

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

**BETWEEN:**

**SA CAPITAL GROWTH CORP.**

**Applicant**

**- and -**

**CHRISTINE BROOKS AS EXECUTOR OF THE ESTATE OF ROBERT MANDER,  
DECEASED, AND E.M.B. ASSET GROUP INC.**

**Respondents**

**and**

**PETER SBARAGLIA**

**Moving Party**

**- and -**

**RSM RICHTER INC. and ONTARIO SECURITIES COMMISSION**

**Responding Parties**

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**FACTUM  
OF THE ONTARIO SECURITIES COMMISSION  
(Motion Returnable May 9, 2012)**

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**FACTUM OF THE ONTARIO SECURITIES COMMISSION**

**OVERVIEW**

1. This factum is filed by the Ontario Securities Commission (the "Commission"), which has been named as a Responding Party to a motion brought by Peter Sbaraglia ("Sbaraglia") to obtain various categories of documents in the possession, control and/or power of the RSM Richter Inc. (the "Receiver"), as an informational factum which is meant to assist and provide the Court with background information regarding the proceedings involving Sbaraglia before the

Commission. This factum also sets out some of the *Rules of Procedure* of the Commission. The Commission takes no position on the issues before the Court on this motion.

## STATUTORY FRAMEWORK

2. The Commission is responsible for performing the duties assigned to it under the *Securities Act*, R.S.O. 1990, c.S.5, as amended (the “*Securities Act*”). The purposes of the *Securities Act* are set out in section 1.1:

**1.1 Purposes** - The purposes of this Act are,

- (a) to provide protection to investors from unfair, improper or fraudulent practices; and
- (b) to foster fair and efficient capital markets and confidence in capital markets.

*Securities Act*, R.S.O. 1990, c.S.5 (“*Securities Act*”), s.1.1

3. The Commission may appoint one or more persons to investigate a matter that the Commission considers expedient, either for the regulation of the Ontario capital markets or to assist in the regulation of capital markets in other jurisdictions. Section 11 of the *Securities Act* provides as follows:

**11(1) Investigation Order** - The Commission may, by order, appoint one or more persons to make such investigation with respect to a matter as it considers expedient,

- (a) for the due administration of Ontario securities law or the regulation of the capital markets in Ontario; or
- (b) to assist in the due administration of the securities laws or the regulation of the capital markets in another jurisdiction.

*Securities Act*, s. 11(1)

## THE COMMISSION PROCEEDINGS

4. Contrary to paragraphs 1 and 38 of Sbaraglia’s factum, the Commission started investigating Sbaraglia in July 2008. On July 15, 2008, the Commission issued an Order, pursuant to subsection 11(1)(a) of the *Securities Act* appointing Staff of the Commission (“Staff”) to investigate and inquire into the business and affairs of Sbaraglia, Robert Mander, CO Capital Growth Inc. (“CO Capital”) and Pero Assets Inc. (the “Sbaraglia Investigation”).

Affidavit of Mehran Shahviri sworn May 1, 2012, at para. 5, Responding Motion Record of the Ontario Securities Commission, Tab A [hereinafter "*Shahviri Affidavit*"]

5. In July 2009, as part of the Sbaraglia Investigation, Staff conducted an examination of Sbaraglia under oath with counsel present where he swore to tell the truth. Sbaraglia was advised by Staff that Staff's primary concern in the investigation was whether investors' funds were at risk and whether CO Capital could properly account for the funds. Staff further advised Sbaraglia that it was seeking verification from CO Capital that its assets were in excess of what was owed to CO Capital Investors.

Statement of Allegations, paras. 14-16 and 20, Exhibit "L" to Affidavit of Peter Sbaraglia sworn April 23, 2012 ("Sbaraglia Affidavit"), Motion Record of Peter Sbaraglia

6. Robert Mander was also examined by Staff in July 2009.

Exhibit "N" to Sbaraglia Affidavit, Volume 21, Motion Record of Peter Sbaraglia

7. From 2009 to present, Staff have interviewed other individuals as part of the Sbaraglia Investigation. The transcripts and/or notes of all of these interviews have been disclosed to Sbaraglia as described in greater detail below.

Exhibit "N" to Sbaraglia Affidavit, Motion Record of Peter Sbaraglia

### ***The Statement of Allegations***

8. On February 24, 2011, a Notice of Hearing and Statement of Allegations was issued by Staff naming Sbaraglia as the Respondent. Staff alleged that Sbaraglia breached the *Securities Act* by committing fraud and misleading Staff.

Statement of Allegations, Exhibit "L" to Sbaraglia Affidavit, Motion Record of Peter Sbaraglia

9. Contrary to paragraph 15 of Sbaraglia's factum, the allegations of fraud are more than he knew or ought to have known that Mander was running a Ponzi scheme. Instead, as particularized in the Statement of Allegations, it is alleged that Sbaraglia committed fraud in the following way:

- (a) He failed to do any due diligence with respect to Mander and his investment scheme and he failed to obtain any objective evidence from Mander about the alleged investment profits (para. 8);
- (b) He misled and deceived investors by operating CO Capital business in a way which deviated from its purported business model by keeping approximately \$6-7 million of \$21 million raised from investors in CO Capital and using the funds for: (i) making payments to CO Capital investors with newly received funds from other CO investors; (ii) making investments in securities, either directly in trading accounts of CO or indirectly in trading accounts in the names of other companies, that resulted in significant losses; and (iii) making payments for personal expenses of the Sbaraglias (paras. 9, 10, 11 and 28); and
- (c) He used CO Capital investor monies to fund his lifestyle (paras. 4 and 10).

Statement of Allegations, Exhibit "L" to Sbaraglia Affidavit, Motion Record of Peter Sbaraglia

10. With respect to the allegation of misleading Staff, it is alleged that Sbaraglia materially misled Staff in respect of the operation and business of CO Capital during his July 9, 2009 examination which was conducted under oath with counsel present. More particularly, among other things, it is alleged that Sbaraglia failed to disclose liabilities of approximately \$9.4 million owing to CO Capital investors and that he mislead Staff about the assets that were allegedly available to satisfy CO Capital's obligations.

Statement of Allegations, para. 20, Exhibit "L" to Sbaraglia Affidavit, Motion Record of Peter Sbaraglia

11. It is further alleged that an undertaking given by Sbaraglia to the Commission on August 7, 2009 is materially misleading as it failed to identify material obligations of CO Capital in its schedule of outstanding loans. It is alleged that the undertaking was of no value in protecting investors.

Statement of Allegations, para. 21, Exhibit "L" to Sbaraglia Affidavit, Motion Record of Peter Sbaraglia

### ***Disclosure***

12. Pursuant to its disclosure obligations, Staff have provided Sbaraglia with full disclosure (subject to its ongoing obligations) of all relevant documents in its possession and custody. The disclosure obligations of Staff are “akin to” those articulated in *R. v. Stinchcombe*.

*R. v. Stinchcombe*, [1991] 3 S.C.R. 326, Brief of Authorities of the Moving Party, Peter Sbaraglia, Tab 1

*Deloitte & Touche LLP v. Ontario (Securities Commission)*, [2003] 2 S.C.R. 713 at para. 26, Brief of Authorities of the Moving Party, Peter Sbaraglia, Tab 2

13. Initial disclosure was made in June 2011. Staff’s disclosure material consists mainly of: banking records for Sbaraglia, CO Capital and several other corporations and individuals related to or involved with CO Capital for the period of 2006 to 2010; trading records for CO Capital and other corporations related to CO Capital for the period of 2006 to 2009; telephone and texting records for particular phone numbers; corporate documents; documents pertaining to various individuals, including Sbaraglia; and transcripts of all interviews and all documents provided pursuant to such interviews conducted by Staff.

Exhibit “N” to Sbaraglia Affidavit, Motion Record of Peter Sbaraglia

14. Contrary to paragraph 22 of Sbaraglia’s factum, neither Julia Dublin or Michael Miller were interviewed by Staff.

15. The disclosure also includes all of the pleadings and materials filed in the receivership application which Staff commenced in September 2010, as well as the decision of Justice Morawetz appointing the Receiver on December 23, 2010. This material formed part of disclosure because Staff must disclose all documents which it obtained pursuant to its investigation which are relevant to the allegations.

Exhibit “N” to Sbaraglia Affidavit, Motion Record of Peter Sbaraglia

### ***The Commission Hearing On The Merits***

16. On November 25, 2011, the Commission made an Order setting the matter down for a hearing on the merits for 15 days commencing June 4, 2012.

17. On January 24, 2012, Sbaraglia brought a motion before the Commission seeking production of materials in the possession and control of the Receiver. The Commission made an Order the same day from the bench that it did not have jurisdiction to make such an order as the Receiver is an independent, court-appointed entity. Sbaraglia was advised that he was not without remedies: he could either obtain a summons from the Commission or bring a third party production motion in the Ontario Superior Court of Justice.

18. On April 30, 2012, Sbaraglia brought a motion before the Commission to adjourn the hearing on the merits. The motion was granted and the hearing on the merits is now scheduled to commence on October 22, 2012 for a three week period on a peremptory basis with respect to Sbaraglia.

Shahviri Affidavit, at para. 7, Responding Motion Record of the Ontario Securities Commission, Tab A

#### **STAFF'S APPLICATION FOR THE APPOINTMENT OF A RECEIVER OVER SBARAGLIA AND CO CAPITAL**

19. As referred to in section 1.0(a) of the Thirteenth Report To Court of Duff & Phelps Restructuring Inc. as Court-Appointed Receiver of the Estate of Robert Mander, E.M.B. Asset Group Inc. and the Related Entities dated April 30, 2012 ("Thirteenth Report of the Receiver"), on March 17, 2010, pursuant to an Order of Justice Morawetz, the Receiver was appointed receiver over the assets, property and undertakings of E.M.B. Asset Group Inc. and Robert Mander.

Thirteenth Report of the Receiver, section 1.0(a)

20. On July 14, 2010, Justice Morawetz made an Order authorizing and directing the Receiver to investigate the affairs of Sbaraglia, Mandy Sbaraglia ("Mandy"), CO Capital and 91 Days Hygiene Services Inc. ("91 Days")

Thirteenth Report of the Receiver, section 1.0(d)

21. On September 8, 2010, Staff brought an application in the Ontario Superior Court of Justice for an order pursuant to section 129 of the *Securities Act* to appoint a receiver over all of the assets, undertakings and properties of Sbaraglia, Mandy, CO Capital and 91 Days.



22. Section 129 of the *Securities Act*, provides:

**129(1) Appointment of a receiver, etc.** – the Commission may apply to the Superior Court of Justice for an order appointing a receiver, receiver and manager, trustee or liquidator of all or any part of the property of any person or company.

(2) Grounds – No order shall be made under subsection (1) unless the court is satisfied that,

(a) The appointment of a receiver, receiver and manager, trustee or liquidator of all or any part of the property of the person is in the best interests of the creditors of the person or company or of persons or companies any of whose property is in the possession or under the control of the person or company or the security holders of or subscribers to the person or company; or

(b) It is appropriate for the due administration of Ontario securities law.

*Securities Act*, s.129(1)

23. The court does not have to find evidence of a breach of the *Securities Act* in order to appoint a receiver pursuant to section 129 of the *Securities Act*. Instead, the court has the discretion to appoint a receiver if it is in the best interests of creditors or it is appropriate for the due administration of Ontario securities law.

24. On December 23, 2010, Justice Morawetz granted the Commission's application and appointed RSM Richter (as it was then) as receiver of all assets, undertakings and properties of Sbaraglia, Mandy, CO Capital and 91 Days. This order was made as the court was satisfied that such an appointment was in the best interests of the company's creditors or security holders and it was appropriate for the due administration of Ontario securities law.

Exhibit "J" to Shahviri Affidavit, Responding Motion Record of the Ontario Securities Commission

25. Staff's investigation of Sbaraglia and his company, CO Capital, did not cease once the Receiver was appointed by the Court. Since that time, Staff has, among other things, done a thorough analysis of all of CO Capital's and the Sbaraglias' bank records for the period of

January 1, 2007 to February 15, 2010. Staff has also done a thorough analysis of all of CO Capital's trading records for the period of January 1, 2007 to February 15, 2010. This evidence will be presented to the panel at the hearing on the merits.

Shahviri Affidavit, at para. 5, Responding Motion Record of the Ontario Securities Commission, Tab A

26. Since its appointment, the Receiver has taken possession of and controlled the assets, undertakings and properties of Sbaraglia, Mandy, CO Capital and 91 Days pursuant to Justice Morawetz's December 24, 2010 Order. It has provided several reports to the Court with respect to its activities and carrying out of duties.

27. The Receiver is not a party to the proceedings before the Commission.

## THE COMMISSION'S RULES OF PROCEDURE

### *Witness Lists*

28. Rule 4.5 of the Commission's *Rules of Procedure* provides:

**4.5 Witness Lists and Summaries (1) Provision of a Witness List** – A party to a proceeding shall serve every other party and file with the Secretary a list of the witnesses the party intends to call to testify on the party's behalf at the hearing, at least 10 days before the commencement of the hearing.

**(2) Provision of Witness Summaries** - If material matters to which a witness is to testify have not otherwise been disclosed, a party to a proceeding shall provide to every other party a summary of the evidence that the witness is expected to give at the hearing, at least 10 days before the commencement of the hearing.

...

**(3) Failure to Provide a Witness List or a Summary** – A party who does not include a witness in the witness list or provide a summary of the evidence a witness is expected to give in accordance with subrules 4.5(1), 4.5(2) and 4.5(3), *may not call that person as a witness without leave of the Panel, which may be on any conditions as the Panel considers just.* [emphasis added]

*Ontario Securities Commission Rules of Procedure* (amendment and consolidation as of August 31, 2010), made under the *Statutory Powers Procedure Act*, R.S.O. 1990, c.S.22, Rule 4.5 [hereinafter "*Commission Rules of Procedure*"]

29. As such, Sbaraglia and Staff's witness lists for the hearing on the merits are due October 12, 2012.

30. Staff however, have advised Sbaraglia that they intend to call Stephanie Collins, a senior forensic accountant at the Commission and Mehran Shahviri, a senior investigator at the Commission, as well as a number of CO Capital investors as witnesses.

31. Staff have advised Sbaraglia and his counsel on at least two occasions, that they do not have a current intention to call the Receiver as a witness at the hearing on the merits. These statements were made by the senior litigation counsel involved in the Sbaraglia investigation.

Shahviri Affidavit, at para. 6, Responding Motion Record of the Ontario Securities Commission, Tab A

### ***Hearsay Evidence***

32. Section 15 of the *Statutory Powers Procedures Act*, (the "SPPA") permits the use of hearsay at a Commission proceeding:

15(1) Subject to subsections (2) and (3), a tribunal may admit as evidence at a hearing, whether or not given or proven under oath or affirmation or admissible as evidence in court,

- (a) any oral testimony; and
- (b) any document or other thing,

relevant to the subject-matter of the proceeding and may act on such evidence, but the tribunal may exclude anything unduly repetitious.

- (2) Nothing is admissible in evidence at the hearing,
  - (a) that would be inadmissible in a court by reason of any privilege under the law of evidence; or
  - (b) that is inadmissible by the statute under which the proceeding arises or any other statute.
- (3) Nothing in subsection (1) overrides the provisions of any Act expressly limiting the extent to or purposes for which any oral testimony, documents or things may be admitted or used in evidence in any proceeding.

*Statutory Powers Procedure Act*, R.S.O. 1990, c.S.22, s.15

33. In *Re Sunwide Finance Inc.*, the Commission made the following findings regarding the admissibility of hearsay in a hearing before the Commission:

Although hearsay evidence is admissible under the *SPPA*, the weight to be accorded to such evidence must be determined by the panel. Care must be taken to avoid placing undue reliance on uncorroborated evidence that lacks the sufficient indicia of reliability. (*Starson v. Swayze*, [2003] 1 S.C.R. 722 at para. 115) In the circumstances, we admitted the hearsay evidence tendered by Staff, subject to our consideration of the weight to be given to that evidence.

*Re Sunwide Finance Inc.* (2009), 32 O.S.C.B. 4671 at para. 22 [hereinafter *Re Sunwide*], Brief of Authorities of the Ontario Securities Commission, Tab 1

34. The panel will also consider the rules of procedural fairness in determining what weight to give hearsay.

*Re Sunwide, supra* at para. 24, Brief of Authorities of the Ontario Securities Commission, Tab 1

### ***Bifurcated Proceedings***

35. Proceedings before the Commission are typically bifurcated. The hearing on the merits only involves the presenting of evidence by Staff and the Respondent(s) and submissions on the allegations set out in the Statement of Allegations. If the Panel finds that there has been a breach(es) of the *Securities Act*, a sanctions hearing will then take place in which the parties make submissions only on the sanctions sought by Staff.

36. In this case, the sanctions that could be imposed on Sbaraglia include:


- (a) a permanent or other specified period ban on trading or acquiring securities;
- (b) a permanent or other specified period ban on being an officer or director of an issuer;
- (c) a reprimand;

- (d) an administrative penalty of not more than \$1 million for each breach of the *Securities Act*;
- (e) disgorgement of any amount found to be obtained by his breach of the *Securities Act*.

37. Sbaraglia could also be ordered to pay costs of the Sbaraglia investigation.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED**

May 7, 2012

  
Jennifer M. Lynch  
Senior Litigation Counsel, Enforcement Branch  
Ontario Securities Commission

## SCHEDULE "A" – AUTHORITIES

*Sunwide Finance Inc. (Re)* (2009), 32 O.S.C.B. 4671 .....1

## **SCHEDULE "B" – STATUTORY REFERENCES**

### ***Securities Act, R.S.O. 1990, c. S.5, as amended***

#### **Section 1.1**

##### **Purposes of Act**

**1.1** The purposes of this Act are,

- (a) to provide protection to investors from unfair, improper or fraudulent practices; and
- (b) to foster fair and efficient capital markets and confidence in capital markets. 1994, c. 33, s. 2.

#### **Section 11(1)**

##### **Investigation order**

**11. (1)** The Commission may, by order, appoint one or more persons to make such investigation with respect to a matter as it considers expedient,

- (a) for the due administration of Ontario securities law or the regulation of the capital markets in Ontario; or
- (b) to assist in the due administration of the securities or derivatives laws or the regulation of the capital markets in another jurisdiction. 1994, c. 11, s. 358; 2010, c. 26, Sched. 18, s. 4 (1).

#### **Section 129(1)**

##### **Appointment of receiver, etc.**

**129. (1)** The Commission may apply to the Superior Court of Justice for an order appointing a receiver, receiver and manager, trustee or liquidator of all or any part of the property of any person or company. 1994, c. 11, s. 375; 2006, c. 19, Sched. C, s. 1 (1).

### ***Statutory Powers Procedure Act, R.S.O. 1990, c. S.22***

#### **Section 15**

##### **Evidence**

##### **What is admissible in evidence at a hearing**

**15.(1)** Subject to subsections (2) and (3), a tribunal may admit as evidence at a hearing, whether or not given or proven under oath or affirmation or admissible as evidence in a court,

- (a) any oral testimony; and
- (b) any document or other thing,

relevant to the subject-matter of the proceeding and may act on such evidence, but the tribunal may exclude anything unduly repetitious.

**What is inadmissible in evidence at a hearing**

(2) Nothing is admissible in evidence at a hearing,

- (a) that would be inadmissible in a court by reason of any privilege under the law of evidence; or
- (b) that is inadmissible by the statute under which the proceeding arises or any other statute.

**Ontario Securities Commission *Rules of Procedure***

**4.5 Witness Lists and Summaries – (1) Provision of a Witness List** – A party to a proceeding shall serve every other party and file with the Secretary a list of the witnesses the party intends to call to testify on the party's behalf at the hearing, at least 10 days before the commencement of the hearing.

**(2) Provision of Witness Summaries** – If material matters to which a witness is to testify have not otherwise been disclosed, a party to a proceeding shall provide to every other party a summary of the evidence that the witness is expected to give at the hearing, at least 10 days before the commencement of the hearing.

**(3) Content of the Witness Summary** – A witness summary shall contain:

- (a) the substance of the evidence of the witness;
- (b) reference to any documents that the witness will refer to; and
- (c) the witness's name and address or, if the witness's address is not provided, the name and address of a person through whom the witness can be contacted.

**(4) Failure to Provide a Witness List or a Summary** – A party who does not include a witness in the witness list or provide a summary of the evidence a witness is expected to give in accordance with subrules 4.5(1), 4.5(2) and 4.5(3), may not call that person as a witness without leave of the Panel, which may be on any conditions as the Panel considers just.

**(5) Incomplete Witness Summary** – A witness may not testify to material matters that were not previously disclosed without leave of the Panel, which may be on any conditions that the Panel considers just.