivership.

4. In particular, the Receiver seeks an order in accordance with the earlier receivership order dated June 21, 2023, compelling 283 (and other entities) to provide documents, books and records, and financial statements; an order expanding the non-possessory powers of the Receiver to include 283; and the advice and directions of the Court as to whether the non-possessory receivership over Oasis and Rivers should be expanded to a possessory receivership over those entities and, in addition, 283.

5. This proceeding has a lengthy, acrimonious and complex history. So too do the motions returnable now, the record in respect of which comprises approximately 3000 pages. Defined terms in this Endorsement have the meaning given to them in the motion materials or earlier Endorsements of this court unless stated otherwise.

6. I have reviewed all of the materials, although I have placed particular emphasis on those documents and facts specifically drawn to my attention in the written and oral submissions of the parties.

7. Some background and context for these motions is in order.

The Parties, the Debt and the Security

8. Chriscwe is an Ontario corporation. Its principal is Mr. Chris Kaufman.

9. Oasis is an Ontario corporation in the business of distributing off-road power sports vehicles including Segway vehicles. Its sole officer and director is the Respondent Rivers. Chriscwe is a shareholder and a first ranking secured creditor of Oasis.

10. 283 is an Ontario corporation of which Rivers' wife, Ms. Linda Rivers, is sole shareholder. Linda Rivers is also a shareholder of Oasis.

11. Kaufman and Rivers were friends and then business partners for many years. Chriscwe provided financing to Oasis. As is often regrettably the case, however, the business relationship soured, resulting in both this proceeding and the collapse of the friendship between the principals.

12. By agreement dated February 13, 2019, Oasis granted Chriscwe a first ranking security interest in its assets. That security agreement includes numerous relatively typical terms, including the covenant on the part of Oasis to provide documents, books and records, financial statements, and information regarding its business and affairs promptly upon request by Chriscwe, the secured creditor.

13. The security agreement also defines events of default, including the failure to satisfy or perform any of the obligations of Oasis when due, upon the occurrence of which Chriscwe may at its option declare any obligations to be immediately due and payable. In the event of default, the security agreement provides that Chriscwe may appoint a receiver.

14. Rivers personally, irrevocably and unconditionally guaranteed the debts and liabilities of Oasis owing to Chriscwe pursuant to a guarantee agreement dated February 13, 2019. That guarantee was supported by a security agreement dated February 13, 2019, in favour of Chriscwe and a mortgage registered against title to a property located in Baltimore, Ontario.

15. Upon default in repayment of the outstanding loans, Chriscwe a made a demand for the production of documents on October 22, 2021, both as a shareholder and secured creditor of Oasis. The position of Chriscwe is that the documents were not forthcoming.

The Proceedings, the Terms of Settlement and the Arbitration

16. Given the default, Chriscwe commenced a mortgage enforcement proceeding in respect of the Baltimore property in October 2021.

17. The parties then retained a professional mediator/arbitrator (Mr. Andrew Diamond), with whose mediation assistance they concluded a settlement and signed formal Terms of Settlement. Pursuant to those Terms, Oasis and Rivers agreed, among other things, to acquire all of the interests of Chriscwe (both equity and debt) in Oasis.

18. Each of Rivers and Oasis acknowledged an indebtedness owing to Chriscwe in the amount of $10 million, which was to be guaranteed by Rivers and paid by Oasis, in sequential instalments such that the amount would be paid in full by December 30, 2022. As security for the payment, Chriscwe was to maintain its existing security agreements with the first ranking security interest in the assets of Oasis and Rivers (in addition to Rivers' guarantee).

19. Oasis and Rivers then defaulted on the payments required pursuant to the Terms of Settlement. As provided in those Terms of Settlement, the ensuing dispute was arbitrated by the same arbitrator.

20. The arbitrator released his Arbitral Award on July 18, 2022, finding that Oasis and Rivers owed Chriscwe $10 million, less amounts received to date, and that Oasis was required to issue shares to Chriscwe as security for that amount owing, again consistent with the Terms of Settlement.

21. Further demand letters were issued. Oasis and Rivers again failed to make any further payments to Chriscwe, and as a result, Chriscwe commenced this action to enforce the Arbitral Award and to enforce its security.

22. Oasis and Rivers then commenced an application seeking leave to appeal and/or review the Arbitral Award. Their position was that it should be set aside on a number of bases, including their assertion that the arbitrator exceeded his jurisdiction and violated the principles of natural justice and procedural fairness.

23. In September 2022, Chriscwe brought a motion in this proceeding to enforce the Arbitral Award and to appoint an interim receiver. By consent order dated December 1, 2022, Zeifman Partners Inc. was appointed interim receiver. Zeifman issued its report in January 2023.

24. On December 12, 2022, the Defendants Oasis and Rivers served a Defence and Counterclaim. In that counterclaim, they seek among other things, judgment in the amount of $30 million against Chriscwe for intentional interference with economic relations, inducing breach of contract, and breach of confidence,

together with $500,000 in punitive damages. The basis for the counterclaim is set out in the pleading, but in summary it includes the allegations that Chriscwe interfered with the banking and financing efforts of the Defendants.

25. The application commenced by Oasis and the motion of Chriscwe in this action to enforce the Arbitral Award and to appoint a receiver were heard together before Steele J. on January 30, 2023. At the same hearing, Oasis requested that the Zeifman Report be permanently sealed. The existing interim receivership was extended on consent until the release of the decision of Steele J. on that motion.

26. By order dated February 24, 2023, Steele J. enforced the Arbitral Award, granted judgment against Oasis and Rivers in the amount of $9,300,267.40, ordered Oasis to issue shares to Chriscwe, and ordered Oasis to produce the documents previously requested by Chriscwe both in its capacity as a shareholder and as a creditor pursuant to the terms of its security agreement.

27. I observe that the Arbitral Award required Oasis to issue sufficient shares such that Chriscwe holds as security 50% of the outstanding shares of Oasis (the shares to be held in a manner consistent with the Terms of Settlement).

28. Oasis had challenged the requirement in the Arbitral Award that it issue the shares, arguing that such constituted double recovery, since it was also ordered to pay to Chriscwe the amount of $10 million.

29. It is clear that the additional shares were required to be issued to stand as security for that payment: see para. 27 of the Arbitral Award and para. 23 of the reasons of Steele J. dated February 24, 2023. As the Court noted, the Terms of Settlement provided that the additional shares were not to be traded or encumbered until either the Settlement Amount was paid in full or there was an uncured default by Oasis or Rivers. Further, the Terms of Settlement state that the shares are security for payment of the Settlement Amount, to be held in escrow.

30. Steele J. also sealed, but only temporarily, the Zeifman Report. Finally, Steele J. deferred the appointment of a receiver with possession, as stated in her reasons, "in order to give Oasis the opportunity to put forward a reasonable plan regarding repayment of the debt owing to Crisco and/or obtain financing", but without prejudice to the right of Chriscwe to return to Court to seek the appointment of a fall receiver. This is discussed further below.

31. Steele J. also observed in her reasons that there was concern on the part of Chriscwe that Oasis and Rivers were dissipating or divesting assets of Oasis, in part due to the structuring of a recent opportunity with Segway. The court observed that recently, Oasis had become the new exclusive distributor of Segway branded power sports vehicles in Canada, and the evidence was to the effect that that distributorship had positively impacted the bottom line of Oasis. However, there was no agreement with Segway that the exclusive distributorship would continue.

32. Those reasons of Steele J. also state that:

> [Rivers] structured the Segway opportunity so that [283] was to be the signing party for the distribution agreement for the Segway vehicles. Oasis was granted a non-exclusive license to represent the Segway Power sports brand and to sell and service Segway vehicles in Canada. [Rivers] states that this corporate structure has not caused any dissipation or divesting of Oasis' assets.

33. As also reflected in the reasons, the interim receiver had noted matters of "serious concern" in its report, including insufficient financing and the lack of a distribution agreement with Segway.

34. Subsequent to the hearing before Steele J. on January 30, 2023, Oasis arranged for certain dealer agreements to be executed in the name of 283 rather than Oasis. Moreover, it appeared to the Plaintiff that at least some of the operations and banking of Oasis were being run through 283. Oasis failed to provide any disclosure of the assets and operations of 283 to Chriscwe, notwithstanding the Order of Steele J. and requests from Chriscwe.

35. Chriscwe therefore moved for an order granting leave to amend the Statement of Claim to add 283 as a defendant on the basis that it was a necessary and proper party to the proceeding. Chriscwe also moved for an order appointing the Receiver as a full receiver with possession of the assets of Oasis, Rivers and 283.

36. By Endorsement dated May 31, 2023, Steele J. appointed Crowe Soberman Inc. as non-possessory receiver of Oasis and Rivers and granted leave to amend the statement of claim. The basis for the relief granted is relevant to the motions before the Court today.

37. After reviewing the principles applicable to motions for leave to amend, Steele J. applied those principles to this matter. The court summarized the additional claims proposed to be added in the draft statement of claim for which leave was sought. Those included the following:

   a. [a] declaration that the Oasis Security Agreement extends to assets held by [283], including but not limited to a distribution agreement with [Segway], dealer agreements with respect to the Segway products and accounts receivable generated by the sale of Segway products (collectively the "Segway Opportunity");

   b. [f]urther, or in the alternative, a declaration that 283 holds the Segway Opportunity in trust for Oasis;

   c. [f]urther, or in the alternative, a declaration that Oasis has fraudulently conveyed assets to 283, including diversion of the Segway Opportunity to 283;

   d. [a]n order setting aside the transfer of assets to 283, including the transfer of the Segway Opportunity to 283;

   e. [f]urther, or in the alternative, a declaration that the acts or omissions of Oasis and its affiliate 283, and the acts and omissions of [Rivers] as sole director of Oasis and 283 are, have been and are threatened to effect a result, to be carried out or conducted and/or exercised in a manner that is oppressive or unfairly prejudicial to or that unfairly disregards the interests of Chriscwe as a creditor and shareholder of Oasis; [and]

   f. [a]n order appointing a receiver, without security, of the assets, undertakings and properties of Oasis, [Rivers] and 283.

38. Steele, J. went on to state the following:

> 11. In Mark's [Rivers'] affidavit dated November 8, 2022, he stated:
>
> > 14) Wary of Mr. Kauffman's increasingly aggressive stance, I structured the Segway Opportunity so that Oasis would benefit from it. 2833713 Ontario Inc. ("283") was incorporated to be the signing party for the distribution agreement of Segway vehicles under the Segway Opportunity. Oasis was granted a non-exclusive license to represent the Segway Powersports brand and to sell and service Segway Powersports vehicles in Canada.

[15)] This corporate structure has not caused any dissipation or divesting of Oasis' assets.

[16)] Oasis has and continues to receive all of the profits under the Segway Opportunity as 283's sales agent for the Segway Opportunity.

12. [Rivers] has repeatedly stated that the Segway Opportunity has been structured to benefit Oasis and [Chriscwe]. It is important to note that the Segway Opportunity, which has been developed through [Rivers'] hard work, is currently the key business opportunity for Oasis and [Rivers]. As noted in [Rivers] and Oasis's January 30, 2023 factum, Oasis's product agreements – including in particular the Segway Opportunity – constituted "most if not all of Oasis' value."

13. 283 argues that [Chriscwe] is seeking to amend its statement of claim to add a new defendant after a judgment has already been rendered. As a result, 283 argues that the onus shifts to [Chriscwe] to rebut the presumed prejudice.

14. 283 submits that [Chriscwe] has not discharged its onus demonstrating that 283 will not suffer prejudice being added as a party at this late stage. 283 states that this deficiency is emphasized by the relief sought: a receivership over 283 in the same omnibus motion. 283 states that this would cause non-compensable prejudice to 283 by changing the litigation landscape of this action, preventing 283 from contesting facts or raising any defences, and irreparably harming its operations. 283 has not even been granted to opportunity to defend itself.

15. These concerns raised by 283 can be addressed by providing 283 with, among other things, the opportunity to defend itself.

16. Oasis and [Rivers] state that the relationship with 283 was well known to the parties for quite some time. They argue that there was not a corporate restructuring done to evade a judgment. 283 was incorporated in April 2021 before the issues between the parties came in dispute. However, [Chriscwe] was not aware of 283's existence until 2022 when it was referenced in certain materials from TD.

17. 283 argues that the Court does not have jurisdiction to bind 283 to an arbitral award it did not consent to be bound by. However, [Chriscwe] is seeking different relief against 283, as noted above. It is not seeking to bind 283 to the arbitral award. 283 should be given the opportunity to defend the new allegations made against the company.

18. There are concerns that [Rivers] has been diverting Oasis's business to 283. For example, while the Court's decision on the January 30, 2023 motion was under reserve, [Rivers] provided a Segway Tech Distribution Agreement Addendum to the interim receiver. It was signed by [Rivers] as CEO of 283 and Segway on February 11, 2023. New dealer agreements were also entered into between 283 and other companies, which were provided to the interim receiver on or about February 23, 2023. The fact that the dealer agreements were being entered into with 283 instead of Oasis was of particular concern to [Chriscwe] given [Rivers'] prior representations.

19. Although 283 existed prior to the issues between the parties, it appears that [Rivers] and Oasis may have taken additional steps to divert business and assets to 283.

> 20. 283 suggests that [Chriscwe] ought to bring a new action. This is not efficient, given that the proposed claims against 283 relate to Oasis's and [Rivers'] alleged attempts to divert assets to thwart [Chriscwe's] realization on its security.
>
> 21. I am satisfied that it is appropriate to permit [Chriscwe] to amend the statement of claim. The parties shall coordinate to work out a schedule for 283's statement of defence and next steps.

39. In the result, Steele J. was satisfied that it was appropriate to permit Chriscwe to amend the statement of claim to add 283 as a defendant and assert the allegations summarized above, and the Court so ordered.

40. Justice Steele then considered the motion to appoint a receiver, which was sought over all of the property and assets of not only Oasis and Rivers, but also 283.

41. Oasis and Rivers argued, as reflected in the Endorsement, that:

    a. it was not appropriate at that time to appoint a possessory receiver since Oasis had prepared a proposed financing and repayment plan that, they submitted, represented Chriscwe's best chance of being repaid;

    b. Chriscwe had unclean hands or had caused or contributed to the defaults;

    c. there had been no dissipation of assets; and

    d. a receivership would not maximize the value for the stakeholders of Oasis since it would destroy Oasis and render its efforts to satisfy the Order to have been in vain.

42. Ultimately, Steele J. observed that this was a circumstance where there was a relatively new business opportunity that had been expanding. The loss of the Segway business relationship would be harmful to Oasis, Rivers and other creditors, and Oasis had provided evidence that it was working with an advisor to secure financing with TD and expected to have that in place soon.

43. All of this led Steele J. to conclude that an interim non-possessory receiver over the property and assets of Rivers and Oasis would be appropriate in the circumstances. The receiver was given investigatory and oversight powers to monitor the operations of Oasis in order to permit Rivers "to continue to operate Oasis as a going concern and provide Oasis the opportunity to finalize the financing with TD and start repaying the debt".

44. The Endorsement further provided that the non-possessory receiver could return to court "if it was of the view that it would be just and convenient to expand the breadth of the receiver's powers and/or to expand the receiver's powers to cover 283 as well."

45. The court ordered that, as suggested by Rivers and Oasis, it (the court) must continue to be apprised of the status of the financing for Oasis.

46. The parties returned to Court yet again on July 20, 2023 at which time Kimmel J. provided orders and directions scheduling these motions before me and, in the meantime, requiring the parties to work cooperatively to provide information and documents reasonably requested by the Receiver (whether pursuant to the existing receivership order or on the basis that they would likely have to be produced either as part of the receivership or as part of the discoveries in any event if the action continues), and to facilitate and consider prospective alternative financing proposals.

47. It is as against this background that the motions now before the Court were brought.

The Motions now before the Court and the Positions of the Parties

The Motion for a Full Possessory Receivership over Oasis, Rivers and 283

48. As of the hearing of these motions, the Defendants have failed to pay any amount to Chriscwe, and have failed to issue shares to Chriscwe or to deliver documents, all as required by the order of Steele J. No viable financing proposal has been advanced, and in particular no proposal from TD has been put forward despite Oasis' statement to Steele J. that a proposal was anticipated imminently.

49. The Plaintiff reiterates its position on the evidence before the Court on the May 31 motion to the effect that Oasis has still failed to provide any disclosure of the assets or operations of 283, and that those assets and operations are the property of Oasis and covered by the Oasis Security Agreement.

50. The Plaintiff relies upon, among other materials, the Affidavit of Kauffman sworn August 1, 2023, which includes as exhibits copies of his earlier affidavits sworn in this proceeding. It also relies upon the First Report of the Receiver, which includes the following findings, among others:

    a. there are growing arrears of government remittances;

    b. there has been a 30% decline in sales;

    c. $40,000 per month, or $480,000 per annum, is being paid to Mark Rivers and Linda Rivers;

    d. there has been an intermingling of assets between Oasis and 283;

    e. Oasis and Rivers have refused to provide financial information for 283;

    f. the financing efforts referred to above, represented to Steele J. as being pending and referred to in the earlier Endorsements of the court, have not been completed;

    g. the Receiver believes that the continued operation of Oasis will lead to the continued deterioration of asset value for all stakeholders; and

    h. the Receiver recommends that the powers of the Receiver be expanded to a full possessory receivership.

51. In short, the Plaintiff submits that the continued delay and obfuscation by the Defendants makes a mockery of the Arbitral Award and the judgment enforcing it.

52. The Plaintiff argues that notwithstanding the now multiple and successive opportunities that the court has extended to the Defendants, there is no viable financing proposal, and the terms of the Order of Steele J. enforcing the Arbitral Award have not been complied with in any material respect. Moreover, the Defendants have refused or failed, and continue to refuse and fail, to cooperate with the Plaintiff with respect to the provision of information, books and records or indeed in any material respect.

53. For its part, the Receiver supports the position of the Plaintiff that there continues to be a complete absence of cooperation from the Defendants. The activities of the Receiver, and its concerns, are set out in the First Report.

54. The First Report reflects the following, among other things:

    a. when representatives of the Receiver attended at the business premises at Baltimore, Ontario to meet with Rivers and observe the Property of Oasis located on the Premises, the representatives

were escorted off the Premises and the gate was locked. Subsequent access following a discussion among counsel was provided;

b. the Receiver has not yet been provided with the accounts payable listing required to determine the full complement of creditors affected by the Receivership;

c. multiple requests for Cash Flow Projections as per the template provided by the Receiver on June 26, have not been provided. The Receiver is of the view that these Projections are essential in order to enable the Receiver to comply with the terms of its mandate to monitor the business, and the failure of Oasis to produce the Projections renders the Receiver unable to monitor the current state of the cash flows and business of Oasis;

d. the Receiver has requested but was initially refused online viewing access of the company's bank accounts, although that access was subsequently provided shortly before these motions;

e. the Receiver notes a significant decrease in accounts receivable of over $2.4 million - those have decreased from the amount reported in the fiscal 2022 financial statements as at December 31, 2022 of $2,900,463 down to $473,631. Rivers explained this significant decrease to the Receiver by observing that the industry generally is down by 30% in the current year and July and August are extremely low, but he anticipated sales to pick up again in August through November;

f. given the inability of the company to produce the Cash Flow Projections as requested, the Receiver is very concerned regarding the decrease in sales and accounts receivable and is concerned that the company will not have sufficient working capital to fund its ongoing operations. Moreover, this decrease is detrimental to the asset value ultimately available to creditors and in addition, would likely impact future potential financial lenders who may be deciding whether to provide financing to the company;

g. an appraisal of the inventory carried out on behalf of the Receiver concluded that the liquidation value was significantly lower than the amount reflected in the inventory listing or in the 2022 financial statements;

h. accounts payable totalled $3,159,631 as of December 31, 2022, but the balance as of the date of the First Report was unknown since the general ledger and trial balance have not been updated or reconciled by the company's external bookkeepers;

i. government remittances due and owing include, according to Note 7 of the 2022 financial statements, $2,084,765.58 (as compared to 50% of that amount for 2021). Since these amounts include amounts owing for HST and payroll source deductions, they would have priority over any secured lender. Given the 100% increase in such amounts from 2021 to 2022, the Receiver has requested a breakdown and particulars, which have not been provided. The materials requested but not provided include notices of assessment, viewing access for the online CRA accounts, and current balances with respect to government remittances accounts;

j. shareholder loan balances have been reduced by approximately $1.24 million based on a review of financial statements from December 31, 2021 and the 2022 financial statements. These reductions were achieved, according to the Receiver's review of the general ledger, by way of payments to Rivers from the bank accounts of the company and use of company credit cards. The explanation given is that these payments reflect compensation to Rivers for services provided;

k. the payments to Rivers were made at a time when amounts owing to the CRA and other government remittances had accrued to over $2 million, and the amounts owing to Chriscwe and in particular the judgment, remain unpaid;

l. the shareholder loan balance as reflected in the company's financial statements owing to Chriscwe has not been reduced since the beginning of fiscal 2021;

m. a portion of the details that were included in the "Due to Shareholder" accounts and the general ledgers were redacted with the result that the Receiver was unable to fully review the general ledger accounts;

n. occupancy costs incurred by the company increased in 2022 over 2021 by 163% to $412,656, a large proportion of which relates to rent expense paid to an entity called Miller Valley Estates, a company of which Rivers is the director, and his wife Linda Rivers is the sole shareholder;

o. the rent payable under the lease agreement between Oasis and Miller Valley dated May 1, 2018, has been increased twice, first from $6000 per month to $12,000 per month in 2022, and then again increased to $15,000 per month effective April 1, 2023, apparently based on an amendment to the lease agreement dated March 24, 2023 (i.e., after they January 31 Endorsement of Steele J. discussed above). The Receiver is concerned that given the non-arm's-length relationship of the landlord entity with Oasis, the actual payments may not be reflective of the fair market value and the payments may not be in the normal course of business. Moreover, the Premises are owned by Rivers, who advised the Receiver that there is a further lease agreement between Miller Valley and himself set up in 2013 or 2014. The Receiver has requested, but has not yet been provided with, a copy of that lease agreement;

p. the 2022 financial statements include a statement of earnings which in turn reflects Royalties of $117,212. There was no expense of this nature for fiscal 2021. The Receiver was provided with an agreement between 283 and Oasis dated April 30, 2021, which refers to Linda Rivers as the sole shareholder of 283 and Mark Rivers as the CEO. As a result of this agreement, the Receiver concluded that Oasis and 283 were not dealings at arm's-length from one another;

q. there are issues and outstanding information requests with respect to the purchase of two boats, apparently by Oasis, with an intention to purchase 12 more, in respect of all of which the bookkeeping and journal entries require further investigation:

r. 36 dealer agreements were provided to the Receiver. Those dated before November 2021 reflect Oasis as the Distributor of Segway powersports products, but those dated after November 2021 reflect 283 as the Distributor;

s. a Distribution Contract – Addendum, between 283 and Segway Powersports, reflects that 283 owns the exclusive rights to the distribution of Segway Powersports products in Canada. A Distribution Contract was dated February 11, 2023, but reflects the term as having commenced on July 15, 2021, and states that that contract is itself an "addendum". The Receiver has requested clarification as to whether there was an original distribution contract and if so, that it be provided with a copy. Such has not been received;

t. Rivers advised the Receiver that 283 was incorporated for the purpose of being the grantee of distributorship rights for the Segway powersport motors but that all of the operations of the Segway Business (Oasis and 283) are reported in Oasis. However, given that as of the date of the First Report, 283 is, according to the documents, the Distributor, the Receiver has concerns regarding the status of the ownership of the inventory, and whether sales and the related expenses are being

recorded in the correct company. As a result, it is the view of the Receiver that Oasis and 283 are intermingled and are part of the same business;

u. accordingly, the Receiver has requested that as part of its monitoring of Oasis, it be provided with the books and records of 283 (noting paragraph 2(a) of the Receivership Order authorizing and directing that the Receiver is "to monitor and evaluate the business … of Oasis and/or Rivers carried on through 283." Oasis has denied this request of the Receiver stating that such documents were beyond the scope of the Receivership Order;

v. certain financing information had been provided by the firm engaged to assist in the financing of Oasis. The only financing that has been completed is a demand operating facility with an EDC guarantee of USD $1.8 million. The purpose of that facility was to provide a standby letter of credit, but in favour of Segway, with the result that that financing does not assist Oasis with working capital;

w. the TD Financing Proposal dated March 2022 provides for working capital but only for an amount of up to $2 million with a temporary bulge increasing to $5 million. Further, it discusses a sub-debt lender, which in turn discusses yet a further subsequent facility, the aggregate of both of which would provide a maximum total of $4 million for financing available to pay down the judgment amount owed to Chriscwe pursuant to two separate facilities. (As observed by the Receiver, this amount is less than half of the judgment amount owed to Chriscwe);

x. the TD financing proposal does not provide for any paydown of the Chriscwe loan, and the subsequent sub-debt loan documents discuss a paydown but for less than the full amount;

y. the Receiver has not been provided with any information from TD or the proposed sub-debt lenders as to why the financing did not proceed, or a status report with respect to due diligence efforts by TD;

z. there is a TD expression of interest letter that was provided by TD in April 2023, which is clearly not a commitment and appears to the Receiver to be a degradation from the financing proposal of a year earlier;

aa. as a result of all of the above, the Receiver believes that no near-date financing will be completed by Oasis or Rivers.

55. In conclusion, the Receiver believes that the continued operation of the business as is will lead to the continued deterioration of asset value, and the financial statements provided indicate that Oasis does not have the financial capabilities to pay the judgment amount owed to Chriscwe, with or without completion of the financing efforts.

56. The Defendants oppose the appointment of the Receiver with expanded powers as a full possessory Receiver, and in particular oppose any receivership order over the assets and property of 283.

57. They submit that the existing limited receivership powers over Oasis and Rivers are sufficient to provide the Plaintiff, Chriscwe, with the protection and ability to monitor the business that it requires. A full possessory receivership, they argue, would impair the ongoing business and operations of Oasis and would make its financing efforts extremely difficult if not impossible.

<u>Analysis - Should the Receivership be expanded to be a Full Possessory Receivership, including over 283?</u>

58. The test for the appointment of a receiver pursuant to section 243 of the *BIA* or section 101 of the *CJA* is not in dispute. Is it just or convenient to do so?

59. In making a determination about whether it is just or convenient to appoint a receiver, the court must have regard to all of the circumstances, but in particular the nature of the property and the rights and interests of all parties in relation thereto. These include the rights of the secured creditor pursuant to its security: *Bank of Nova Scotia v. Freure Village on the Clair Creek*, 1996 O.J. No. 5088 (Gen. Div.).

60. Where the rights of the secured creditor include, pursuant to the terms of its security, the right to seek the appointment of a receiver, the burden on the applicant is lessened: while the appointment of a receiver is generally an extraordinary equitable remedy, the courts do not so regard the nature of the remedy where the relevant security permits the appointment and as a result, the applicant is merely seeking to enforce a term of an agreement already made by both parties: *Elleway Acquisitions Ltd. v. Cruise Professionals Ltd.,* 2013 ONSC 6866, O.J. No. 5399, at para. 27. However, the presence or lack of such a contractual entitlement is not determinative of the issue.

61. The appointment of a receiver becomes even less extraordinary when dealing with a default under a mortgage: *BCIMI Construction Fund Corporation et al v. The Clover on Yonge Inc.,* 2020 ONSC 1953, O.J. No. 1615, at paras. 43-44.

62. As observed by this Court in *Canadian Equipment Finance and Leasing Inc. v. The Hypoint Company Limited*, 2022 ONSC 6186, O.J. No. 4779, the Supreme Court of British Columbia, citing *Bennett on Receivership*, 2nd ed. (Toronto, Carswell, 1999), numerous factors historically have been taken into account in the determination of whether it is appropriate to appoint a receiver and I agree with those: *Maple Trade Finance Inc. v. CY Oriental Holdings Ltd*., 2009 BCSC 1527, B.C.J. No. 2214, at para. 25):

    a. whether irreparable harm might be caused if no order is made, although as stated above, it is not essential for a creditor to establish irreparable harm if a receiver is not appointed where the appointment is authorized by the security documentation;

    b. the risk to the security holder taking into consideration the size of the debtor's equity in the assets and the need for protection or safeguarding of assets while litigation takes place;

    c. the nature of the property;

    d. the apprehended or actual waste of the debtor's assets;

    e. the preservation and protection of the property pending judicial resolution;

    f. the balance of convenience to the parties;

    g. the fact that the creditor has a right to appointment under the loan documentation;

    h. the enforcement of rights under a security instrument where the security-holder encounters or expects to encounter difficulties with the debtor;

    i. the principle that the appointment of a receiver should be granted cautiously;

    j. the consideration of whether a court appointment is necessary to enable the receiver to carry out its duties efficiently;

k. the effect of the order upon the parties;

l. the conduct of the parties;

m. the length of time that a receiver may be in place;

n. the cost to the parties;

o. the likelihood of maximizing return to the parties; and

p. the goal of facilitating the duties of the receiver.

63. How are these factors to be applied? The British Columbia Supreme Court put it, I think, correctly: "these factors are not a checklist but a collection of considerations to be viewed holistically in an assessment as to whether, in all the circumstances, the appointment of a receiver is just or convenient: *Pandion Mine Finance Fund LP v. Otso Gold Corp*., 2022 BCSC 136, B.C.J. No. 140, at para. 54).

64. It is not essential that the moving party establish, prior to the appointment of a receiver, that it will suffer irreparable harm or that the situation is urgent. However, if the evidence respecting the conduct of the debtor suggests that a creditor's attempts to privately enforce its security will be delayed or otherwise fail, a court-appointed receiver may be warranted: *Bank of Montreal v. Carnival National Leasing Ltd*., 2011 ONSC 1007, O.J. No. 671, at paras. 24 and 28-29.

65. Accordingly, is it just or convenient to appoint a full possessory receiver in the particular circumstances of this case?

66. Having considered all of the evidence, and in particular the facts summarized above in this Endorsement, I am satisfied that it is not only just *or* convenient to expand the terms of the receivership to be a full possessory receivership, including over the assets and property of 283, but it is both just *and* convenient to do so.

67. I begin with observing the obvious: nothing in a full possessory receivership makes a final determination or grants judgment (to the extent that a final judgment does not already exist, as it does in respect of Oasis and Rivers).

68. Here, the evidence shows the failure of the Defendants to first disclose the existence of 283 at all, their continued failure to provide the Receiver with books and records as to the intermingling of the business of Oasis and 283, and their failure to comply with the orders for production already made.

69. The existence of 283 was not initially disclosed by the Defendants at all. Chriscwe learned of the existence of this corporation when it was provided with a copy of a TD Bank presentation which listed 283 as a guarantor. It was only following the arbitration hearing that Chriscwe obtained a Corporate Profile Report that revealed that 283 had in fact been incorporated on April 19, 2021 and that Rivers was the sole officer and director.

70. The draft dealership agreement with Segway was in turn disclosed by Rivers only in his affidavit filed in response to the motion by Chriscwe to enforce the Arbitral Award. It is therefore somewhat ironic that the Defendants now argue that the fact that 283 was not a party to the arbitration and has only recently been added to this action as a defendant is a basis to oppose a full receivership (or to grant a stay).

71. Whether there has in fact been a diversion of assets and/or opportunities from Oasis and Rivers to 283, and whether any such diversion constitutes a fraudulent conveyance undertaken in an attempt to avoid the effects of the judgment already granted, are questions for another day. But for the purposes of whether a

full receivership should be granted, the balance of convenience and consideration of all factors overwhelmingly favours the Plaintiff.

72. Two receivership orders have already been made. The first was an interim limited receivership order made and then extended on consent. The second was the non-possessory receivership order made by Steele J. over the assets and property of Oasis and Rivers, without prejudice to the right of the Plaintiff to bring the motion for the expanded relief sought today.

73. Unfortunately, but clearly, the powers that the Receiver currently has have not been sufficient to enable it to carry out its mandate, in large part due to the lack of cooperation by the Defendants. This has to stop. I am satisfied that a full possessory receivership is necessary for the Receiver to determine the best path forward, to maximize value for the benefit of all stakeholders.

74. I also observe, as noted above, that Oasis and Rivers consented to the appointment of a receiver in the original loan and security documentation.

75. I am also satisfied that for the reasons set out in the First Report and summarized above, it is appropriate to expand the scope of the receivership to cover the assets and property of 283. Indeed, I am satisfied that for the Receiver to understand and unravel the business, operations, and assets of the entities and the transactions between and among them, this expansion of receivership powers is clearly necessary.

76. The Defendants have challenged and opposed the efforts of the Plaintiff to collect on its underlying debt. The loans were advanced. The parties willingly, and with the assistance of counsel, engaged in a mediation process that resulted in the Terms of Settlement. Those Terms were agreed to.

77. Yet the Defendants did not comply with them. That non-compliance resulted in the Arbitration proceeding. Chriscwe was successful in the Arbitral Award. Chriscwe brought a motion in this Court for enforcement of the Arbitral Award and for judgment. That too, was opposed by the Defendants. The Defendants were unsuccessful, and judgment together with an order directing enforcement of the Arbitral Award was granted. The Defendants have not complied with the judgment in any respect. There has been no repayment. There remains a demonstrated lack of cooperation in the production of documents and information.

78. There is no refinancing available. Even if there was, this is something that the Receiver should, and I expect will, explore in the course of discharging its duties.

79. The Defendants submit that 283 was not a party to the Arbitration or the Arbitral Award and that any receivership order covering its assets or property therefore amounts to execution before judgment. I do not agree. First, there is no execution. It is a receivership. Second, 283 was not a party for the simple yet fundamental reason that neither its existence, nor the intermingling of its assets and operations with Oasis, were disclosed by the Defendants. That intermingling, and the entering into of agreements by or involving 283, appears to continue and in fact has continued at least to dates subsequent to the January 30, 2023 Order of Steele J.

80. On the basis of the facts set out above and the facts as already found by Steele J., and for the reasons set out by the Receiver in the First Report, I am satisfied that the receivership should be expanded to include 283.

<u>The Motion for a Stay: Should the February 24, 2023 Order requiring the Payment be Stayed?</u>

81. The Defendants move for an order staying the payment obligation in paragraph two of the Order dated February 24, 2023, that enforces the Arbitral Award, pending a determination of their counterclaim.

82. They submit that they have asserted a valid counterclaim, that the counterclaim has merit, and that it would be premature, prejudicial and unfair to enforce the February 24, 2023 Order and the payment obligation until after a final determination of the counterclaim, at which time it will be known whether any net amount is owing to the Plaintiff, and if so, what the quantum of that debt is.

83. As stated above, the counterclaim was brought late in the chronology, on December 12, 2022. The Defendants claim against Chriscwe for, among other things, judgment in the amount of $30 million for damages for intentional interference with economic relations; inducing breach of contract; breach of confidence; and they claim $500,000 in punitive damages.

84. The Defendants assert that Chriscwe has failed to cooperate with Oasis, has failed to facilitate financing efforts by providing discharge statements for mortgages and secured debts, and has attempted to undermine the relationship of Oasis with prospective lenders. In the counterclaim, the Defendants submit that prior to the banking restrictions (imposed as part of the orders referred to above), Oasis was in advanced negotiations with RBC for a significant operating line of credit and other financing that would have allowed it to pay down outstanding debt and "buy back equity" from Chriscwe. (I pause to observe that not even the Defendants assert that the financing would have facilitated the payment of the full debt owing to Chriscwe).

85. The punitive damages are sought on the basis of the allegation that the conduct of Chriscwe has been malicious and undertaken in bad faith, designed to cause financial and reputational harm to the Defendants.

86. In their factum filed August 3, 2023, the Defendants argue that the actions of the Plaintiff have had a material impact on their ability to pay the judgment and that "as of [the date of the factum, August 3, 2023], Chriscwe continues to refuse to cooperate with Oasis' applications for financing, which would provide up to $5,000,000 in financing from TD".

87. The Defendants further submit that enforcement of the judgment and Order now "would destroy Oasis." They argue that it is a profitable company, with more than $20 million in revenue and an annual payroll of more than $2.2 million. I pause again to observe parenthetically that if the company were in excellent financial condition, one might have expected alternative financing to have been arranged over the significant period of time during which the Defendants have had the opportunity to do so.

88. While acknowledging that stays are limited to very rare circumstances, the Defendants submit that an interim stay is warranted in this case due to the inextricable link between the failure of Oasis to satisfy its payment obligation, and the obligation of Chriscwe to cooperate. The result is that the "balance of prejudice" favours the Defendants as enforcement would be "permanent, destructive, and irreparable." In contrast, they submit, a stay would not prejudice Chriscwe.

89. Finally, but vigourously, the Defendants submit that "Oasis is prevented by statute from paying the full [judgment amount]." They submit that the Order compels Oasis to purchase shares for an amount that would render Oasis insolvent. As a result, they say, enforcement of the Order is prohibited by ss. 30(2) and 31(3) of the Ontario *Business Corporations Act*, R.S.O. 1990, c. B16 ("OBCA"). This statutory prohibition is, they submit, binding on a receiver as well.

90. In the alternative, the Defendants submit that if the entire judgment amount of $10 million is deemed to be a debt, then enforcement of the Terms of Settlement (which are enforced by the Arbitral Award) amounts to the imposition of a criminal rate of interest contrary to the *Criminal Code*, R.S.C. 1985, c. C-46 such that the Defendants should be granted relief pursuant to s. 2 of the *Unconscionable Transactions Relief Act*, R.S.O. c. U2.

91. For all of these reasons, the Defendants submit that they are entitled to a stay so that all of the issues related to the dispute (including the counterclaim) can be adjudicated.

92. In response, the Plaintiff submits that the stay motion amounts to an abuse of process as the latest in an ongoing series of efforts by Oasis and Rivers to thwart the ability of Chriscwe to realize on its security and recover on the judgment already granted. The Plaintiff argues that the motion is an attempt to relitigate matters already determined.

93. Having considered all of the evidence, I find the stay motion is without merit and it is dismissed. I am inescapably led to the conclusion that it is yet another attempt to avoid the obligation to pay the debt owing to Chriscwe and avoid the obligation to comply with the Order enforcing the Arbitral Award that has already been granted.

94. Section 106 of the *Courts of Justice Act,* R.S.O 1990, c. C.43 gives this Court the discretion to stay any proceeding on such terms as are considered just.

95. The factors to be considered in the exercise of discretion to impose a stay have been succinctly summarized by Chalmers J. in a recent decision of this court: *2650795 Ontario Inc. v. 2524991 Ontario Corporation et al*, 2023 ONSC 3139, O.J. No. 2314 (*265 Ontario*).

96. I accept and agree with the law applicable to a stay application in respect of a final order, as set out by Chalmers J.:

> [26] The jurisdiction to grant a stay of a judgment is found in s. 106 of the *CJA*, which states as follows:
>
>> Stay of Proceedings
>>
>> 106. A court, on its own initiative or on motion by any person, whether or not a party, may stay any proceeding in the court on such terms as are considered just.
>
> [27] Section 106 of the *CJA* applies to a stay of a final order or judgment: *1852998 Ontario Ltd. v. Halton Condominium Corp.,* 2021 ONSC 6566, at paras. 24-42. The Court of Appeal recently confirmed that the general authority of the court to stay a proceeding, pursuant to s. 106 of the *CJA*, can be applied to the enforcement of a judgment: *Peerenboom v. Peerenboom*, 2020 ONCA 240, at para. 30.
>
> [28] In the case of a stay of final order, a more stringent test than the ordinary three-part *RJR-McDonald* applies: *1247902 Ontario Inc. v. Carlisle Power Systems Ltd*., [2003] O.J. No. 6300 (Div. Ct.); aff'd [2005] O.J. No. 118 (CA) (*Carlisle*), at para. 10. The stay of the execution of a judgment may be granted in rare circumstances, where the moving party establishes the following:
>
> 1. Continuance of the proceeding through execution would amount to injustice because it would be oppressive, vexatious or an abuse of the Court's process; and,
>
> 2. The stay does not cause an injustice to the party entitled to judgment: *1247902 Ontario Inc. v. Carlisle Power Systems Ltd.*, at para. 30, and *Peerenboom v. Peerenboom*, at para. 34.

> [29] A stay is to be used only in rare circumstances. As stated by Cunningham A.C.J. in *Carlisle*:
>
> > There is good reason for the bar to have been set so high. As the earlier authorities have so often stated, judgments ought to be considered final and creditors should have unencumbered rights of enforcement. For a defendant to be able to raise equitable grounds at that stage would derogate from the notice of finality. It would frustrate commercial enterprise and needless to say would encourage a whole new area of litigation.
> >
> > [….]
> >
> > Accordingly, we have concluded that in very rare circumstances there is discretion under s. 106 of the *CJA* to stay the enforcement of a final judgment. This discretion ought to be used very sparingly and only in circumstances where it could not be found that not only would it be oppressive or vexatious or an abuse of process of the court, but also in circumstances where it would not cause an injustice to the plaintiff: *1247902 Ontario Inc. v. Carlisle Power Systems Ltd*., at paras. 7 and 10.

97. In short, a stay of the final order should be imposed only in rare circumstances. The discretion to impose it should be exercised only in circumstances where to enforce the judgment would be oppressive or vexatious or an abuse of the court and where the stay would not cause an injustice to the plaintiff.

98. The Defendants rely on *Heliotrope Investment Corporation v. 1324789 Ontario Inc.,* 2021 ONCA 589, 462 D.L.R. (4th) 731, and *Hinke v. Thermal Energy International Inc.,* 2012 ONCA 635, O.J. No. 4447, as well as the test set out in Rule 20.08. Each of those two cases involve circumstances where a stay was sought pending a determination of the counterclaim where the plaintiff's claim had been determined by summary judgment. Rule 20.08 also deals with summary judgment. Here, there was a final determination on the merits in the Arbitral Award, followed by the challenge to the enforcement of that award before Steele J.

99. More fundamentally, the facts here are entirely distinguishable.

100. I do not accept the submission that the Order should be stayed because its effect would be catastrophic on Oasis. The Terms of Settlement were freely entered into. Outstanding issues were arbitrated, and the Arbitral Award was made. It was challenged on multiple grounds, and Steele J. has already determined that it should be enforceable as a judgment of this Court. An unsuccessful party is not entitled to a stay simply because it says it is performing well but lacks the funds to comply with an order or judgment.

101. Moreover, the evidence in the record does not support the submission that otherwise available financing has been compromised or thwarted by the actions of the Plaintiff. There is no evidence that there is in fact financing available (from TD or Royal - and the evidence is inconsistent even on that point as to the source of financing).

102. In fact, the evidence is to the effect that there is no committed financing available to satisfy the judgment. That is the fundamental point. Whether from TD, or RBC, or any other source, there is no evidence in the record to the effect that, but for the actions of the Plaintiff, Defendant by Counterclaim, the Defendants would have had committed financing and available funds to permit them to satisfy the amount of the Arbitral Award enforced by the Order: $10 million.

103. Specifically, even if the financing commitment from either RBC or TD was firm and unconditional subject to cooperation from Chriscwe (and I am not satisfied that it was - there does not seem to have been any RBC commitment at all), it was not in a sufficient quantum so as to satisfy the judgment.

104. Even if there were financing commitments (which I have found there were not), I am not persuaded that Chriscwe has, on the evidence, breached its obligations under the Terms of Settlement by refusing to subordinate or postpone its security. It had no obligation to compromise its security at all, except as part of a refinancing that would see it paid out in full. That was the whole point of the Terms of Settlement in the first place.

105. Article 3 of the Terms of Settlement provides that Chriscwe shall maintain the existing security agreements with the first ranking security interest in the assets of Oasis and Rivers.

106. Article 7 provides that the additional 30% of the shares in Oasis to be issued in favour of Chriscwe shall not be traded, encumbered or voted unless there is an uncured default.

107. Article 10, the term on which the Defendants principally rely, provides that "[Chriscwe] shall cooperate in facilitating an application by Oasis for financing, to the extent reasonable for Chriscwe and shall not be unreasonably withheld."

108. In my view, the argument of the Defendants that the Terms of Settlement imposed upon Chriscwe an obligation to subordinate, postpone or discharge its security except in connection with the financing transaction that provides for the simultaneous payment of all amounts payable pursuant to those Terms of Settlement, is simply not borne out on a review of the document. Nor is it borne out by common sense. It strikes me as commercially absurd that Chriscwe would agree to compromise its security position in any way in the absence of the payment in full of the debt owing.

109. There is no evidence, as noted, of any financing commitment that was either firm at all, let alone firm in the quantum sufficient to pay out Chriscwe. There is certainly no evidence, for example, of one omnibus transaction, or separate transactions scheduled to close simultaneously with escrow conditions if and as appropriate, so as to provide for the contemporaneous advance of a sufficient quantum of new money, the imposition of new first ranking security in favour of the lender, and appropriate postponements or subordination of the Chriscwe security.

110. By that I mean this: it would be relatively straightforward to provide for the necessary mechanics through an escrow closing, to discharge the Chriscwe security, have a lender advance new money, and have that lender's security rank ahead of the security currently in place in favour of Chriscwe. That is quite common in secured transactions where a new lender advances funds to pay out a previous lender and take appropriate security. Put another way, I reject the submission that the security in favour of Chriscwe needs to be discharged or postponed, or agreed to be discharged and postponed, before the Defendants can even obtain a financing commitment from a new lender or investor.

111. The Defendants also place heavy reliance on the decision in *265 Ontario*, the facts of which, they argue, are very analogous to the facts in this case.

112. In *265 Ontario*, Chalmers J. stayed the judgment obtained by the plaintiff pursuant to section 106 of the *CJA*, on the basis that enforcement would be an injustice, oppressive and an abuse of process. The defendant moving party argued that the insistence of the plaintiff on enforcement of judgment while refusing to cooperate to assist the defendants in satisfying the judgment was inconsistent with the intention of the parties to end their business relationship as expressed in the arbitration.

113. In that case, however, there were two proceedings before the court at the time of the motion: an oppression action (analogous to the counterclaim here) alleging oppressive acts in relation to the attempts of the other party to satisfy a final arbitral award; and an application by the party who had been successful in the arbitration, seeking judgment in accordance with the final award and enforcement of that award.

114. Justice Chalmers granted judgment in the enforcement application at the commencement of the hearing, in accordance with the final award, but on the consent of the parties. The motion to stay the enforcement of the judgment was then argued, and the court granted a stay of the judgment, without prejudice to the parties making a further application with respect to a possible court directed sale of certain property.

115. Moreover, and importantly, in that case it was the plaintiff, and not the defendant, who was seeking to argue an issue that had already been decided against it in the arbitration. Justice Chalmers concluded that a stay would not cause an injustice to that same party. Such a situation is entirely distinguishable from that before me.

116. In my view, that case would have been more analogous had the stay motion now before me been brought at the same time and together with the enforcement motion by the Plaintiff before Steele J. many months ago. That was the circumstance before Chalmers J. That did not occur here.

117. The sequence of events in this action is important. The counterclaim was not brought until December 2022. To emphasize the obvious, it was not brought until after:

   a. the mediation efforts;

   b. the execution of the Terms of Settlement (which were signed by Rivers himself);

   c. the arbitration and the rendering of the Arbitral Award; and

   d. the bringing of the motion by Chriscwe to enforce the Arbitral Award and appoint an interim receiver.

118. In their factum on this motion, the Defendants argue, with reliance on the Rivers affidavit, that in July 2022, Oasis was negotiating with RBC for up to $8 million in financing, but that on or about August 12, 2022, Kauffman used his personal connections to improperly contact RBC's account manager for Oasis. In attempting to access banking information of Oasis, Kauffman made misrepresentations to the bank, according to Rivers. This caused RBC to place restrictions on certain Oasis accounts and to discontinue negotiations.

119. These are the allegations on which the counterclaim is based. I pause to observe that there is no evidence from RBC to support these allegations, and indeed nothing beyond the assertions by Rivers. Moreover, there is no evidence whatsoever about what happened to the proposed financing from TD beyond the objective fact that there is no commitment and the assertion from the Defendants that TD would not undertake "the significant work to draft a term sheet" until it received confirmation that Chriscwe would cooperate with the financing application of Oasis. The Defendants argue that Chriscwe refused to cooperate with the result that the TD financing has not progressed.

120. The RBC events occurred, even according to the Defendants, in July 2022. The counterclaim was commenced in December. There is no reason why all of the arguments made now in support of the stay motion could not and should not have been made before Steele J. on the motion to enforce the Order.

121. The stay motion is now too late. If the Defendants wished to assert the allegations made, very late in the day, through the counterclaim, they ought to have done so earlier.

122. Indeed, they did exactly that, with the result that the matter is *res judicata*.

123. The subsequent attempt, on this motion, to relitigate the issues already determined by Steele, J. (i.e., whether the Order should be enforced now), amounts to an estoppel.

124. The doctrine of *res judicata* requires litigants to put their best foot forward, and to do so when first called upon to do so. Once decided, an issue should generally not be re-litigated to the benefit of the losing party: *Angle v. M.N.R.*, 1975] 2 S.C.R. 248. There are two branches of the doctrine of *res judicata*: cause of action estoppel, and issue estoppel.

125. Cause of action estoppel operates so as to prohibit litigating again claims that have been previously litigated or which properly belong to the subject matter of previous litigation: *Maynard v. Maynard*, [1951] SCR 346 and *Henderson v. Henderson*, [1843-60] All E.R. 373.

126. Issue estoppel operates so as to prevent re-litigation of issues that have already been determined in a previous proceeding where: "(1) the issue [is] the same as the one decided in the prior decision; (2) the prior decision [was] final; and (3) the parties to both proceedings [are] the same, or their privies": *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63, [2003] 3 S.C.R. 77 ("*C.U.P.E. Local 79*") and *Danyluk v. Ainsworth Technologies Inc.,* 2001 SCC 44, [2001] S.C.R. 460.

127. In *C.U.P.E. Local 79*, the Supreme Court of Canada further observed that judges have an inherent and residual discretion to prevent an abuse of the court's process, and that Canadian courts have applied the doctrine of abuse of process to "preclude re-litigation in circumstances where the strict requirements of issue estoppel (typically the privity/mutuality requirements) are not met, but where allowing the litigation to proceed would nonetheless violate such principles as judicial economy, consistency, finality and the integrity of the administration of justice.": paras. 35 – 37.

128. On the motion to enforce the Arbitral Award before Steele J., the Defendants specifically argued that the Arbitral Award should not be enforced because, among other things, the arbitrator exceeded his jurisdiction by enforcing only the obligations of Oasis under the Terms of Settlement, and not enforcing the obligation of Chriscwe to cooperate in facilitating the financing for Oasis. The Defendants specifically relied upon paragraph 10 of the Terms of Settlement (referred to above): Endorsement of February 24, 2023, at para. 20.

129. In this regard, Schedule "A" to the responding factum of the Plaintiff sets out a useful summary of the arguments advanced and positions taken by the Defendants in arbitration statements, affidavits filed in this proceeding, facta, written submissions and "aides memoire" filed in respect of earlier motions, all in support of their various submissions as to why the Terms of Settlement should not be enforced - effectively the same arguments they advance now in support of their motion for a stay.

130. Finally, I am further not persuaded that enforcement of the Order would be oppressive, vexatious or an abuse of the court's process in the particular circumstances of this case, where the evidence from both the Plaintiff and the Receiver is clear that the Defendants continue to be evasive, uncooperative, and have not provided information and books and records to the Plaintiff (in its capacity as a shareholder, or as a secured creditor pursuant to its contractual entitlement in the loan and security documentation) or to the court-appointed Receiver.

131. My concern in this regard is increased by the involvement in the business dealings of Oasis and Rivers of 283. Its existence was not initially disclosed to the Plaintiff, and the Defendants have, even as of the date of these motions, still not been forthcoming with respect to the involvement of 283, the ownership of the Segway Opportunity, and the intermingling or transfer of assets.

132. None of those factors was present in the case before Chalmers J. in *265 Ontario*.

133. In my view, enforcing the Order is not oppressive or an abuse of process in the circumstances of this case. Nor can I conclude that a stay would not cause an injustice to the Plaintiff, largely for the same reasons, and given what appears to be actions on the part of the Defendants to divert assets to 283 in the face of orders already made.

Is Enforcement of the Order against Oasis prohibited by ss. 30 and 31 of the *OBCA*?

134. In my view, ss. 30 and 31 of the *OBCA* cannot be relied upon by the Defendants now so as to prohibit enforcement of the Order in the circumstances of this case.

135. First, the Defendants ought to have raised these arguments on the enforcement motion, and I am satisfied that raising them now is an attempt to relitigate issues already determined. The discussion about estoppel above applies equally here.

136. As is clear from the Endorsement dated February 24, 2023, issues surrounding the shares and the rights attached thereto were also specifically argued on the enforcement motion. At paragraph 23 of the Endorsement, Steele J. noted that:

> Oasis and [Rivers] further argue that the Arbitrator incorrectly deferred issues within the scope of the arbitral agreement to this Court. At para. 27 of the Clarification, in response to Oasis and [Rivers'] question as to whether [Chriscwe] is permitted to vote the issued shares pursuant to the Award, [the Arbitrator] states:
>
>> As the 30% of shares were to be held as security for payment, I will defer all issues relating to the Claimant's enforcement of its security and entitlements with respect to the 30% share issue to the judge in the enforcement proceeding, other than to reiterate that the Claimant [Chriscwe] may vote all 50% of the Oasis shares in light of the default of the Respondents.

137. Justice Steele rejected the jurisdiction arguments and enforced the Arbitral Award. Accordingly, the issue of whether the Arbitral Award should be enforced, including the issuance of the shares to stand as security, has already been litigated.

138. Even if the matter were appropriate for determination now, the statutory provisions do not, in my view, effectively oblige or require the Court to impose a stay, as is urged upon me by the Defendants.

139. The Defendants rely on the decision in *Ramsden v. Home Coverings*, 2011 ONSC 1998, O.J. No. 1441. That decision does not assist them. Indeed, Hourigan J. (as he then was) noted that that case raised an interesting issue regarding the interaction between a judgment of the court that provides for the purchase of shares and the provisions of section 30 in circumstances where subsequent to the judgment, the corporation finds itself in financial peril. However, he concluded that he need not decide the issue on that motion given the particular circumstances of that case.

140. In any event, I am not persuaded that ss. 30 and 31 of the *OBCA* operate so as to prohibit the issuance of shares in the circumstances so ordered here, where those shares are to stand as security for the payment of a debt obligation. Given my conclusion above, however, I need not determine that.

141. I do observe that the Order requires Oasis to issue shares to Chriscwe, but only as security for the payment of the judgment. This tracks the Terms of Settlement, which required that an additional 30% of the shares in the capital of Oasis be issued in favour of Chriscwe, such shares not to be traded or encumbered until

either the Settlement Amount was paid in full or there is an uncured default by Oasis or Rivers. Upon such issuance, Chriscwe shall hold 50% of the shares. Chriscwe was not entitled to vote the 30% of its shares or act as a shareholder unless there was an uncured default.

142. The Terms of Settlement track again through the Arbitral Award, which requires Oasis to "issue sufficient shares such that [Chriscwe] holds 50% of the outstanding shares of Oasis, such shares to be held by the [Chriscwe] in a manner consistent with the terms of Terms of Settlement."

143. In short, the new shares are to be issued for the purpose of providing security as against the judgment and amount outstanding.

Does Enforcement of the Order amount to the Imposition of a Criminal Rate of Interest or an Unconscionable Transaction?

144. The Defendants argue that a stay should be granted since enforcement of the Order amounts, if the entire quantum is considered to be a debt owing, to the imposition of a rate of interest that would be contrary to the *Criminal Code*, R.S.C. 1985, c. C-46, and/or should be set aside pursuant to the terms of the *Unconscionable Transactions Relief Act*, R.S.O. 1990, c. U2.

145. The Defendants submit that this Court has the jurisdiction to grant remedial relief and asks, now, that this court reopen the Terms of Settlement. As described in the factum of the Defendants, "a stay will permit the Court to take account of Chriscwe's original loans to Oasis and relieve Oasis from payment of any sum in excess of the sum adjudged by the court to be fairly due."

146. In my view, these arguments also relate to whether and on what terms the Arbitral Award should be enforced or, (and this is even more problematic for the Defendants), represent further challenges to the Arbitral Award itself. Those issues have already been determined by Steele J., as fully discussed above.

Motion to Unseal the Zeifman Report

147. The Plaintiff seeks an order unsealing the Zeifman Report. It identified a number of concerns and issues regarding the operations and controls of Oasis. It also identified numerous categories of information and materials that were required to assess the business of Oasis and which had been requested but not provided.

148. These included 2022 year-end financial information; any books of account for August through December, 2022; a cash flow forecast and budget for the 2023 fiscal year; particulars of 2021 HST arrears; outstanding inventory counts; a reconciliation of dealer product claims with claims made by Oasis; a purported amount "due from Segway" reflected in a credit balance of $2.432 million; and numerous other relevant agreements and other materials.

149. The Plaintiff submits that there is no valid reason for continuing the sealing relief granted by Steele J. It submits that the previous order was granted to provide a window of opportunity for Oasis and Rivers to come to terms with Chriscwe and avoid the appointment of a receiver, which has not occurred. It therefore submits that there is no continuing rationale for an order permanently sealing the Zeifman Report.

150. The Defendants oppose the unsealing of the report.

151. In her Endorsement of February 24, 2023, Steele J. sets out in detail, at paras. 49 – 58, her reasons for ordering that the report be temporarily sealed until further order of the Court. While determining that at that time, a full receivership was premature, Steele J. concluded that the report contains commercially sensitive information that could be damaging to Oasis as it attempts to continue to build its business.

152. In my view, that analysis and those reasons apply equally today. The proceedings are ongoing. The full receivership is just beginning. It would be in the best interests of all parties if Oasis were able to pay out the debt owing to Chriscwe. In my view, it continues to be premature to unseal the report, and the earlier order of Steele J. continues until further order of this Court.

Motion of the Receiver for a Sealing Order in respect of Confidential Appendix "E"

153. The motion of the Receiver to seal Confidential Appendix "E" of its First Report was not opposed by the Defendants or the Plaintiff. In my view, the test articulated by the Supreme Court of Canada in *Sherman Estate v. Donovan*, 2021 SCC 25, 458 D.L.R. (4th) 361 (refining the test set out in *Sierra Club of Canada v. Canada (Minister of Finance)*, [2002] 2 S.C.R. 522) is met for the time being, for the same reasons set out above, subject to further order of the Court.

Disposition

154. Order to go in accordance with these reasons. The parties should submit a revised draft order to reflect the above through my judicial assistant, Ms. Mary Sibenik at mary.sibenik@ontario.ca, for signing. If, as I hope is not the case, the parties are unable to agree on the form of order, a brief attendance may be scheduled before me for the purposes of settling same.

155. The parties were not in a position at the conclusion of argument to address costs. If costs cannot be agreed, I may be spoken to.

Osborne, J.