CITATION: Brenner v. Saks, 2026 ONSC 2857
COURT FILE NO.: CV-14-0010688-00CL
DATE: 20260515

SUPERIOR COURT

OF JUSTICE - ONTARIO

RE: DAVID BRENNER, Applicant

AND:

URI SAKS and AHARON KALDERON, Respondents

BEFORE: Cavanagh J.

COUNSEL: *Sarah O'Connor*, for the Responding Party/Applicant, David Brenner

Douglas F. Best, Michael Gora, and David Taub for the Moving Party/Respondent, Uri Saks

HEARD: March 31, 2026

ENDORSEMENT

Introduction

[1] Uri Saks is the moving party on this motion and a respondent in the within application.

[2] In his notice of motion, Mr. Saks seeks an order permitting him to pay into court the monies to be paid by him to the applicant, David Brenner, for the purchase of Mr. Brenner's shares in 1170057 Ontario Inc. ("117") pursuant to Minutes of Settlement made in the within application, pending the trial in a related action (CV-15-10949-00CL) (the "523 Action").

[3] Mr. Saks seeks, in the alternative, such other form of security as the Court deems just. Mr. Saks seeks, also in the alternative, an order, if required, in the form of a *Mareva* order against Mr. Brenner restraining him from dealing with the proceeds from the sale of shares of 117 pending the trial in the 523 Action.

[4] For the following reasons, Mr. Saks' motion is dismissed.

Procedural Background

[5] This application, and three other legal proceedings, were brought to address the breakdown of the 30-year business relationship between Mr. Saks and Mr. Brenner.

[6] One of these proceedings is the 523 Action brought by Mr. Saks against Mr. Brenner in which Mr. Saks alleges that Mr. Brenner obtained a court order for the sale of property at 434 Steeles Avenue, Toronto, knowing that the purchase price ($12 million) was below fair market value. Mr. Saks alleges that Mr. Brenner acted in breach of his fiduciary duties to the owner of the property, 523910 Ontario Ltd. (owned equally by Mr. Brenner and Mr. Saks).

[7] The within application was commenced by Mr. Brenner on September 9, 2014. In the within application, Mr. Brenner seeks, among other things, to wind up 117. Mr. Brenner's shares of 117 were sold to Mr. Saks pursuant to a Share Purchase Agreement made pursuant to Minutes of Settlement signed by Mr. Brenner and Mr. Saks dated February 25, 2019 and approved by Hainey J. by an Order made on consent that day (the "February 2019 Order").

Analysis

[8] On this motion, Mr. Saks submits that new evidence confirms a fraudulent secret joint venture between Mr. Brenner and the purchaser of 434 Steeles, 1880607 Ontario Limited (the "Tenant"), to sell 434 Steeles to the Tenant at an undervalue and kick back collateral benefits to Mr. Brenner in the form of litigation funding, above market interest payments on a suspect loan, and such other damages flowing from the joint venture as may be proven in the litigation.

[9] Mr. Saks states that the purpose of the relief sought on this motion is to preserve Mr. Saks' recovery pending the trial of issues in the 523 Action, and a companion action - the "117 Action" - where Mr. Saks seeks an accounting of his and Mr. Brenner's jointly run company, UriDave Developments Inc.

[10] The funds at issue on this motion are proceeds from the sale to Mr. Saks of Mr. Brenner's shares in 117 ($2,119,333.33) which are currently being held by Mr. Brenner's lawyers pursuant to the Order of Kimmel J. dated July 7, 2025.

Should Mr. Saks be granted an order under rule 59.06(2) of the Rules of Civil Procedure varying the February 2019 Order of Hainey J.?

[11] Mr. Saks moves pursuant to rule 59.06(2) of the *Rules of Civil Procedure* to vary the February 2019 Order on the ground of fraud discovered after it was made. Mr. Saks seeks such variation to require payment into court of $2,119,333.33 representing the monies to be paid to Mr. Brenner for the purchase by Mr. Saks of Mr. Brenner's shares in 117 as provided for in the Minutes of Settlement approved by the February 2019 Order.

[12] The February 2019 Order was made on consent and contains only the following operative paragraph (and attaches the Minutes of Settlement):

> 1. THIS COURT ORDERS that the attached Minutes of Settlement are approved and that the parties will abide by the terms contained therein.

[13] The Minutes of Settlement provide, among other things, for the purchase of Mr. Brenner's shares in 117 by Mr. Saks and include provisions for how the purchase price will be calculated.

[14] The Minutes of Settlement provide, in paragraph 27:

> Upon the closing of the Share Purchase Agreement, Uri shall pay David $71,000 in addition to the sums owing under the Share Purchase Agreement. Payment of the $71,000 is in full satisfaction of the unpaid costs orders referenced in paragraphs 6-8 of the Recitals.

[15] Rule 59.06(2)(a) provides that a party who seeks to have an order set aside or varied on the ground of fraud or of facts arising or discovered after it was made may make a motion in the proceeding for the relief claimed.

[16] Mr. Saks seeks an order varying the February 2019 Order as follows:

(a) Paragraph 1 of the February 2019 Order is to be amended to remove paragraph 27 of the Minutes of Settlement providing for payment to Mr. Brenner of $71,000 in addition to the sums owing under the Share Purchase Agreement (for the sale of Mr. Brenner's shares of 117 to Mr. Saks).

(b) The February 2019 Order is to be further amended by adding a paragraph ordering Mr. Brenner to pay into court the sum of $2,119,333.33.

[17] Mr. Saks submits that the evidence of fraud by Mr. Brenner makes it in the interests of justice that the February 2019 Order be varied.

[18] It is important to recognize that the February 2019 Order was made, on consent, approving a contract made by Mr. Saks and Mr. Brenner (the Minutes of Settlement).

[19] When Hainey J. made this order, there was nothing contentious for him to adjudicate. No evidence was filed. Hainey J. was asked to make a consent order approving the contractual terms that Mr. Saks and Mr. Brenner had agreed upon in the Minutes of Settlement, and to direct that they will abide by these terms. He did so. Hainey J. was not asked to decide whether the amount to be paid by Mr. Saks to Mr. Brenner under the Minutes of Settlement in satisfaction of the purchase price for the shares of 117 should be paid into court. This, of course, would have conflicted with the Minutes of Settlement for which approval, on consent, was sought. Hainey J. was not asked to order that security be posted by Mr. Brenner for claims made by Mr. Saks in other legal proceedings.

[20] Although Mr. Saks frames the primary relief sought on this motion as an order under rule 59.06(2) of the *Rules of Civil Procedure* varying the February 2019 Order on the ground of fraud discovered after the Order was made, the relief he seeks would, in substance, vary by court order the terms of the Minutes of Settlement, a contract made by Mr. Saks and Mr. Brenner. If Mr. Saks is successful in varying the Minutes of Settlement to remove the requirement that the proceeds of sale be paid to Mr. Brenner, he then seeks to vary the February 2019 Order by adding a mandatory order that would decide an issue that was not before Hainey J. The effect of such a variation would be to order Mr. Brenner, retroactively to February 25, 2019, to pay into court money to which he is entitled under the Minutes of Settlement, to be held as security for Mr. Saks' claims in other legal proceedings.

[21] In *Monarch Construction Ltd. v. Buildevco Ltd*., 1988 CarswellOnt 369, the Court of Appeal decided an appeal from an order granting leave to amend a consent judgment, which

embodied an offer to sell contained in a joint venture agreement. The amendment was to correct an error in calculating the amount owing by the appellant to the respondent. The Court of Appeal allowed the appeal and set aside the order below.

[22] In *Monarch*, the Court of Appeal held that rescission of the offer to sell was no longer possible because the respondent forced the transfer of the property to it pursuant to the consent judgment. On this motion, Mr. Saks does not seek to rescind or set aside the Minutes of Settlement (or the Share Purchase Agreement made thereunder) on the ground that the contract was induced by fraud. This is so because the sale of Mr. Brenner's shares in 117 has been completed. Mr. Saks seeks only to vary the Minutes of Settlement approved by the February 2019 Order to remove the requirement that the proceeds of sale be paid to Mr. Brenner and to add a provision to the February 2019 Order that the proceeds be paid into court.

[23] In *Monarch*, the Court of Appeal, at para. 3, in concluding that the order granting leave to amend the consent judgment should be set aside, held:

> A consent judgment is final and binding and can only be amended when it does not express the real intention of the parties or where there is fraud. In other words, a consent judgment can only be rectified on the same grounds on which a contract can be rectified. Here, there was no allegation of fraud and, in our opinion, there was no basis on the material before the Local Judge on which she was entitled to grant rectification. The contract is unambiguous on its face; on the motion of Monarch, it was incorporated in a consent judgment and should be performed in accordance with its terms.

[24] Mr. Saks submits that *Monarch* is best read as using "rectification" and "amended" as synonyms for "varying", and not in reference to the legal test for rectification. He submits that the requirements for rectification need not be shown on a motion under rule 59.06(2) and, even if these requirements apply on a motion to vary a consent order in cases of mistake, they do not apply in cases of fraud. I disagree. Rectification is an equitable remedy, and the references by the Court of Appeal to rectification as the only basis to amend a contract embodied in a consent judgment are references to this remedy, which has established requirements. The references to fraud in the decision of the Court of Appeal in *Monarch* are to fraud in the context of rectification of a contract.

[25] In *Performance Industries Ltd. v. Sylvan Lake Golf & Tennis Club Ltd*., 2002 SCC 19, the Supreme Court of Canada, at para. 31, explained the meaning of "fraud or the equivalent of fraud" in the context of the remedy of rectification:

> Rectification is an equitable remedy whose purpose is to prevent a written document from being used as an engine of fraud or misconduct "equivalent to fraud". The traditional rule was to permit rectification only for mutual mistake, but rectification is now available for unilateral mistake (as here), provided certain demanding preconditions are met. Insofar as they are relevant to this appeal, these preconditions can be summarized as follows. Rectification is predicated on the existence of a prior oral contract whose terms are definite and ascertainable. The plaintiff must establish that the terms agreed to orally were not written down properly. The error may be fraudulent, or it may be innocent. What is essential is

> that at the time of execution of the written document the defendant knew or ought to have known of the error and the plaintiff did not. Moreover, the attempt of the defendant to rely on the erroneous written document must amount to "fraud or the equivalent of fraud". The court's task in a rectification case is corrective, not speculative. It is to restore the parties to their original bargain, not to rectify a belatedly recognized error of judgment by one party or the other: [citations omitted].

[26] In *Performance Industries*, the Supreme Court of Canada explained, at para. 39, that "fraud or the equivalent of fraud" in this context refers not to the tort of deceit or strict fraud in the legal sense, but rather to the broader category of equitable fraud or constructive fraud as described in that paragraph.

[27] Mr. Saks does not allege that the terms of the Minutes of Settlement were not, in error, written down properly, to the knowledge of Mr. Brenner, or that his attempt to rely on the Minutes of Settlement as written amounts to fraud, or the equivalent of fraud, in the sense used by the Supreme Court of Canada in *Performance Industries*.

[28] Mr. Saks submits that the use of rule 59.06(2) as a proper procedural basis for the relief he seeks on this motion is supported by *International Corona Resources Ltd. v. LAC Minerals Ltd*. (Ont. H.C.J.), 1988 CanLII 4534 (ON SC). In *Lac Minerals*, the plaintiff moved to set aside a trial judgment on a motion under rule 59.06(2). The plaintiff alleged that one of the defendant's witnesses had given perjured evidence at trial. The motion judge summarized the underlying principles on such a motion including that the fraud must be proven on a balance of probabilities, the proved fraud must be material, the evidence of fraud must not have been known to the party seeking to rely upon it at the time of trial, and the moving party is required to establish that it acted with due diligence. The motion judge noted that relief under rule 59.06(2) is discretionary.

[29] I disagree that *Lac Minerals* is a helpful authority. *Lac Minerals* did not involve a consent order approving a written contract, where no evidence was given. The remedy sought in *Lac Minerals*, setting aside the trial judgment and ordering a new trial, would follow from the fraud alleged, if proven and shown to be material. On this motion, no evidence was given, perjured or otherwise, and the order approving the Minutes of Settlement was made on consent. The request for an added term ordering, retroactively, a payment into court as security, was not before Hainey J. when he made the February 2019 Order. The *Lac Minerals* case involved very different considerations.

[30] In my view, Mr. Saks' motion under rule 59.06(2) of the *Rules of Civil Procedure* to amend the Minutes of Settlement approved by the February 2019 Order, and to add a provision for security to that order, is misconceived. This rule does not apply where a party to a written contract approved by a court order made on consent (here, the Minutes of Settlement) seeks an order amending the terms of the contract. As the Court of Appeal held in *Monarch*, a consent judgment (in that case, embodying an offer to sell in a joint venture agreement) can only be rectified on the same grounds on which a contract can be rectified. The rule also does not apply to allow a party, retroactively, to obtain an order for security for claims made in legal proceedings, with effect similar to a *Mareva* injunction, where such security was not sought when the order for which variation is requested was made.

[31] I decline to make an order under rule 59.06(2) of the *Rules of Civil Procedure* amending the Minutes of Settlement approved by the February 2019 Order and adding to the February 2019 Order a provision requiring, as security, payment into court of the proceeds of the share sale to which Mr. Brenner is entitled under the Minutes of Settlement.

Should Mr. Saks be granted a Mareva Injunction restraining Mr. Brenner from dealing with the proceeds of the share sale?

[32] Mr. Saks, in the alternative, moves for an order in the nature of a *Mareva* injunction restraining Mr. Brenner from dissipating or otherwise dealing with the proceeds from the sale of his shares of 117 to Mr. Saks pending the trial in the 523 Action. Mr. Saks submits that it is permissible for him to move for this relief in the within application, instead of through a motion in the 523 Action, because these proceedings are interrelated, all relevant evidence and pleadings are before the court, and it is just and convenient that the motion be heard and decided. In the circumstances, I accept this submission.

[33] The requirements for a *Mareva* order are well-established. The moving party must: (a) demonstrate a strong *prima facie* case; (b) provide particulars of its claim against the responding party, setting out the grounds of its claim and the amount thereof, and fairly stating the points that could be made against it by the responding party; (c) give grounds for believing that the responding party has assets in the jurisdiction; (d) give grounds for believing that there is a real risk of the assets being removed from the jurisdiction, or disposed of within the jurisdiction or otherwise dealt with so that the plaintiff will be unable to satisfy a judgment awarded to him or her; and (e) give an undertaking as to damages. See *Sibley & Associates LP v. Ross*, 2011 ONSC 2951, at paras. 11-12.

[34] Mr. Saks submits that he has shown, through new evidence, a strong *prima facie* case that Mr. Brenner breached his fiduciary duties as an officer and director of 523 in respect of the sale of 434 Steeles to the Tenant, as pleaded by Mr. Saks in the 523 Action. Mr. Saks summarizes the evidence upon which he relies as follows:

(a) On February 20, 2013, the Tenant wrote a letter to Mr. Brenner regarding their "Proposed Purchase and Joint Venture Agreement";

(b) On April 8, 2015, the Tenant made a $12 million offer to purchase 434 Steeles;

(c) 20 days later, Mr. Brenner commenced the 523 Application to sell 434 Steeles to the Tenant, funded by the Tenant as recently shown by the new evidence;

(d) The Tenant has paid (at least) $351,273.55 in Mr. Brenner’s legal fees for the 523 Application to compel the sale of 434 Steeles, including a $25,000 Fasken retainer before the Tenant's $12 million offer was even made;

(e) In May 2017, Mr. Brenner’s lawyers begin drafting a Memorandum of Understanding between Mr. Brenner and the Tenant that was later signed;

(f) On May 26, 2017, 434 Steeles was sold by Court Order in the 523 Application to the Tenant for $12 million;

(g) On August 14, 2017, Mr. Brenner wrote a handwritten note describing a "plot" between him and the Tenant to accept the Tenant's $12 million offer, over the $14.6 million offer solicited by Mr. Saks;

(h) On July 3, 2018, Mr. Brenner and the Tenant entered into a Memorandum of Understanding ("MOU") which describes a $3 million loan (the DBI Loan) to the Tenant which is convertible into shares in the Tenant equal to 25% of the value of 434 Steeles, regardless of whether that amount exceeds $3 million. Mr. Saks submits that this is significant given Mr. Brenner's evidence that the value of 434 Steeles is "unbelievable" and could be worth $44 million;

(i) Mr. Brenner has not produced any evidence, such as a bank statement, that he actually advanced $3 million to the Tenant, despite undertaking to do so. He has only produced a copy of the front side of the $3 million cheque;

(j) The market rate for interest in 2018 was 3.65% per annum, not the 10% prescribed by the DBI Loan. If the market rate had been applied, Mr. Brenner would have earned $848,400 at the return of this motion. Instead, he has earned $2,324,383, a windfall of $1,475,983. Mr. Brenner confirms receiving all payments owing to him by the Tenant; and

(k) The DBI Loan is notionally "secured" by a mortgage, general assignment of rents and a general security agreement, which are registerable upon a default by the Tenant under the loan agreement. Mr. Brenner acknowledged on cross-examination that the Tenant is in default, but that he has no intention of exercising any remedies available to him under the agreement. Mr. Brenner acknowledged being advised by his solicitor that the DBI Loan is an unsecured loan.

[35] Mr. Brenner denies that he made a secret agreement with the Tenant as alleged by Mr. Saks. Mr. Brenner responds as follows, correspondingly, to the evidence cited by Mr. Saks:

(a) The letter contains an error because it was prepared from a precedent;

(b) The Tenant's offer was higher than a valuation and Mr. Saks had the option to match it;

(c) Mr. Brenner brought the application because Mr. Saks opposed the Tenant's offer, leaving no other practical way forward;

(d) Payment of legal fees occurs regularly in litigation and is not a badge of fraud. Mr. Brenner repaid the legal fees.

(e) The MOU was entered into after the 434 sale was ordered by the Court, and after appeals failed, during the same month as the closing;

(f) The sale was approved by the Court at a value higher than the valuation price;

(g) The 2017 handwritten note is dated on the same day as a motion before Hainey J. The note is Mr. Brenner's note detailing Mr. Saks' allegations against him at the hearing.

(h) After the closing and disbursal of the initial funds, Mr. Brenner and the Tenant signed the MOU;

(i) The cheque and all closing documents were produced, and Mr. Brenner produced evidence that the Tenant is paying interest as specified in the MOU;

(j) The parties are free to negotiate whatever interest rates they wish, just as private mortgage lenders do;

(k) A party can enforce remedies if and when they choose, and there is no evidence that Mr. Brenner would not take enforcement proceedings if the Tenant stopped paying interest.

[36] The parties filed considerable evidence, and submissions were made at the hearing of this motion, concerning the merits of Mr. Saks' claim and the defences of Mr. Brenner, in relation to whether Mr. Saks has established a strong *prima facie* case. It is unnecessary for me to decide whether Mr. Saks has met this requirement because I conclude, for the following reasons, that he has failed to satisfy the requirement for a *Mareva* order that he show that there is a real risk of assets being removed from the jurisdiction, or disposed of within the jurisdiction or otherwise dealt with so that Mr. Saks will be unable to satisfy a judgment awarded to him.

[37] Mr. Saks submits that in cases involving fraud, the requirement that there be a risk or removal or dissipation of assets can be established by inference, arising from the circumstances of the fraud itself, in all of the surrounding circumstances. In support of this submission, Mr. Saks relies on *Sibley & Associates LP v. Ross*, 2011 ONSC 2951.

[38] In *Sibley*, Strathy J. (as he then was), considered how the requirement that there be risk of removal or dissipation can be established in cases involving fraud. Strathy J. held, at paras. 62-64:

> [62] From *Chitel v. Rothbart* to the present day, the law has sought to draw a fair balance between leaving the plaintiff with a "paper judgment" and the entitlement of the defendant to deal [page511] with his or her property until judgment has issued after a trial. In my respectful view, a plaintiff with a strong prima facie case of fraud should be in no more favoured position than, say, a plaintiff with a claim for libel, battery or spousal support. On the other hand, there may be circumstances of a particular fraud that give rise to a reasonable inference that the perpetrator will attempt to perfect the deception by making it impossible for the plaintiff to trace or recover the embezzled property. To this extent, it seems to me that cases of fraud may merit the special treatment they have received in the case law.
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> [63] Rather than carve out an "exception" for fraud, however, it seems to me that in cases of fraud, as in any case, the Mareva requirement that there be risk of removal or dissipation can be established by inference, as opposed to direct evidence, and that inference can arise from the circumstances of the fraud itself,

> taken in the context of all the surrounding circumstances. It is not necessary to show that the defendant has bought an air ticket to Switzerland, has sold his house and has cleared out his bank accounts. It should be sufficient to show that all the circumstances, including the circumstances of the fraud itself, demonstrate a serious risk that the defendant will attempt to dissipate assets or put them beyond the reach of the plaintiff.
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> [64] The risk of removal or alienation can be inferred by evidence suggestive of the defendant's fraudulent criminal activity: *Insurance Corp. of British Columbia v. Leland*, [1999] B.C.J. No. 2073, 91 A.C.W.S. (3d) 49 (S.C.); *Insurance Corp. of British Columbia v. Patko*, *supra*. In referring to these authorities, I have not overlooked the fact that British Columbia applies a somewhat more flexible approach to the grant of a Mareva injunction than the courts of Ontario have applied: [citations omitted]. It seems to me, however, that in some cases a pattern of prior fraudulent conduct may support a reasonable inference that there is a real risk that the conduct will continue.

[39] Mr. Saks submits that the circumstances of Mr. Brenner's fraudulent conduct (by making a fraudulent secret agreement with the Tenant to sell 434 Steeles to the Tenant at an undervalue and to kick back collateral benefits to Mr. Brenner) justify an inference that there is a real risk of the assets being removed from the jurisdiction, or disposed of within the jurisdiction or otherwise dealt with, so that Mr. Saks will be unable to satisfy a judgment awarded to him. Mr. Saks submits that such an inference is justified because (a) Mr. Brenner's conduct bears multiple badges of fraud; (b) the proceeds from the sale of Mr. Brenner's shares in 117 are liquid and would be difficult to trace; and (c) Mr. Brenner, by denying the existence of a secret joint venture with the Tenant, including through sworn affidavits, has lied to Mr. Saks and to the Court. Mr. Saks submits that these factors, together, create a real risk that the share sale proceeds will be dissipated by Mr. Brenner so that Mr. Saks will be unable to satisfy a judgment awarded to him.

[40] For the purpose of my analysis of whether Mr. Saks has given grounds for believing that there is a real risk of Mr. Brenner removing the share sale proceeds from the jurisdiction, or disposing of them within the jurisdiction, or otherwise dealing with them so that Mr. Saks will be unable to satisfy a judgment awarded to him, I consider the circumstances of the alleged fraudulent conduct to determine whether this conduct, if demonstrated on a strong *prima facie* case basis, would support a reasonable inference that there is such a real risk.

[41] Only inferences which logically and reasonably flow from proven facts are permissible inferences. See *Borrelli v. Chan*, 2018 ONSC 1429, at para. 160.

[42] Mr. Saks alleges that the fraudulent secret agreement between Mr. Brenner and the Tenant was made before the Tenant's offer to purchase 434 Steeles in April 2015, and is shown by the MOU. This conduct, while extremely serious if proven, does not involve any improper or unlawful dissipation of Mr. Brenner's assets. Mr. Saks has presented no evidence that since the fraudulent agreement was allegedly made, Mr. Brenner, a Toronto resident, has taken steps to remove assets from Ontario, dissipate his assets, or put them beyond the reach of Mr. Saks so that Mr. Saks will be unable to satisfy a judgment against Mr. Brenner. Unlike in *Sibley*, there is no evidence of a pattern of deceitful conduct by Mr. Brenner in respect of his assets involving, for example,

concealing assets, destroying financial records concerning his assets, or using a nominee to avoid detection of fraudulent activity.

[43] The circumstances of Mr. Brenner's alleged fraudulent conduct by making a secret agreement with the Tenant and his subsequent statements allegedly falsely denying this conduct, even if taken to have been shown on a strong *prima facie* case basis for the purpose of this analysis, together with the share sale proceeds being liquid, do not logically and reasonably justify an inference that there is a real or serious risk that Mr. Brenner will remove the share sale proceeds from Ontario, or dispose of them within Ontario, or otherwise put them beyond the reach of Mr. Saks so that Mr. Saks is unable to enforce a judgment awarded to him.

[44] Mr. Saks has failed to establish this requirement for a *Mareva* injunction. As a result, I do not grant Mr. Saks' motion against Mr. Brenner for this relief.

Disposition

[45] For these reasons, Mr. Saks' motion is dismissed.

[46] If the parties are unable to resolve costs, they may make written submissions (with reasonable page limits) in accordance with a timetable to be agreed upon by counsel and approved by me.

Cavanagh J.

Date: May 15, 2026