

Court File No. CV-24-00000869-0000

**ONTARIO
SUPERIOR COURT OF JUSTICE**

B E T W E E N:

**GULED WARSAME and SHELLI SAREEN on their own behalf and on
behalf of all members of UNITE HERE Local 75**

Plaintiffs (Moving Parties)

and

**DAVID SANDERS, ASHLEY HAYES, RAFUNZEL KORNGUT AND ALLAN PACE
on his own behalf and on behalf of all members of THE TORONTO HOSPITALITY
EMPLOYEES UNION – CSN (THEU-CSN)**

Defendants (Responding Parties)

**FACTUM OF THE PLAINTIFFS / MOVING PARTIES
MOTION RETURNABLE JUNE 19, 2024**

June 5, 2024

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PART I - INTRODUCTION

1. The Moving Parties, Plaintiffs, are executive officers of the trade union UNITE HERE Local 75 (“Local 75”) suing on behalf of Local 75.
2. The individual Defendants are former employees, executives and agents of Local 75 now working for a rival trade union, the “THEU-CSN”. THEU-CSN is seeking to solicit the support of Local 75’s members and other employees who Local 75 is authorized by statute to represent.
3. Local 75 contends that: (a) the individual defendants stole confidential member contact information while they were still affiliated with Local 75; and, (b) that the THEU-CSN is now using this contact information to solicit Local 75’s members and “raid” its bargaining units. Local 75 brings this motion for the return of its property and for injunctive relief to prevent the THEU-CSN from further misusing Local 75’s and its members’ confidential contact information.
4. The present factum draws solely on the motion record filed and served by Local 75, given the Court-ordered timetable. Local 75 therefore reserves the right to make additional submissions that arise from the THEU-CSN’s filings that cannot be addressed herein.

PART II - SUMMARY OF FACTS

A. The Parties

5. Local 75 is a trade union representing workers employed primarily in the hotel, hospitality, entertainment, and food services industries. Local 75 is a part of the UNITE HERE International

Union (the “IU”) representing over 275,000 people in North America. Local 75 and its predecessors have been representing workers in the Province of Ontario for over 120 years.¹

6. Currently, Local 75 has approximately 8,000 individual members working in 54 separate bargaining units across the GTA and in Kitchener-Waterloo. Each bargaining unit is composed of a group of employees that Local 75 is legally designated to negotiate and administer a collective agreement on behalf of.²

7. The individual Defendants are all current employees or officers of the THEU-CSN.³ THEU-CSN is a union affiliated with a Quebec-based parent, the Confédération des syndicats nationaux.⁴

B. The Individual Defendants Stole Confidential Member Contact Information from Local 75 that the THEU-CSN is Now Using to Solicit Local 75 Members

8. Recently, the THEU-CSN has contacted employees in many of Local 75 bargaining units by mail to their home addresses and text message seeking to convince those employees to abandon Local 75 and designate the THEU-CSN as their new trade union representative.⁵ During a brief temporal period (the “open period”) established by section 7 of the *Labour Relations Act, 1995*,

¹ Affidavit of S. Sareen dated May 28, 2024 [“Sareen Affidavit”], Plaintiff’s Motion Record [“MR”], Tab 2, CaseLines p. (“CL”) A15, ¶¶9 and 10. ^{A15}

² Sareen Affidavit, MR, Tab 2, CL A14, ¶¶6 and 7. ^{A14}

³ Affidavit of J. Cusay dated May 27, 2024 [“Cusay Affidavit”], MR, Tab 3, Exhibit 5, CL A350. ^{A350}

⁴ See *Toronto Hospitality Employees Union – CSN (THEU-CSN) v Fairmont Royal York*, [2024 CanLII 11753 \(ON LRB\)](#) [“THEU-CSN”] and related decisions of the OLRB. ^{A319}

⁵ Sareen Affidavit, MR, Tab 2, CL A28-29, ¶¶50 – 52 and 54; Cusay Affidavit, MR, Tab 3, CL A319, ¶6; Affidavit of M. Ghebre dated May 28, 2024 [“Ghebre Affidavit”], MR, Tab 4, CL A358-361; Affidavit of T. Wimalendra dated May 27, 2024 [“Wimalendra Affidavit”], MR, Tab 5, CL A362-364; Affidavit of A. Idris dated May 28, 2024 [“Idris Affidavit”], MR, Tab 6, CL A365-368, ¶¶3 – 8; Affidavit of M. Krishnamoorthy dated May 28, 2024 [“Krishnamoorthy Affidavit”], MR, Tab 7, CL A370-374; Affidavit of M. Seyoum dated May 28, 2024 [“Seyoum Affidavit”], MR, Tab 8, CL A375-378; Affidavit of M. McKenzie dated May 28, 2024 [“McKenzie Affidavit”], MR, Tab 9, CL A379-381; Affidavit of K. Dublin dated May 28, 2024 [“Dublin Affidavit”], MR, Tab 10, CL A382-386. ^{A362} ^{A370} ^{A375} ^{A379} ^{A382}

S.O. 1995, c. 1, Sched. A and the collective agreements Local 75 negotiates, these groups of employees can choose to designate a trade union other than Local 75 to represent them.

9. Twenty-seven bargaining units Local 75 currently represents, primarily in the hotel sector, are currently in, or will soon be in, an open period. If employees in these bargaining units designate the THEU-CSN to represent them instead of Local 75, Local 75 will not be able to try to re-establish its bargaining rights until another open period occurs. Given past patterns, it will be between three or four years before another open period arises.⁶

10. The evidence that the THEU-CSN and its agents took Local 75's confidential contact information and are now using it as part of its raiding campaign is overwhelming.

11. Many employees in Local 75 bargaining units who the THEU-CSN has solicited did not provide their contact information to them. Local 75 has obtained affidavit evidence in short order indicating that at least 113 such individuals have been solicited by the THEU-CSN lately.⁷

12. In some cases, the THEU-CSN is contacting individuals who have not been members of a Local 75 bargaining unit since 2019.⁸ In other words, the THEU-CSN cannot contend that they recently obtained such contact details through the hard work of on-the-ground campaigning when persons not "on the ground" for five years are being contacted. To have contacted such persons, the THEU-CSN must be starting from contact lists that are at least five years old.

⁶ Sareen Affidavit, MR, Tab 2, CL A17-20, A31, ¶¶19, 20 and 58. A17 A319

⁷ Sareen Affidavit, MR, Tab 2, CL A28-29, ¶¶50 – 52 and 54; Cusay Affidavit, MR, Tab 3, CL A319, ¶6; Ghebre Affidavit, MR, Tab 4, CL A358-361; Wimalendra Affidavit, MR, Tab 5, CL A362-364; Idris Affidavit, MR, Tab 6, CL A365-368, ¶¶3 – 8; Krishnamoorthy Affidavit, MR, Tab 7, CL A370-374; Seyoum Affidavit, MR, Tab 8, CL A375-378; McKenzie Affidavit, MR, Tab 9, CL A370-381; Dublin Affidavit, MR, Tab 10, CL A 382-386. A362 A370 A379 A382

⁸ Sareen Affidavit, MR, Tab 2, CL A29, ¶¶51 and 54; Cusay Affidavit, MR, Tab 3, CL A317-357; Idris Affidavit, MR, Tab 6, CL A365-369. A365 A317

13. Local 75 contends that the THEU-CSN is using contact information stolen by the individual Defendants or their associates from Local 75 in 2017/2018 when the individual defendants were employed by Local 75 and/or the IU. This is the only logical inference to be drawn from the facts.

14. Local 75 and/or the IU terminated these individual defendants' employment following a period of internal conflict in January 2018.⁹ In the weeks leading up to the termination, certain of the individual defendants and those affiliated with them were seen removing physical documents from Local 75's offices.¹⁰ During their employment with Local 75, these individual defendants also had electronic access to membership lists and records containing contact information for all employees in Local 75. As just noted, the THEU-CSN has contacted at least 113 individuals in multiple Local 75 bargaining units who deny providing their contact information to the THEU-CSN. These individuals include Josh Cuasay, Abdalla Idris and Eulalia Marcos, all of whom are not currently working in a Local 75 bargaining unit, but who were in 2017 and 2018.¹¹

15. In light of the above, Local 75 now believes the following lists and records were improperly retained by the individual defendants or their associates and are currently in the possession of the THEU-CSN: (a) electronic and printed bargaining unit lists that Local 75 receives and is entitled to receive from employers under its collective agreements; (b) records from Broadstripes, an organizing database and membership management software Local 75 used; and, (c) records from the Timms database, which houses Local 75 membership records for the purpose of administering union dues records (collectively, the "Confidential Information").¹²

⁹ Sareen Affidavit, MR, Tab 2, CL A20-23, ¶¶26-35. A20

¹⁰ Sareen Affidavit, MR, Tab 2, CL A23 & A24, ¶¶34 and 38. A23

¹¹ Sareen Affidavit, MR, Tab 2, including CL A29, ¶¶51 and 54; Cuasay Affidavit MR, Tab 3, CL A317-357; Idris Affidavit, MR Tab 6, CL A365-369. A365

¹² Sareen Affidavit, MR, Tab 2, CL A30, ¶55. A30

16. The Confidential Information includes contact information for all employees working in bargaining units that Local 75 represents.¹³ In the labour relations context, employee contact information is highly confidential. Employers guard this information carefully because of how valuable it can be in a union organizing context. Unions spend significant resources on compiling and maintaining contact information for members and potential members for the same reason. Other than talking to potential union members and asking for their contact information, there is no regular way for a union such as the THEU-CSN to obtain this sort of information without becoming a certified bargaining agent.¹⁴

C. The THEU-CSN's Use of the Confidential Information Threatens Local 75 and its Members

17. Almost immediately after the termination of their employment with Local 75 and/or the IU, the individual defendants joined Unifor, another trade union, and attempted to raid Local 75's bargaining rights. As a result of that raid campaign, Local 75 lost bargaining rights at seven hotels. Local 75 and its members thus suffered significant, unquantifiable losses related to diminished market share and risk pooling efficiencies that are more fully detailed in argument, below.¹⁵

18. If the THEU-CSN's raid campaign against Local 75 succeeds in a manner that is comparable to Unifor's campaign, Local 75 expects to lose approximately \$750,000 per year in union dues, or between \$2.25 and \$3 million in dues payable over three or four years at seven hotels.¹⁶ Local 75 and its members will also suffer significant unquantifiable losses such as diminished bargaining

¹³ Sareen Affidavit, MR, Tab 2, C A24-25, A30, ¶¶39 and 55. A24 A30

¹⁴ Sareen Affidavit, MR, Tab 2, CL A31-32, ¶¶59 and 60. A31

¹⁵ Sareen Affidavit, MR, Tab 2, CL A15, A16-17, A24-26, ¶¶12, 15-18 and 36-42. A15 A24

¹⁶ Sareen Affidavit, MR, Tab 2, CL A31, ¶¶57 and 58. A31

power and increased per member benefit costs for a three to four year period, at minimum, given when the next open period will likely occur, as summarized above.

19. Local 75 issued a Statement of Claim on May 27, 2024 seeking, *inter alia*, damages and an Order against the Defendants to return, destroy and cease all use of the Confidential Information.

20. Local 75 brings this motion to secure the return of its property and, further or alternatively, for injunctive relief to prohibit further misuse of the Confidential Information.

PART III - STATEMENT OF ISSUES, LAW & AUTHORITIES

21. As is more fully set out in the Notice of Motion, Local 75 seeks Orders:

- (a) restraining the Defendants (including individuals acting on behalf of THEU-CSN and anyone aiding or assisting the Defendants) from disclosing or using the Confidential Information;
- (b) requiring the Defendants (including individuals acting on behalf of THEU-CSN and anyone aiding or assisting the Defendants) to immediately deliver to the Local 75's designate for inspection all property, equipment, documents and data, including copies thereof, belonging to Local 75;
- (c) directing the Defendants (including individuals acting on behalf of THEU-CSN and anyone aiding or assisting the Defendants) to permanently delete any copies of the Confidential Information; and,
- (d) ordering that the Defendants provide Local 75 with a sworn statement describing the nature and location of the Confidential Information which is presently in their care,

power, or control, and describing their Defendants' use of the same and, further, that each Defendant submit to examinations under oath regarding the same.

22. These remedies are within the Court's jurisdiction and flow from the Defendants' actions. The relief sought should be granted pursuant to sections 101 and 104 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43 and Rules 40 and 44 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194.

23. Local 75 also seeks orders naming the Plaintiffs Guled Warsame and Shelli Sareen as representative Plaintiffs and Allan Pace as a representative Defendant on behalf of the members of the THEU-CSN, pursuant to Rules 12.07 and 12.08. These types of representative orders are standard procedural steps that are appropriate when trade unions, being voluntary unincorporated associations, are parties to a legal proceeding in Ontario.¹⁷

A. Rule 44 – Return of Property

24. Section 104 authorizes the Court to make an interim order for recovery of the property that is unlawfully in the Defendants' possession. This power, which Rule 44 elaborates upon, provides Local 75 with the most direct route to recover its property, the Confidential Information.

25. Rule 44 requires a party seeking the return of its property to provide affidavit evidence setting out the following: (a) a description of the property sufficient to make it readily identifiable; (b) its value; (c) that the plaintiff is the owner or lawfully entitled to possession of the property; (d) that the property was unlawfully taken from the possession of the plaintiff or is unlawfully detained by the defendant; and, (e) the facts and circumstances giving rise to the unlawful taking or detention.

¹⁷ *Lawrence v. International Brotherhood of Electrical Workers*, [2017 ONCA 321 \(CanLII\)](#) aff'd [2018 SCC 11 \(CanLII\)](#), [2018] 1 SCR 267.

1. A Rule 44 Order *Can* be Granted

26. The affidavit evidence contained in Local 75's Motion Record satisfies the five Rule 44 requirements.

27. *First*, the Sareen affidavit clearly describes the records in the THEU-CSN's possession as electronic and printed copies of: bargaining unit lists that Local 75 was entitled to receive from employers quarterly or bi-annually under its collective agreements; records from Broadstripes, an organizing database and membership management software; and, records from the Timms database, which houses membership records for the purpose of administering union dues.¹⁸ Electronic contact information and information stored on electronic databases has been recognized as property for the purposes of a Rule 44 order.¹⁹

28. *Secondly*, the Sareen affidavit estimates the monetary value of the property as \$750,000 per annum or between \$2.25 and \$3 million over a three-to-four-year period, which is the standard term of a collective agreement in the hotel sector.²⁰

29. *Third*, the Sareen affidavit explains that Local 75's membership contact information must be obtained through collective agreement entitlements and direct union organizing and, further, that this information is treated as confidential.²¹

30. *Fourth*, Local 75 has provided extensive affidavit evidence from individual members and employees, in addition to the Sareen affidavit, confirming that the contact information the THEU-CSN used to contact at least 113 individuals was not voluntarily provided to the THEU-CSN by

¹⁸ Sareen Affidavit, MR, Tab 2, CL A30, ¶55. A30

¹⁹ *Baca v Tatarinov*, 2017 ONSC 2935 (CanLII) ["*Baca*"].

²⁰ Sareen Affidavit, MR, Tab 2, CL A31, ¶¶57 and 58. A31

²¹ Sareen Affidavit, MR, Tab 2, CL A30-32, ¶¶55, 56, 59 and 60. A30

those individuals (nor is such information, personal addresses and cell numbers, publicly available).²² Local 75 had requested that the individual defendants return all Local 75 documents and copies in their possession when they ceased to be employed with Local 75 in early 2018 and provided termination letters issued to certain of these defendants making this request, consistent with their contractual obligations under Article 16 (m) of the IU's Constitution, such that the THEU-CSN has no lawful explanation for possessing such information.²³

31. *Finally*, Local 75 has provided a detailed description of the circumstances by which the Defendants accessed Local 75's membership contact information. Local 75 has also set out specific circumstances, including the Defendants' attempts to solicit support from individuals such as Josh Cuasay, Abdalla Idris and Eulalia Marcos, who are not currently working in a Local 75 bargaining unit but were in 2017 and 2018, as conclusive evidence that the THEU-CSN is using stale contact information that it could not have obtained from anywhere other than Local 75.²⁴

2. A Rule 44 Order *Should* be Granted

32. Having established that it is *can* access Rule 44 relief, Local 75 must also establish that such relief *should* be granted by the Court by satisfying the following three-part test: (1) there are substantial grounds for the plaintiff's assertion that it is the legal owner or entitled to possession of the property; (2) there are substantial grounds for its claim that the property is being unlawfully detained by the defendants; and, (3) the balance of convenience favours the plaintiff.²⁵

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²² Sareen Affidavit, MR, Tab 2, CL A28-29, ¶¶50 – 52 and 54; Cusay Affidavit, MR, Tab 3, CL A319, ¶6; Ghebre MR, Tab 4, CL A358-361; Wimalendra Affidavit, MR, Tab 5, A362-364, CL A; Idris Affidavit, MR, Tab 6, CL A365-368, ¶¶3 – 8; Krishnamoorthy Affidavit, MR, Tab 7, CL A370-374; Seyoum Affidavit, MR, Tab 8, CL A375-378; McKenzie Affidavit, MR, Tab 9, CL A379-381; Dublin Affidavit, MR, Tab 10, CL A382-386.

²³ Sareen Affidavit, MR, Tab 2, CL A23, A34-143, A307-311, ¶35 and Exhibits 1, 7 and 8.

²⁴ Sareen Affidavit, MR, Tab 2, including CL A29, ¶¶51 and 54; Cusay Affidavit, MR, Tab 3, A317-322; Idris Affidavit, MR, Tab 6, A365-369.

²⁵ *Baca* at ¶¶27-28; *Dong v. J. Lockwood Leasing*, 2023 ONSC 5228 (CanLII) at ¶6.

33. Local 75 meets all three prongs of the Rule 44 test.

Prongs 1-2 of the Rule 44 Test

34. The “substantial grounds” criteria at prongs 1 and 2 of the test requires the Plaintiffs to demonstrate with a “high degree of assurance” that they will be successful at trial. This is a less onerous standard to meet than the “strong *prima facie* case” requirement for obtaining a *Mareva* injunction, though it requires meeting more than the “substantial issue” test applied generally in injunction cases. Courts have held that the “substantial ground” criteria will be met where there is clear documentation supporting the plaintiff, such as the envelopes Local 75 has provided that are addressed to Josh Cuasay and Eulalia Marcos at their home addresses.²⁶

35. The Claim sets out multiple causes of action in contract and tort that would enable Local 75 to establish that it is the legal owner and/or is otherwise entitled to the possession of Confidential Information currently being used by the Defendants. Local 75 simply needs to establish that there is a high degree of assurance that it will be successful at trial in establishing at least one of these causes of action. We review the elements of these causes of action briefly.

36. Local 75 asserts breach of contract. The elements of this cause of action are the existence of a contract and the breach of a contractual term.²⁷ As both members and employees of Local 75 and the IU, the individual defendants were parties to one or more contracts with Local 75, the terms of which were established by the union’s governing documents and by implied terms determined by the statutory regime affecting unions generally as well as the labour law principles that courts have

²⁶ *Clark Door of Canada Ltd. v. Inline Fiberglass Ltd.*, 1996 CarswellOnt 193, [1996] O.J. No. 238, Abbreviated Book of Authorities [“BOA”], Tab 1 at ¶23; Cusay Affidavit, and Exhibit 1 thereto, MR, Tab 3, CL A317-357; Sareen Affidavit, MR, Tab 2, and Exhibit 10 thereto, MR, Tab 2, CL A13-32 & A315. A322 A315 A13 A317

²⁷ *Atlantic Lottery Corp. Inc. v. Babstock*, 2020 SCC 19 (CanLII) at ¶91.

fashioned over the years.²⁸ Article 16(m) of the IU’s Constitution expressly prohibits “[r]etaining for his or her own use, or failing to deliver to his or her successor in any office or position, any property of UNITE HERE or of an affiliate”.²⁹ By retaining the Confidential Information, the individual defendants breached this contractual term. They breached other terms too. These are express and implied terms that prohibit working against the interests of Local 75 and the IU generally and supporting rival trade unions specifically.

37. As employees of Local 75 and the IU, the individual defendants also owed an implied duty of fidelity and good faith. Such a duty is recognized to prohibit the retention of client lists and other confidential information.³⁰ An employee may also owe a fiduciary duty to his or her employer where the employee has discretionary power to affect adversely the employer's interests and the employer is vulnerable to the exercise of that power.³¹ Given the access the individual defendants had to Local 75’s members’ and their information, the individual defendants were likely fiduciaries.

38. Retaining and using the Confidential Information for the purpose of facilitating a raid is contrary to the implied obligations the individual defendants continue to owe to Local 75.

39. In the Action, Local 75 also asserts breach of confidence. To establish this, Local 75 must satisfy a three-part test: (1) confidential information was conveyed; (2) the information was conveyed in confidence; and, (3) the information was misused by the Defendants to the Local 75’s detriment.³² Local 75 meets these tests.

²⁸ *Berry v. Pulley*, [2002 SCC 40 \(CanLII\)](#), [2002] 2 SCR 493 at ¶48.

²⁹ Sareen Affidavit, MR, Tab 2, and Exhibit 1 thereto, MR, Tab 2, CL A13-A143.

A34

A13

³⁰ *R.T. Investment Counsel Inc. v. Werry*, [1999 CanLII 5886 \(BC SC\)](#) at ¶23; *Anderson, Smyth & Kelly Customs Brokers Ltd. v. World Wide Customs Brokers Ltd.*, [1996 ABCA 169](#) at ¶28.

³¹ *Enbridge Gas Distribution Inc. v. Marinaccio*, [2012 ONCA 650 \(CanLII\)](#) at ¶16.

³² *Lac Minerals Ltd. v. International Corona Resources Ltd.*, [\[1989\] 2 S.C.R. 574](#) [“*Lac Minerals*”], at p. 635.

40. Confidential information is: information that is confidential because it has not been made public; or, information that may have been assembled from publicly available materials but amounts to a confidential work product because its assembly required the application of some independent thought process.³³

41. The information tendered as confidential must have a quality of confidence,³⁴ assessed on a case-by-case basis. Factors considered include: (a) the extent to which the information is known outside the business; (b) the extent to which the information was acquired in the course of employment; (c) the extent to which it is known by other employees or others involved in the business; (d) measures taken to guard the secrecy of the information; (e) the ease or difficulty with which the information can be properly acquired or duplicated by others; and, (f) whether the holder and taker of the secret treated the information as confidential.³⁵

42. The Confidential Information has strong indicators of a quality of confidence because it is highly guarded by employers, it was resource-intensive to assemble, and it is protected by the terms that governed the individual defendants' employment.³⁶ The Confidential Information is also not publicly available: it contains personal contact information which is generally regarded as private.

43. Breach of confidence also requires that the confidential information be conveyed in confidence. This assessment is made on an objective test considered from the perspective of a reasonable person. The assessment is whether the circumstances surrounding the communication

³³ *Lac Minerals*, at [p. 635](#) citing Lord Greene in *Saltman Engineering Co. v. Campbell Engineering Coy.* (1948), 65 R.P.C. 203, [1963] 3 All E.R. 413n (C.A.), (leave to appeal to House of Lords refused) at 215 [R.P.C.], BOA, Tab 2.

³⁴ *Lac Minerals*, at [p. 635](#).

³⁵ *Donaldson Travel Inc. v. Murphy et al.*, [2016 ONSC 740](#), at ¶142; *Pharand Ski Corp. v. Alberta*, [1991 CanLII 5869 \(AB QB\)](#), at ¶136 citing *Ansell Rubber Co. v. Allied Rubber Industries Pty. Ltd.*, [1967] V.R. 37, BOA, Tab 3 and *Deta Nominees Pty. Ltd. v. Viscount Plastics Products Pty. Ltd.*, [\[1979\] V.R. 167](#) at 193.

³⁶ Sareen Affidavit, MR, Tab 2, CL A31-143, ¶¶59, 60 and Exhibit 1. [A31](#) [A34](#)

would cause a reasonable person in the individual defendants' position to know that the information was being shared confidentially.³⁷ This is a contextual and fact-sensitive analysis.³⁸

44. As trade union officials, the individual defendants knew that membership lists and employee contact information are extremely valuable assets and are perhaps a trade union's most valuable assets.³⁹ The Confidential Information was accessible to them purely in their capacity as employees or agents of Local 75. There can be no questions that the Confidential Information was conveyed to these defendants in confidence.

45. Finally, breach of confidence requires that the confidential information be used in a manner that was not authorized by the Plaintiffs.⁴⁰ The Plaintiffs must also establish that this misuse has been detrimental to them.⁴¹ The Confidential Information is currently being used by the THEU-CSN to mount a raid campaign against Local 75. This conduct threatens Local 75's very existence as a trade union. The Ontario Labour Relations Board has recognized that membership contact lists are tactically significant in the context of a union organizing campaign.⁴² In a proceeding involving the same parties to this Action, the Board noted that the statutory scheme governing raiding provides incumbent unions with a "structural advantage" associated with access to member contact information.⁴³ By using the Confidential Information to mount a raid campaign, the THEU-CSN is attempting to circumvent this statutory scheme, secure an unlawful head start, and undermine

³⁷ *Lac Minerals*, at p. 635.

³⁸ *Sabre Inc. v. International Air Transport Association*, 2011 ONCA 747, at ¶17.

³⁹ Sareen Affidavit, MR, Tab 2, CL A31-32, at ¶59. A31

⁴⁰ *Lac Minerals*, at p. 642.

⁴¹ *Rodaro v. Royal Bank*, 2002 CanLII 41834 (ON CA), at ¶48; *Catalyst Capital Group Inc. v. Moyse*, 2016 ONSC 5271, at ¶69.

⁴² *International Union, United Automobile, Aerospace and Agricultural Implement Workers of America v. Tri-Canada Inc.*, 1981 CanLII 1010 (ON LRB) at ¶¶20 and 21.

⁴³ *THEU-CSN* at ¶203.

support for Local 75. This, in addition to facilitating raiding, reduces Local 75's bargaining power and, in turn, the collective agreement outcomes it can obtain for the employees it represents.⁴⁴

46. Local 75 has also asserted that the Defendants have committed several property and economic torts including trespass to chattels, conversion, detinue and unlawful interference with economic relationships.

47. The tort of trespass to chattels will simply be established by any direct touching of another person's goods, unless such touching is justified by law. The plaintiff must merely show that it was in possession of the goods at the material time.⁴⁵ THEU-CSN's ongoing possession of the Confidential Information which resides in Local 75's databases is such a trespass.

48. For conversion, the wrongful act may take the form of any intentional dealing or interference with the chattel inconsistent with the rights of the person entitled to its possession. For detinue, the wrongful act consists of the wrongful withholding of the chattel.⁴⁶ The Confidential Information is currently possessed by the Defendants and being used to solicit Local 75's members. These facts, supported by the evidence in Local 75's motion record, constitute substantial grounds for the purpose of establishing with a high degree of assurance that these property torts will succeed.

49. Finally, the tort of unlawful interference with economic relationships consists of three elements: (a) the defendant must have intended to injure the plaintiff's economic interests; (b), the interference must have been by illegal or unlawful means; (c), the plaintiff must have suffered

⁴⁴ Sareen Affidavit, MR, Tab 2, CL A15-17, A26, at ¶¶12, 15-18 and 42.

⁴⁵ Bruce Feldthusen & Louise Bélanger-Hardy, Halsbury's Laws of Canada - Torts (2020 Reissue) (online) at HTO-19, BOA, Tab 5, an older version of this section cited with approval in cited in *Century 21 Canada Limited Partnership v. Rogers Communications Inc.*, 2011 BCSC 1196 (CanLII) at ¶285.

⁴⁶ *Kew v. Konarski*, 2020 ONSC 4677 (CanLII) at para. 22; *Sui v. Chitiz*, 2022 ONSC 2989 (CanLII) at ¶¶181-182.

economic harm or loss as a result.⁴⁷ By retaining and using the Confidential Information contrary to their contractual obligations, the Defendants are now seeking to solicit Local 75's members. This constitutes unlawful interference with Local 75's economic relationships.

Prong 3 of the Rule 44 Test – The Balance of Convenience

50. Local 75 must demonstrate that, on a balance of convenience, it will suffer greater harm if relief is not granted than the responding party would suffer if the relief requested is granted.

51. Local 75 will suffer significant harm if the Confidential Information continues to be used by the THEU-CSN to solicit its members. Local 75 has or will soon have 27 separate bargaining units in the statutory open period. A loss of bargaining rights at any of these properties will lead to a reduction in Local 75's bargaining power, its capacity to engage in pattern or coordinated bargaining, and in the efficiencies generated by Local 75's ability to pool risk to reduce the cost of providing high quality benefits to its members. This harm would be long-term and potentially permanent. It will likely be at least three or four years before Local 75 can seek to re-establish bargaining rights at any properties the THEU-CSN successfully raids. In the interim, bargaining outcomes reflecting Local 75's diminished bargaining power will be incorporated into the collective agreements it negotiates and will become "baked into" these collective agreements through future rounds of bargaining.⁴⁸

52. Conversely, the THEU-CSN will suffer minimal harm if it is required to return the Confidential Information to Local 75. The THEU-CSN currently has no statutory interest in any of

⁴⁷ *Grand Financial Management Inc. v. Solemio Transportation Inc.*, [2016 ONCA 175 \(CanLII\)](#) at ¶62.

⁴⁸ Sareen Affidavit, MR, Tab 2, CL A15-17, A26, A31, at ¶¶12, 15-18, 42 and 58.

A15

A26

A31

the 27 properties that are or will soon be in an open period. If it turns out that the THEU-CSN was entitled to possess the Confidential Information, it can be made whole through damages.

53. It is a counsel of prudence, all things being equal, to preserve the *status quo*.⁴⁹ In the present case, preserving the *status quo* means preserving the labour relations *status quo* where Local 75 is the designated bargaining agent for the 27 properties. Allowing the THEU-CSN to raid these properties using the Confidential Information could lead to long-term, irreversible outcomes. In the circumstances, prudence counsels granting the order requested by Local 75.

3. The requested orders are consistent with Rule 44

54. Section 104 and Rule 44 permit this Court to make an interim order for the recovery of personal property. In doing so, Rule 44.03(c) permits the court to “make such other order as is just.” In addition to seeking the recovery of the Confidential Information, Local 75 also seeks orders that would restrain the Defendants from disclosing or using the Confidential Information, require them to permanently delete any copies of the Confidential Information, require them to deliver electronic devices to Local 75’s designate for forensic inspection by a third party in order to ensure all Confidential Information and copies thereof has been removed, and require the Defendants to provide Local 75 with a sworn statement describing the nature and location of the Confidential Information and submit to examinations under oath regarding the same.

55. In *Oliveira*, another case involving a former trade union official who improperly retained and threatened to misuse a membership contact list, the Court ordered similar relief.⁵⁰ The orders

⁴⁹ *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 [“RJR”], at ¶75.

⁵⁰ File Direction/Order of Justice Ferguson, dated December 23, 2020 and Order of Justice Ferguson, dated December 23, 2020 in *Oliveira v. Oliveira*, CV-20-652528 (unreported), BOA, Tab 4; Also see *Oliveira v. Oliveira*, 2023 ONCA 520 (CanLII) at ¶24 where this order is reproduced alongside a recitation of the facts.

Local 75 is requesting are consistent with those granted in *Oliveira*. They are necessary to bring about the purpose of a Rule 44 order since the property here is in an electronic format and can be digitally reproduced. A restraint on the Defendants' use and disclosure of the Confidential Information is necessary to ensure that the Defendants do not subvert an order to return by returning the Confidential Information but continuing to use copies. The orders are the obvious corollary of an order to return property that can be electronically copied. In *Rae*, this Court (quoting the English Court of Appeal) held that, without a deletion order, confidential information would still be "out there", thereby rendering relief under Rule 44 illusory.⁵¹

56. With respect to an order appointing an independent third-party forensic inspector to conduct a forensic inspection of the Defendants' devices to ensure that all confidential contact information has been permanently and irrevocably deleted, Local 75 acknowledges that such an order is intrusive. However, such an order has been granted in similar cases,⁵² including *Oliveira*,⁵³ and it is warranted and proportionate in these circumstances where the privacy interests of the individual defendants can be protected through the appointment of a third-party. Local 75 has already retained an IT specialist who has outlined several steps they would take in order to conduct the inspection.⁵⁴

57. Finally, Local 75's request for a sworn statement describing the nature and location of the Confidential Information and that the Defendants submit to examinations under oath regarding that declaration is necessary to catalogue and trace the full extent of the assets that are the subject of the relief, including excerpts and copies of the Confidential Information that were created by the

⁵¹ *Rae v. Ecolab Co.*, [2023 ONSC 5995 \(CanLII\)](#) at ¶133.

⁵² *Hospex v. Edwards*, [2011 ONSC 3837](#).

⁵³ File Direction/Order of Justice Ferguson, dated December 23, 2020 and Order of Justice Ferguson, dated December 23, 2020 in *Oliveira v. Oliveira*, CV-20-652528 (unreported), BOA, Tab 4.

⁵⁴ June 3, 2024 Letter from William B. Ellwood to Stephen Moreau, Plaintiff's Supplementary Motion Record, Tab 1, Exhibit A, CL A401-418. **A401**

Defendants while it was in their possession. This type of relief is contained in the Superior Court's standard *Mareva* order.⁵⁵ The purpose of examinations in that context is to "breathe life" into the injunctive relief so that the plaintiffs have full knowledge of the assets that are subject to the order.⁵⁶ In this case, a sworn statement and examination will enable Local 75 to ensure that the requested order captures all copies, versions and excerpts of the Confidential Information such that the requested relief is actually effective.

B. Alternative Injunctive Relief

58. In the alternative, if the Court is not inclined or determines that it is unable to grant the relief sought by Local 75 under section 104 and Rule 44, Local 75 relies on the broader powers for injunctive relief conferred by section 101 and Rule 40. To obtain such relief, Local 75 must meet the well-known three-part *RJR* test: (1) a serious issue to be tried; (2) Local 75 will suffer irreparable harm if the injunction is refused; and, (3) the balance of convenience favours granting an injunction.⁵⁷

59. The standard of a serious issue to be tried simply requires Local 75 to show a non-frivolous cause of action.⁵⁸ This is a lower standard than the substantial grounds criteria Local 75 is required to meet under Rule 44: accordingly, Local 75 relies on its submissions previously in support of its position that there is certainly a serious issue to be tried.

⁵⁵ *Yan v. Chen*, [2014 ONSC 267 \(CanLII\)](#) at ¶12.

⁵⁶ *Sakab Saudi Holding Company v. Al Jabri*, [2021 ONSC 3909 \(CanLII\)](#) at ¶26.

⁵⁷ *RJR*, at ¶43.

⁵⁸ *RJR*, at [pp. 334](#), [337](#) and [338](#); *R. v. Canadian Broadcasting Corp.*, [2018 SCC 5](#), at ¶¶17-18.

60. As Local 75 has already addressed the balance of convenience criteria under its Rule 44 submissions, it only needs to address the irreparable harm factor here to justify its request for Rule 40 relief.

61. Irreparable harm is harm that cannot be quantified in damages or harm that cannot later be rectified or remedied in damages. "Irreparable" connotes a type of harm rather than its magnitude.⁵⁹ In cases alleging misuse of confidential information, irreparable harm is to be presumed.⁶⁰

62. The THEU-CSN is using the Confidential Information to solicit Local 75's members, to raid its bargaining rights, and to diminish Local 75's standing in the eyes of the employees who it represents. The Defendants' conduct undermines Local 75's bargaining power and, if the THEU-CSN's raids are successful, its market share in the hotel sector.

63. As a result of the THEU-CSN's conduct, Local 75 will be less capable of pursuing strategies of pattern or coordinated bargaining and it will therefore be unable to extract the most advantageous collective agreement terms for its members. This is exactly what occurred as a result of the 2018 Unifor raids.⁶¹

64. Local 75 has established that there is "a high degree of probability that the harm will in fact occur," by providing proof of "imminent danger".⁶² We can analogize the present matter to cases where courts have held that the loss of permanent market share justify interim relief.⁶³ In the present matter, there is the added concern that the diminished bargaining power of Local 75 will become

⁵⁹ *RJR*, at ¶¶57-59

⁶⁰ *Carecor Health Services Ltd. v. Health Trans Services Inc.*, [2006 CanLII 21049](#) (S.C.J.), at ¶20; *TAPS Media Inc. v. Canadian Craft Brewers Association et al*, [2022 ONSC 960 \(CanLII\)](#) at ¶59.

⁶¹ Sareen Affidavit, MR, Tab 2, CL A26, ¶42.

⁶² *Canadian Civil Liberties Association v Toronto Police Service*, [2010 ONSC 3525](#), at ¶86.

⁶³ *ISkin Inc. v. Sa*, [2005 CanLII 19766 \(ON SC\)](#), at ¶7.

“baked in” to the collective agreements it negotiates forever, including into the non-monetary entitlements that form the bulk of what it negotiates.⁶⁴ Local 75’s benefit plans will also become more expensive as a result of reduced risk pooling if the THEU-CSN’s raiding campaign succeeds.⁶⁵

65. For the reasons set out above, Local 75 submits that the criterion of irreparable harm has been met and that the requested relief should be ordered under Rule 40 if Rule 44 is unavailable.

PART IV - ORDER REQUESTED

66. For the foregoing reasons the Moving Parties request the Order set out in their Notice of Motion, including costs.

67. The third party IT forensics advisor, if appointed, has likewise suggested an additional set of orders that it would benefit from having if appointed to inspect and recover and/or destroy the Confidential Information. The Moving Parties submit that those requested orders may be appropriate as well.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 5th day of June, 2024.



Stephen J. Moreau / Cole Eisen

⁶⁴ Sareen Affidavit, MR, Tab 2, CL A15-17, A26, ¶¶12, 13, 15-18 and 42. A15

⁶⁵ Sareen Affidavit, MR, Tab 2, CL A15, ¶12. A15