

Court File No.

**ONTARIO
SUPERIOR COURT OF JUSTICE
(Commercial List)**

BETWEEN:

**BANNERS BROKER INTERNATIONAL LIMITED and
STELLAR POINT, INC., by their Receiver MSI SPERGEL INC.**

Plaintiffs

- and -

**RAJIV DIXIT, KULDIP JOSUN, DIXIT HOLDINGS INC.,
DIXIT CONSORTIUM INC., DREAMSCAPE VENTURES LTD.,
WORLD WEB MEDIA INC., and REAL PROFIT LIMITED**

Defendants

FACTUM OF THE PLAINTIFF

(Ex Parte Motion for a Mareva Injunction, Returnable May 31, 2016)

May 30, 2016

CASSELS BROCK & BLACKWELL LLP
2100 Scotia Plaza
40 King Street West
Toronto, ON M5H 3C2

David S. Ward LSUC #: 33541W
Tel: 416.869.5960
Fax: 416.640.3154
dward@casselsbrock.com

Christopher Horkins LSUC #: 61880R
Tel: 416.815.4351
Fax: 416.642.7129
chorkins@casselsbrock.com

Lawyers for the Plaintiffs

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I. Overview

1. This is an *Ex Parte* motion by msi Spergel inc., in its capacity as court-appointed receiver (in such capacity, the “**Receiver**”) of Banners Broker International Limited (“**BBIL**”) and Stellar Point Limited (“**Stellar Point**”), for an interim and interlocutory *Mareva* injunction.

2. The injunction sought is in standard Model Order form. It seeks to restrain Rajiv Dixit (“**Dixit**”), Dreamscape Ventures Limited (“**Dreamscape**”), 8643989 Canada Inc. o/a Dixit Consortium Inc. (“**Dixit Consortium**”), Dixit Holdings Inc. (“**Dixit Holdings**”, collectively referred to herein, with Dixit, Dixit Consortium and Dreamscape, as the “**Dixit Defendants**”) and Kuldip Josun (“**Josun**”) from selling, removing, dissipating, alienating, transferring, assigning, encumbering, or similarly dealing with any assets pending the final disposition of the Receiver’s recently issued action against those parties for recovery of funds which were fraudulently misappropriated from the insolvent corporations. Without the relief sought, the Receiver believes it is likely that assets will be dissipated or transferred abroad and that its right of recovery will be irreparably prejudiced.

3. The facts supporting the relief sought by the Receiver on this motion are more fully described in the Receiver’s Seventh Report to the Court, dated May 30, 2016 (“**Seventh Report**”), filed in support of this motion.

II. Purpose of a *Mareva* Injunction

4. The function of a *Mareva* injunction is to freeze exigible assets found within the jurisdiction wherever the defendant may reside, provided there is a cause between the plaintiff and the defendant which is justiciable by the court. It is granted upon demonstration by the plaintiff of a strong *prima facie* case against the defendant and a genuine risk of the disappearance of assets, either inside or outside the jurisdiction, which would otherwise be available to the plaintiff if successful in the action.

Aetna Financial Services Ltd. v. Feigelman, [1985] 1 SCR 2, Book of Authorities, dated May 30, 2016 (“BOA”), Tab 1, at para. 26 [*Aetna*]

Chitel v. Rothbart, [1982] OJ No. 3540, 39 OR (2d) 513 (CA), BOA, Tab 2, at paras. 56-58 [*Chitel*]

III. Strong *Prima Facie* Case

5. The Receiver’s Seventh Report and the Statement of Claim set out facts which present a strong *prima facie* case of fraud, breach of fiduciary duty and oppression by the Dixit Defendants and Josun. The Banners Broker enterprise was not a *bona fide* business. It relied on false representations as to profitability, false reports as to affiliates’ ability to double their money from purchases of Banners Broker advertising products and false statements as to the nature of its operations in order to induce affiliates to purchase Banners Broker products.

6. In addition, Dixit has recently been charged with offences under the *Criminal Code* and *The Competition Act* in relation to his role in and operation of the Banners Broker enterprise.

7. A *Mareva* injunction will be granted where the plaintiff has satisfied the following requirements:

- (i) The plaintiff makes full and frank disclosure of all matters in his knowledge which are material for the judge to know;
- (ii) The plaintiff provides particulars of his claim against the defendant, stating the ground of his claim and the amount thereof, and fairly states the points made against it by the defendant;
- (iii) The plaintiff gives some grounds for believing that the defendants have assets in the jurisdiction;
- (iv) The plaintiff gives some grounds for believing that there is a risk of the assets being removed before the judgment or award is satisfied; and

- (v) The plaintiffs must give an undertaking as to damages.

Chitel, supra, BOA, Tab 2, at para. 44

IV. Full and Frank Disclosure

8. The Receiver has undertaken extensive investigations into Banners Broker's operations and has detailed in its Seventh Report relevant facts and circumstances relating to conduct of the individual defendants, Dixit and Josun, personally and through their various corporate entities, which describe the fraudulent nature of their activities, and the illicit methods by which they have improperly appropriated to themselves monies belonging to the companies for which the Receiver has been appointed, and their creditors.

9. This motion is brought on a timely basis as, in the circumstance, it was reasonable for the Receiver to take time to prepare its case on the motion. Any delay has therefore been adequately explained on the basis that certain relevant information only recently came to the attention of the Receiver and, in any event, the defendants can suffer no prejudice.

Jajj v. 100337 Canada Ltd., 2014 ONSC 557, BOA, Tab 3, at para. 141

Sabourin & Sun Group of Companies v. Laiken, [2006] OJ No. 3847, BOA, Tab 4, at para. 14

10. Further, the merits are such that an injunction is clearly called for and substantial prejudice would otherwise be occasioned to the Receiver in light of the real risk of disposition or dissipation of assets by the defendants.

SLMsoft.com Inc. v. Rampart Securities Inc., 2004 CarswellOnt 3246, BOA, Tab 5, at para. 27

V. Particulars of the Claim

11. The Receiver's Seventh Report and the Statement of Claim set out full particulars of the claims of the Receiver as against the defendants, the amount being claimed, and the fact that

there is no legitimate explanation for the actions taken by the defendants in appropriating the monies in question.

VI. Identification of Assets

12. As a result of its investigation, the Receiver has identified assets which are the product of the defendants' misappropriation, both within and outside the jurisdiction. The Receiver's accounting demonstrates how affiliate contributions were received and dispersed over the period of Banners Broker's operations. Many payments can be traced to the defendants. Other disbursements cannot as yet be completely accounted for, however there is reason to believe that the monies may have flowed to the individual defendants or their companies.

13. To date, the Receiver and Joint Liquidators have collected, reviewed and incorporated information obtained from approximately 100 financial institutions, 9 payment processors and 46 other third parties which outlines the extensive improper personal use of affiliate funds by both Dixit and Josun in respect of which their liability may well exceed \$100 million.

14. In particular, the Receiver's Seventh Report contains details of the following conduct:

- (i) misappropriation of funds from corporate bank accounts for personal use, including the purchase of clothing, accessories, furniture, vehicles and recreational travel;
- (ii) inter-corporate transfers of funds between companies controlled by Dixit which are not properly accounted for;
- (iii) non-cash asset transfers between Banner Broker entities without any discernible business or contractual reason, and without little or no documentation;
- (iv) use of Banners Broker funds to support an extravagant lifestyle rather than to promote Banners Broker products for which the funds were intended; and

- (v) direct embezzlement by Josun of at least USD\$3.6 million which was deposited in a Swiss bank account.

15. Through its investigation to date, the Receiver has identified a number of assets held by the defendants which include:

- (i) Bank accounts at Canadian financial institutions;
- (ii) Visa accounts with Canadian financial institutions; and
- (iii) Bank accounts at foreign financial institutions.

16. Based on these findings, the Receiver has good reason to believe that the defendants have additional exigible accounts or assets, both within and outside the jurisdiction, which can properly be subject to a *Mareva* injunction.

VII. Risk of Dissipation and Removal

17. In light of the facts and circumstances as set out in the Receiver's report, and the Statement of Claim, there is a real risk that property and assets will be dissipated, concealed, transferred, sold or otherwise conveyed within or outside of the jurisdiction, for the purpose of evading any recovery by the Receiver, unless this Court intervenes.

18. This is further demonstrated by, among other things:

- (i) The defendants' maintenance of banks accounts in foreign jurisdictions, such as Cyprus and Switzerland; and
- (ii) The demonstrated capacity of the defendants to transfer funds abroad and structure the corporate affairs of the Banners Broker enterprise through entities in

foreign jurisdictions (i.e. Isle of Man, Belize, British Virgin Islands, US Marshall Islands, etc.) in such a way as to put assets beyond the reach of creditors.

19. In the circumstances, it is appropriate, and this court has jurisdiction, to grant an injunction with respect to assets both in Ontario and outside the jurisdiction in light of the demonstrated capacity of the defendants to transfer funds abroad and to structure the corporate affairs of the Banners Broker enterprise through entities in foreign jurisdictions in such ways as to attempt to put those assets beyond the reach of creditors.

Innovative Marketing Inc. v. D'Souza, 2007 CarswellOnt 1131, 42 CPC (6th) 328, BOA, Tab 6, at para. 3

VIII. Undertaking in Damages

20. The Receiver has given an undertaking in damages.

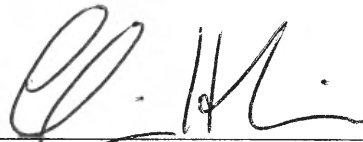
IX. Necessity of *Mareva* Injunction

21. A *Mareva* injunction is necessary in this case in order to require the defendants to preserve property misappropriated from BBIL or Stellar Point, or such other property to which it can be traced, pending the determination of the litigation.

X. Relief Requested

22. The Receiver therefore requests an order in the form set out in Schedule "A" to the Notice of Motion.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 30th day of May, 2016.



David S. Ward / Christopher Horkins

CASSELS BROCK & BLACKWELL LLP

2100 Scotia Plaza
40 King Street West
Toronto, ON M5H 3C2

David S. Ward LSUC #: 33541W

Tel: 416.869.5960
Fax: 416.640.3154
dward@casselsbrock.com

Christopher Horkins LSUC #: 61880R

Tel: 416.815.4351
Fax: 416.642.7129
chorkins@casselsbrock.com

Lawyers for the plaintiffs

TAB A

SCHEDULE "A"

LIST OF AUTHORITIES

1. *Aetna Financial Services Ltd. v. Feigelman*, [1985] 1 SCR 2
2. *Chitel v. Rothbart*, [1982] OJ No. 3540, 39 OR (2d) 513 (CA)
3. *Jaji v. 100337 Canada Ltd.*, 2014 ONSC 557
4. *Sabourin & Sun Group of Companies v. Laiken*, [2006] OJ No. 3847
5. *SLMsoft.com Inc. v. Rampart Securities Inc.*, 2004 CarswellOnt 3246
6. *Innovative Marketing Inc. v. D'Souza*, 2007 CarswellOnt 1131, 42 CPC (6th) 328

TAB B

SCHEDULE “B”

TEXT OF STATUTES, BY-LAWS & REGULATIONS

Courts of Justice Act, R.S.O. 1990, c. C.43

Injunctions and receivers

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

Rules of Civil Procedure, RRO 1990, Reg 194

RULE 40 INTERLOCUTORY INJUNCTION OR MANDATORY ORDER

HOW OBTAINED

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

WHERE MOTION MADE WITHOUT NOTICE

Maximum Duration

40.02 (1) An interlocutory injunction or mandatory order may be granted on motion without notice for a period not exceeding ten days.

Extension

(2) Where an interlocutory injunction or mandatory order is granted on a motion without notice, a motion to extend the injunction or mandatory order may be made only on notice to every party affected by the order, unless the judge is satisfied that because a party has been evading service or because there are other exceptional circumstances, the injunction or mandatory order ought to be extended without notice to the party.

(3) An extension may be granted on a motion without notice for a further period not exceeding ten days.

[...]

UNDERTAKING

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

FACTUMS REQUIRED

40.04 (1) On a motion under rule 40.01, each party shall serve on every other party to the motion a factum consisting of a concise argument stating the facts and law relied on by the party.

(2) The moving party's factum shall be served and filed with proof of service in the court office where the motion is to be heard at least seven days before the hearing.

(3) The responding party's factum shall be served and filed with proof of service in the court office where the motion is to be heard at least four days before the hearing.

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**PROCEEDING COMMENCED AT
TORONTO**

FACTUM OF THE PLAINTIFF

Cassels Brock & Blackwell LLP
2100 Scotia Plaza
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David S. Ward LSUC #: 33541W
Tel: 416.869.5960
Fax: 416.640.3154
dward@casselsbrock.com

Christopher Horkins LSUC #: 61880R
Tel: 416.815.4351
Fax: 416.642.7129
chorkins@casselsbrock.com

Lawyers for the Plaintiffs