

**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.,  
SHEPPARD RX PHARMACY INC. and LILIAN FAM**

Defendants

**FACTUM OF THE CREDITOR  
MD HEALTH MEDICAL CENTRE (BRAMPTON) INC.**

**BISCEGLIA & ASSOCIATES  
PROFESSIONAL CORPORATION**

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MD Heath Medical Centre (Brampton) Inc.

**SERVICE LIST**  
(Updated July 23, 2019)

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**ONTARIO  
SUPERIOR COURT OF JUSTICE  
COMMERCIAL LIST**

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

**ASTRAZENECA CANADA INC.**

Plaintiff

-and-

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

Defendants

**FACTUM**

**PART I – OVERVIEW:**

1. The secured creditor, MD Health Medical Centre (Brampton) Inc. ("MD Health"), opposes the Receiver's Distribution Motion on the grounds that it is a secured creditor and it has priority over the interests of the various pharmaceutical corporations, being the Plaintiff, AstraZeneca Canada Inc. ("AstraZeneca"), Pfizer Canada ULC, Eli Lilly Canada Inc. and Lundbeck Canada Inc. (collectively, the "Pharma Companies").
2. The Plaintiff obtained an order appointing Alvarez & Marsal Canada Inc. ("A&M") as the Receiver, without security, of the assets, undertakings and properties of the Defendants. After having realized on the various domestic assets of the Defendants, including properties, bank accounts and vehicles, the Receiver has recovered approximately \$5,427,000. After payment of various Super-Priority Payments, which includes AstraZeneca's legal costs in the amount of

\$432,117.00, the Receiver claims that the net cash balance available for distribution is \$3,495,509.00 ("Net Proceeds").

3. A&M is seeking an order, among other relief, to distribute the Net Proceeds equally, *pari passu*, to the Secured Creditors, one being MD Health, and the Pharma Companies, as alleged Constructive Trust claimants. The total amount being claimed being \$14,758,142.00. The estimated recovery for each creditor is 23.7%.
4. MD Health respectfully submits that the Net Proceeds should not be distributed in *pari passu* as between the Secured Creditors and the Pharma Companies, and instead the Net Proceeds should be paid to MD Health first, in total satisfaction of its claim. The Pharma Companies can then share in the balance of the Net Proceeds, in *pari passu*, after the Secured Creditors are paid.

## **PART II – THE FACTS:**

### **NATURE OF MD HEALTH'S SECURED INTEREST:**

5. On or about May 13, 2016, Emily RX Pharm Inc. ("Emily RX"), an affiliated corporation of the Defendant, Sameh Sadek ("Sadek"), entered into an Asset Purchase Agreement, wherein Emily RX purchased a medical clinic business from MD Health. MD Health took a Vendor Take Mortgage in the amount of \$100,000.00.  

Responding Motion Record of the Creditor, MD Health Medical Centre (Brampton) Inc., Affidavit of Domenic Trotta, sworn August 2, 2019 [Trotta Affidavit], para 3
6. As further security in relation to the Asset Purchase Agreement, St. Maharial Pharmacy Inc. ("St. Maharial") executed a General Security Agreement ("GSA") in favour of MD Health on June 21, 2016 and the GSA was perfected under the PPSA.

Trotta Affidavit, para 4



7. On December 20, 2016, the Defendant, Lilian Fam ("Fam") purchased a home located at 5046 Churchill Meadows, Mississauga, Ontario. The purchase price was \$775,000.00. Fam provided \$465,000 and a mortgage was granted in favour of MCAP Service Corporation for the balance of the purchase price. MD Health believes that Fam used the proceeds obtained from the operation of Emily RX and/or St. Maharial as equity in the home.

Trotta Affidavit, para 16 and 20

8. MD Health learned that Emily RX, Sadek and Fam had defrauded MD Health. In particular, Emily RX sold all of its assets to St. Maharial Clinic Inc. ("St. Clinic") contrary to the provisions of the Asset Purchase Agreement and various Promissory Notes provided.

Trotta Affidavit, para 5

9. On October 3, 2017, MD Health (among other Plaintiffs) commenced an action against Emily RX, Sadek, Fam, Medhaat Saad, St. Maharial and St. Clinic for breach of contract and fraud.

Trotta Affidavit, para 6

#### **CONFIRMATION OF MD HEALTH'S SECURED STATUS BY THE RECEIVER:**

10. On September 11, 2018, AstraZeneca obtained an Order appointing Alvarez & Marsal Canada Inc. ("A&M") as Receiver of all the domestic assets, undertakings and properties of Sadek, Fam, St. Maharial, St. Clinic, SRX Investments Inc. ("SRX"), and Sheppard RX Pharmacy Inc. (among other relief obtained).

Trotta Affidavit, para 8

11. Pursuant to the Claims Procedure Order of the Honourable Justice Hainey, dated March 1, 2019, MD Health submitted a Proof of Claim. As a result of the Claims Process, A&M accepted MD Health's secured creditor status in the estate of St. Maharial in the amount of \$100,000.00.

Trotta Affidavit, paras 12-13

## **THE RECEIVER'S DISTRIBUTION MOTION:**

12. In its Reports, the Receiver has revealed the extent of the fraud perpetrated by the Defendants on all its creditors. Further, the Receiver has advised that it has realized on the various assets held by the Defendants and that the net cash balance from these realized assets is \$4,339,598.00.

Motion Record of the Plaintiff, Tab 6, Sixth Report [6<sup>th</sup> Report], page 22

13. The Receiver is seeking an Order approving its planned distribution outlined in its Sixth Report. The Receiver has determined that it can trace the funds paid out by the Pharma Companies and that all of the Pharma Companies hold a constructive trust over those funds.

6<sup>th</sup> Report, pp 17-18

14. AstraZeneca is the only pharmaceutical company that has a Judgment against the Defendants. AstraZeneca obtained a Judgment declaring that the funds paid to St. Maharial are impressed with a constructive trust. The other pharmaceutical companies claiming a constructive trust, which at this point remain contingent unsecured claims, are Pfizer Canada LLC, Eli Lilly Canada Inc., and Lundbeck Canada Inc. (all pharmaceutical companies will be collectively known as the "Pharma Companies".) Together, the Pharma Companies are claiming a total of \$14,018,020.00.

6<sup>th</sup> Report, p 17

15. The Reports further reveal that the alleged fraud against AstraZeneca commenced in or around June 2017.

Trotta Affidavit, para 16

16. There are two secured creditors being CWB and MD Health; together their claims amount to \$740,122.00.

6<sup>th</sup> Report, p 17

17. The Receiver has recovered approximately \$5,427,000. After payment of various Super-Priority Payments, which includes AstraZeneca's legal costs in the

amount of \$432,117.00, the Receiver claims that the net cash balance available for distribution is \$3,495,509.00 ("Net Proceeds").

6<sup>th</sup> Report, pp 9

18. A&M is seeking an order, among other relief, to distribute the Net Proceeds equally (*pari passu*) to the two Secured Creditors, one being MD Health, and the Pharma Companies, as alleged Constructive Trust claimants. The total amount being claimed being \$14,758,142.00. The estimated recovery for each corporation will be 23.7%.

6<sup>th</sup> Report, page 22

19. MD Health opposes the proposed distribution on the basis of its secured creditor status and that at minimum, the Plaintiff cannot trace the funds to the original equity placed on the Churchill Home.

### **PART III – THE ISSUES AND THE LAW:**

20. MD Health respectfully submits that issues in the within motion are:
  - (a) Whether the Receiver is permitted to pay out the Net Proceeds to the Secured Creditors and the Pharma Companies in *pari passu*; and
  - (b) Whether MD Health has an interest in the \$465,000.00 that was originally paid as equity in the Churchill Home in 2016.

### ***The Receiver's Distribution Motion Ignores the Interests of MD Health as Secured Creditor and, as such, ought not be Approved:***

21. In this case, all creditors, whether secured or unsecured, are victims of the Defendants' fraud. It is trite law to state that constructive trust claims are equitable claims. However, MD Health opposes the Receiver's distribution because the Receiver is asking that the constructive trust remedy is accorded to all Pharma Companies such that they are granted a priority property interest equal to that of MD Health, a secured creditor.

22. While the Pharma Companies would need to satisfy the test for constructive trust, namely, (1) the enrichment of the defendant, (2) a corresponding deprivation of the plaintiff and (3) the absence of a juristic reason for the enrichment, the Court would further have to determine whether a constructive trust is an appropriate remedy in all the circumstances of the case.

*Canadian Imperial Bank of Canada v. Melnitzer (Trustee of) 1993 CarswellOnt 251 [CIBC v Melnitzer], para 109*

23. At the first instance, the Pharma Companies would have to demonstrate (1) that a monetary award would be inadequate and (2) that they are able to identify property to which the Plaintiff contributed in some manner. Further, the property must be specific. It is not a charge on the Defendants' general assets for the amount of the Plaintiff's claim.

*BNSF Railway v. Teck Metals Ltd. 2016 BCCA 350, para 4, 59*

24. Moreover, the Courts have determined that there are four conditions that must be present before a constructive trust is granted. In particular, the Plaintiff, and the other Pharma Companies, will have to demonstrate that:

- a. That the Defendants must have been under an equitable obligation, that is, an obligation of the type that courts of equity have enforced, ie fiduciary duties, in relation to the activities giving rise to the assets in their hands;
- b. The assets in the hands of the Defendants must be shown to have resulted from deemed or actual agency activities of the defendants in breach of their equitable obligations to the Plaintiff;
- c. That the Plaintiff must show a legitimate reason for seeking proprietary remedy, either personal or related to the need to ensure that others like the defendants remain faithful to their duties; and
- d. There must be no factors which would render the imposition of a constructive trust unjust in all of the circumstances of the case, including whether there are interests of intervening creditors that need to be protected.

*DBDC Spadina Ltd. v Walton 2018 ONCA 60, para 140*  
*Soulos v. Korkontzilas [1997] 2 SCR 217, para 45*

25. The Courts have rarely awarded constructive trusts in circumstances where the parties' relationship is governed by a commercial contract. The Court in *CIBC v. Melnitzer* declined to make a finding for constructive trust because, CIBC would be given, retrospectively, a priority property interest over the other property-interest claimants as well as the general creditors of the Defendant.

*CIBC v Melnitzer*, supra, para 112

26. MD Health respectfully submits that a constructive trust ought not be granted or deemed in relation to the claims of the Pharma Companies because they fail to satisfy above outlined conditions. MD Health obtained a General Security Agreement to protect its interests from these very circumstances. It would not be fair nor commercially reasonable in the circumstances to allow the unsecured creditors to gain priority and share equally with the secured creditor, by way of a constructive trust.

***MD Health has an interest in the Equity provided to Purchase of the Churchill Home:***

27. As indicated above, a constructive trust is not a blanket charge on all of the realized properties. Based on the Receiver Reports, the Defendants provided equity in the Churchill Home in December 2016, well before any funds were paid out by AstraZeneca.
28. MD Health believes that the equity provided were proceeds from the operation of Emily RX and St. Maharial and, as such, MD Health has a security interest in those proceeds.

**PART IV – RELIEF SOUGHT:**

29. The Secured Creditor, MD Health, respectfully asks that the Net Proceeds be paid to the Secured Creditor, MD Health, in its entirety and that the balance of the proceeds be paid to the Pharma Companies *pari passu*.
30. The Secured Creditor further seeks costs.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED.**

**Dated:** August 2, 2019

  
\_\_\_\_\_  
Emilio Bisceglia

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## SCHEDULE "A" – LIST OF AUTHORITIES

- 1 *Canadian Imperial Bank of Canada v. Melnitzer (Trustee of)* 1993 CarswellOnt 251 [CIBC v Melntizer]
- 2 *BNSF Railway v. Teck Metals Ltd.* 2016 BCCA 350
- 3 *DBDC Spadina Ltd. v Walton* 2018 ONCA 60
- 4 *Soulos v. Korkontzilas* [1997] 2 SCR 217

**ASTRAZENECA CANADA INC.**  
Plaintiff

and

**SAMEH SADEK et al**  
Defendants

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

**ONTARIO**  
**SUPERIOR COURT OF JUSTICE**  
**Commercial Court**

Proceeding commenced at Toronto

**FACTUM**  
**OF THE CREDITOR**  
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**(BRAMPTON) INC**

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