Ontario Securities Commission | Commission des valeurs mobilières de l'Ontario | P.O. Box 55, 19th Floor 20 Queen Street West Toronto ON M5H 3S8 | CP 55, 19e étage 20, rue queen ouest Toronto ON M5H 3S8

IN THE MATTER OF THE *SECURITIES ACT*,
R.S.O. 1990, c. S.5, AS AMENDED

- AND -

IN THE MATTER OF PETER SBARAGLIA

ORAL REASONS AND DECISION ON A MOTION TO QUASH A SUMMONS
(Rule 4.7(2) of the Ontario Securities Commission's *Rules of Procedure* (2012), 35 O.S.C.B. 10009)

Hearing:	February 27, 2013	
Oral Ruling:	February 27, 2013	
Decision:	March 14, 2013	
Panel:	Alan J. Lenczner, QC	- Commissioner
Counsel:	Matthew Gottlieb	- For Robert Kofman, the Moving Party
	Kevin D. Toyne Richard Niman	- For Peter Sbaraglia, the Respondent on the Motion
	Pamela Foy Catherine Weiler	- For Staff of the Ontario Securities Commission

The following text has been prepared for purposes of publication in the Ontario Securities Commission Bulletin and is based on excerpts of the transcript of the hearing. The excerpts have been edited and supplemented and the text has been approved by the Panel for the purpose of providing a public record of the decision.

ORAL REASONS AND DECISION ON A MOTION TO QUASH A SUMMONS

[1] Robert Kofman ("**Kofman**") of Duff & Phelps Canada Restructuring Inc. ("**D&P**" or the "**Receiver**") moves to quash a summons which was issued by the Ontario Securities Commission (the "**Commission**") and served on him by Peter Sbaraglia ("**Sbaraglia**") on January 17, 2013 (the "**Summons**"). In March 2010, the Ontario Superior Court of Justice (the "**Court**") appointed D&P as the Receiver over the assets, property and undertaking of the late Robert Mander ("**Mander**"), his company, E.M.B. Asset Group Inc. ("**EMB**") and related companies (the "**Mander Receivership**"). In December 2010, on the application of Enforcement Staff of the Commission ("**Staff**"), D&P was also appointed the Receiver over the assets, property and undertaking of Sbaraglia, his wife and their companies (the "**Sbaraglia Receivership**").

[2] In a Statement of Allegations filed on February 24, 2011, Staff alleged that Mander, through EMB, operated a fraudulent Ponzi scheme ("**Mander's Ponzi Scheme**"), and that Sbaraglia, through his company, C.O. Capital Growth Inc. ("**CO**"), participated in Mander's Ponzi Scheme in a manner which he knew or ought reasonably to have known perpetrated a fraud on investors contrary to s. 126.1(b) of the *Securities Act*, R.S.O. 1990, c. S.5, as amended (the "**Act**") and contrary to the public interest. Staff also alleges that Sbaraglia made statements to Staff, during the course of its investigation, that were materially misleading or untrue and/or failed to state facts which were required to be stated, contrary to subsection 122(1)(a) of the Act and contrary to the public interest.

[3] The Summons requires Kofman to attend to give evidence at the hearing on the merits in this matter, which is scheduled to begin on March 18, 2013, and requires Kofman to bring with him and produce at the hearing the documents and things set out in Appendix "A" to the Summons. The Summons asks for documents in various categories and quite broadly, including copies of all documents relevant to the Statement of Allegations, all documents provided by 15 named individuals, all notes taken during interviews with the named individuals, all recordings of any interviews, and all documents provided to the Commission. Sbaraglia submits that these documents may be relevant to the allegations against him and may assist him in making full answer and defence.

[4] Kofman moves to quash the Summons on three bases: (1) on the basis of *res judicata* or issue estoppel, and, as a subsidiary point, abuse of process; (2) on the basis of the non-compellability of the Receiver to produce documents in a proceeding outside the receivership; and (3) on the basis that the documents are not likely to be relevant to the allegations contained in the Statement of Allegations (the "**Motion**").

[5] Having considered the matter, I am granting the Motion on the basis of grounds (2) and (3). There is a long line of unbroken, consistent authority that a receiver cannot be compelled to produce documents for a proceeding outside of or unrelated to the receivership. The latest case in that long line is related to this Motion. It is the decision of the Court of Appeal in *SA Capital Growth Corp. v. Christine Brooks*, 2012 ONCA 681, 112 O.R. (3rd) 16, which incorporates a

number of important elements as to why the Receiver is not compellable in these circumstances. I make particular reference to paragraphs 8, 9 and 10 of that decision:

> The reach of the phrase "interested person" was discussed and applied by Greer J. in *Battery Plus Inc. (Re)*, [2002] O.J. No. 261, 31 C.B.R. (4th) 196 (S.C.J.), where "interested person" was held to include parties who have a direct interest in the subject matter of the receivership itself but to exclude parties who seek production of documents that do not "relate to a specific purpose" concerning the receivership itself. This approach is in line with the case law that states that receivers are not subject to cross-examination on their reports except in exceptional or unusual circumstances: see *Bell Canada International Inc. (Re)*, [2003] O.J. No. 4738, 126 A.C.W.S. (3d) 790 (S.C.J.); *Impact Tool & Mould Inc. (Re)*, [2007] O.J. No. 5492, 41 C.B.R. (5th) 112 (S.C.J.), affd [2008] O.J. No. 962, 41 C.B.R. (5th) 1 (C.A.), leave to appeal to S.C.C. refused [2008] S.C.C.A. No. 220; and *Anvil Range Mining Corp. (Re)*, [2001] O.J. No. 1125, 21 C.B.R. (4th) 194 (S.C.J.). It is also consistent with bankruptcy case law that establishes that a court officer (trustee in bankruptcy) will not be compelled to produce documents created and obtained as part of its duties in one proceeding for a collateral purpose; see, for example, *Impact Tool & Mould Inc. (Estate Trustee of) v. Impact Tool & Mould Inc. (Interim Receiver of)* (2006), 79 O.R. (3d) 241, [2006] O.J. No. 958 (C.A.); *GMAC Commercial Credit Corp.-- Canada v. TCT Logistics Inc.*, [2002] O.J. No. 4210, 37 C.B.R. (4th) 267 (S.C.J.).
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> The OSC proceedings are clearly separate and distinct from the receivership. The appellant does not seek production for the purpose of advancing any legal claim or interest in the receivership, but rather for a purpose collateral to the receivership, namely, his defence before the OSC. Accordingly, in our view, the appellant is not an interested person as his request was made for a purpose collateral to the receivership proceeding.
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> We agree with the receiver's submission that to recognize a right to require the receiver to produce material for purposes collateral to the receivership could lead to serious mischief. A court-appointed receiver is an officer of the court, not a regular litigant. Officers of the court should be left to perform their functions and duties without the distraction, added cost and potential chilling effect on their investigations that could result from permitting open-ended access to the fruits of their investigation.

[6] There is a rationale for the determinative elements that I've just read into the record, and I say, on my own behalf, that each one of those elements applies to these particular circumstances.

[7] On the next point, I recognize the right of a respondent, in a section 127 hearing before the Commission, to be able to make full answer and defence, and to have the necessary production and disclosure sufficient to make that right meaningful; but the required disclosure and production must be tied and linked to the allegations levelled against him.

[8] In this case the respondent has received 55 volumes of disclosure encompassing loan agreements, banking documents and other original documents relating to the specific factual allegations that are in paragraphs 9 to 11 and 14 to 20 of the Statement of Allegations.

[9] I am satisfied that Dr. Sbaraglia has received disclosure enabling him to fully respond to these allegations. What Dr. Sbaraglia now seeks are primarily interview notes from the Receiver which the Receiver himself describes as follows in his Thirteenth Report, at paragraph 3.1(d) of that Report:

> The primary purpose of the interviews was to gather background information regarding the Mander Debtors. However, a majority of the information obtained from the individuals was highly speculative, unsupported and anecdotal; much of it related to the stories woven by Mander to justify his investment techniques and the whereabouts of investor monies. Accordingly, in preparing its reports to the court, the Receiver relied on the financial information that it analyzed.

[10] The financial information that is relevant has also been provided to Dr. Sbaraglia.

[11] I refer to paragraph 3.1(e) of the Receiver's Thirteenth Report in which he says:

> Over the course of carrying out its mandate, the Receiver generated various notes and internal memoranda regarding the interviews, which were created solely for its internal purposes and were not intended to be relied upon by other parties. The notes were not reviewed by the individuals. The notes prepared were not intended to be a verbatim transcript of what was said by the individuals, and the Receiver cannot confirm that the notes are an accurate or complete review of all that was discussed. The Receiver cannot confirm that its notes summarize all of the discussions that the Receiver had with the individuals. The notes were only meant to be used by the Receiver for its purposes in the context of the discussions that were had with the respective individuals.

[12] Dr. Sbaraglia states that these notes might lead to other avenues of inquiry or might provide some corroboration for his own evidence.

[13] In my view, such statements do not meet the material requirement of “likely relevant” under the test set out in *R. v. O'Connor*, [1995] 4 S.C.R. 411. I can do no better than relate what Justice Pattillo said when he made a review of Dr. Sbaraglia’s claim for these notes in his decision, *SA Capital Corp. v. Christine Brooks* 2012 ONSC 2800, 110 O.R. (3d) 765, at paragraphs 47-50:

> In my view, Sbaraglia has not established, based on the allegations in the OSC’s Notice of Hearing and the evidence or lack thereof before me, that the information or documents provided to the Receiver by the 11 individuals who were former partners, associates, employees or clients of Mander is likely relevant to his defence to the OSC allegations. Sbaraglia has not established that the information requested is either logically probative to an issue before the OSC or relates to the credibility of a witness or the reliability of other evidence in the case.
>
> First, and given that the Receiver has had no communication with either of Walton and Fluke, there is no evidence that there is any record in the hands of the Receiver concerning them that is likely relevant to Sbaraglia's due diligence defence.
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> Of the nine individuals remaining, there is no evidence that any of them have refused to speak to Sbaraglia or his counsel about their dealings with the Receiver

> or to provide copies of the documents they provided to the Receiver, if any. In fact, [the] Sbaraglia affidavit indicates that in the case of three of the individuals, Zurini, Auriemma and Ward, either he or his wife spoke with them after they met with the Receiver. Sbaraglia has listed the nine individuals specifically and the Receiver has confirmed that it had discussions with them. Any information or documents given to the Receiver that Sbaraglia now seeks to obtain came from the individuals and one would have thought they would be first persons to speak to about it. It is no answer, in my view, to say that the discussions with the Receiver took place a long time ago and the Receiver's record is therefore the best evidence when no attempt whatsoever has been made to speak with these individuals in the first instance.
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> Further, some of the individuals have been cross-examined at length by Sbaraglia's counsel in the CO Group receivership application. No explanation has been provided by Sbaraglia as to why the information obtained from that proceeding about individuals' relationship with Mander and Sbaraglia is not sufficient. In fact, it was not mentioned at all by Sbaraglia in his affidavit.

[14] I echo what Justice Pattillo has said and I come to the same determination.

[15] For these reasons, the Motion to quash is granted. I thank counsel.

[16] An Order will issue accordingly.

DATED at Toronto this 14th day of March, 2013.

"Alan Lenczner"

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Alan J. Lenczner, QC