CITATION: Banner v. Austin, 2026 ONSC 1838
COURT FILE NO.: CV-20-00636543
MOTION HEARD: 20241126, 20241127, 20251202

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Paul Banner and Double Bogey Investments, Plaintiffs

AND:

James Austin and Alibra Financial Services, Defendants

BEFORE: Associate Justice B. McAfee

COUNSEL: D. Camenzuli and J. Cecchetto, Counsel, for the Moving Parties, the Plaintiffs

S. Rana, Counsel, for the Responding Parties, the Defendants

HEARD: November 26, 27, 2024, and December 2, 2025

ENDORSEMENT

The Motion

[1] This is a motion brought by the plaintiffs Paul Banner (Banner) and Double Bogey Investments (DBI) (collectively the plaintiffs), for an order striking the statement of defence (amended statement of defence) of the defendants, James Austin (Austin) and Alibra Financial Services (Alibra) (collectively the defendants). In the alternative, the plaintiffs seek answers to undertakings, under advisements and refusals given on the examination for discovery of Austin, an order that Austin re-attend on examinations for discovery and production of a further and better affidavit of documents.

[2] On November 28, 2023, a telephone case conference proceeded before me for the purpose of scheduling the plaintiffs' long motion. No one appeared on behalf of the defendants. The plaintiffs' long motion was scheduled for November 26 and 27, 2024, and a timetable for the delivery of material was ordered (see endorsement dated November 28, 2023).

Preliminary/Procedural Issues

[3] On September 6, 2024, the plaintiffs requested a further case conference. The plaintiffs requested a 15 minute case conference to take place in early November 2024, in an effort to streamline the process having regard to the complexity of the motion and the volume of material.

[4] On November 4, 2024, the further requested case conference took place before me. The plaintiffs requested that the plaintiffs' motion be bifurcated with the main relief proceeding

and being decided first. The plaintiffs also requested that plaintiffs' counsel, J. Cecchetto, be permitted make submissions on the motion notwithstanding that she swore two affidavits in support of the motion. The defendants did not object to J. Cecchetto making oral submissions on the motion and an order was made accordingly. The defendants did not agree to bifurcation, and I was unable to determine that contested issue on the case conference (see endorsement dated November 6, 2024).

[5] On November 26, 2024, at the outset of the motion, an issue was raised with respect to late material delivered by the defendants. It took approximately 2 hours to address issues relating to late material. Ultimately, the parties agreed that the defendants' late supplementary responding motion record dated November 22, 2024, would not be admitted and the defendants' late amended responding motion record dated November 22, 2024, would be admitted. Defendants' counsel confirmed that he would not be requesting an adjournment to enable him to rely on the late supplementary responding motion record. Having regard to the time taken to address the issue of the defendants' late material, it was agreed that the motion would commence with the plaintiffs making submissions on the main relief sought. The plaintiffs concluded their submissions on the main relief at approximately 4:15 p.m. on November 27, 2024.

[6] After hearing moving submissions on the main relief, I asked to hear responding submissions from the defendants on the main relief and bifurcated the motion as the plaintiffs had requested. The motion was taking more time than had been anticipated and as had been submitted by the plaintiffs, if the main relief was granted there would be no need to address the alternative relief. Defendants' counsel was then asked if he wanted to start his responding submissions on the main relief in the time remaining that day or start another day. Defendants' counsel stated that he wished to start his responding submissions on the main relief and proceeded to do so.

[7] On November 27, 2024, at the end of the day, defendants' counsel indicated that he required four more hours to complete responding submissions to the main relief and plaintiffs' counsel indicated they required one further hour. Counsel agreed that no new material would be filed.

[8] On November 28, 2024, defendants' counsel wrote to the court confirming his agreement at the conclusion of submissions on November 27, 2024, that no new material would be filed; however, he sought to clarify that this would not include the defendants' late supplementary responding motion record that he now expected to be able to rely upon. Plaintiffs' counsel then wrote to the court noting that the communication of defendants' counsel to the court was unsolicited and defendants' counsel had not contacted plaintiffs' counsel before doing so. Plaintiffs' counsel objected to defendants' counsel relying on the late supplementary responding motion record, noting that defendants' counsel had agreed not to rely on this late material. Counsel were then advised that the court was not of the same understanding as defendants' counsel and that the understanding of plaintiffs' counsel was correct. Counsel were reminded of Rule 1.09.

[9] The motion as it relates to the main relief was then scheduled to continue before me on December 2, 2025, being the next available date for five hours. An earlier return date subsequently became available to the court and was offered to the parties; however, the date was not mutually available to both counsel.

[10] On October 28, 2025, defendants' counsel requested a case conference further to my previous directions encouraging counsel to resolve or narrow the issues. Plaintiffs' counsel wrote indicating that they had not been consulted about the requested case conference and noted that the motion was in mid-hearing. The parties were advised that unless the parties consent, a case conference would not be convened. Counsel were reminded of Rule 1.09. Counsel were encouraged to make best efforts to resolve or narrow the issues. A further case conference was not convened.

[11] The motion as it relates to the main relief continued before me on December 2, 2025, for five hours. The balance of the submissions on the main relief, including reply and costs submissions, were heard.

[12] On December 2, 2025, the plaintiffs raised a preliminary issue. The defendants had prepared and uploaded a further compendium on December 1, 2025. Tab 24 of the further compendium contained the affidavit of Austin sworn November 22, 2024, being the contents of the late supplementary responding motion record that had been addressed on November 26, 2024, and again on November 28, 2024. As noted above, on November 26, 2024, defendant's counsel confirmed that he would not be seeking an adjournment and agreed that the late supplementary responding motion record would not be admitted. Tab 24 of the further compendium of the defendants was not admitted.

The Action

[13] On February 19, 2020, the action was commenced by statement of claim. On or about June 24, 2020, the statement of defence was served. The plaintiffs' reply is dated July 20, 2020. On December 21, 2021, the plaintiffs amended the statement of claim. On April 4, 2022, the defendants amended their statement of defence.

[14] As set out in the amended statement of claim, it is pleaded that at all material times Banner was the directing mind and sole shareholder of his holding company DBI. Austin, a registered mutual fund dealer, was the directing mind, shareholder and director of Alibra. Austin provided services as a financial advisor through Equity Associates. Alibra provides financial and investment services.

[15] As set out in the amended statement of claim, Banner and Austin have been acquainted for approximately 40 years. Banner wound down his investments some time ago and for the previous few years had focused primarily on lending money. Banner relied on Austin to perform his personal and corporate booking and other related financial services for approximately 20 years.

[16] As set out in the amended statement of claim, this action arises from alleged loans from Banner to the defendants, referred to in the pleadings as the DBI Loan. It is alleged that

some or all of the DBI Loan was advanced further to Austin's need for funds for an investment opportunity.

[17] As set out in the amended statement of defence, the defendants deny any investment. The defendants allege that a non-party, Positano, who had known Banner for several years, needed money relating to an automotive business. The defendants allege that Banner loaned money to Positano. The defendants allege that because they were acting as the plaintiffs' bookkeepers, Banner requested that the loans to Positano be made through the defendants' services and that the defendants were engaged as a conduit only. Separate proceedings have been brought by Alibra against Positano and others (court file no. CV-19-00614433-0000)

[18] As set out in the amended statement of claim, as against Austin the plaintiffs claim an interim, interlocutory and permanent injunction restraining Austin from disposing of personal and corporate assets pending trial. As against the defendants, the plaintiffs claim an interim and interlocutory order requiring the defendants to provide full particulars of assets acquired with the proceeds of funds provided to them by the plaintiffs, payment of $407,000.00 representing the defendants' outstanding debt to the plaintiffs, damages in the amount of $250,000.00 for breach of confidence and breach of fiduciary duty, damages in the amount of $62,000.00 for conversion/detinue for Austin's theft of misappropriated funds, damages in the amount of $469,000.00 for unjust enrichment and/or restitution, in the alternative, damages in the amount of $250,000.00 for conspiracy to injure, an accounting and disgorgement of all profits made by the defendants, in the alternative damages in the amount of $500,000.00 on account of fraud or breach of trust, oppression remedy compensation and relief pursuant to s. 248 of the *Ontario Business Corporations Act*, punitive and exemplary damages in the amount of $100,000.00, interest and costs.

[19] The plaintiffs submit that the only appropriate remedy on this motion is the striking of the defence. The plaintiffs submit that it is not one thing but a continuing pattern of conduct on the part of the defendants that they rely upon in support of this relief. On the motion, the plaintiffs submit that they seek to strike the statement of defence for the following reasons:

i. disruptive conduct that the defendants engaged in at examinations for discovery;

ii. conduct leading up to the examinations for discovery including breaches of court orders and certificates of non-attendance;

iii. failure to produce documents at the outset and in accordance with the *Rules*;

iv. potential spoliation of documents;

v. failure to answer undertakings as ordered by the court;

vi. failure to answer refusals.

[20] The plaintiffs argue that based on all the foregoing, the defendants have an obvious intention to delay this proceeding and have an indifference to this litigation.

[21] The defendants oppose the striking of their defence.

[22] In *Broniek-Harren v. Osborne*, 2008 CanLII 19782 (Ont. S.C.J.) Justice Gray states as follows at paragraphs 28 and 29:

> [28] The policy underlying the *Rules of Civil Procedure* is twofold: to ensure that cases that are not settled are tried on their merits; and to ensure that cases are processed, and heard, in an orderly way. A civilized society must ensure that a credible system of justice is in place, and the *Rules of Civil Procedure*, made pursuant to the *Courts of Justice Act*, reflect the scheme created by the Province for the orderly handling of civil cases.
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> [29] The *Rules* reflect a balance. The litigant does not have an untrammelled right to have his or her case heard. In order to be heard, a case must be processed in accordance with the *Rules*. By the same token, adherence to the Rules must not be slavish in all circumstances. They are, after all, designed to ensure that cases are heard. Throughout the Rules, the principle is reflected that strict compliance may be dispensed with where the interests of justice require it: see, for example, Rules 1.04(1), 2.01, 3.02, and 26.01. The difficult issue, in any particular case, is to determine when non-compliance reaches the point that it can no longer be excused. The Court, and society as a whole, have an interest in ensuring that the system remains viable. If the *Rules* can be ignored with impunity, they might as well not exist.

[23] The plaintiffs rely in part on the decision of the Court of Appeal in *Aslezova v. Khanine*, 2023 ONCA 153. *Aslezova* is a decision in a family law dispute. At paragraph 9 the following is stated: It is well established that while discretionary, the remedy of striking pleadings is extraordinary and should only be used sparingly and in limited and exceptional circumstances, and when no other remedy would suffice…".

i. disruptive conduct that the defendants engaged in at examinations for discovery

[24] The examination for discovery of the defendants took place virtually on August 30, 2023, and September 20, 2023. Current counsel for the defendants was not counsel at the examination for discovery. Current counsel was retained on October 2, 2023, shortly after the examination for discovery of the defendants, due to the retirement of previous counsel for the defendants, R. Chapman.

[25] The plaintiffs rely on Austin's failure during the examination for discovery to put his notes on a chair behind him and out of reach so he could not refer to them after having been asked to do so by plaintiffs' counsel. In response to that request, defendants' counsel stated that he was not agreeable, that the documents can be left where they are and that if Austin reads from a piece of paper, a copy would be provided. Defendants' counsel subsequently

advised that Austin would not look at any documents if he had writing on them and Austin agreed. After this exchange, counsel went off the record. At Q. 26 plaintiffs' counsel confirmed the conversation off the record. Austin agreed not to use any notes he made in preparation for the discovery and had now placed them on the side of his desk. To the extent that the plaintiffs rely on these circumstances, this issue resolved on the discovery as confirmed at Q. 26 and the examination continued.

[26] The plaintiffs rely on the defendants' refusal to answer one hundred and thirty-seven questions and taking thirty questions under advisement and failure to provide a basis for the majority of the refusals. The defendants did not always provide a brief reason for the objection contrary to Rule 34.12. The issue of refusals is dealt with further below.

[27] The plaintiffs rely on Austin having confirmed that he was in his room alone, without anyone listing or in attendance, yet an individual was seen entering the room. Austin provided a reasonable explanation. The person who entered the room was his wife who had been upstairs and had just come downstairs to obtain a printout from the computer.

[28] The circumstances before me are distinguishable from the serious circumstances in *Kaushal v. Vasudeva*, 2021 ONSC 440 (Ont. S.C.J.) Austin did not attempt to conceal the presence of someone else being in the room. His wife was seeing entering the room. Austin readily provided a reasonable explanation.

[29] The plaintiffs rely on defendants' previous counsel yelling at plaintiffs' counsel (page 152, line 4). While it is not acceptable to raise one's voice on an examination for discovery, this appears to have been taken place after defendants' counsel responded to a question indicating that they "…haven't seen any evidence of that" and thereafter asking plaintiffs' counsel to "move on" five times. It was on the sixth time that his voice was raised.

[30] The plaintiffs rely on defendants' previous counsel ending day one of the examination for discovery at 4:45 p.m. or 4:50 p.m. notwithstanding that plaintiffs' counsel had stated that the examination was not concluded or adjourned. It was not unreasonable to end the examination for discovery at this time, particularly when a few more minutes would not have completed the plaintiffs' examination for discovery of the defendants.

[31] The plaintiffs rely on defendants' previous counsel refusing to discuss or confirm the next date for the continued examination for discovery before leaving at or about 4:45 p.m. or 4:50 p.m. Defendants' counsel had stated that his law clerk had left and that she deals with his diary. Plaintiffs' counsel then stated that if he did not hear back by noon the next day, he would unilaterally serve a notice of examination on Austin. Not confirming a new date before leaving was not unreasonable in the circumstances.

ii. conduct leading up to the examinations for discovery including breaches of court orders and certificates of non-attendance

[32] In February 2021 the parties agreed to schedule examinations for discovery to take place June 2 and 3, 2021. Less than one week before the examinations, the defendants served approximately 700 documents relating to the Positano action. Plaintiffs' counsel then

cancelled the examination of the defendants due to the timing of productions from the Postino action. Defendants counsel also sought to cancel the examination for discovery of the plaintiffs. Plaintiffs' counsel took the position that the defendants' examination of the plaintiffs should still proceed as scheduled or they would take the position that the defendants did not wish to examine the plaintiffs. Defendants' counsel ultimately agreed, as requested by plaintiffs' counsel, that the examination for discovery of the plaintiffs would still proceed on June 3, 2021.

[33] The examination for discovery of the plaintiffs did proceed on June 3, 2021, but was adjourned shortly after it started. It had become apparent to both counsel that the statement of claim required amendment and further production was required with respect to the proposed amendments.

[34] Plaintiffs' counsel then wrote to defendants' counsel on six occasions between February and May 2022, attempting to canvass dates for examinations for discovery. The letter from plaintiffs' counsel of May 11, 2022, threatened to schedule examinations unilaterally. On May 20, 2022, defendants' counsel responded and requested a copy of the plaintiffs' further affidavit of documents. Plaintiffs' counsel then unilaterally scheduled the examination for discovery of the defendants for October 5, 2022, because he had already provided the requested further affidavit of documents.

[35] On May 31, 2022, defendants' counsel advised that he was not available on October 5, 2022. Counsels' respective offices then went back and forth regarding mutually available new dates for the examinations for discovery. The dates of February 15 and 17, 2023 were then agreed to. The plaintiffs' notice of examination was served on October 18, 2022, and the defendants' notice of examination was served on October 20, 2022.

[36] On October 5, 2022, plaintiffs' counsel obtained a certificate of non-attendance (the first certificate of non-attendance). I am not satisfied that this certificate of non-attendance supports the plaintiffs' position on this motion. At the time, counsel had been corresponding in an effort to schedule new mutually available dates.

[37] The plaintiffs' examination for discovery of the defendants was scheduled for February 15, 2023. The examination did not proceed. This was at the request of plaintiffs' counsel due to a failure of his home furnace and the limited availability of a repair person. Counsel agreed to adjourn this examination for discovery to March 1, 2023. Although plaintiffs' counsel still wanted the defendants to proceed with their examination for discovery of the plaintiffs on February 17, 2023, it was agreed to also adjourn that examination for discovery. Defendants' counsel indicated that after the defendants' examination an offer would be forthcoming, and defendants' counsel did not wish to incur costs preparing if not necessary. Plaintiffs' counsel agreed with that approach. The examination for discovery of the defendants was then scheduled for March 13, 2023, and the examination for discovery of the plaintiffs was then scheduled for March 17, 2023.

[38] The parties subsequently agreed that examinations for discovery would proceed on April 20 and 21, 2023, because the defendants intended to amend their amended statement of defence.

[39] The proposed amended amended statement of defence was provided on March 28, 2023. The plaintiffs would not consent, taking the position that the proposed amendments did not amount to a viable defence.

[40] On April 18, 2023, defendants' counsel requested confirmation that the examinations would be rescheduled after the pleadings were amended. The plaintiffs would not agree. Defendants' counsel cancelled the examinations for discovery taking the position that they were premature until the pleadings amendments had been dealt with. On April 20, 2023, plaintiffs' counsel obtained a certificate of non-attendance (the second certificate of non-attendance).

[41] The plaintiffs then requested a case conference. A case conference proceeded before Associate Justice Jolley on June 5, 2023. Associate Justice Jolley ordered the following agreed upon timetable:

a. discoveries to take place by August 17, 2023 (plaintiffs) and August 22, 2023 (defendants);

b. answers to undertakings to be provided by October 31, 2023;

c. mediation to take place by November 30, 2023; and

d. any undertakings/refusals motion to be scheduled by January 31, 2024.

[42] The timetable endorsement of Associate Justice Jolley also provided that the defendants will serve their notice of motion for leave to amend the amended statement of defence by June 9, 2023, and that the parties may agree to amend the timetable on consent.

[43] On June 6, 2023, defendants' counsel requested the availability of plaintiffs' counsel for the defendants' motion for leave to amend. Plaintiffs' counsel responded that he was not available on any of the dates provided and requested legal authority for the proposed amendments. On or about June 9, 2023, further dates were then provided. Plaintiffs' counsel responded and again requested case law. I was not referred to evidence of the requested case law having been provided. The defendants did not serve a notice of motion.

[44] On August 14, 2023, the plaintiffs served their notice of examination. On August 15, 2023, defendants' counsel advised that he was retiring at the end of the month and that the defendants would be retaining new counsel. Defendants' counsel stated that he would not be examining the plaintiffs and would "leave it up to new counsel". On August 16, 2023, plaintiffs' counsel advised that they were not consenting to an amendment of the timetable and advised that they would proceed with the examination for discovery of the defendants on August 22, 2023.

[45] On August 21, 2023, plaintiffs' counsel advised that he "may need to deal with a family issue tomorrow" and suggested adjourning the examination for discovery of the defendants to August 23, 2023. On August 21, 2023, plaintiffs' counsel then sent a document to defendants' counsel indicating that they would be asking the defendants questions about it tomorrow. Defendants' counsel responded "this morning you advised that you were not proceeding tomorrow. I advised the client and he is no longer available". Plaintiffs' counsel responded stating that he did not say he would not be proceeding and that he simply asked if August 23, 2023, was a possibility. Plaintiffs' counsel asked if the defendants were attending the next day because he needed to advise the reporter. Defendants' counsel responded that the defendants will not be in attendance, and the reporter should be cancelled.

[46] The defendants did not attend their examination for discovery on August 22, 2023, and a certificate of non-attendance was obtained (third certificate of non-attendance).

[47] On or about August 22, 2023, plaintiffs' counsel scheduled a CPC attendance on an urgent basis for August 29, 2023.

[48] On August 22, 2023, plaintiffs' counsel also provided the defendants with a further opportunity to attend examinations for discovery. On August 22, 2023, plaintiffs counsel wrote stating that despite the attendance at CPC, if the defendants confirm they can be discovered on August 30, 31 or September 1, 2023, they would forego their motion. On August 22, 2023, the defendants' counsel confirmed August 30, 2023. On August 22, 2023, plaintiffs' counsel replied that they would still be appearing at CPC to book their motion.

[49] On August 24, 2023, defendants' counsel advised that he had a commitment at 1 p.m. on August 30, 2023, and requested confirmation that he would be able to attend the commitment. Plaintiffs' counsel responded stating that defendants' counsel would not be able to attend the commitment and that he intended on taking 7 hours to examine the defendants and threatened to obtain a fourth certificate of non-attendance. On August 29, 2023, defendants' counsel agreed that August 30, 2023, would be for a full day as the plaintiffs requested.

[50] On August 29, 2023, at CPC, the plaintiffs sought to schedule a motion to strike the defence for failure to attend an examination for discovery and failure to comply with an interlocutory order. Justice Chalmers did not schedule the motion before a Judge because the motion is within the jurisdiction of an Associate Judge.

[51] The examination for discovery of the defendants took place on August 30, 2023, and September 20, 2023. Although the examinations for discovery of the defendants took place after the date of August 22, 2023 ordered by Associate Justice Jolley, they were completed within one month of that date and the circumstances giving rise to the brief delay have been explained.

iii. failure to produce documents at the outset and in accordance with the Rules

[52] On or about August 31, 2020, the defendants served a sworn affidavit of documents with schedule "A" listing three tabs consisting of approximately 269 pages of documents. On or about May 11, 2023, the defendants served a sworn supplementary affidavit of documents with schedule "A" listing three tabs consisting of four pages of documents. On May 28, 2021, the defendants provided productions from the Positano action consisting of approximately 700 pages of documents. While the Positano documents could have been produced earlier, they were produced over 4 ½ years ago.

iv. potential spoliation of documents

[53] Spoliation of relevant documents is a serious matter. Parties are under a duty to preserve what they know, or reasonably should know, is relevant to the action (*Doust v. Schatz*, 2002 SKCA 129 at para. 27).

[54] The plaintiffs submit that a summary of the potential evidence and documents which may have been lost or destroyed is found at Appendix A and Appendix B to their factum. Appendix A and Appendix B are the undertakings and refusals charts.

[55] The plaintiffs rely in part on the defendants' assertion that the defendants' access to Alibra's QuickBooks data has been lost as a result of their subscription to QuickBooks having ended around or after September 2019. The defendants submit that the plaintiffs already have some of the documents at issue included in the plaintiffs' own affidavit of documents and that the defendants were questioned on their examination for discovery referencing the contents of specific QuickBooks documents (see for example Q. 295, Q. 298, Q. 345-348).

[56] To the extent that the plaintiffs rely on the potential spoliation of documents I was not referred to case law regarding the applicable test for spoliation or how that test is satisfied with respect to specific documents. I am unable to find that there is a potential spoliation of documents.

v. failure to answer undertakings as ordered by the court

[57] On November 22, 2023, plaintiffs' counsel emailed defendants' counsel enclosing an undertakings chart and advising the defendants that they were in breach of the timetable order of Associate Justice Jolley because no answers to undertakings had been provided by the October 31, 2023 deadline.

[58] Answers to undertakings were first provided on February 29, 2024.

[59] I am satisfied that there is a reasonable explanation for failing to comply with the deadline for answers to undertakings ordered by Associate Justice Jolley. The dates of the examination for discovery of the defendants took place later than ordered. Counsel who acted for the defendants on their examination for discovery retired shortly thereafter and new counsel was appointed.

[60] To the extent that the plaintiffs take issue with some of the answers provided, there has been no determination of whether an answer provided is insufficient or remains outstanding, which is the subject matter of the alternative relief.

vi. failure to answer refusals

[61] The plaintiffs submit that it is not necessary to address whether a particular question has been properly refused in order to determine whether the failure to answer refusals should be considered as a basis to strike the amended defence. While the number of refusals is high, the propriety of the refusals has not been determined. In the circumstances of this case, the failure to answer questions refused does not support the striking of the amended statement of defence.

[62] I have considered the bases upon which the plaintiffs seek to strike the amended statement of defence, which the plaintiffs rely on collectively. In all the circumstances I am not satisfied that it is proportional or just to strike the amended statement of defence. The motion for an order to strike the amended statement of defence is dismissed.

Costs

[63] If successful in opposing the motion with respect to the striking of the amended statement of defence, the defendants seek costs of the motion on a partial indemnity basis in the amount of $24,316.25. The plaintiffs submit that if the motion to strike is not successful, there should be no costs. Had the plaintiffs been successful, the plaintiffs sought costs of the motion with respect to the striking of the amended statement of defence on a partial indemnity basis in the amount of $56,400.00.

[64] The defendants were successful in opposing the motion to strike. I am satisfied that the defendants are entitled to some costs, but not in the amount sought, which is too high in all the circumstances. I am also satisfied that payment other than within 30 days is more just. In my view a fair and reasonable amount that the plaintiffs could expect to pay for costs is the all-inclusive amount of $7,500.00, payable by the plaintiffs to the defendants in the cause.

Next Steps

[65] I have asked counsel in the past to make efforts to resolve or narrow the issues on this motion. I am directing that counsel speak with each other and discuss a resolution or narrowing of the issues remaining in the alternative relief on the motion. After such a discussion has taken place, counsel may contact me to schedule a case conference to address next steps with respect to the alternative relief.

Associate Justice B. McAfee

Date: March 25, 2026