

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

BETWEEN:

ASTRAZENECA CANADA INC.

Plaintiff

- and -

SAMEH SADEK also known as SAM SADEK, ST. MAHARIAL PHARMACY
INC. dba MD HEALTH PHARMACY, ST. MAHARIAL CLINIC INC., SRX
INVESTMENT INC., SHEPHERD RX PHARMACY INC. and LILIAN FAM

Defendants

RESPONDING PARTY'S FACTUM

(Motion by Lilian Fam to Set Aside Noting in Default Returnable April 17, 2019)

April 10, 2019

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PART I - INTRODUCTION

1. The defendant Lilian Fam seeks two things on this motion: an order setting aside her being noted in default, and an order varying the Mareva Injunction (defined below) against her.
2. Motions to extend the time for delivery of pleadings and to relieve against defaults are typically granted on an almost routine basis. This case is an exception to that general rule. The reason is simple. Instead of contesting the claim against her, Ms. Fam dissipated assets and fled Ontario for Egypt, in breach of the Mareva Injunction. While in Egypt for almost two months she took no steps to defend the action. Instead, she actively interfered with the work of the receiver the plaintiff had to have appointed after she fled, before trying to bargain with this Court on the terms on which she would agree to return to Ontario. Only after the Court turned her down twice did she return to the province to face cross-examination on an affidavit of assets. During cross-examination Ms. Fam admitted receiving over \$2 million from her husband or his companies. In these circumstances, this Court should not grant Ms. Fam the discretionary relief she now seeks or, alternatively, should only grant it on terms requiring her to abandon any claim to the money she received from her husband and to pay the significant costs AstraZeneca has incurred to date.
3. Ms. Fam has failed to establish that she is entitled to a variation of the Mareva Injunction against her. The Court should decline to vary it.

PART II - SUMMARY OF FACTS

4. To understand why AstraZeneca is opposing what is usually a routine request to set aside a noting in default and why Ms. Fam has not established that she is entitled to a variation of the Mareva Injunction, the Court needs to have a detailed outline of the events in this action to date.

The following, based on Ms. Fam's own evidence, the pleadings, and prior orders and judgments of this Court, is intended to provide that outline.

The Claim

5. As set out in its statement of claim, AstraZeneca is a biopharmaceutical distribution company. It operates two "patient choice" programs (the "**AstraZeneca Programs**") through certain service providers. The AstraZeneca Programs allow patients to purchase AstraZeneca products for approximately the same price as a generic product. Under the Programs, participating pharmacies sell patients who are prescribed an AstraZeneca medication for which there is a generic alternative the brand-name product for the generic price, with AstraZeneca reimbursing the pharmacy the price differential.

Affidavit of Tim Rutherford, Exhibit B, Affidavit of Lilian Fam sworn February 28, 2019 ("**Fam Affidavit**"), Fam Motion Record dated February 28, 2019 ("**MR**"), Tab 2B, pp. 50 to 74.

6. The defendant Sameh Sadek is a pharmacist. He is married to Lilian Fam who is also a pharmacist. Until at least June 2016, Ms. Fam and he were shareholders in St. Maharial Pharmacy Inc. ("**MD Health**") which carried on business under the name MD Health. MD Health participated in both AstraZeneca Programs.

Cross-examination of Lilian Fam of March 28, 2019 ("**Fam Cross #2**"), at qq. 44-58, Responding Motion Record dated April 3, 2019 ("**RMR**") Vol. 4, p. 800-802; Statement of Claim ("**Claim**") at paras. 4-5, 10, 20, RMR Vol. 1, Tab 1, pp. 5-9.

7. AstraZeneca alleges that starting in early 2017, Mr. Sadek, Ms. Fam and MD Health realized that they could generate a substantial amount of money by making claims under the AstraZeneca Programs for completely fictitious prescriptions of AstraZeneca medication. AstraZeneca further alleges that Mr. Sadek, Ms. Fam and MD Health decided to, and did, make fraudulent claims under both AstraZeneca Programs using the information of unsuspecting and/or

non-existent patients, such that they defrauded AstraZeneca of approximately \$7.4 million between June 2017 and March 2018. In the alternative, AstraZeneca alleges that Ms. Fam participated in and/or knew or ought to have known of Mr. Sadek's fraudulent activities, and that she was being enriched by the proceeds of what was a fraudulent scheme.

Claim at paras. 21-27, 48, RMR Vol. 1, Tab 1, pp. 10-11, 15-16.

The Mareva Injunction

8. On August 8, 2018, AstraZeneca served Lou Brzezinski, a lawyer acting for Mr. Sadek, Ms. Fam and their companies on an unrelated claim, with the statement of claim and a motion record for a motion for a *Mareva* injunction returnable the next day, August 9, 2018.

August 9 Reasons and August 17 Order, RMR Vol. 1, Tabs 2-3, pp. 36, 49.

9. The motion was argued before Justice Dunphy on August 9, 2018. Mr. Brzezinski was present and made submissions on behalf of the defendants. Justice Dunphy granted a temporary *Mareva* order against the defendants.¹ The order froze their bank accounts, prohibited them from dealing with their assets, and required them to remain in Ontario and to surrender their passports. The order allowed the defendants to take out \$10,000 to cover their ordinary living and legal expenses. It also required them to provide a sworn statement of their assets by August 16, 2018, and to submit to cross-examination on that sworn statement by September 14, 2018. The order was in effect until the next hearing date which was fixed as August 17, 2018.

August 9, 2018 Order, RMR Vol. 1, Tab 2.

¹ The one exception was Shepherd Rx. The Order of Justice Dunphy dated August 9, 2018, as augmented by the Orders of Justice Dunphy dated August 17, 2018, and September 5, 2018, are collectively the "**Mareva Injunction**".

Ms. Fam Depletes Assets and Flees the Jurisdiction

10. Ms. Fam did not prepare her affidavit of assets or return to Court on August 17, 2018, to seek access to funds for legal and living expenses at the return of the Mareva Injunction. Instead, she withdrew approximately \$30,000 from a bank account in her son's name, and then, on August 13, 2018, in breach of Justice Dunphy's order, she, together with her three children, left Ontario for her native Egypt.

Fam Cross #2 at qq. 408-426, RMR Vol. 4, pp. 891-894; Cross-examination of Lilian Fam of January 21, 2019 ("Fam Cross #1), at qq. 936-977, RMR Vol. 2, pp. 369-376, and Exhibit 34 (Daniel Sadek account), RMR Vol. 3, Tab 34 p. 678.

Second Appearance before Justice Dunphy

11. AstraZeneca appeared before Justice Dunphy on August 17, 2018. Mr. Brzezinski was present. Stating in his endorsement that it appeared that the individual defendants had gone into hiding or left the country, Justice Dunphy continued the Mareva Injunction, deleting the clause authorizing the defendants to draw \$10,000 from one of their bank accounts. A copy of the order was emailed to Ms. Fam who acknowledges that she received it.

August 17 Order, RMR Vol. 1, Tab 3; Fam Cross #2 at qq. 496-501, RMR Vol. 4, pp. 908-909.

Ms. Fam Remains in Breach of the Mareva Injunction and is Noted in Default

12. Despite the Mareva Injunction against her and the running of the time during which she was entitled to deliver a defence, Ms. Fam did nothing either to bring herself in compliance with the Mareva Injunction or to defend herself in this action for the balance of August 2018 and into mid-to-late September.

Fam Cross #2 at qq. 502-515, 534-563, RMR Vol. 4, pp. 909-911, 915-920.

13. On August 29, 2018, AstraZeneca asked the Registrar to note the defendants in default given their failure to defend. Judgment was granted against the defendants, except Ms. Fam (against whom the judgment motion was adjourned) on February 11, 2019.

Requisition for Noting Default and Judgment, RMR Vol. 1, Tabs 4 and 11.

The Receiver

14. With both individual defendants nowhere to be found and real property in Ontario appearing abandoned, on September 11, 2018, AstraZeneca applied *ex parte* for the appointment of a receiver over the domestic assets of all of the defendants. Justice Dunphy granted the motion, appointing Alvarez & Marsal Canada Inc. (“**A&M**” or the “**Receiver**”) as receiver that day. The Receiver has undertaken the bulk of its work and is only awaiting the closing of one final property sale before distribution will be made. Justice Hainey granted a Claims Procedure Order on March 1, 2019; claimants now have until April 15, 2019 to file a claim.

Receivership Order dated September 11, 2018, as amended October 17, 2018, RMR Vol. 1, Tabs 6 and 8; Claims Procedure Order, RMR Vol. 1, Tab 12.

Ms. Fam’s Attempt to Remove \$1 Million from Ontario while in Egypt

15. Not satisfied with the funds she took when she fled, Ms. Fam attempted in late August 2018 to sell a house here in Ontario while she remained in Egypt. In particular, she attempted to sell a house the Receiver discovered when it began taking control of the defendants’ domestic property in September 2018 in Georgetown, Ontario (“**8 Calico**”). Based on the paperwork the Receiver found, Mr. Sadek paid over \$1 million for the property but put it in Ms. Fam’s name. Ms. Fam admits that the money to purchase the property came from her husband and says she claims no interest in that property.

Fam Cross #1, at qq. 505, 547, 554-568, 578-587, RMR Vol. 2, pp. 280-281, 288-293, 295-296, and Exhibit 24, RMR Vol. 3 Tab 24, pp. 632-635; Fam Cross #2 at qq. 854-858, RMR Vol. 4, p. 986.

16. Notwithstanding the Mareva Injunction prohibiting her from dealing with her assets and her knowledge that she had contributed no funds to the purchase of 8 Calico, Ms. Fam entered into a listing agreement for that property on August 28, 2018 and gave her eldest son (Pierre) a power of attorney to facilitate a sale. Ms. Fam's realtor then negotiated an agreement of purchase of sale which Pierre signed on his mother's behalf on September 17, 2018. Ms. Fam orchestrated all that knowing that it contravened the Mareva Injunction against her. She admitted that she did not tell the real estate agent that there was a *Mareva* injunction in place because she knew it would cause problems in selling the property.

Fam Cross #1 at qq. 986-991, 1000-1006, 1009, 1040-1042, RMR Vol. 2, pp. 378-380, 382-384, 392, and Exhibits 36-37, RMR Vol. 3, Tabs 36-37, pp. 697-714.

17. Ms. Fam tried to close the sale before the Receiver became aware of the property. In a series of text messages between Ms. Fam and the real estate agent, Ms. Fam encouraged him to sell the house as quickly as possible "*cuz i need the money quickly*". When the real estate agent told her that he had learned that a receiver had been appointed, she encouraged him to sell the property and further asked him "*do you think you can sell the other bigger house before they know about it*" (Sadek had paid hundreds of thousands of dollars towards another, pre-build home in the same development as 8 Calico).

Fam Cross #1, at qq. 1027-1031, 1033-1037, 527-531, RMR Vol. 2 pp. 389-391, 284-285; Exhibits 38, 21-23, RMR Vol. 3, Tabs 38, 21-23, pp. 715-730, 600-631.

Ms. Fam's Disregard for the Court's Orders, Breaches of the Mareva Injunction and Interference with the Receiver

18. Once in Egypt, Ms. Fam went on vacation repeatedly, staying in a seaside town six hours from Cairo (where she apparently has a life interest in an apartment) from time to time. She

brought her teenaged sons with her to Egypt in August, but had them return home for school in the fall. During this time, she was weighing whether to return to Canada or defend the action at all.

Fam Cross #2 at qq. 459-478, 484-485, 646, 502-523, 543-563, 722-724, RMR Vol. 4, pp. 902-905, 939, 909-913, 917-920, 958.

19. Ms. Fam did not retain her current counsel or contact AstraZeneca until the end of September 2018, after she was served with the Receivership Order. At that time, and continuing through December 2018, she attempted to negotiate terms on which she would agree to return to Ontario to meet the obligations imposed on her by the Mareva Injunction. Ms. Fam purports to have wanted to defend herself in this action, but it appears that, until recently, she was only willing to do so on her own terms.

Fam Cross #2 at qq. 522-523, 671-686, RMR Vol. 4, pp. 912-913, 946-948; Endorsements of Justices Chiappetta and Dunphy, RMR Vol. 1 Tabs 7 and 9.

20. Ms. Fam was twice refused a motion date by the Court until she purged her contempt – including returning to Canada and surrendering her passport in accordance with the orders against her. She was first refused by Justice Chiappetta on October 5, 2018. Thereafter, Ms. Fam's two-page affidavit of assets was provided on October 29, 2018, although even then she did not return to Canada to purge her contempt.

Endorsement of Justice Chiappetta, RMR Vol. 1, Tab 7.

21. When AstraZeneca counsel advised in December 2018 that it was seeking a date for its motion for judgment, counsel for Ms. Fam appeared and again asked that the Court agree to remove the terms requiring Ms. Fam to surrender her passport **before** she returned to Canada. On December 14, 2018, Justice Dunphy declined to set a motion date for Ms. Fam's motion and, in his endorsement, again explained that compliance with the Court's order was not a negotiation.

Endorsement of Justice Dunphy, RMR Vol. 1, Tab 9.

22. At the December 14th appearance, AstraZeneca's motion for judgment was set for February 11, 2019. Ms. Fam finally returned to Ontario and made herself available to be cross-examined on her affidavit of assets on January 21, 2019. Before she returned to Canada, however, she arranged for her two teenaged sons to visit her in Egypt to celebrate Christmas.

Fam Cross #2, at qq. 479-483, RMR Vol. 4, p. 904; Endorsement of Justice Dunphy, RMR Vol. 1, Tab 9.

23. Ms. Fam has made plain her disdain for the Court's authority and her obligations in this litigation. In her affidavit on this motion, she says she "had no choice" but to return to Ontario given that the Court refused to give her a motion date while she remained in breach of the Mareva Injunction. On cross-examination in January, she indicated that she was "willing" to comply with the Courts' orders but "*just in my time, in my pace because it was just things were going too fast and crazy for me to handle.*" She admitted she did not disclose the existence of a property to AstraZeneca or the Receiver (the Calico Court Property discussed below) because she was going to try to sell it and take the money because "*Like, you can't leave me with no money.*" She described the obligation to surrender her passport as something she did not "agree" to, so she kept her passport.

Fam Affidavit at para. 41, MR Tab 2, p. 15; Fam Cross #1 at qq. 913, 988-991, RMR Vol. 2, pp. 363-364, 379-380; Fam Cross #2 at qq. 310-312, RMR Vol. 4, p. 868.

24. Ms. Fam claims she is being treated for anxiety, and that she acted as she did because she panicked and because she had to provide for her children. She has failed to provide evidence supporting her claims of treatment for anxiety. In any event, the sums of money she was trying to extract from assets in which she admits she has no legitimate interest far outstrip any amount reasonably required to support her children. Moreover, she fled the country four days before a

scheduled appearance before this Court, the purpose of which was to allow her to apply for access to funds for the sake of paying living and/or legal expenses.

25. Ms. Fam's plan to avoid the Court's power over her began as soon as she received notice of the action and the motion for a *Mareva* injunction. After receiving notice on August 8, 2018, of the impending motion, Ms. Fam took a \$500,000 bank draft from Mr. Sadek and opened an account at a bank she had never dealt with before (HSBC). She admitted she took that money and put it into that new bank to attempt to avoid the *Mareva* Injunction. Prior to fleeing the country on August 13, 2018, she withdrew approximately \$30,000 in cash from an account in her minor son's name, over which only she had authority. Both before and after leaving the country, Ms. Fam depleted the contents of her HSBC accounts, which she opened with the \$500,000 she received from Mr. Sadek on August 8, 2018, down to only \$463,674.61 as of September 10, 2018. Ms. Fam has not attempted to account for that approximately \$70,000 on this motion. Presumably she spent that money while she was vacationing in Egypt and ignoring this Court's orders.

Fam Cross #1, at qq. 769-774, 808-837, 885-887, 936-944, 953-966, 976, pp. 331-332, 339-345, 356, 369-370, 372-376, and Exhibits 20 (HSBC account), 33 (SRX cheque), 34 (D. Sadek account), RMR Vol. 3, Tabs 20, 33, 34, pp. 595, 674-679.

26. As above, in late August and into mid-September 2018, Ms. Fam attempted to sell 8 Calico despite the *Mareva* Injunction, to get \$1 million of monies she admits were not hers. She even enlisted the help of her 19-year-old son in that attempt to breach this Court's Orders. On cross-examination, Ms. Fam also admitted that she has further dissipated her assets since the *Mareva* Injunction was imposed (for example, by selling jewelry and taking on loans).

Fam Cross #2 at qq. 706-715, RMR Vol. 4, pp. 951-952; Fam Cross #1, at qq. 4-12, RMR Vol. 2, pp. 174-176; regarding 8 Calico, see paras. 15-17 above.

27. Since returning to Canada in January 2019, and while she seeks this Court's indulgence to be permitted to defend and have access to the assets collected by the Receiver, she has:

- (a) failed to answer undertakings given on her cross-examinations (one of which occurred on January 21, 2019);
- (b) refused over one hundred questions on her cross-examination on this motion, including questions going to her purported defence to the action and questions going to express statements in her affidavit sworn in support of this motion;

See, e.g., Fam Cross #2, at qq. 124-153, RMR Vol. 4, pp. 823-830, where questions about her knowledge of and participation in the fraud were all refused.

- (c) failed to adhere to the Court-ordered schedule for this motion, including particularly by serving her factum a week late; and
- (d) never provided a draft Statement of Defence.

Ms. Fam's Assertions of Ignorance of the Fraud

28. Although Ms. Fam now denies any involvement in, or knowledge of, the fraud, there is good reason to doubt her claims of innocence and ignorance. First and foremost, questions about her purported defence were all refused on cross-examination.

29. Second, Ms. Fam and Mr. Sadek have already been part of a similar fraud, one in which they defrauded the Ontario Drug Benefit Program (the "**ODBP**") by submitting false claims. The details of that fraud can be found in the decision of the Discipline Committee of the Ontario College of Pharmacists (the "**College**") following charges the College brought against Ms. Fam.

College Decision, Fam Cross #2, Exhibit B, RMR Vol. 4, Tab B, pp. 1096-1113.

30. Ms. Fam's counsel refused to allow AstraZeneca's counsel to question Ms. Fam about the College's decision and the facts underlying it, going so far as to refuse to allow her to identify it as a decision relating to her. AstraZeneca nevertheless submits that the court can take notice of it.

Fam Cross #2, at qq. 103-123, RMR Vol. 4, pp. 816-822.

31. As the decision makes clear, the case proceeded by way of an agreed statement of facts. Ms. Fam admitted that between August 1, 2014 and December 31, 2015, a period in which she was an officer, director and shareholder of MD Health, MD Health had billed the ODBP for more products than it had dispensed. While she contended that it was Sadek that controlled MD Health's operations, she accepted that she was obliged to ensure that it was operated in accordance with the laws and regulations pertaining to pharmacies, and that her conduct would reasonably be regarded by members of the profession as disgraceful, dishonourable or unprofessional.

College Decision at paras. 8(1),(2),(21)-(24), Fam Cross #2, Exhibit B, RMR Vol. 4, Tab B, pp. 1096-1113.

32. Third, between mid-2017 and summer 2018, Ms. Fam received millions of dollars in money or assets from Mr. Sadek – who she claims to be estranged from, although they remain married and began co-habiting again in the summer of 2018. Such sums are out of all proportion to the legitimate earnings of Mr. Sadek, with which Ms. Fam was familiar as his spouse and as a fellow pharmacist. She claims Mr. Sadek told her he had other businesses that were making money. But she also admits he told her that some businesses – including the pharmacy and the medical clinic – were not doing well.

See Schedule C for summary of monies received; Fam Cross #1 at qq. 542-543, 563-564, 646-649, 1063-1065, RMR Vol. 2, pp. 287-288, 292, 307, 396-397; see para. 36(b)(i) below regarding co-habitation with Mr. Sadek.

33. Based on documents found by the Receiver, Ms. Fam and Mr. Sadek entered into a separation agreement in April 2016. According to section 1.4 of that agreement:

Sameh is employed as a pharmacist by St. Maharial Pharmacy [MD Health] and earns an annual income of approximately \$200,000. Lilian is employed as Pharmacy Assistant by St. Maharial Pharmacy and earns an annual income of approximately \$80,000.

Separation Agreement, Fam Cross #1, Exhibit 10, RMR Vol. 3, Tab 10, p. 478.

34. While there is some basis for questioning those numbers, assuming they are correct and a tax rate of 40%, as of April 2016, Mr. Sadek and Ms. Fam's joint income would have been in the range of \$168,000 per year.

35. Yet, Ms. Fam received almost \$2.4 million in monies and assets from Mr. Sadek or his companies during or after the fraud period. She claims not to know where that money came from. Her denials are not believable, particularly where, as here, she took hundreds of thousands of dollars from him after she was served with the Statement of Claim and motion record for a *Mareva* injunction. The amounts received by Ms. Fam from the other defendants include:

Date	Monies/Asset	Value
6/2/17	Money (received in account 6391480)	\$10,000.00
Jan-July 2018	Monies paid re: Lot 91A (8 Calico)	\$1,098,242.29
4/30/18	Money (received in account 6391480)	\$92,400.00
5/23/18	Money (received in account 6391480)	\$300,000.00
5/25/18	Money (received in account 6391480)	\$24,000.00
6/12/18	Money (received in account 6391480)	\$4,000.00
7/5/18	Money (received in account 6391480)	\$4,000.00
7/13/18	Mini Cooper	\$19,199.01
8/1/18	Money (received in account 6391480)	\$4,000.00
8/4/18	Range Rover	\$119,728.92
8/8/18	Money (received in HSBC account)	\$500,000.00
8/9/18	Money (received in "Daniel Sadek" account)	\$176,145.00
8/9/18	Money (received in account 6391480)	\$5,000.00
	Total Value Received:	\$2,356,715.22

See Schedule C hereto.

36. Fourth, Ms. Fam has been dishonest and evasive in both her sworn affidavits and on cross-examination. By way of example:

- (a) Most starkly, in January 2019 on her first cross-examination, Ms. Fam initially claimed that Mr. Sadek left Canada about one week before she did, and in advance of notice of the motion for the Mareva Injunction. She further claimed that, when notice came on August 8, 2018 of AstraZeneca's claim and impending motion for a *Mareva* injunction, she attended at the office of her prior counsel (who represented all defendants) alone. However, once confronted with the \$500,000 cheque dated August 8, 2018 from the defendant SRX payable to her, she admitted that (i) Mr. Sadek gave her the cheque on August 8, 2018, and (ii) that both Mr. Sadek and she attended counsel's office that day;

Fam Cross #1, at qq. 289-293, 296-300, 741-751, 770-779, 839-850, RMR Vol. 2, pp. 240-242, 326-328, 331-333, 346-348.

- (b) When confronted with falsehoods or half-truths in her affidavits, Ms. Fam evaded the questions, or her lawyer intervened – inappropriately – to claim the questions were irrelevant. For example:
 - (i) In both her August 8, 2018 affidavit and her affidavit on this motion, she falsely swears that she has not “resided” with Mr. Sadek since October 2015. On cross-examination, she admitted she moved in with him at the Hammond Road property in July 2018 (she asserts she required assistance following a medical procedure, but also admitted it was an attempt to reconcile). In both her affidavits, she refers to having resided at 5045

Churchill Meadows, although she leased that property out for a year commencing July 2018, a fact she does not mention in either affidavit;

Fam Cross #2 at qq. 248-273, RMR Vol. 4, pp. 856-860; Fam Cross #1 at qq. 659-664, RMR Vol. 2, pp. 309-311; August 8, 2018 Affidavit of Lilian Fam at para. 5, RMR Vol. 3 Tab 4 p. 455; Fam Affidavit at para. 9, MR Tab 2, p. 9.

- (ii) Her evidence that she was not in a major city in Egypt and that the “closest” notary public she could use to commission her affidavit of assets was six hours away was plainly false. The notary she actually used to commission her affidavit, in Hurghada, was 20 minutes away. Ms. Fam attempted to explain the discrepancy by claiming a “good” notary was six hours away, in Cairo. She then admitted she usually only spent 7 to 10 days in Hurghada, away from Cairo. Eventually, her counsel interjected, asserting that these falsities in her sworn evidence are irrelevant;

Fam Cross #2 at qq. 650-664, 720-732 RMR Vol. 4, pp. 940-943, 957-961.

- (iii) She purported to clarify part of her affidavit at the start of cross-examination on March 28th, advising that she has seen her sons since returning to Canada (i.e. in January or February), contrary to the statement that she had not seen them for “four months”. Even the clarification turned out to be untrue. Later in the cross-examination she admitted that: (a) her sons went with her to Egypt in August 2018, returning for school in the fall (contrary to para. 21 of her affidavit, in which she asserts she left them behind); and (b) her sons visited her in Egypt over the Christmas holidays;

Fam Cross #2 at qq. 3-13, 479-482, RMR Vol. 4, pp. 790-791, 904; Fam Affidavit paras. 4 and 21, MR Tab 2 pp. 9, 12; paras. 10, 22 above.

- (c) Ms. Fam frequently asserts that she was left “with nothing”, although the truth is that she secured some \$70,000 for herself within one month of leaving Canada as a result of her withdrawals from the account in her minor son’s name and the HSBC account. When first questioned about the upkeep for her minor son, who is in Ontario, she claimed that his uncle was providing for him. Later, when confronted with her withdrawals from the HSBC account, she claimed she spent that money to provide for that son.

Fam Cross #1, at qq. 143-147, 920-928, RMR Vol. 2, pp. 202, 365-367; see also paras. 10, 25 above.

PART III - ISSUES AND LAW

ISSUE I: Should Ms. Fam’s noting in default be set aside?

37. Under rule 19.03 of the *Rules of Civil Procedure*, the court has a broad discretion to set aside a noting in default on such terms as are just. In deciding whether to exercise that discretion, the court is to consider all the context and factual circumstances of the case, while looking at particular factors as described by the Court of Appeal for Ontario in *Intact Insurance Co. v Kisel*:

When exercising its discretion to set aside a noting of default, a court should assess “the context and factual situation” of the case. It should particularly consider such factors as the behaviour of the plaintiff and the defendant; the length of the defendant’s delay; the reasons for the delay; and the complexity and value of the claim. These factors are not exhaustive. Some decisions have also considered whether setting aside the noting of default would prejudice a party relying on it. Only in extreme circumstances, however, should the court require a defendant who has been noted in default to demonstrate an arguable defence on the merits: [*citations omitted*].

Intact Insurance Co. v. Kisel, 2015 ONCA 205 at para. 13, Brief of Authorities of the Responding Plaintiff (“RBA”) Tab 6; Rule 19.03, Schedule B.

38. In *Garten v Kruk* Master Dash provided courts with a useful set of questions to consider in deciding whether to set aside a noting in default:

Under rule 19.03(1) the court may set aside a noting in default on such terms as are just. On such motion the court is principally concerned with the answers to three questions: “(1) Is there believable evidence that, in the time permitted for responding to a statement of claim, the defendant had an intent to defend? (2) What prevented the defendant from responding to the statement of claim in a timely fashion? (3) Has the motion been brought with reasonable dispatch?” The onus of satisfying the court that the noting in default should be set aside rests with the defendant who has been noted in default. ...

Motions to relieve against a noting in default are “typically granted on an almost routine basis” where a time period is missed inadvertently, provided of course that there has been a demonstrated intention to defend and the motion to set aside is brought promptly. Such orders are usually made on consent except perhaps as to terms or costs. While parties should comply with the time requirements for filing a defence, “the Rules are not meant to be traps for the unwary” and “where slips are made...accommodations should and will be made.” As a basic principle “the Court will always strive to see that issues between litigants are resolved on their merits whenever that can be done with fairness to the parties.”

Garten v. Kruk, [2009] O.J. No. 1764 at paras. 4-7, rev'd [2009] O.J. No. 4438 (Div. Ct.), RBA Tab 4.

39. The courts have refused to set aside a noting in default where a defendant makes a conscious decision not to participate in a proceeding of which she is aware. Default should not be set aside if a defendant is aware that a lawsuit has been issued against it, has an opportunity to defend it and fails to explain why it did nothing in the face of that knowledge.

Volvo Rents, a Division of Volvo Group Canada Inc. v. ABCO One Corp., 2014 ONSC 1045 at para. 8, RBA Tab 9; *Schill & Beninger Plumbing & Heating Ltd. v. Gallagher Estate*, [2001] O.J. No. 260 at para. 11, RBA Tab 7; *De Morales v. Lafontaine-Rish Medical Group Ltd.*, 2009 ONCA 87 at para. 1, RBA Tab 2; and *Sunlife Assurance Company of Canada v. Premier Financial Group Incorporated (Premier Financial)*, 2013 ONCA 151 at para. 1, RBA Tab 8.

40. Ms. Fam's behaviour (including her continuous flouting of the Mareva Injunction until the last possible moment before judgment was to be granted against her), her delay in moving to set aside the noting in default (having been aware of the action from August 8, 2018, and failing to return to be examined on her affidavit until January 21, 2019), and her lack of an intent to defend in the time available to do so, should result in a denial of her request to have the noting in default set aside. The Court should also consider that Ms. Fam's flight from Canada – and continued refusal to return for many months – necessitated the appointment of a Receiver, whose work is now almost finished, such that a claims procedure is well underway.

41. Further, Ms. Fam's assertions that she did not understand the process or her obligations should be given no weight. Ms. Fam is a professional – a pharmacist – who was represented by counsel at the initial *Mareva* motion. She claims she received bad advice from her prior counsel, but her current counsel continues to assert privilege over such advice on her behalf. Additionally, Ms. Fam is not a first-time litigant. In fact, she has herself sought and obtained an *ex parte* injunction in the past – in a 2015 proceeding against Mr. Sadek, in which she was represented by her current counsel. She since has been the subject of College proceedings and other civil litigation. She should not be permitted to “game the system” now that the risk she took in deciding not to defend in the time provided has not turned out the way she hoped.

Western Steel and Tube Inc. v. Technoflange Inc., 2017 ONSC 2697 (*Western Steel*) at para. 30, citing *CIBC v. Petten*, RBA Tab 11. See, e.g., Fam Cross #2 at qq. 281, 336-349, 633-636, RMR Vol. 4 pp. 862, 875-878, 934; Fam Cross # 1 at qq. 1019-1025, RMR Vol. 2, pp. 386-388.

42. In the alternative, if the Court is inclined to set aside the noting in default, it can and should impose terms in conjunction with that order. For example, in the *Western Steel* case, Justice Myers set aside a default judgment and noting in default on terms including that the defendant pay security for the value of the claim (approximately \$2 million) plus \$500,000 in costs.

Western Steel at para. 37, RBA Tab 11.

43. Given that the domestic assets held in Ms. Fam's name have already been collected by the Receiver, AstraZeneca submits that this Court should impose the following terms if the noting in default against Ms. Fam is to be set aside:

- (a) In this action, Ms. Fam may not assert any entitlement to the monies and assets received by her from Mr. Sadek and the defendant corporations as set out above (namely, \$2,356,715.22, plus applicable interest). Further, Ms. Fam may not seek distribution of such monies or assets to her direct or indirect benefit in the Claims Process in the Receivership;
- (b) AstraZeneca may renew its motion for judgment as against Ms. Fam to seek partial judgment as against Ms. Fam in the amount set out in paragraph (a) above, with the balance of its claim against her to be determined in the ordinary course following the expiry of the stay imposed by the Receivership Order;
- (c) Ms. Fam must serve and file her Statement of Defence by May 2, 2019;
- (d) There is no variation of the Receivership Order, as amended, or the Claims Procedure Order dated March 1, 2019, and the Claims Procedure shall continue until disposed of by further order of this Court in the Receivership; and
- (e) Ms. Fam shall be jointly and severally liable for AstraZeneca's costs of the action to date, to be fixed by the Court, and of the Receivership.

ISSUE II: Should the Mareva Injunction be Varied?

44. Ms. Fam seeks an order that the Receiver provide her with \$5,000 per month for living expenses. The majority of the funds in the hands of the Receiver to which Ms. Fam seeks access are proprietary to AstraZeneca.

45. A proprietary injunction is granted to preserve an asset in the possession of a defendant, which the plaintiff says belongs to it or is subject to a trust in its favour. Such injunctions are typically sought in cases of alleged theft, conversion or fraud. The Mareva Injunction is both a proprietary and a *Mareva* injunction. The purpose of a proprietary injunction is “to preserve the disputed property until trial so that the property will be returned to the plaintiff if successful at trial, rather than used by the defendant for his own purposes.” As this Court has stated:

There is a fundamental unfairness in requiring the plaintiff to fund the defence of its own case against the defendant and to provide the defendant and his family with all of their living expenses for the time it takes to get this case to trial, if the defendant did in fact defraud the plaintiff of the amounts claimed.

Canadian Imperial Bank of Commerce v. Credit Valley Institute of Business and Technology, [2003] O.J. No. 40 at paras. 15, 20, 50 (S.C.J.) [“*Credit Valley*”], RBA Tab 1; *Innovative Marketing, Inc. v. D’Souza*, [2008] O.J. No. 3051 at para. 4 (S.C.J.) [“*Innovative Marketing*”], RBA Tab 5.

46. The test to be applied in deciding whether to vary a *Mareva* injunction was set out by Justice Molloy in *Credit Valley* as follows:

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

costs. Those assets must be exhausted before the defendant is entitled to look to the assets subject to the proprietary claim.

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

Credit Valley at para. 26, RBA Tab 1, cited with approval by the Court of Appeal for Ontario in *Waxman v. Waxman*, [2007] O.J. No. 1688 at paras. 36-37 [*Waxman*], RBA Tab 10.

47. Ms. Fam has not satisfied any part of the *Credit Valley* test.

48. Regarding whether Ms. Fam has other assets available to pay her expenses, Ms. Fam admitted on cross-examination that she can earn sufficient funds to support herself by working, which she has not done in months. Despite her assertion to the contrary, nothing in the Mareva Injunction prevents her from working. If she is not currently able to work, it is due to her own failure to comply with the sanctions imposed on her by the College in April 2018. AstraZeneca does not object to Ms. Fam being authorized to open a bank account into which to deposit pay-cheques and government payments (e.g. tax returns and child benefits), provided that copies of the account statements are provided to counsel for AstraZeneca every month for the duration of the litigation or until further order of the Court.

Fam Cross #2 at qq. 764-771, 821-828, RMR Vol. 4, pp. 967-968, 980-982.

49. Further, while all of Ms. Fam's assets are to be frozen pursuant to the Mareva Injunction, she admits ongoing contact with Mr. Sadek, and he has transferred millions of dollars offshore. In addition, she took money out of accounts before the banks implemented the Mareva Injunction,

totaling approximately \$70,000, for which she has not accounted. She also claims to have arranged loans totaling \$30,000 to \$40,000 – all in cash and all undocumented – from a variety of family and friends since the imposition of the Mareva Injunction. She has an apartment in Cairo, which she asserts she is not able to sell. While she should not, given the Mareva Injunction, Ms. Fam appears to have access to monies beyond those secured by the Receiver.

Paras. 10, 25, 26 above; Fam Cross #2 at qq. 742-744, RMR Vol. 4 p. 963; Fam Cross #1 at qq. 130, 1044-1074, RMR Vol. 2, pp. 200, 393-398, and Exhibit 39, RMR Vol. 3 Tab 39 pp. 731-738.

50. Where a party fails to satisfy the Court that they have no assets other than those frozen by the injunction, the other elements of the test will not be considered. Ms. Fam should accordingly be denied access to any of the assets frozen by the Mareva Injunction and held by the Receiver to pay her expenses.

Waxman at paras. 38-39, 44-45, RBA Tab 10; *DIRECTV Inc. v. Souphanthong*, [2005] O.J. No. 5407 at para. 11 (S.C.J.) [*“DIRECTV”*], RBA Tab 3.

51. With respect to the second and third aspects of the *Credit Valley* analysis, Ms. Fam has made no attempt to identify assets in the hands of the Receiver which are not subject to AstraZeneca’s proprietary claims nor has she limited her request to only seeking access to such assets. Whether there are any such funds available is a live question as Ms. Fam has other creditors who may participate in the Claims Procedure in the Receivership and has costs obligations in the Receivership and this action. Further, the Court will only consider granting access for ‘reasonable’ living expenses. Ms. Fam has made no attempt to particularize her request for \$5,000 per month for living expenses and, in any event, she admits she can earn that money herself if she begins working.

Credit Valley at para 56, RBA Tab 1.

52. While the Court should not go on to the fourth part of the *Credit Valley* analysis given Ms. Fam's failure to satisfy parts one through three, that part of the test sees the Court consider the strength of the plaintiff's case and the extent to which the defendant has put forward an arguable defence. AstraZeneca has established a strong *prima facie* case against the defendants, including Ms. Fam, as is evident from the granting of the Mareva Injunction and the Receivership Order. Among other things, it has demonstrated receipt by Ms. Fam of millions of dollars from Mr. Sadek and/or the corporate defendants during and after the fraud.

Credit Valley at para 26, RBA Tab 1.

53. For her part, Ms. Fam has not advanced any defence other than a bald denial. She has not provided a draft Statement of Defence, and all questions going to the merits were refused on cross-examination. Evidence is required in order to enable the Court to weigh the relative strengths of the parties' positions, but Ms. Fam has led no evidence of her defence save a bald denial.

Credit Valley at para. 25, RBA Tab 1.

PART IV - ORDER REQUESTED

54. AstraZeneca asks that Ms. Fam's motion be dismissed with costs.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 10th day of April, 2019.



R. Seumas M. Woods



Erin Hoult

BLAKE, CASSELS & GRAYDON LLP
Barristers & Solicitors

Lawyers for the plaintiff

SCHEDULE “A”

LIST OF AUTHORITIES

1. *Canadian Imperial Bank of Commerce v. Credit Valley Institute of Business and Technology*, [2003] O.J. No. 40
2. *De Morales v. Lafontaine-Rish Medical Group Ltd.*, 2009 ONCA 87
3. *DIRECTV Inc. v. Souphanthong*, [2005] O.J. No. 5407
4. *Garten v. Kruk*, [2009] O.J. No. 1764, rev'd [2009] O.J. No. 4438 (Div. Ct.)
5. *Innovative Marketing, Inc. v. D'Souza*, [2008] O.J. No. 3051
6. *Intact Insurance Co. v. Kisel*, 2015 ONCA 205
7. *Schill & Beninger Plumbing & Heating Ltd. v. Gallagher Estate*, [2001] O.J. No. 260
8. *Sunlife Assurance Company of Canada v. Premier Financial Group Incorporated (Premier Financial)*, 2013 ONCA 151
9. *Volvo Rents, a Division of Volvo Group Canada Inc. v. ABCO One Corp.*, 2014 ONSC 1045
10. *Waxman v. Waxman*, 2007 ONCA 326
11. *Western Steel and Tube Ltd. v. Technoflange Inc.*, 2017 ONSC 2697

SCHEDULE "B"

TEXT OF STATUTES, REGULATIONS & BY - LAWS

Rules of Civil Procedure, R.R.O. 1990, Reg. 194

SETTING ASIDE THE NOTING OF DEFAULT

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

SCHEDULE "C" – Summary of Receipts by Fam

Date	Monies/Asset	Value	References
6/2/17	Money (received in account 6391480)	\$10,000.00	Exhibit C, Cross #2, RMR Vol. 4 Tab C, questions refused Cross #2 q. 169
Jan-July 2018	Monies paid re: Lot 91A (8 Calico)	\$1,098,242.29	Exhibit 24, Cross #1, RMR Vol. 3 Tab 24, Cross #1 qq. 558-588
4/30/18	Money (received in account 6391480)	\$92,400.00	Exhibit 25, Cross #1, RMR Vol. 3 Tab 25, Cross #1 qq. 592-611
5/23/18	Money (received in account 6391480)	\$300,000.00	Exhibit 26, Cross #1, RMR Vol. 3 Tab 26, Cross #1 qq. 612-615, 638-643, Cross #2 q. 793.
5/25/18	Money (received in account 6391480)	\$24,000.00	Exhibit D, Cross #2, RMR Vol. 4 Tab D, questions refused Cross #2 q. 170
6/12/18	Money (received in account 6391480)	\$4,000.00	Exhibit 16, Cross #1, RMR Vol. 3 Tab 16 p. 546, Cross #1 qq. 646, 650-651
7/5/18	Money (received in account 6391480)	\$4,000.00	Exhibit 16, Cross #1, RMR Vol. 3 Tab 16 p. 548, Cross #1 qq. 652-655
7/13/18	Mini Cooper	\$19,199.01	Exhibit 30, Cross #1, RMR Vol. 3 Tab 31, Cross #1 qq. 703, 708-719, Exhibit E, Cross #2, RMR Vol. 4 Tab E, questions refused Cross #2 q. 174
8/1/18	Money (received in account 6391480)	\$4,000.00	Exhibit 16, Cross #1, RMR Vol. 3 Tab 16 p. 552, Cross #1 qq. 657-658
8/4/18	Range Rover	\$119,728.92	Exhibit F, Cross #2, RMR Vol. 4 Tab F, questions refused Cross #2 q. 177-178, Exhibit 32, Cross #1, RMR Vol. 3 Tab 32, Cross #1 qq. 721-731
8/8/18	Money (received in HSBC account)	\$500,000.00	Exhibit 33, Cross #1, RMR Vol. 3 Tab 33, Cross #1 qq. 769, Cross #2 qq. 832-833
8/9/18	Money (received in "Daniel Sadek" account)	\$176,145.00	Exhibit 34, Cross #1, RMR Vol. 3 Tab 34, Cross #1 qq. 953-964.
8/9/18	Money (received in account 6391480)	\$5,000.00	Exhibit 16, Cross #1, RMR Vol. 3 Tab 16 p. 554.
	Total Value Received:	\$2,356,715.22	

*References to Cross #1 are to the January 21, 2019 cross-examination of Ms. Fam at RMR Vol. 2

*References to Cross #2 are to are to the March 28, 2019 cross-examination of Ms. Fam at RMR Vol. 4.

ASTRAZENECA CANADA INC. -and- SAMEH SADEK also known as SAM
SADEK et al.

Plaintiff

Defendants

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

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

Proceeding commenced at Toronto

RESPONDING PARTY'S FACTUM
(Motion by Lilian Fam returnable April 17, 2019)

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