

# Court of King's Bench of Alberta

**Citation: Distinct Real Estate USA 2 v Wazonek, 2025 ABKB 275**

**Date:** 20250506  
**Docket:** 2501-00473  
**Registry:** Calgary

Between:

**Distinct Real Estate USA 2, LP, Distinct Real Estate LP 2, 2304460 Ontario Inc., Alberta Capital Corporation, Distinct Real Estate 2, LP by 2304460 Ontario Inc., Distinct Real Estate USA 2, LP by its limited partner Distinct Real Estate LP 2 by its limited partner Alberta Capital Corporation**

Plaintiffs/Applicants/Cross-Respondents

- and -

**Phillip Wazonek, Distinctive Realty Services Ltd., and 1508632 Alberta Ltd.**

Defendants/Respondents/Cross-Applicants

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**Reasons for Decision  
of the  
Honourable Justice M.A. Marion**

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## **I. Introduction**

[1] The plaintiffs/applicants (**Plaintiffs** or **Applicants**), named as Distinct Real Estate USA 2, LP (**Crane Manor US LP**), Distinct Real Estate LP 2 (**Canadian Crane Manor LP**), 2304460 Ontario Inc. (**230 Ontario**) and Alberta Capital Corporation (**ACC**), in various capacities, seek (**Application**):

- (a) an order that Crane Manor US LP can bring this action in its own name or through one of the other Applicants; and
- (b) an attachment order under the *Civil Enforcement Act*, RSA 2000, c C-15 (*CEA*) as against the defendant Philip Wazonek (**Wazonek**)<sup>1</sup>.

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<sup>1</sup> The Applicants originally also sought an attachment order against 150 Alberta, but have withdrawn that request.

[2] The cross-applicants/defendants (**Cross-Applicants** or **Defendants**), Philip Wazonek (**Wazonek**), Distinctive Realty Services Ltd. (**DRS**) and 1508632 Alberta Ltd (**150 Alberta**), seek (**Cross-Application**):<sup>2</sup>

- (a) an order directing the Clerk of the Court to pay to their counsel C\$145,000 paid into Court on January 29, 2025 (**Court Funds**) pursuant to my January 23, 2025 interim without prejudice attachment order (**Interim Order**);
- (b) dismissing the Plaintiffs' Application;
- (c) setting aside the statement of claim; and
- (d) costs.

[3] These proceedings involve, in part, a multi-unit residential property in Memphis, Tennessee known as "Crane Manor" (**Crane Manor Property**). The Crane Manor Property was purchased in March 2021 by Crane Manor US LP, a limited partnership created under Delaware law. The project did not go as planned. Parties involved allegedly did not live up to each other's expectations. Later, the Crane Manor Property was sold (**Sale**). This action relates to Crane Manor US LP's management (including the Sale) and the use of its funds (including the Sale proceeds).

[4] The ownership of and interests in Crane Manor US LP was and is complex:

- (a) Crane Manor US LP has a general partner, although there is presently a dispute about which entity is its general partner. The Plaintiffs assert that its general partner continues to be the original general partner, namely Distinct Real Estate USA 2 GP, Inc (**First Crane Manor US GP**)<sup>3</sup> and the Defendants assert its general partner is Crane GP US, Inc (**Second Crane Manor US GP**).<sup>4</sup> Both First Crane Manor US GP and Second Crane Manor US GP are Delaware corporations owned 50% by a corporation owned or operated by Gordon Berger (**Berger**) or his spouse Ruth Berger (namely, 230 Ontario in respect of First Crane Manor US GP and PanFinancial Investments Inc in respect of Second Crane Manor US GP) and 50% by 150 Alberta (an Alberta corporation owned and operated by Wazonek). For ease of reference, I sometimes refer to Crane Manor US LP's general partner as "**Crane Manor US GP**" as a neutral way to refer to either First Crane Manor US GP or Second Crane Manor US GP;
- (b) Crane Manor US LP has several limited partners. Over 80% of its limited partnership units are owned by Canadian Crane Manor LP, an Alberta limited partnership. Canadian Crane Manor LP's general partner is Distinct Real Estate GP 2 Inc (**Canadian Crane Manor GP**), which in turn is owned 50% by 230 Ontario

<sup>2</sup> The Cross-Application also included relief related to financial disclosure and undertakings as to damages, but acknowledged those issues were rendered moot by the time I heard the parties' applications, so they are not materially addressed in these Reasons.

<sup>3</sup> The Plaintiffs sometimes refer to this entity as the "US CM GP" and the Defendants refer to it as the "Original Crane Manor GP" or the "Former Crane Manor GP".

<sup>4</sup> The Defendants assert that this entity is operating as "Crane Manor GP US, Inc".

and 50% by 150 Alberta. Canadian Crane Manor LP's limited partnership units are held by various people and entities (including a significant portion held by ACC).

[5] The core of the dispute is a claim that Wazonek and his corporations sold or caused the Crane Manor US GP to effect the Sale of the Crane Manor Property without authorization, and to use the Sale proceeds or other Crane Manor US LP funds without authorization, for Wazonek and/or his corporations' benefit. The Plaintiffs also allege Wazonek otherwise engaged in unauthorized and fraudulent conduct *vis a vis* Crane Manor US LP. The Plaintiffs assert several claims against the Defendants, including fraud, knowing assistance, knowing receipt, conspiracy, fraudulent misrepresentation, deceit, misappropriation, conversion, and breach of fiduciary obligations.

[6] The Plaintiffs seek Court confirmation or authorization that the Plaintiffs may advance claims in the name of Crane Manor US LP "on its own", or on its behalf, because, they argue, the Crane Manor US GP is "under the control" of Wazonek and he will not allow the Crane Manor US GP to advance claims against Wazonek or his corporations. The Plaintiffs also assert that an attachment order under the *CEA* is appropriate against Wazonek because: (1) there are strong, or reasonably likely to be successful, claims against Wazonek and (2) that there are reasonable grounds to believe that Wazonek is dealing with his exigible property as contemplated by section 17(2)(b) of the *CEA*.

[7] The Defendants deny that the Plaintiffs have standing to pursue the claims in the statement of claim, deny that there are strong or reasonable claims against Wazonek, and deny that the elements of the *CEA* are met *vis-à-vis* Wazonek.

[8] For the reasons set out below:

- (a) the claim by Crane Manor US LP in its own name is struck, without prejudice to any future action which may be brought by or through its general partner;
- (b) the claims by Canadian Crane Manor LP, 230 Ontario and ACC, purportedly brought in the name of Crane Manor US LP are struck, without prejudice to any future derivative action brought by them on behalf of Crane Manor US LP as may be authorized by an appropriate Delaware court;
- (c) the direct claim by Canadian Crane Manor LP against the Defendants is declared to not have been properly brought by its general partner, but is not struck or set aside at this time, to allow an application seeking permission to commence a derivative action in its name to be filed within one month of these Reasons (failing which it is struck without further order);
- (d) the direct claims by 230 Ontario and ACC against the Defendants are not struck or set aside;
- (e) the Application for an attachment order against Wazonek is dismissed; and
- (f) the Court Clerk is directed to pay the Court Funds to the Defendants' legal counsel forthwith.

## II. Procedural Background

[9] On January 7, 2025, the Application first came before me *ex parte*, based on unfiled materials. It was adjourned so the Applicants could correct or supplement their evidence, following which the Applicants advised of their intention to provide the Defendants notice of the Application (which they did).

[10] On January 13, 2025, the Plaintiffs filed their statement of claim in this action (**Action**).

[11] On January 22, 2025, the Application was again before me. At that attendance, the Plaintiffs sought another adjournment of the Application so they could conduct questioning on an affidavit Wazonek had filed in response to the Application, but they argued that an interim attachment order should be granted in the meantime. The Defendants agreed that the matter be adjourned to allow the parties to conduct questioning on the affidavits and to file further evidence, but opposed the interim attachment order.

[12] I heard submissions on the interim application and reserved my decision. On January 23, 2025, I granted the Interim Order against Wazonek based substantially on the Court's form of template Marevan Injunction / Attachment Order Template<sup>5</sup>. The Interim Order froze some of Wazonek's assets to a capped amount of C\$145,000, with an exception to a maximum of \$75,000 for Wazonek's living expenses or legal costs in the Action. It was to be in place until February 26, 2025 (and then February 27, 2025), unless discharged earlier, at which time it was to be reviewed at the same time the Application was to be heard. The Interim Order provided it could be discharged upon the Defendants providing sufficient alternative security, including the payment of C\$145,000 into Court.

[13] On January 28, 2025, 230 Ontario and ACC filed undertakings as to damages.

[14] On January 29, 2025, the Defendants paid the Court Funds into Court.

[15] On February 27, 2025, after the parties engaged in a further evidentiary process and filed briefs, I heard the Application and the Cross-Application.

## III. Record

[16] The record on the applications is:

- (a) a December 20, 2024 Berger affidavit;
- (b) a January 6, 2025 Berger affidavit;
- (c) a transcript of the January 7, 2025 court proceedings;
- (d) a January 10, 2025 Berger affidavit;
- (e) a January 20, 2025 Wazonek affidavit;

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<sup>5</sup> <https://albertacourts.ca/kb/areas-of-law/commercial/templates-and-forms>.

- (f) a transcript of the January 23, 2025 court proceedings;
- (g) a January 30, 2025 Berger affidavit;
- (h) a February 4, 2025 Wazonek affidavit;
- (i) a transcript of the February 7, 2025 questioning of Wazonek on his affidavits, together with exhibits and Wazonek's responses to undertakings; and
- (j) a transcript of the February 10, 2025 questioning of Berger on his affidavits, together with exhibits and Berger's responses to undertakings.

#### **IV. Issues**

[17] The issues on these applications are:

- (a) Can or should this action be pursued by the Applicants in the name of, or on behalf of, Crane Manor US LP?
- (b) Should the statement of claim be set aside, or portions of it struck?
- (c) Should an attachment order be granted against Wazonek:
  - (i) Is there a reasonable likelihood that the claim against Wazonek will be established?
  - (ii) Are there reasonable grounds for believing Wazonek is dealing with (or is likely to deal with) his exigible property, otherwise than for his reasonable and ordinary business or living expenses, and in a manner that would seriously hinder enforcement of a judgment against him?
  - (iii) Should the Court exercise its discretion to grant an attachment order?
- (d) What should happen with the Court Funds?

#### **V. Analysis**

##### **A. Can or Should the Action Be Pursued by the Applicants in the Name of, or on Behalf of, Crane Manor US LP?**

[18] The statement of claim purports to advance the Action in the name of, or on behalf of, Crane Manor US LP, in three ways:

- (a) solely in the name of Crane Manor US LP;
- (b) in the name of Crane Manor US LP "by" 230 Ontario as a shareholder of its general partner (First Crane Manor US GP); and
- (c) in the name of Crane Manor US LP "by" Canadian Crane Manor LP as one of its limited partners, which in turn, purports to act by one of its own limited partners, ACC.

[19] The issue is whether any of these parties have standing to bring the action.

**1. Do the Applicants Have Standing to Pursue the Action “in the Name of” Crane Manor US LP?**

[20] The Applicants rely on rule 2.2(1), which provides that an “action by or against 2 or more persons as partners may be brought using the name of the partnership”.

[21] At common law, partnerships are a “collection of partners”, not distinct legal entities; they lack capacity to sue or be sued, such that historically at times all partners had to be named in legal proceedings: *Binscarth Holdings LP v Grant Anthony*, 2024 ONCA 522 at paras 51-53, 55, citing *Kucor Construction & Developments & Associates v Canada Life Assurance Co*, 1998 CanLII 4236 (ON CA) and *McCormick v Fasken Martineau DuMoulin LLP*, 2014 SCC 39 at para 30.

[22] Rule 2.2(1), like similar rules in other provinces, is a permissive rule that allows an action to be brought by or against partners using the name of the partnership to avoid having to name each individual partner: *Bidell Equipment LP v Caliber Midstream GP LLC*, 2017 ABQB 76 at para 64; *Axiom Foreign Exchange International v Rudiger Marketing Ltd*, 2024 ABKB 224 at para 42; *Binscarth* at para 38; *Asher Place Senior Residency Limited Partnership v Balcom*, 2021 BCCA 162 at paras 21-24. This is a procedural provision, not a substantive one. It does not answer the substantive question of who has authority to cause an action to be commenced in the name of a partnership, it simply facilitates the efficient naming of a partnership in an action commenced by someone with authority to do so.

[23] Crane Manor US LP’s original “Agreement of Limited Partnership” dated as of March 26, 2021<sup>6</sup> (**Original LPA**) provides, at clause 3.2 (emphasis added):

3.2 General Powers of the General Partner.

(a) **the General Partner shall have the power and authority on behalf of and in the name of the Partnership to take any and all actions in the best interest of the Partnership** required to serve the purpose and power of the Partnership set forth in Section 2.4 hereof and to perform all acts and enter into and perform all contracts and other undertakings which they may deem necessary or advisable or incidental thereto, and to have and possess the same rights and powers as any general partners in a partnership formed under the laws of the State of Delaware, including without limitation, to:

[...]

(v) **bring an action on behalf of** or litigate, arbitrate, negotiate or otherwise dispose of claims against **the Partnership as the General Partner may deem necessary**;

<sup>6</sup> Berger January 10, 2025 Affidavit, Exhibit E (Berger December 20, 2024 Affidavit Exhibit O).

[24] Clause 5.1 of the Original LPA provides that except “as otherwise expressly provided in this Agreement, the day-to day management and control of the Partnership shall be vested exclusively in the General Partner”.

[25] Clause 5.3(a) of the Original LPA provides that the limited partners “shall have no authority to act on behalf of the Partnership in connection with any matter, except as specifically provided in this Agreement”.

[26] There is a dispute about whether the Original LPA is the operative limited partnership agreement for Crane Manor US LP, or whether a Second Amended Agreement of Limited Partnership of Distinct Real Estate USA 2, LP dated October 1, 2022 (**2<sup>nd</sup> Amended LPA**)<sup>7</sup> is the operative agreement. However, the 2<sup>nd</sup> Amended LPA has virtually identical provisions set out above as the Original LPA.

[27] These provisions clearly vest the management of Crane Manor US LP, including commencing actions in its name, in its general partner. The Applicants have not pointed to any substantive law of Delaware that would change this conclusion. It is common ground that Crane Manor US LP’s general partner has not been involved in, and has not authorized the filing of, the Action.

[28] The Applicants argue that Wazonek is in control of the Crane Manor US GP, as well as Canadian Crane Manor GP, which causes several complications or barriers to the Applicants’ desire to cause Crane Manor US LP’s general partner to commence the action on Crane Manor US LP’s behalf. The Applicants argue that “in such circumstances, it is appropriate for the limited partnership to bring the action on its own behalf and to be allowed to do so notwithstanding the restrictive language in the limited partnership agreements”.<sup>8</sup>

[29] In my view, the Applicants essentially ask this Court to ignore, override, or amend the internal governance rules of a limited partnership created under Delaware law. Both the Original LPA and the 2<sup>nd</sup> Amended LPA for Crane Manor US LP reference that it “has been formed as a limited partnership in accordance with the Title 6, Chapter 17 of the Delaware Code, as amended from time to time ... by the filing of the Certificate on March 26, 2021”.

[30] The Applicants have not provided me any authority to suggest that this Court has or should exercise jurisdiction to ignore, override or amend the internal governance rules of a foreign limited partnership.

[31] I find that the Applicants do not have standing to bring an action in the name of Crane Manor US LP and that portion of the statement of claim is struck.

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<sup>7</sup> Wazonek January 20, 2025 Affidavit, Exhibit E.

<sup>8</sup> Applicants’ Brief at para 44.

**2. Do 230 Ontario or Canadian Crane Manor LP (by ACC) have Standing to Commence an Action “on behalf” of Crane Manor US LP?**

**a. Generally?**

[32] Based on the same provisions in the Original LPA and/or the 2<sup>nd</sup> Amended LPA, and the same reasoning as above, I find that 230 Ontario and Canadian Crane Manor LP (through its limited partner ACC), do not have authority to commence an action “on behalf” of Crane Manor US LP. Subject to relief that may be obtained from an appropriate Delaware court, only Crane Manor US LP’s general partner may commence an action on its behalf or in its name.

[33] There appears to have been a meeting of the Crane Manor US LP limited partners on November 28, 2024, which may have been for the purposes of removing the Crane Manor US GP. The results of this meeting are not before me, and there is no evidence that either 230 Ontario or ACC have become Crane Manor US LP’s general partner.

[34] There is an additional problem with Canadian Crane Manor LP attempting to commence the action on behalf of Crane Manor US LP. Canadian Crane Manor LP is a limited partnership under the *Partnership Act*, RSA 2000, c P-3. The action by Canadian Crane Manor LP (on behalf of Crane Manor US LP) is purported to be brought through its own limited partner, ACC, not its general partner Canadian Crane Manor GP. Under the Amended and Restated Limited Partnership Agreement for Canadian Crane Manor LP (**Canadian LPA**)<sup>9</sup>, Canadian Crane Manor GP has the “full and exclusive” right to manage, control, administer and operate the business and affairs of Canadian Crane Manor LP (clause 7.1(a)(ii)), and full power and authority to commence actions in connection with the partnership (clause 7.2(m)). It does not appear that ACC has authority to cause Canadian Crane Manor LP to commence an action purportedly on behalf of Crane Manor US LP. No application has been filed in this Court to allow ACC to take control of the affairs of, or to commence a derivative action on behalf of, Canadian Crane Manor LP.

**b. As a Derivative Action?**

[35] The Applicants alternatively argue that they should be allowed to pursue the Action as a derivative action, relying on common law exceptions to the rule in *Foss v Harbottle* (1843), 2 Hare 461, which allow for derivative actions, as applied to limited partnerships.

[36] In *Asher Place*, the British Columbia Court of Appeal confirmed that, in certain circumstances, a limited partner could be authorized to bring a common law derivative action in the name of and on behalf of a limited partnership, including as against the general partner: *Asher Place* at paras 41-44. In *1115830 BC Ltd v Treasure Bay HK Limited*, 2022 BCCA 380, the British Columbia Court of Appeal confirmed that, in British Columbia, no leave was required to commence a common law derivative action: *Treasure Bay* at para 53.

[37] In *Binscarth*, the Ontario Court of Appeal comprehensively reviewed the application of derivative action principles to Ontario limited partnerships. It held that a derivative action was not

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<sup>9</sup> Berger January 10, 2025 Affidavit, Exhibit E (December 20, 2024 Affidavit, Exhibit P). The Canadian LPA is described by Berger as the form of the limited partnership agreement in place for Canadian Crane Manor LP at the time he and 230 Ontario became involved with the Crane Manor project, but the Applicants also rely on it as the existing form of limited partnership agreement for Canadian Crane Manor LP: Applicants’ Brief at paras 40-41.

needed or necessary for direct claims by limited partners against the general partner or its sole directors, because a direct action was available for breach of the limited partnership agreement or breach of fiduciary duty: *Binscarth* at paras 84-89.

[38] In *Binscarth*, the Court then went on to hold that where limited partners do not have a direct cause of action against third parties, there may be an equitable gap that permits the Court to grant leave to a limited partner to pursue a derivative action on behalf of and in the name of a limited partnership, based on the statutory test applied to corporations: (1) the general partner has refused to pursue a claim against a third party; (2) the limited partner is acting in good faith; and (c) it appears to be in the best interests of the limited partnership that the action be brought: *Binscarth* at para 103. Non-exhaustive factors to consider may include whether the general partner's failure to act is unreasonable or in bad faith; the existence of any conflict of interest between the general partner and the proposed third-party defendant; the presence of a strong *prima facie* case against the third party; and alternative, non-derivative remedies that may be available to the limited partner: *Binscarth* at para 104.

[39] Neither party provided me any Alberta case expressly or clearly addressing whether a derivative action can be commenced (whether with or without leave) on behalf of a limited partnership under Alberta common law. In *Quikjets Inc v Q Private Jets Limited Partnership*, 2015 ABQB 702 it was not necessary to decide the issue because the alleged wrongdoers were no longer in control of the partnership. In *0738827 BC Ltd v CPI Crown Properties International Corporation*, 2013 ABQB 499, the Court held that limited partners had a direct cause of action against the general partner and did not have to grapple with the rule in *Foss v Harbottle*.

[40] Ultimately, the problem with the Applicants' reliance on a possible common law right to file, or a right to have the Court authorize, derivative actions in the name of limited partnerships, is that the Alberta common law (perhaps as may be persuasively informed by *Binscarth* and *Asher Place*) governs that right in respect of *Alberta* limited partnerships, not *Delaware* limited partnerships like Crane Manor US LP.

[41] Further, under Alberta law, the law of the place of the formation of a limited partnership governs the status of the partnership and the partners: *Devon Canada Corporation v PE-Pittsfield, LLC*, 2008 ABCA 393 at para 27, citing *International Assn of Science and Technology for Development v Hamza*, 1995 ABCA 9. For Crane Manor US LP, that is the law of Delaware. The Applicants have not proven the law of Delaware, but it appears from the materials provided by the Defendants that there is a statutory regime in Delaware expressly governing derivative actions in respect of Delaware limited partnerships. That regime contemplates proceedings in the Delaware Court of Chancery.

[42] Where there is an express statutory remedy relating to creatures of statute such as corporations (or, by analogy, limited partnerships), it is well accepted as a matter of Canadian law that it is the court empowered by that statute that has jurisdiction (or alternatively should exercise jurisdiction) to grant the statutory remedy: *Douez v Facebook, Inc*, 2017 SCC 33 at para 109 (Abella J concurring); *Obodo v Trans Union of Canada, Inc*, 2021 ONSC 7297 at paras 198-199; *Ironrod Investments Inc v Enquest Energy Services Corp*, 2011 ONSC 308 at paras 14 and 16; *Incorporated Broadcasters Ltd v Canwest Global Communications Corp 2001 CanLII 28395 (ON SC)* at paras 100 and 111-113, aff'd 2003 CanLII 52135 (ON CA); *CAE Wood Products GP v Coe Newnews/McGehee ULC*, 2011 ONSC 1617 at para 31; *Gould v Western Coal Corp*, 2012 ONSC 5184 at paras 328-339; *Zi Corporation v Steinberg, 2006 ABQB 92* at paras 76-78; *Voyage*

*Co Industries Inc v Craster*, 1998 CanLII 1776 at para 12; *Nord Resources Corp v Nord Pacific Ltd*, 2003 NBQB 201 at para 17; *Raymond Henry Chyc Shelley Pring Family Trust v Concentric Agriculture Inc*, 2020 ONSC 7820 at para 20; *1523428 Ontario Inc / JB&M Walker Ltd v TDL Group*, 2018 ONSC 5886 at para 29; *Mickiewicz v Unstoppable Domains Inc*, 2025 BCSC 575 at paras 20-21.

[43] It is unknown to me whether there exists common law jurisdiction in Delaware to commence derivative actions, over and above the statutory provisions in the Delaware Code, and whether court permission is required. Any such law was not proven by either party.

[44] Ultimately, it is not clear to me that I have jurisdiction to permit a derivative action on behalf of Crane Manor US LP. Ultimately, I find that is not an issue I need to decide in this case because, even if I do have jurisdiction, for the reasons discussed immediately below, I decline to exercise any such jurisdiction.

### 3. Should the Court Exercise Any Jurisdiction it May Have in Any Event?

[45] Even if I could vary or ignore Crane Manor US LP's Original LPA/2<sup>nd</sup> Amended LPA, or could entertain an application to commence a derivative action on behalf of Crane Manor US LP, I would decline to do so for a few reasons.

[46] First, the standing issue was a concern I raised during the *ex parte* attendance on January 7, 2025 and the Applicants have not materially or adequately addressed my concern.

[47] Second, as noted above, the substantive laws of Delaware apply to the internal management of Delaware limited partnerships (including derivative actions). The Applicants have not formally proven the law of Crane Manor US LP's domicile, being Delaware law. The applicable principles for proving foreign law are summarized in *Orica Canada Inc v ARVOS GmbH*, 2024 ABKB 97 at para 50:

[50] Alberta Courts have framed the applicable principles as follows: (1) foreign law is a question of fact and must be proved as a fact; (2) foreign law must be specifically plead by the party who wants to rely upon it; (3) the onus of proving foreign law is on the party wishing to rely on the foreign law; and (4) if foreign law is not plead or proven, a court will apply the law of the forum: *Phillips v. Avena*, 2006 ABCA 19 (Alta. C.A.) at para. 72, citing *Royal Trust Corp. of Canada v. A.S.(W.)S.*, 2004 ABQB 284 (Alta. Q.B.), starting at para. 24.; *CNH Capital Canada Ltd. v Highway Equipment Sales Ltd.*, 2014 ABQB 6 (Alta. Master) at para. 5.

[48] Ironically, although not formally proven, it is the Defendants that provided the Court with certain portions of the Delaware Code. The apparent existence of a comprehensive regime in Delaware (including in respect of derivative actions) reinforces my conclusion.

[49] Third, an analogy can be drawn to Alberta courts' treatment of jurisdiction over foreign corporations. A local court may hear matters concerning ownership and transfer of shares in a foreign corporation as long as they apply, as a choice of law, the law of the place of incorporation; however the fact that the law of the domicile applies may affect whether a court should exercise

its discretion to assume jurisdiction: *Phillips v Avena*, 2006 ABCA 19 at para 82, citing *Voyage Co* and *National Trust C Ltd v Ebro Irrigation & Power Co Ltd*, 1954 CanLII 82 (ON SC).

[50] It is well established, at least in part as a matter of judicial comity, that courts in one jurisdiction will not issue orders purporting to direct or regulate the internal affairs or governance of a corporation incorporated in another jurisdiction, based at least in part on principles of international comity: *Incorporated Broadcasters* at para 104; *Cira v Rico Resources Inc*, 2004 CanLII 18394 (ONSC) aff'd 2006 CanLII 3257 at para 3; *Zi Corporation* at paras 75, 79; *Wheatland Industrial Park Inc (Re)*, 2013 BCSC 27 at para 36.

[51] In my view, these principles apply by analogy to the internal affairs or governance of statutorily created limited partnerships, including to the authority to commence actions in the name of the partnership (as a derivative action or otherwise), and with respect to the removal of general partners.

[52] As a matter of judicial comity, I would not expect a Delaware court to ignore, override or amend the internal management or governance rules of an Alberta limited partnership, or to purport to authorize commencement of derivative actions in its name. It is important for this Court to reciprocate those expectations absent compelling circumstances not to do so. No such compelling circumstances exist. It is not enough for the Applicants to say that it is inconvenient for them to go to Delaware to seek relief about Crane Manor US LP's internal management.

[53] In all the circumstances, I would decline to exercise any jurisdiction I may have to ignore, override or amend the governance rules for Crane Manor US LP to allow this action to be brought in the name of Crane Manor US LP, as a derivative action or otherwise, without that being done by its general partner or under the authorization of an appropriate Delaware court.

#### 4. Conclusion

[54] I find that this action cannot be commenced only in Crane Manor US LP's name, or on its behalf, unless that is done by its general partner or pursuant to an authorization granted by a Delaware Court. Neither of those things have happened here.

#### B. Should the Statement of Claim be Set Aside, or portions of it Struck?

[55] Rule 3.68(1) provides that if circumstances warrant and a condition under rule 3.68(2) applies, the Court may (among other things) order that all or any part of a claim be struck out, that a claim be amended or set aside, or that an action be stayed. Rule 3.68(2) provides that the conditions for the order are one or more of several factors, including if a claim discloses no reasonable claim, is frivolous, irrelevant or improper, constitutes an abuse of process, or has an irregularity that is so prejudicial to the claim that it is sufficient to defeat the claim.

##### 1. Claims by or on behalf of Crane Manor US LP

[56] Actions commenced without authority, right or standing are an abuse of process, or disclose no reasonable claim, and should be struck: *Quikjets* at paras 22-26; *Composite Technologies Inc v Shawcor Ltd*, 2017 ABCA 160 at para 6; *Alberta Union of Provincial Employees v Her Majesty the Queen (Alberta)*, 2021 ABQB 371 at para 13, citing *Soldier v Canada (Attorney General)*,

2009 MBCA 12 at paras 36-37; *Onischuk v Alberta*, 2013 ABCA 129 at paras 8-9, citing *Downtown Eastside Sex Workers United Against Violence Society v Canada*, 2012 SCC 45.

[57] I have found that the claims filed in the name of Crane Manor US LP alone, and in the name of Crane Manor US LP by 230 Ontario, and by Canadian Crane Manor LP (by ACC), were all unauthorized because they were not commenced by or on behalf of the Crane Manor US LP general partner. The claims made by those plaintiffs in those capacities are struck, without prejudice to the right of any of them to later commence an action (or to seek to amend this action to re-instate them as plaintiffs in these capacities) if they become the general partner of Crane Manor US LP or if a Delaware court of competent jurisdiction has confirmed they are authorized to commence such an action (whether derivative or otherwise).

[58] The striking of the above claims does not end the matter. Although the Applicants' main focus has been on claims brought by or in the name of Crane Manor US LP, and indeed their Brief states that "the claims being advance[d] are those of the limited partnerships"<sup>10</sup>, each of Canadian Crane Manor LP, 230 Ontario and ACC are also plaintiffs in their own right. I must also consider their individual direct claims.

## 2. Direct Claim by Canadian Crane Manor LP

[59] Canadian Crane Manor LP is a significant limited partner of Crane Manor US LP. Its potential claims under the Original LPA or the 2<sup>nd</sup> Amended LPA are limited. Clause 53(c) of the Original LPA describes Canadian Crane Manor LP's interest in Crane Manor US LP:

- (a) The Limited Partner interests in the Partnership shall be limited to the beneficial interest conferred by this Agreement represented by the Interests. The Interests shall be deemed to be personal property giving only the rights ascribed to such under this Agreement. Ownership of the Interests<sup>11</sup> shall not entitle any Limited Partner to any title in or direct ownership of Partnership Assets or confer upon any Limited Partner the right to call for a partition or division of the same or for an accounting.

[60] The 2<sup>nd</sup> Amended LPA has similar provisions (clause 5.2(c)).

[61] However, although not drafted with precision, the statement of claim pleads direct claims by Canadian Crane Manor LP:

- (a) the Crane Manor Property and its proceeds were a primary asset of Crane Manor US LP and, in turn, Canadian Crane Manor LP (paras 20, 87);
- (b) Wazonek committed fraud against Canadian Crane Manor LP (para 5);
- (c) Wazonek owed Canadian Crane Manor LP fiduciary duties and breached them (paras 94-95);

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<sup>10</sup> Applicants' Brief para 33.

<sup>11</sup> "Interest" is defined as being a calculated percentage of the limited partnership capital accounts.

- (d) Wazonek intentionally and improperly interfered with Canadian Crane Manor LP's contractual relations with 230 Ontario and 150 Alberta, causing damage to Canadian Crane Manor LP (para 96);
- (e) the Defendants denied Canadian Crane Manor LP's ownership of funds and converted them to their own use (para 97);
- (f) the Defendants have been unjustly enriched to the detriment of one or more of the Plaintiffs (para 98);
- (g) the Defendants conspired to carry out wrongful conduct with the actual or constructive intent to cause injury to Canadian Crane Manor LP (para 99);
- (h) Wazonek made fraudulent representations to the Plaintiffs, which were relied on by the Plaintiffs allowing Wazonek to continue to exert control over the general partners (para 100); and
- (i) DRS and 150 Alberta are liable for conspiracy, knowing assistance, knowing receipt and wrongful gain for receiving Crane Manor US LP's funds or facilitating their misuse, misappropriate or conversion, and facilitating Wazonek's fraud (para 5, 94).

[62] A pleading will only be struck as not disclosing a “reasonable claim” under rule 3.68(2)(b) if it is plain and obvious that it does not disclose a valid claim; the facts pleaded are assumed to be true and the claim is assessed for its legal sufficiency: *SR v Edmonton (Police Service)*, 2024 ABCA 340 at para 13; *Gay v Alberta (Workers' Compensation Board)*, 2023 ABCA 351 at para 11, citing *Alberta v Elder Advocates of Alberta Society*, 2011 SCC 24 at para 20; *PricewaterhouseCoopers Inc v Perpetual Energy Inc*, 2021 ABCA 16 at para 70, leave to appeal to SCC refused, 39597 (8 July 2021), citing *R v Imperial Tobacco Canada Ltd*, 2011 SCC 42 at para 21.

[63] At least some of the claims summarized above give rise to a “reasonable claim”, and do not plainly and obviously fail to disclose a valid claim, as contemplated by rule 3.68(2)(b). For example:

- (a) the statement of claim pleads the tort of conspiracy: *D'Agnone v D'Agnone*, 2017 ABCA 35 at paras 19-24;
- (b) the statement of claim engages the tort of unlawful means (referred to in the statement of claim as interference with contractual relations), as described in *AI Enterprises Ltd v Bram Enterprises Ltd*, 2014 SCC 12;
- (c) in some circumstances limited partners have been able to advance direct claims against a general partner for breach of limited partnership agreements or breach of fiduciary duty: *Binscarth* at paras 67-69, citing (among others) *Molchan v Omega Oil & Gas Ltd*, 1988 CanLII 103 (SCC), [1988] 1 SCR 348 at 350, *0738827 BC Ltd*, *Starratt v Mandani*, 2015 ABQB 280 aff'd 2017 ABCA 92;

- (d) the statement of claim engages Wazonek's potential personal concurrent liability for the conduct of the Crane Manor US LP's general partner and/or Canadian Crane Manor GP, which under Alberta law is determined based on the framework set out by the Court of Appeal and applied by this Court: *Hall v Stewart*, 2019 ABCA 98 at para 18; *Hogarth v Rocky Mountain Slate Inc*, 2013 ABCA 57 at para 107; *Driving Force Inc v I Spy-Eagle Eyes Safety Inc*, 2022 ABCA 25 at paras 48-49; *Parks v McAvoy*, 2023 ABCA 211; *Swanby v Tru-Square Homes Ltd*, 2023 ABCA 224 at para 42; *H2 Canmore Apartments LP v Cormode & Dickson Construction Edmonton Ltd*, 2024 ABKB 423 at paras 26-34; and
- (e) claims for knowing assistance and knowing receipt are claims that may in some circumstances be directly pursued by limited partners: *Binscarth* at para 101.

[64] At this stage, neither party has taken a position or provided the Court any authorities as to whether the applicable law for any claims by Canadian Crane Manor LP would be governed by the substantive law of Alberta or Delaware.

[65] I am not satisfied that it is plain and obvious that the entirety of Canadian Crane Manor LP's claim should be set aside as disclosing no reasonable claim. As no application to strike or dismiss only portions of the statement of claim has been filed, I need not go further assessing the potential merits of these claims.

[66] Notwithstanding the foregoing, as noted above there is a problem with Canadian Crane Manor LP being named as an individual plaintiff in this matter. It has been named as a plaintiff without the involvement or approval of its general partner (which the Applicants suggest is controlled by Wazonek). Canadian Crane Manor GP, not the Plaintiffs, has the right to bring an action on behalf of Canadian Crane Manor LP (subject to the possibility of a derivative action).

[67] In contrast to the discussion above about Crane Manor US LP, this Court *can* and *should* exercise jurisdiction over the question of whether a derivative action can or should be brought in the name of an Alberta limited partnership like Canadian Crane Manor LP. No such application has been filed, no such relief has been requested, and the Applicants did not take the position that they were permitted to bring a common law derivative action in the name of Canadian Crane Manor LP without court approval. The statement of claim does not reference a derivative action being brought on behalf of Canadian Crane Manor LP.

[68] It can be inferred from the Applicants' approach to this matter that one or more of them may seek confirmation that they can commence an action on behalf of Canadian Crane Manor LP. Therefore, rather than immediately striking or setting aside Canadian Crane Manor LP's claim, I will give the Applicants time to address this question further, failing which the claim of Canadian Crane Manor LP will be struck.

[69] Accordingly, the Applicants (or another appropriate party) shall have 1 month from the release of these Reasons to file an application seeking court approval to commence this Action as a derivative action in the name of and on behalf of Canadian Crane Manor LP to advance its direct claims against the Defendants (or an application seeking a declaration that it is entitled to bring a derivative action in the name of Canadian Crane Manor LP without prior court approval). I seize myself of that application, if filed. Pending the filing and judicial determination of that application, the Defendants need not file a statement of defence. If the Applicants (or another appropriate party)

fail to file the referenced application, the claim of Canadian Crane Manor LP shall be struck without further order.

### 3. Direct Claims by ACC and 230 Ontario

[70] Based on the summary of the statement of claim above, and the general nature of some of the pleadings, I am also not satisfied that it is plain and obvious that the direct claims by ACC and 230 Ontario should be entirely set aside as sought by the Defendants.

#### C. Should an Attachment Order be Granted against Wazonek?

[71] As I have struck claims made by or on behalf of Crane Manor US LP, and because the Applicants now limit the attachment order relief to Wazonek, my assessment of whether an attachment order is appropriate is based on the merit of the direct claims of Canadian Crane Manor LP, ACC and 230 Ontario against Wazonek personally.

[72] Section 17(1) of the *CEA* provides that a claimant may apply to the Court for an attachment order where (a) the claimant has commenced or is about to commence proceedings in Alberta to establish the claimant's claim, or (b) the claimant has commenced proceedings before a foreign tribunal to establish a claim, in certain circumstances. Section 17(1)(b) is not engaged as the Applicants have not provided evidence or asserted that they have commenced foreign proceedings.

[73] To grant an attachment order, under section 17(2), the Court must be satisfied:

- (a) there is a reasonable likelihood that the claimant's claim against the defendant will be established, and
- (b) there are reasonable grounds for believing that the defendant is dealing with the defendant's exigible property, or is likely to deal with that property,
  - (i) otherwise than for the purpose of meeting the defendant's reasonable and ordinary business or living expenses, and
  - (ii) in a manner that would be likely to seriously hinder the claimant in the enforcement of a judgment against the defendant.

[74] See *Secure 2013 Group Inc v Tiger Calcium Services Inc*, 2017 ABCA 316 at para 63. *Secure 2013* also confirmed the statutory requirements and limitations on an attachment order at para 64, including that the applicant is required to undertake to pay any damages or indemnity required by the Court (s 17(4)), the order must be granted in such a manner that it causes as little inconvenience to the defendant as is consistent with achieving the purposes for which the order is granted (s 17(5)), and the order must not attach property that exceeds an amount necessary to meet that claimant's claim (including interest, costs and related writs), unless such a limitation would make operation of the order unworkable: s 17(6).

[75] Pre-judgment attachment is a "powerful", "extraordinary" remedy, with a "strict" test, that is not granted lightly: *Gaastra v Tri-Link Consultants Inc*, 2012 ABCA 394 at para 8; *Graeff Estate v Huey*, 2020 ABQB 262 at para 18; *Prestigious Properties Inc v Cold Lake Estates Inc*, 2018 ABQB 81 at para 5, citing *Royal Bank v Levy*, 2009 ABQB 564 at para 5; *Giammarco &*

*Co (Western) Division Ltd v TRL Real Estate Syndicate (05) Ltd*, 2014 ABQB 424 at para 21; *1498587 Alberta Inc v Devani*, 2012 ABQB 324 at paras 14-15 [*Devani*]; *Qualex-Landmark Investments Inc v Soroya*, 2009 ABQB 689 at para 10; *1482221 Alberta Ltd v Haney Farms (1985) Ltd*, 2009 ABQB 760 at para 82 [*Haney Farms*].

[76] The burden is on the applicant: *Henenghaixin Corp v Deng*, 2022 ABCA 271 at para 38; *Giammarco* at para 21; *Devani* at para 38; *Qualex-Landmark* at para 8; *Ridge Development Corporation v Crestwood Condominiums Inc*, 2008 ABQB 599 at para 27.

### 1. Is There a Reasonable Likelihood that a Claim Against Wazonek Will be Established?

[77] The standard for an attachment order is a reasonable likelihood that the case will be established (not as high as, and arguably lower than, a strong *prima facie* case): *Lloyd Gardens Inc v Chohan*, 2023 ABCA 328 at para 9, citing *Bank of Nova Scotia v Five Star Motor Group Ltd*, 2020 ABCA 244 at para 17 [*Five Star Motor Group*]; *Kleiman et al v Innes et al*, 2024 ABKB 745 at para 26, citing *Lion's Gate Homes Ltd v Bahramloian*, 2007 ABQB 137 at para 8 and *Osman Auction Inc v Belland*, 1998 ABQB 964 (CanLII); *SanLing Energy Ltd v Liu*, 2022 ABQB 767 at para 51. It does not require the applicant to show on a balance of probabilities that they will obtain the remedy sought, but something more than “suspicion or subjective hope” is required: *Qualex-Landmark Towers Inc v 12-10 Capital Corp*, 2024 ABCA 115 at para 19; *Lloyd Gardens* at para 9; *Five Star Motor Group* at para 17.

[78] I summarized the claims against Wazonek in this action in my January 23, 2025 oral reasons and above. There is a significant and voluminous factual background to this matter, which has been augmented by the further evidentiary process since the Interim Order.

#### a. Sale of the Crane Manor Property

[79] There is new evidence about the background to the sale of the Crane Manor Property since the Interim Order. Wazonek points to Berger’s failure to raise funds for the Crane Manor project, the physical deterioration and damage to the Crane Manor Property, Berger’s knowledge that they had agreed to sell the Crane Manor Property and concentrate on renovating a different Memphis-based real estate project (referred to as “**Whispering Pines**”), Berger’s lack of credibility, Berger’s acknowledgment that he was ignoring Wazonek, and meetings with real estate agencies that Berger likely knew about.

[80] However, I find that even if all of that is accepted, it does not change my earlier conclusion that Wazonek failed to obtain appropriate authorization for the Sale, even based on his own position about which documents govern Crane Manor US LP.

[81] Clause 2.4 of the 2<sup>nd</sup> Amended LPA (relied on by Wazonek) provides:

Purpose of the Partnership. The primary purpose of the Partnership shall be to purchase, renovate, rent, hold or sell the “Property” (which is the Crane Manor Property). The Partnership may engage in all such activities and transactions as the General Partner deems necessary, appropriate, proper, advisable, incidental or convenient to or in connection therewith, including without limitation:

- (a) to purchase, acquire, renovate, lease, sell, exchange and/or otherwise deal with the Property; [...]
- (d) to incur and assume indebtedness and to grant such security interests in, execute deeds of trusts and/or mortgages pertaining to the Property to secure the repayment of indebtedness; [...]
- (f) to convert or exchange Property for other properties, sell and/or otherwise dispose of any Properties or other property at any time held by the Partnership; [...]

[82] Clause 3.2 of the 2<sup>nd</sup> Amended LPA provides (emphasis added):

- (a) [...] the General Partner shall have the power and authority on behalf of the and in the name of the Partnership to take any and all actions in the best interests of the Partnership required to serve the purpose and power of the Partnership set forth in Section 2.4 hereof and to perform all contracts and other undertakings which they may deem necessary or advisable or incidental thereto... including without limitation, to:
  - (i) purchase, hold, service, **sell**, exchange, receive and otherwise acquire and/or **dispose of** the Property.

[83] These provisions collectively provided the Crane Manor US GP with the power to sell the Crane Manor Property. However, this does not necessarily mean that Wazonek had the authority to cause it to do so.

[84] Wazonek asserts that he had such authority. He points to the Second Crane Manor US GP's unanimous shareholders agreement (**USA**).<sup>12</sup> He also adduced evidence of a document called "Organizational Actions by Written Consent of the Board of Directors of Crane Manor GP US, Inc" (**Board Resolution**)<sup>13</sup> and the Second Crane Manor US GP's bylaws (**Bylaws**).

[85] The Board Resolution adopts the Bylaws and appoints Wazonek as President/Treasurer and Berger as Vice President/Secretary. Section 4.5 of the Bylaws provides:

President. The president shall be the chief executive officer of the Corporation and, subject to the control of the Board of Directors, shall in general supervise and control all of the business and affairs of the Corporation. **He may sign, with the secretary or any other proper officer of the Corporation duly authorized** by the Board of Directors, certificates of stock, deeds, mortgages, bonds, any and all contracts, instruments of conveyance, checks, drafts, in cases where the signing and execution thereof shall be otherwise expressly delegated by the Board of Directors, these Bylaws or Law. The president, in general, shall perform all duties incident to

<sup>12</sup> Wazonek January 20, 2025 Affidavit, Exhibit F. When I granted the Interim Order, there was an issue as to whether clause 4.3 of the relevant USA was properly included. Wazonek has since acknowledged that clause 4.3 was agreed by all parties to be removed.

<sup>13</sup> Wazonek January 20, 2025 Affidavit, Exhibit G.

the office of president and such other duties as may be prescribed by the Board of Directors from time to time.

[86] This provision contemplated that contracts could be signed by Wazonek, as president, with the secretary or others. It does not contemplate that Wazonek could enter into contracts on his own.

[87] Wazonek also relies on this provision in the Board Resolution (emphasis added).

Resolved, that the President of the Corporation **upon consultation with the Secretary**, be and she is hereby authorized to enter into, execute and delivery, in the name and on behalf of the Corporation, any contract, agreement, deed, conveyance, mortgage or other instrument that may be deemed by her necessary in the ordinary course of the operation of the business of the Corporation without further act or resolution of the Board of Directors.

[88] This aspect of the Board Resolution required Wazonek to *consult* with the Secretary about entering into, executing and delivering contracts.

[89] With respect to the Sale, I make the following findings for the purposes of the Application:

- (a) on June 22, 2023, Wazonek signed a Commercial Purchase Agreement (**CPA**) for the sale of the Crane Manor Property by Crane Manor US LP for US\$3.65 million to Rich Investment LLC (**Purchaser**). The CPA included a \$50,000 deposit and the closing date was August 21, 2023. No other person signed the CPA on behalf of Crane Manor US LP;
- (b) in July 2023, according to Wazonek, the Purchaser indicated it would not close;
- (c) in August 2023, the CPA transaction fell apart and Crane Manor US LP retained the US\$50,000 deposit;
- (d) in October 2023, negotiations with the Purchaser recommenced. An addendum to the CPA was prepared and signed by the Purchaser (and apparently Wazonek for US Crane Manor LP<sup>14</sup>). Wazonek proceeded to cause Crane Manor US LP to close the Sale on or about October 31, 2023; and
- (e) despite being in contact with Berger, or others affiliated with the Plaintiffs, several times after the CPA was signed, Wazonek never consulted (or even attempted to consult) with Berger about the existence or signing of the CPA (or the addendum), or closing of the Sale under the CPA, until months after closing.

[90] Wazonek asserts that he consulted with Berger about the sale of the Crane Manor Property. I agree Wazonek consulted with Berger *generally* about selling the Crane Manor Property. In those communications, on July 20, 2023, Berger made it clear that he had a “minimum target to sell” in mind. The specific sale price was important to Berger. Based on the record before me, Wazonek was required to consult with Berger about the *specific* CPA transaction but did not do so. Instead,

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<sup>14</sup> Exhibit 1 to the February 7, 2025 questioning transcript of Wazonek.

he failed to disclose its existence at all before he proceeded to close (and for a lengthy period thereafter).

[91] I find that there is a reasonable likelihood that it will be established that Crane Manor US LP's general partner, and Wazonek, effected the sale of the Crane Manor Property without authorization. I find that Crane Manor US LP's limited partners have a reasonable direct claim for breach of the applicable LPA and breach of fiduciary duty, as against the Crane Manor US GP, and Wazonek, in relation to the Sale, and against the proceeds of Sale to the extent they were not properly used in accordance with the applicable LPA. At this stage, I need not make further findings about other claims, including fraud, conspiracy, constructive trust, knowing assistance or knowing receipt.

[92] Therefore, I find that Canadian Crane Manor LP has a reasonable likelihood it will establish a claim against Wazonek personally. I need not go further to consider whether 230 Ontario or ACC have a reasonable likelihood of establishing a direct claim against Wazonek personally.

### **b. Other Claims / Damages**

[93] Any damages relating to the Sale is a matter for trial. For present purposes, the Plaintiffs assert that additional claims and/or damages are reflected in the alleged improper use of Crane Manor US LP's funds (including the Sale proceeds). The Plaintiffs assert that an appropriate amount for the attachment order is now US\$217,304 (or CAD\$310,500), comprised of (collectively referred to as the **Impugned Transactions**):

- (a) US\$44,012.00 related to funds alleged to have been retained by DRS from the original purchase of the Crane Manor Property;
- (b) US\$48,192.92 related to alleged improper payments for Wazonek's personal use or unexplained cash withdrawals;
- (c) US\$18,543.00 related to alleged over-payment to Wazonek for expenses where he was reimbursed for expenses in US dollars when the expenses were incurred in Canadian dollars;
- (d) US\$30,000 related to an alleged payment to Wazonek without justification, except perhaps that it was made to repay Wazonek for a loan to a different Delaware limited partnership related to the Whispering Pines project;
- (e) US\$5,180.38 related to an alleged payment to Wazonek for expenses incurred related to Whispering Pines;
- (f) US\$14,805 related to an alleged payment to an accounting firm for accounting work performed in respect of DRS; and
- (g) US\$56,571.48 related to an alleged payment to Wazonek without justification, which Wazonek asserts was related to taxes for the Crane Manor Property.

[94] When I granted the Interim Order, I went through some of the above matters in some detail and granted an attachment order capped at C\$145,000 because I found that there was a reasonable likelihood that the claims in sub-paragraphs (d), (f) and (g) above would be established against

Wazonek. As noted, since the Interim Order, the parties have engaged in a further detailed evidentiary process. Wazonek has responded to and denied the allegations about the Impugned Transactions. He also asserts that Crane Manor US GP has a set-off defence or counterclaim against Crane Manor US LP for amounts owing under the Original LPA/2<sup>nd</sup> Amended LPA (including reimbursement of expenses), and that 150 Alberta and he have a claim against Crane Manor US GP for failing to remit funds to its shareholders or failing to collect and remit fees to Wazonek for the work he personally performed.

[95] I continue to be satisfied that the Impugned Transactions in sub-paragraphs (d), (f) and (g) above meet the evidentiary threshold under the *CEA*. I am also satisfied that the Impugned Transactions under sub-paragraphs (b) and (c) above meet the “reasonable likelihood” of success threshold. However, it is important to note that the Defendants have raised genuine issues requiring a trial to resolve the disputed matters. It is not appropriate or necessary for me to comment further on the merits of the parties’ respective positions at this stage.

**2. Are There Reasonable Grounds to Believe Wazonek is Dealing with his Exigible Property as Contemplated in Section 17(2)(b) of the *CEA*?**

[96] The Applicants must show that there are reasonable grounds to believe that Wazonek is dealing with his exigible property, or is likely to deal with that property:

- (i) otherwise than for the purpose of meeting the defendant’s reasonable and ordinary business or living expenses, and
- (ii) in a manner that would be likely to seriously hinder the claimant in the enforcement of a judgment against the defendant.

[97] This requirement is “rigorous and specific”, and requires “solid evidence”, not merely the applicant’s belief: *Athabasca Minerals Inc v Syncrude Canada Ltd*, 2017 ABQB 47 at para 129; *GEMBA LLC v Nixious Investments Inc*, 2014 ABQB 197 at para 44; *Welcome Ford Sales Limited v Hellec*, 2011 ABQB 753 at paras 39-40; *Devani* at para 35; *Ridge Development Corporation* at para 34; *Edmonton Region Community Board for Persons with Developmental Disabilities v Pearl Villa Homes Ltd*, 2003 ABQB 1026 at para 29; *First Mortgage Fund (V) Inc (Receiver-Manager of) v Boychuk*, 2003 ABQB 217 at para 30.

[98] When assessing this part of the *CEA* test, the Court may look to various non-exhaustive factors, including:

- (a) the timing of the creation of debts by the defendant;
- (b) whether the debts were created out of the ordinary course of business;
- (c) whether assets have disappeared;
- (d) whether assets have been sold to non arms-length parties for less than market value;
- (e) whether the value of the defendant’s exigible assets greatly exceeds the sum of the plaintiff’s claims;
- (f) unexplained transfers of funds;

- (g) hidden bank accounts;
- (h) liquidation of real property or investments; and
- (i) attempts to move assets outside Alberta

See: *Kleiman* at para 49, citing *Edmonton Region Community Board* at para 28; *Welcome Ford Sales* at paras 42-43; *Devani* at para 38; *Simonelli v Ayrton Developments Inc*, 2010 ABQB 565 at para 156.

**a. Otherwise for the Purpose of Meeting Wazonek’s Reasonable and Ordinary Business or Living Expenses?**

[99] Whether a defendant is dealing with its assets otherwise than for the purpose of meeting the defendant’s reasonable and ordinary business or living expenses is a question of fact based on determining the usual or regular type of transactions engaged in by people in the defendant’s business: *Stone Sapphire Ltd v Transglobal Communication Group Inc*, 2008 ABQB 575 at para 49; *Haney Farm* at para 49. “Expenses” must be read broadly, not technically, and may include useful or necessary legitimate investments, dividends, deposits or security: *Cho v Twin Cities Power-Canada*, 2012 ABCA 47 at para 17.

[100] I granted the Interim Order in part because Wazonek had disclosed that he had entered into a transaction to purchase a property (**Wooddale Property**) in Memphis for \$3,170,000 (**Memphis Transaction**), which was to close on January 24, 2025. He deposed that the Memphis Transaction could not be closed if his accounts were frozen. At that time, the purchase appeared to be partly financed by “his own cash” and a home equity line of credit (**HELOC**) against his personal residence in Calgary, but the details of exactly how the transaction was going to work or be financed were unclear. He deposed that it was not out of his ordinary course of business to personally enter into and finance transactions like the Memphis Transaction, but he provided no details about his ordinary course of business.

[101] Since the Interim Order, there is more evidence about the structure and financing of the Memphis Transaction. Wazonek created a corporation, Wooddale Multifamily Investment Group, LLC (**WMIG**) to purchase the Wooddale Property. Wazonek (on his own behalf and/or on behalf of his assigns) executed a one-page “Standard Contract for the Sale & Purchase of Real Estate” (**Purchase Contract**) which references it was signed on January 3, 2025. From January 16 to 21, 2025, Wazonek transferred the aggregate sum of USD\$403,180.97 (**Wazonek Advanced Funds**), from his HELOC (which has been registered against his home since 2000) and his personal bank account, to WMIG. As of February 7, 2025, those funds remained with WMIG and were intended to be used in respect of the Wooddale Property. He has clarified that he used his HELOC to avoid liquidating other investments the sale of which would trigger capital gains.

[102] Wazonek deposed that the plan is for the Memphis Transaction purchase price to be financed by a USD\$2,000,000 mortgage and investor funds. He gave only limited evidence about the mortgage or the investors. His evidence was also unclear or inconsistent as to what amount of the Wazonek Advanced Funds, if any, would be used to close the transaction versus on renovations to the Wooddale Property.

[103] If the transaction closes, which Wazonek deposed was not certain, he anticipates the Wazonek Advanced Funds being returned to him from the terms of a renovation loan which will be advanced initially for USD\$500,000 shortly after closing and then to a total of USD\$2,500,000 as renovations of the Wooddale Property progress. If the Memphis Transaction does not close, he intends to cause WMIG to return the Wazonek Advanced Funds.

[104] Wazonek provided few details about the renovation loan. It is not clear whether the plan is to renovate and sell units, or renovate and rent them. He provided no evidence that he had conducted any detailed financial analysis for the Wooddale Property project to determine whether it would be profitable.

[105] By February 7, 2025, the Memphis Transaction had not closed because, according to Wazonek, he was waiting for the lender's appraisal.

[106] Aspects of the Memphis Transaction are suspicious:

- (a) the Purchase Contract is a very simple, one-page document, although there was no evidence that this was unusual in Memphis and Wazonek deposed that he had been involved in transactions papered in one page before;
- (b) the US\$3.170 million purchase price was not arrived at by use of an appraisal, but based on Wazonek's knowledge of the marketplace and the anticipated renovations. There is also evidence from Wazonek in his questioning that the purchase price "hasn't been settled yet..." and may change depending on the appraisal. However, the Purchase Contract had no conditions relating to the appraisal of the Wooddale Property; in fact, it provided it could not be amended without the consent of both parties and that Wazonek "waives the right to terminate this contract regarding the condition of the Property";
- (c) the Memphis Transaction had a miniscule deposit of only \$500 (referred to as "Earnest Money"), when compared to the \$50,000 deposit in the CPA for the Crane Manor Property for a transaction of comparable value;
- (d) although the Purchase Contract indicates it was signed on January 3, 2025, and Wazonek recalled signing it electronically, he could not remember or discern in an undertaking response what electronic platform he used to sign it or on which device he signed it;
- (e) Wazonek's evidence is that the vendor in the Memphis Transaction does not use email, that communications with the vendor have been primarily by cell phone and in person at several site meetings at the Wooddale Property;
- (f) Wazonek did not begin advancing funds to WMIG until January 16, 2025. He continued to advance funds after he was served with the Application (on January 17, 2025) and had notice of the January 22, 2025 court attendance;
- (g) Wazonek could not explain why the specific dollar amounts (some of them for very specific amounts down to pennies) from his HELOC and bank accounts were

transferred to WMIG, other than they were amounts that were “gonna be used to close the deal and start the renovations”;

- (h) in his January 20, 2025 affidavit, Wazonek described obtaining a “loan” from ATB to complete the Memphis Transaction, then in his second affidavit explained he used his HELOC which has been registered against his home for years;
- (i) in his January 20, 2025 affidavit, Wazonek deposed that “I will not be able to close on this transaction” if his bank accounts were frozen. However, by that time, according to his February 4, 2025 affidavit, he had already advanced USD\$319,417 to WMIG and then advanced the balance the day before the January 22, 2025 court appearance. Further, he deposed that the balance of the purchase price was to be funded by a mortgage and investors, and the renovations funded by a renovation loan. His initial evidence about the effect of the attachment order on his ability to close the transaction is questionable;
- (j) in his February 4, 2025 affidavit, Wazonek described that the Memphis Transaction was delayed due to the lender’s appraisal, without which mortgage funds could not advance. He expected the appraisal by February 5, 2025, but it was still not received by his February 7, 2025 questioning and he had not been given any revised timing for the appraisal. In his undertaking answers filed February 21, 2025, he implies that the closing delay may also be for a different reason; he stated that “the vendor remains elusive as to a final Closing Date for this transaction”; and
- (k) Wazonek has provided no information about any of the investors for the Memphis Transaction, how much money (if any) has been raised to facilitate closing, whether investor involvement has been documented in valid and binding agreements, and in particular whether investors have agreed to the return of the Wazonek Advanced Funds from the first tranche of a renovation loan. He has also provided few details about the status or terms of the renovation loan.

[107] Wazonek deposed that using his personal funds for the Memphis Transaction is in his ordinary course of business. Although he was unable to confirm whether he used his HELOC in similar transactions previously, he referenced his personal involvement and use of his personal funds or resources in (a) 10 to 12 condominium redevelopment projects he engaged in prior to 2010; (b) a 2011 condominium renovation project in Brooks in which he used \$300,000 of his own personal resources to fund renovations and carry financial shortfalls; (c) a 2017-2018 \$100,000 personal investment in a junior capital pool company engaged in developing real estate valuation software; and (d) the 2021 Crane Manor project and Whispering Pines project (although he notes that his contribution was his services and as personal guarantor). In addition to these matters, Wazonek deposed that he has been involved in 30 other multi-family properties for other companies.

[108] In my view, these historical transactions do not support Wazonek’s position. The evidence indicates that he has not used his personal funds to finance the start of a real estate development project in approximately 14 years. Ordinary business expenses are not static and can change over time. The fact Wazonek’s personal practices may have involved his personal funds earlier in his career does not mean such transactions are part of his ordinary business expenses now.

[109] The lack of any similar transactions in recent history, the suspicious or vague nature of the Memphis Transaction, its timing and changing closing date, and the timing of the Wazonek Advanced Funds, together with a lack of reliable evidence to assess whether (or conclude that) the Memphis Transaction was a “useful or necessary legitimate investment”, all lead me to find that the Wazonek Advanced Funds were not transferred for Wazonek’s ordinary business or living expenses.

[110] Even if the Wazonek Advanced Funds constitute an ordinary business expense of Wazonek, given the uncertainty and lack of documentation about the financing, closing, renovation and structure of the Memphis Transaction and the Wooddale Property project, I also find that Wazonek Advanced Funds did not constitute a “reasonable” business expense as contemplated by section 17(2)(b)(i) of the *CEA*. This is particularly so given Wazonek’s recent experience with the Crane Manor project.

[111] I find that there are reasonable grounds to believe that Wazonek is dealing with his exigible property otherwise than for the purpose of meeting his reasonable and ordinary business or living expenses.

**b. In a Manner that Would be Likely to Seriously Hinder Judgment Enforcement against Wazonek?**

[112] The spending or use of assets must involve a “serious hindrance” based on a serious examination of the defendant’s situation: *Cho* at para 17; *Simonelli* at para 159; *Haney Farms* at para 58.

[113] At the time of the Interim Order, Wazonek provided some evidence about the value of his Calgary home, he also described its encumbrance as part of the Memphis Transaction. He had not provided any detail about his or DRS’ assets more generally. Without that type of evidence, I found that the Memphis Transaction was likely to seriously hinder the enforcement of a judgment against him.

[114] Since the Interim Order, neither party has provided reliable appraisal evidence about the value of Wazonek’s Calgary home. The City of Calgary assessment value is \$574,000 for 2025. While municipal tax assessments are not always useful indicators of market value, it is the only objective evidence before me and represents, at least, a reasonable floor value. Wazonek also gave evidence that he used a Royal Bank of Canada online tool indicating an estimated value of \$1,257,000. I give that little weight. Under either scenario, given the \$325,000 draw down on the HELOC, there is at least approximately \$250,000 in equity in the home. There is no evidence that Wazonek intends to sell or further encumber it.

[115] In his February 4, 2025 affidavit, Wazonek also provided significantly more detail about his exigible Alberta assets. In addition to his home, he provided evidence of his personal account holdings and the holdings of 150 Alberta and DRS. These accounts reflect that, in addition to approximately \$38,000 in bank accounts, Wazonek has personal investments held at ATB (over \$487,000), 150 Alberta has an ATB investment account (approximately \$880,000), and DRS has two ATB investments accounts (in aggregate over \$1,540,000). Further, 150 Alberta owns shares in the Crane Manor US GP, which Wazonek argues is entitled to significant amounts from Crane Manor US LP (and that 50% of those amounts accrue to 150 Alberta). Wazonek also deposed that

none of the Defendants have any debt. Wazonek was not questioned about any of these accounts or whether the Defendants have any other creditors.

[116] The Wazonek Advanced Funds have already left Alberta. There is no other evidence that Wazonek intends to infuse more of his own funds into the Memphis Transaction or in any other transaction outside Alberta. The equity in his home, his bank accounts, and the value of his shares in 150 Alberta and DRS disclose remaining exigible assets in Alberta of at least approximately \$3,195,000 (before factoring in the potential increase in 150 Alberta share value due to its shareholdings in the Crane Manor US GP). Wazonek's exigible Alberta assets dwarf the approximately \$310,500 the Plaintiffs seek to attach.

[117] In my view, it is unlikely that Wazonek is going to attempt to dissipate his significant assets to avoid a claim currently estimated to be in the amount of \$310,500 (before any set-off or counterclaim). It is significant that the Plaintiffs became aware of the Crane Manor Sale in or about April 2024, caused Crane Manor US LP's banks to be frozen in June 2024, and Wazonek was well aware of the allegations against him by that time. The Plaintiffs did not seek an attachment order for approximately 6 months. Even though Wazonek likely knew the nature of the claims and allegations by the Plaintiffs, Wazonek did not immediately dissipate his assets or make himself judgment-proof.

[118] I find that there are not reasonable grounds to believe that Wazonek's dealings with his exigible property will *seriously* hinder enforcement of any judgment against him.

**c. Should the Court Infer that the Requirements of Section 17(2)(b) are Met?**

[119] Some or all of the requirements of section 17(2)(b) of the *CEA* can be inferred, including where allegations of dishonesty, fraud, conversion or breach of trust, are determined to have a reasonable foundation: *Five Star Motor Group* at para 18; *Metalworks Canada Ltd v Warrack*, 2014 ABCA 389 at para 40 (footnote 2); *1773907 Alberta Ltd v Davidson*, 2016 ABQB 2 at paras 81-83 aff'd 2017 ABCA 267 at paras 31-33, 35-36; *GEMBA* at para 48; *1007374 Alberta Ltd v Ruggieri*, 2013 ABQB 420 at para 28; *Cho* at para 10; *Bank of Montreal v Cochrane*, 2010 ABQB 476 at para 8; *Haney Farms* at para 56; *Lyons v Creason*, 2008 ABQB 550 at para 41; *Osman Auction* at paras 28-29. However, there is no universal or mandatory inference that must be drawn: *Five Star Motor Group* at para 18.

[120] In this case, there is a reasonable foundation that there was dishonesty involved in Wazonek's decision to close the Crane Manor Sale without consulting Berger about the specific transaction. There is also suspicious conduct following that Sale: opening a new Crane Manor US LP bank account in November 2023 following the Sale (into which a significant portion of the Sale proceeds were deposited and remained for some time); starting to pay certain expenses from Crane Manor US LP's funds only after the Sale; apparently changing the authorizations for one of Crane Manor US LP's bank accounts such that only he had authority (on the very same day that an ACC representative first learned about the Sale on April 26, 2024).

[121] However, with respect to the specific post-Sale Impugned Transactions, as noted above, these are hotly contested by Wazonek. He asserts that none of them were dishonest or improper. Based on the record before me, I am unable to conclude, one way or the other, as to whether there is a reasonable foundation for dishonesty, fraud or similar claims in respect of the Impugned

Transactions. That is, it is a reasonable possibility the Impugned Transactions involved dishonest or fraudulent conduct, but it is also a reasonable possibility that they did not because some of them were authorized transactions on behalf of Crane Manor US LP (as agreed by its limited partners or Berger), or, even if unauthorized or improper, they were not dishonest or fraudulent but negligent based on Wazonek's honestly held belief about his rights and the rights of Crane Manor US GP, based on his dealings with Berger among others.

[122] I also have some concerns about the credibility and reliability of some aspects of the Applicants' evidence of dishonesty, which causes me some concern about the allegations against Wazonek, including:

- (a) the evidence in the *ex parte* appearance included numerous errors. That evidence, and Berger's subsequent evidence, has been difficult to follow at times;
- (b) Berger's evidence was often one-sided and failed to include known (or reasonably known) information that would have put the allegations in more balanced context;
- (c) Berger's evidence was also infused with conclusory statements and allegations of fraud, "fraudulent schemes", and "theft" based on Berger's opinions (some of which are unsupported and/or relate to matters that may potentially be otherwise explainable). For example, in his December 20, 2024 affidavit, Berger deposes or implies that the creation of the Second Crane Manor GP was part of a "larger fraudulent scheme" that he learned about in the course of an investigation he and others commenced in April 2024. However, emails provided by Wazonek show that Berger was directly involved in the process to create a new general partner for Crane Manor US LP starting in April 2022;<sup>15</sup> and
- (d) Berger was sometimes argumentative, evasive, inconsistent, and unbelievable in his questioning. As one example, he categorically and firmly denied receiving a July 21, 2024 email from Wazonek, and then later admitted to receiving it.

[123] Notwithstanding my concerns about the evidence, the evidence about the Memphis Transaction is of concern. It could support an inference that Wazonek is likely to continue dealing with some of his assets other than in his reasonable and ordinary business or living expenses. However, on balance, and in light of all the evidence, including the fact that Wazonek has not taken steps to dissipate over \$3 million of his personal assets since becoming aware of the allegations against him, I am not prepared to infer that he is likely to deal with his assets in a manner that would be likely to seriously hinder the enforcement of the potential judgment against him personally.

#### **d. Conclusion**

[124] For the reasons set out above, I find that the Applicants have failed to meet the second part of the test under section 17(2) of the *CEA*.

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<sup>15</sup> Wazonek Undertaking Responses UT4.01 (PDF page 26).

[125] For the reasons set out above, I find that an attachment order is not appropriate based on the record before me. This finding is without prejudice to any future application based on new evidence that was unavailable as of February 27, 2025.

### 3. Should the Court Exercise its Discretion to Grant an Attachment Order?

[126] The granting of an attachment order is discretionary: *Secure 2013* at para 34. As such, even if the elements of section 17(2) of the *CEA* are met, the Court has discretion not to grant an attachment order: *Giammarco* at para 21; *GEMBA* at para 32; *Simonelli* at para 148; *Haney Farms* at paras 38-39; *Lion's Gate Homes* at para 9; *Rea v Patmore*, 1999 ABQB 759 at paras 22-23 (CanLII). Given my findings, I do not need to address my residual discretion.

### 4. Conclusion re Attachment Order

[127] For the reasons noted above, the Application for an attachment order against Wazonek is dismissed.

#### D. What Should be Done with the Court Funds

[128] Based on my conclusion that an attachment order is not appropriate, there is no reason for the Court Funds to remain held by the Clerk of the Court. The Clerk of the Court is directed to pay the Court Funds to the Defendants' legal counsel.

## VI. Conclusion

[129] The Application is dismissed. The claims noted above are struck on the terms noted. The Court Funds shall be paid to the Defendants' legal counsel.

[130] If the parties are unable to reach agreement on costs or any damages suffered as a result of the Interim Order, within 30 days of these Reasons, they may notify my office and I will set a procedure to address those issues.

Heard on the 27<sup>th</sup> day of February, 2025.

**Dated** at the City of Calgary, Alberta this 6<sup>th</sup> day of May, 2025.

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**M.A. Marion**  
**J.C.K.B.A.**

#### Appearances:

Amy M. Cooper  
for the Plaintiffs/Applicants

Sean S. Smyth, KC  
for the Defendants/Cross-Applicants