

**CITATION:** Dabron v. Spinks, 2024 ONSC 5091  
**COURT FILE NO.:** CV-21-657188  
**DATE:** 20240913

**SUPERIOR COURT OF JUSTICE - ONTARIO**

**RE:** Dabron v. Spinks et al  
**BEFORE:** Associate Justice G. Eckler  
**COUNSEL:** Michelle Stephenson, for the plaintiff/moving party  
Denise Sayer and Adam Stikuts for the defendants/responding parties  
**HEARD:** June 13, 2024 by video conference

**REASONS FOR DECISION**

**A. Overview**

[1] The plaintiff, Gavin Dabron (“Dabron”) brings this motion, pursuant to Rule 34.10 of the *Rules of Civil Procedure* for disclosure of certain documents referenced in an affidavit affirmed by Zvi Joseph (“Joseph Affidavit”), a non-party, on December 22<sup>nd</sup>, 2023.

[2] The Joseph Affidavit was filed on behalf the defendants in response to the plaintiff’s pending Rule 30.10 motion (“the 30.10 motion”) seeking production of all paper and digital documents, notes, files and records in the possession of the non-party Ernst & Young LLP (“E&Y”), relating to the Sourced Group defendants. Both parties agree that, subject to potential redactions, the documents requested in this motion are a subset of the documents being requested in the underlying 30.10 motion.

[3] Dabron is also seeking an Order requiring the defendants’ affiant Zvi Joseph to provide answers to three questions which were refused at his cross-examination which took place on April 3<sup>rd</sup>, 2024.

[4] Dabron’s position on this motion is that production of the documents in the possession of the non-party should be ordered as the documents are relevant to the underlying 30.10 motion. Dabron further argues that the documents are referred to in the Joseph Affidavit and are required to be produced pursuant to Rules 34.10 of the *Rules of Civil Procedure*.

[5] The defendants argue that the requested documents in this motion should not be produced as production of the requested documents is the very issue that the Court is being asked to decide in the underlying 30.10 motion. They further argue that the requested documents are not relevant to the motion or the issues raised in the action and that in any event, production of non-party

documents can only be ordered if the plaintiff meets the required test for production under Rule 30.10.

[6] For the reasons that follow, the plaintiff's motion is dismissed. In my view, in the immediate case, ordering production of the requested documents in this motion will interfere with the orderly, fair and just process of the hearing of the 30.10 motion and disturb the fairness of the procedure in place for seeking productions from a non-party.

## **B. Procedural Background**

[7] In this action, the plaintiff seeks *inter alia* damages of over 50 million dollars for fraudulent misrepresentation and breach of contract as well as rescission of settlement documents.

[8] The statement of claim was issued on February 18th, 2021.

[9] The plaintiff is seeking as against the defendant Jonathan Spinks and the corporate defendants (collectively "Sourced Group"), damages for fraudulent misrepresentation in the amount of \$50,000,000, a declaration that Jonathan Spinks breached the confidentiality provisions of the Short Minutes of Settlement dated July 3rd, 2018 and the Further Minutes of Settlement dated August 30th, 2018, as a result of his alleged unlawful and unauthorized disclosure of the purchase price of the plaintiff's shares of Sourced Group Inc. and Sourced Group Holdings Pty Limited. The plaintiff is also seeking damages in the amount of \$3,000,000 for breach of contract, breach of confidence and intentional infliction of emotional harm.

[10] As against all defendants, the plaintiff is seeking rescission of the Minutes of Settlement, the Release and the Share Purchase Agreement dated August 30 2018 between the defendant Sourced Group Worldwide Inc. and the plaintiff. The plaintiff is also seeking punitive and exemplary damages in the amount of \$1,000,000, plus interest and costs.

[11] Spinks and the corporate defendants ("collectively "Sourced Group") served a notice of intent to defend on March 4th, 2021.

[12] A Demand for Particulars was served by the defendants on March 23rd, 2021.

[13] A Request to Inspect Documents was served by the defendants on March 23rd, 2021.

[14] The plaintiff served a Response to Demand for Particulars and Response to Request to Inspect Documents on April 30th 2021.

[15] A Fresh as Amended Statement of Claim was issued on June 23rd, 2021.

[16] The defendants served a second Demand for Particulars with respect to the Fresh as Amended Statement of Claim on July 9th, 2021.

[17] With leave of the Court, the plaintiff later issued an Amended Fresh as Amended statement of claim on March 22nd, 2022, adding Sourced Group's former Chief Financial Officer, Wilson Lee ("Lee") as a defendant.

[18] The plaintiff delivered a Response to Second Demand for Particulars on April 25th, 2022.

[19] Lee filed his statement of defence on June 3rd, 2022 and Spinks and Sourced Group filed their statement of defence on June 13th, 2022, responding to the Amended Fresh as Amended statement of claim.

[20] Pleadings are now closed and oral examinations for discovery have not yet been completed. The parties have not yet exchanged productions. No discovery plan has been agreed upon.

### **C. Facts**

[21] The following factual background is largely taken from the pleadings and the affidavits filed for the purposes of the 30.10 motion.

[22] In support of the 30.10 motion, the plaintiff relies on the Affidavit of Ryan Chan sworn on November 21<sup>st</sup> 2023. Mr. Chan is an associate at the firm Corman Feiner LLP, counsel for the plaintiff.

[23] In response to the 30.10 motion, the defendants rely on the Affidavit of the defendant Jonathan Spinks sworn on December 22<sup>nd</sup>, 2023 and the Affidavit of Zvi Joseph, sworn on December 22<sup>nd</sup>, 2023. Ms. Zvi is the Deputy Counsel for a non-party, Amdocs.

[24] This action relates to the settlement of a business dispute and previous litigation between the plaintiff and certain of the defendants commenced in 2017 in Ontario and Australia.

[25] The statement of claim alleges that the plaintiff Gavin Dabron ("Dabron"), and the defendant Jonathan Spinks ("Spinks"), were the co-founders of Sourced Group, a global cloud computing business. Former best friends, they started the business in 2010 in Sydney, Australia. Eventually, additional offices were opened in Toronto and Singapore.

[26] Sourced Group Inc., Sourced Group Worldwide Inc., Sourced (Singapore) Pte Ltd., Sourced Group Holdings Pty Limited ACN 144 751 422, Sourced Group Services Pty Ltd CAN 607 300 685, Sourced Group Pty Limited ACN 606 436 033, and the Sourced Group Unit Trust (collectively the "Sourced Group") operated to provide cloud computing consulting services in Canada, Australia, and Singapore.

[27] Although the corporate entities co-operated to all do business under the "Sourced Group" banner, they did not operate as one business in multiple countries. Rather, the different entities mainly operated independently in their own regions while sharing certain resources and back-office functions.

[28] Sourced Group provides information technology consulting services, specializing in configuration management, automation, cloud computing, and data management. Sourced Group serves clients in many industries, including financial services, media, transportation, and telecommunications.

[29] Dabron alleges that in 2016, he and Spinks began to have disagreements about the nature of Dabron's remuneration and use of corporate funds which culminated in Spinks unilaterally locking Dabron out of the company at the end of 2016.

[30] The defendants' position is that Dabron parted ways with the defendants after Dabron misappropriated corporate funds from Sourced Australia's bank accounts.

[31] This breakdown in the parties' relationship led to litigation in Ontario and Australia which was commenced by Spinks.

[32] In particular, in July 2017, Spinks commenced litigation in Australia on behalf of Sourced Australia against Dabron and his holding company to recover the \$374,034.09 AUD (or \$340,022.79 CAD) that Dabron had allegedly taken from the company. It is alleged that this total amount represented the unauthorized withdrawals, as well as Dabron's alleged overbilling and unpaid directors' loans.

[33] In May of 2017, Spinks and Sourced Ontario also commenced litigation in Canada under the oppression remedy and asked the court to order Dabron to sell his Sourced Group interests because of the complete breakdown in the parties' relationship.

[34] Dabron denied the allegations made against him in the Ontario and Australia litigation. Dabron defended the litigation and also issued a counter-claim and third party claim in the Ontario action.

[35] The Ontario and Australian actions were settled following a mediation which was held on July 3rd, 2018.

#### **D. The Settlement Agreement**

[36] In an attempt to settle the litigation, the parties agreed to settle the litigation by judicial mediation.

[37] In advance of the mediation, Spinks and Dabron (via their counsel) jointly retained Ernst & Young LLP ("E&Y") to provide its opinion as to the fair market value and pro rata ownership interest of Sourced Ontario as at each of April 30 2018, April 30 2017 and August 31st, 2016, Sourced Australia as of April 2018 and Sourced Singapore as of April 2018.

[38] The plaintiff alleges that relying on the financial information provided by the defendants, E&Y provided its opinion on the fair market value, and Dabron's pro rata ownership interest, of Sourced Group in a report dated June 15, 2018 (the "2018 E&Y Report"). In the 2018 E&Y Report,

the highest valuation of Sourced Group was \$8,400,000. The defendants reference the highest valuation as being \$8,440,000.

[39] The defendants maintain that Dabron, Spinks and their counsel had the opportunity to review and comment on E&Y's drafts and attend meetings with E&Y to understand and supervise the valuation engagement.

[40] A judicial mediation took place on July 3, 2018 before Justice Hainey, at which the parties agreed to resolve, not just the litigation in Ontario, but all outstanding issues between the parties. Minutes of Settlement were signed on July 3, 2018 and "Further Minutes of Settlement" were signed on August 30, 2018, wherein Dabron agreed to sell his 50% interest in all of the Sourced Group businesses, based on the value as determined by E&Y in the Report (the "Settlement").

[41] Ultimately, Sourced Worldwide paid \$3,800,000 CAD for Dabron's interest in Sourced Group. (the "Buyout Price"). However, Dabron agreed that \$300,000 of the Buyout Price would be directed to Sourced Australia for monies owing by Dabron to Sourced Australia such that Dabron's net proceeds from the sale were \$3,500,000.

[42] As part of the settlement, Dabron resigned from his prior various roles in Sourced which included director, officer, and/or consultant of the Australia based companies.

[43] The defendants maintain that the amount of the settlement reflected a compromise of the uncertain litigation risks facing the parties, including whether or not a court would force a buyout, whether Dabron would agree to sell his ownership interest, the disputed status of Dabron's claim to a 505 interest in Sourced Singapore, a disagreement over the proper valuation of Sourced Ontario and the repayment of large legal fees.

[44] Almost three years after the Settlement was concluded between the parties, the defendant, Spinks' ownership interest in Sourced Ontario ended when Amdocs Limited, a publicly traded company in the United States, purchased Sourced Group in March 2021 via its subsidiary Amdocs Canadian Managed Services Inc. ("Amdocs").

[45] On or around May 12, 2021, Sourced Group announced via news release that it was acquired by Amdocs Limited for US\$75,000,000 plus potential additional future consideration.

[46] Dabron has alleged that this sale price represents a more than 1125% increase from the highest valuation calculated by E&Y, in 2018, less than three years earlier and that this increase in valuation is beyond the margin of error of the 2018 E&Y Report.

[47] Dabron further alleges that the 2018 E & Y Report was based on incomplete, inaccurate, and/or misleading information provided by the individual defendants and that, had accurate financial information been provided, the valuation of Sourced Group and purchase price of Dabron's shares would have been much higher.

[48] Dabron alleges that the defendant Spinks acted outside the scope of his duties to Sourced Group by knowingly providing misleading financial information to and/or withholding material

information from E&Y in 2018 for the predominant purpose of undervaluing the share price and thereby lowering the purchase price that Dabron would receive for his shares. It is alleged that the misrepresentations made by the defendant Spinks include the following:

- i. providing misleading and/or incomplete financial statements that misrepresented the financial position of Sourced Group;
- ii. failing to disclose Sourced Group's true pipeline, including all customers, potential customers and sales opportunities;
- iii. withholding projected revenues;
- iv. failing to disclose its business plan, investor exit plan, potential acquirers; and
- v. failing to provide an accurate description of Sourced Group's goodwill.

[49] It is alleged that these misrepresentations were material to E&Y's 2018 valuation and the 2018 purchase price of Dabron's interest.

[50] The defendants deny Dabron's allegations and state that they made no misrepresentations to E&Y, fraudulent or otherwise. The defendants further maintain that the buyout was a negotiated resolution and not based solely on the 2018 E&Y report. The defendants maintain that after Dabron's exit from Sourced Group, they were able to raise capital which had previously been difficult because of the litigation arising from Dabron's alleged illegitimate withdrawals. That capital in turn allowed Sourced Group to expand its operations. At the same time, demand for Sourced Group's cloud computing expertise grew rapidly during the COVID-19 pandemic just as market valuations for technology companies exploded to approach or exceed all-time highs. The defendants maintain that these factors, not fraud or negligence explain Sourced's increase in value after Dabron's exit.

#### **E. Scheduling of the 30.10 Motion**

[51] On July 21, 2022, Dabron's counsel sent a documentation preservation letter to E&Y. This letter advised E&Y that Mr. Dabron had commenced an action against Spinks and Sourced Group and a request was made that E&Y preserve all evidence and records maintained in connection to the action. A copy of the statement of claim was enclosed. The defendants were not copied with this letter.

[52] Without providing notice to the defendants or the non-party Amdocs, E&Y subsequently delivered a Statement of Work ("SOW") dated October 14<sup>th</sup>, 2022 which confirmed that E&Y would make reasonable searches and produce documents in E&Y's power, possession and control in relation to Sourced Group.

[53] In this Statement of Work, E&Y confirmed the following:

EY has previously prepared a Comprehensive Value Report of Sourced Group in June 2018 along with an allocation of the purchase price of Sourced Group in 2021 (the “Engagements”). Our assistance is required, in relation to Court File No. CV-21-00657188-000 (the “Action”) to produce information in the possession of EY related to the Engagements with Sourced Group.

[54] Prior to sending the October 14<sup>th</sup>, 2022 Statement of Work, E&Y did not obtain consent from the non-party Amdocs to produce documentation relating to the 2021 Engagement which indeed was an engagement of E&Y by the non-party Amdocs and not a Sourced Group engagement.

[55] On February 9<sup>th</sup>, 2023, E&Y wrote to plaintiff’s counsel to advise that E&Y was no longer able to perform the documentary production work outlined in the SOW due to “E&Y’s confidentiality obligations to its client, Amdocs Canadian Managed Services Inc. (“Amdocs”). E&Y confirmed that the wording of E&Y’s engagement agreements with its clients prohibited E&Y from disclosing confidential client documents to third parties unless E&Y obtains consent to disclose from the client, or is required to do so by law...”. E&Y confirmed that the required consent was not provided by Amdocs.

[56] After receiving the communication from E&Y, the plaintiff launched a 30.10 motion wherein the plaintiff seeks production from E&Y of what the defendants term a “vast swath of documents” relating to certain defendants and relating to the non-party Amdocs, the defendants’ parent company.

[57] In particular, the plaintiff’s notice of motion with respect to the 30.10 motion confirms that the following documentary productions are being sought from E&Y:

- i. An Order pursuant to rule 30.10 for the production for inspection by the parties, within 30 days, of all paper and digital documents, notes, files and records in the possession of Ernst & Young LLP (“E&Y”), relating to the defendants Sourced Group Inc., Sourced Group Worldwide Inc., Sourced (Singapore) PTE Ltd., Sourced Group Holdings PTY Limited ACN 144 751 422, Sourced Group Services PTY Ltd ACN 607300 685, Sourced Group PTY Limited ACN 606 436 033, and Sourced Group Unit Trust (collectively, “Sourced Group”) including but not limited to:
  - A. All documents relating to the Comprehensive Valuation Report prepared by E&Y, valuing Sourced Group, dated June 15, 2018 (the “Report”);
  - B. All other documents relating to value of Sourced Group, including all relevant documents related to the April 2021 engagement of E&Y which originated from any of the defendants;
  - C. All correspondence between E&Y and Sourced Group staff or representatives, including the individual defendants;

- D. All internal correspondence related to Sourced Group;
  - E. Internal notes, memoranda, etc. of telephone discussions between E&Y staff and Sourced Group staff or representatives related to the Report and the underlying valuation (collectively, with paras. (a)(i)-(iv), the “Responsive Documents”).
- ii. An Order that E&Y may redact the documents to be produced pursuant to paragraph (a) for relevance and to remove E&Y client confidential information related to any client that is not a party to this action;

[58] The defendants have consented to the production of E&Y’s complete file with respect to the parties’ joint retainer of E&Y in 2018.

[59] The plaintiff advised that he also sought production of E&Y’s file relating to the 2021 acquisition of Source by the non-party Amdocs. Amdocs and Sourced object to the production of E&Y’s file relating to Amdocs engagement with E&Y arguing that the documentation is confidential, not relevant to the issues raised in the underlying action and that the request is overly broad.

**F. Background to This Refusals Motion and Motion pursuant to Rule 34.10**

[60] Zvi Joseph, Amdocs’ Deputy General Counsel, swore an affidavit to register Amdocs’ objection to producing its confidential documents to Dabron. Before swearing the affidavit, Joseph took the necessary step of reviewing the Referenced Documents (E&Y’s Statement of Work 2021 and E&Y’s Final Report in the 2021 Amdocs engagement) to consider whether or not Amdocs would object to E&Y producing all of the files it holds in relation to Amdocs’ engagement of E&Y in 2021.

[61] The documents being sought by the plaintiff in this motion are referenced at paragraphs 5 and 7 of the Joseph affidavit. These two paragraphs, as well as paragraphs 6 and 9 have been referenced below:

5. While I was not directly engaged in the Amdocs Engagement at the time, I have reviewed The Statement of Work prepared by EY as well as the final report that EY provided to Amdocs in respect of this engagement.

6. I can advise that the purpose of the Amdocs Engagement was to allocate the purchase price that Amdocs had already agreed to pay (and which is a matter of public record) to the various geographies in which Sourced operated at the time for tax planning purposes.

7. Not only did EY not prepare a valuation of Sourced Group during the Amdocs Engagement, but its Statement of Work expressly stated that determining an



independent valuation of Sourced Group or its assets was excluded from the Scope of the Amdocs Engagement.

9. Given the private and confidential nature of the documents that EY may have in its possession, Amdocs objects to any court order that will result in Mr. Dabron receiving Amdocs' documents, including any documents that Amdocs provided to EY as part of any engagement between Amdocs and EY.

[62] The defendants argue that the plaintiff seized on the references to the Amdocs' documents and served both a request to inspect and a notice of examination demanding production of the E&Y Statement of Work 2021 and the E&Y Final Report from 2021 ("**the Referenced Documents**").

[63] Moreover, during Mr. Joseph's cross-examination, Dabron's counsel also asked Mr. Joseph to provide a list of all of the documents that E&Y received as part of the 2021 Amdocs engagement and made further requests for the Referenced Documents, being, the E&Y 2021 Statement of Work and the E&Y Final report prepared in 2021 which had been requested in the Notice of Examination and Request to Inspect.

[64] These questions were all refused on the basis that the 2021 Amdocs engagement is not relevant to the action or the motion and answering the question would require Amdocs to disclose confidential and private information to Dabron, which as a non-party it has no obligation to do absent a court order. Moreover, production requests were refused on the basis that the documents being sought during the examination were the very documents being sought in the underlying 30.10 motion.

[65] The plaintiff maintains that the documents were referred to in the Joseph affidavit and are relevant and therefore producible in the context of this motion.

### **G. Legal Analysis and Discussion**

[66] The documents which the plaintiff seeks to have produced in this motion are the following:

1. The Statement of Work prepared by E&Y in 2021 referenced in paragraph 5 and 7 of the Joseph Affidavit (**Referenced Document and Refusal**)
2. The Final Report that E&Y provided to Amdocs in respect of this 2021 engagement referenced in paragraph 5 of the Joseph Affidavit. (**Referenced Document and Refusal**)
3. A list of documents that Amdocs provided to E&Y in the 2021 Engagement (**Refusal**)
4. If there was a list of documents E&Y was going to be receiving through its 2021 engagement to advise what if any documents on the list Amdocs does not object to producing. (**Refusal**)

[67] In the plaintiff's notice of motion, the plaintiff confirmed that he is seeking production of the Referenced Documents pursuant to *inter alia*, Rules 30.04(2) and 34.10(2)(b) of the *Rules of Civil Procedure*.

[68] Despite the fact that considerable portions of the plaintiff's factum and the defendants' responding factum were devoted to arguments relating to production requirements under Rule 30.04(2), the plaintiff confirmed at the outset of the hearing of the motion that relief pursuant to Rule 30.04(2) was no longer being sought and that the argument pursuant to Rule 30.04(2) was being abandoned.

[69] On this motion, the court is therefore tasked with deciding if the Referenced Documents should be produced pursuant to Rule 34.10(2)(b) and/or if the defendants' refusals relating to production of the Referenced Documents were proper refusals.

***Issue #1 – Should the Referenced Documents be produced pursuant to Rule 34.10(2)(b)?***

[70] The issue to be decided on the underlying 30.10 motion is whether the non-party E&Y should be ordered to produce the documents in its possession relating to Sourced Group, subject to redactions for relevance and to remove confidential information relating to non-party clients.

[71] Rule 30.10 provides that on a motion for production from a non-party, the moving party must demonstrate that:

- a) The documents sought are relevant to a material issue in the action; and
- b) It would be unfair to require the moving party to proceed to trial without having discovery of the documents.

[72] Non-party production orders “are not routinely granted” because they are “exceptional remedies in the context of civil litigation” and such motions call for “a robust review of the considerations” under the rule. (*Regional Municipality of Halton v. Alizadeh*, 2021 ONSC 6958 at para. 41) The relief is discretionary. (*Philip Services Corp. v. Deloitte & Touche*, 2015 ONCA 60 at para 10).

[73] In *Ontario (Attorney General) v. Stavro*, 1995 CarswellOnt 1332, at para. 15, the Ontario Court of Appeal outlined various factors that a motion judge should consider on a non-party production motion. These factors include:

- a) the importance of the documents in the litigation;
- b) the stage of the proceedings and whether discoveries have been held and whether production at the discovery stage as opposed to at trial is necessary to prevent unfairness to the moving party;
- c) whether there is another practical source to obtain the same or equivalent documents;

- d) the position of the non-parties with respect to production;
- e) whether discovery is adequate without the documents, and if it is inadequate, whether that is the fault of the moving party.

[74] The defendants, other than Mr. Lee, oppose the plaintiff's 30.10 motion on several grounds, including relevance and have filed two affidavits in opposition to the underlying motion.

[75] E&Y has confirmed that it does not take a position on the merits of the motion. It has confirmed that it cannot produce the requested documents without consent from Amdocs and/or absent a court Order.

[76] Mr. Spinks, one of the defendants, filed an affidavit confirming that the defendants consent to the production of E&Y's 2018 file to the plaintiff in its entirety. However, his evidence is that the E&Y documents, including the E&Y documents relating to Amdocs 2021 retention of E&Y ought not to be produced as they are not relevant or necessary to the litigation.

[77] Mr. Joseph, the Deputy General Counsel for Amdocs, also filed an affidavit objecting to the relief being sought on the underlying motion. Mr. Joseph's affidavit confirms that Amdocs objects to the production of its confidential business information. Mr. Joseph confirmed that E&Y was retained by Amdocs in 2021 to provide advice on tax allocation issues with respect to a valuation of Source Group that had already been agreed upon. In his affidavit, he confirmed that E&Y was not retained to value Sourced Group as the valuation had already been agreed upon.

[78] As is required pursuant to Rule 39.01(4), Mr. Joseph confirmed the source of his information and belief for his evidence in this regard and referenced a 2021 Statement of Work prepared by E&Y as well as the final report that E&Y provided to Amdocs in respect of this 2021 engagement of E&Y by Amdocs.

[79] The plaintiff served a notice of cross-examination on Mr. Joseph, on or about March 29<sup>th</sup> 2024, and requested that he attend a cross-examination on April 3<sup>rd</sup>, 2024 and bring the Referenced Documents to his examination. In particular the Notice of Cross-Examination states as follows:

**YOUR ARE REQUIRED TO BRING WITH YOU and produce at the Examination the following documents and things:**

1. Your affidavit sworn December 22<sup>nd</sup>, 2023;
2. A copy of the Statement of Work of Ernst & Young, referred to in paragraphs 5 and 7 of your affidavit sworn December 22<sup>nd</sup>, 2023;
3. The final report of Ernst & Young referred to in paragraph 5 of your affidavit sworn December 22<sup>nd</sup>, 2023.

[80] Rule 34.10(2)(b) provides as follows:

### **PRODUCTION OF DOCUMENTS ON EXAMINATION**

#### ***Persons to be Examined Must Produce Required Documents and Things***

(2)The person to be examined shall produce for inspection at the examination,

(b) on any examination, including an examination for discovery, all documents and things in his or her possession, control or power that are not privileged and that the notice of examination or summons to witness requires the person to produce.

[81] Rule 34.10(3) provides as follows:

#### ***Notice or Summons May Require Documents and Things***

(3) Unless the court orders otherwise, the notice of examination or summons to witness may require the person to be examined to produce for inspection at the examination,

a) all documents and things relevant to any matter in issue in the proceeding that are in his or her possession, control or power and are not privileged; or

(b) such documents or things described in clause (a) as are specified in the notice or summons.

[82] Rule 34.10 therefore places limits on the documents that a party is required to produce at an examination. Privileged documents need not be produced, and the documents listed in a notice of examination may only include “documents and things relevant to any matter in issue in the proceeding”.

[83] During oral submissions, the parties confirmed that neither party was able to find a case directly on point in terms of a case where a party was seeking production of documents from a non-party pursuant to Rule 34.10 or via a refusals’ motion stemming from the cross-examination of a non-party for the purposes of obtaining evidence for the hearing of a 30.10 motion.

[84] The defendants argue that the term “proceeding” referenced in Rule 34.10(3) is defined in Rule 1.03 as meaning “an action or application” The defendants argue therefore that Mr. Joseph is only required to produce the Referenced Documents if they are documents that are not privileged and are relevant to an issue raised in the action itself as opposed to the motion. In this regard, the defendants argue that the documents should not be produced as the Referenced Documents are not relevant to issues raised in the action. They further argue that production of the Requested Documents in this motion should not be ordered as production of the Referenced Documents is the very issue that the Court is being asked to decide in the underlying 30.10 motion.

[85] The plaintiff argues that the wording of Rule 34.10 is clear and that given that the Referenced Documents are referred to in the notice of cross-examination, they must be produced. Moreover, relying on *Rebello v. Del Property Management et al.*, 2024 ONSC 573 (CanLII) paras 45 and 46, the plaintiffs argue that pursuant to Rule 34.10, the documents must be produced if they are relevant to the 30.10 motion itself, as opposed to relevant to the action, as suggested by the defendants.

[86] The plaintiff argues that the Referenced Documents are relevant as they will assist the Court in the determination of the underlying 30.10 motion. In particular, the plaintiff argues that the 2021 E&Y Statement of Work will assist the court in knowing what the documents requested on the 30.10 motion will include.

[87] Both parties referenced *Fairview Donut Inc. v. The TDL Group Corp.*, 2011 ONSC 247, (“*Fairview*”) in support of their respective positions. The plaintiff refers to *Fairview*, and argues that this case demonstrates that, in the context of a Rule 39.02 examination, the Court may order production of non-party documents with reference to Rule 34.10.

[88] The defendants argue that *Fairview* is the only case referred to in the parties’ motion materials which addresses the intersection of Rule 34.10 and 30.10. The defendants’ position is that *Fairview* confirms, that in the context of a Rule 39.02 examination, non-party production orders should not be made unless the party seeking production can meet the required 30.10 test which is applied in 30.10 motions.

[89] In *Fairview*, the plaintiffs moved for production of documents pursuant to Rule 34.10 from *inter alia* a non-party franchisee who swore an affidavit filed by the defendants in support for their motion for summary judgment and as part of their record in response to the plaintiff’s motion for certification of a proceeding as a class action. The plaintiff served a notice of examination on the franchisee and requested that he produce records known as throw sheets which were referred to in the non-party’s affidavit.

[90] Justice Strathy, as he then was, determined that the Court had jurisdiction to order production of the requested records from a non-party under the combined operation of Rule 34.10 (dealing with production of documents on examination) and section 12 of the *Class Proceedings Act*, 1992, S.O. 1992, c. 6. 8]:

In my view, I also have jurisdiction under the combined operation of Rule 34.10 (dealing with production of documents on examination) and section 12 of the *Class Proceedings Act*, 1992, S.O. 1992, c. 6. The latter permits the court to make “any order it considers appropriate regarding the conduct of a class proceeding to ensure its fair and expeditious determination and, for the purpose, may impose such terms on the parties as it considers appropriate.” I do not believe that the concluding words limit the court’s jurisdiction to making orders only in relation to parties. It seems to me that where an affiant whose cross-examination is pending has made it clear that he/she does not intend to produce a requested document, the court must be

able to order the production of that document at the request of the other party. Doing so promotes the “just, most expeditious and least expensive determination” of the proceeding (rule 1.04) and, what amounts to the same thing, its “fair and expeditious determination”.

[91] As will be discussed in the analysis of issue #2 below, it is significant that in ordering production from the non-party, Justice Strathy (as he then was) applied the applicable 30.10 test.

[92] While the immediate case is not a class action, Rules 34.10, 1.04 and 29.2 are applicable.

[93] Rule 1.04 of the *Rules of Civil Procedure* provides as follows:

**Interpretation**  
***General Principle***

**1.04** (1) These rules shall be liberally construed to secure the just, most expeditious and least expensive determination of every civil proceeding on its merits. R.R.O. 1990, Reg. 194, r. 1.04(1).

***Proportionality***

(1.1) In applying these rules, the court shall make orders and give directions that are proportionate to the importance and complexity of the issues, and to the amount involved, in the proceeding. O. Reg. 438/08, s. 2.

***Matters Not Provided For***

(2) Where matters are not provided for in these rules, the practice shall be determined by analogy to them. R.R.O. 1990, Reg. 194, r. 1.04 (2).

[94] With respect to the relief being sought pursuant to Rule 34.10, Rule 29.2.02 of the *Rules of Civil Procedure*, confirms that Rule 29.2 Proportionality in Discovery, applies to the court’s determination of any issues flowing from Rule 34 which includes 34.10.

[95] In this regard, Rule 29.2.02 provides as follows:

**APPLICATION**

29.2.02 This Rule applies to any determination by the court under any of the following Rules as to whether a party or other person must answer a question or produce a document:

1. Rule 30 (Discovery of Documents).
2. Rule 31 (Examination for Discovery).
3. Rule 34 (Procedure on Oral Examinations).

4. Rule 35 (Examination for Discovery by Written Questions). O. Reg. 438/08, s.

[96] Rule 29.2.03(1) sets out the proportionality factors which apply to both oral and documentary discovery:

In making a determination as to whether a party or other person must answer a question or produce a document, the court shall consider whether,

- (a) the time required for the party or other person to answer the question or produce the document would be unreasonable;
- (b) the expense associated with answering the question or producing the document would be unjustified;
- (c) requiring the party or other person to answer the question or produce the document would cause him or her undue prejudice;
- (d) requiring the party or other person to answer the question or produce the document would unduly interfere with the orderly progress of the action;
- (e) and the information or the document is readily available to the party requesting it from another source.

2) In addition to the considerations listed in subrule (1), in determining whether to order a party or other person to produce one or more documents, the court shall consider whether such an order would result in an excessive volume of documents required to be produced by the party or other person.

[97] The court is permitted to consider “undue prejudice” under rule 29.2.03(1)(c) in relation to all motions under rule 30 or 34.

[98] Pursuant to Rule 29.2.03(1)(d), the court is also permitted to consider if requiring the party or other person to answer the question or produce the document would unduly interfere with the orderly progress of the action.

[99] Moreover, the wording “unless the court orders otherwise” provided for in Rule 34.10(3) necessarily implies authority on the part of the court to order or refuse to order production of a document referenced in a notice of examination. *Fairview, supra*, suggests that the Court also has jurisdiction to order or not order production pursuant to Rule 34.10 in combination with other Rules.

[100] In my view, considerations of fairness to the parties and the court process dictate that production of the Referenced Documents not be ordered prior to the hearing of the 30.10 motion.

[101] The documents which the plaintiff is seeking to have produced in this motion, represent a subset of the documents being requested on the main motion.

[102] Therefore, in the immediate case, it is my view that ordering production of the Referenced Documents on this motion will interfere with the orderly progress of the action and could lead to inconsistent and potentially unjust results.

[103] In particular, if an order is made in this motion to order production of the Referenced Documents and if it is then determined at the hearing of the 30.10 motion that the same documents ought not to be produced, this would result in inconsistent findings and potentially unfair and unjust results for the parties involved in this litigation.

***Issue #2 – Should the defendants be ordered to answer the three questions refused at the cross-examination of Mr. Joseph?***

**LAW ON THE SCOPE OF CROSS-EXAMINATION**

[104] On a motion, evidence generally is not presented to the court orally. Rather, the evidence is presented by an affidavit and by reference to the transcript of the cross-examination of the deponent of the affidavit. Rules 39.01 (1) and 39.01(4) provide as follows:

**EVIDENCE BY AFFIDAVIT**

**Generally**

**39.01 (1)** Evidence on a motion or application may be given by affidavit unless a statute or these rules provide otherwise.

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**39.01 (4)** An affidavit for use on a motion may contain statements of the deponent's information and belief, if the source of the information and the fact of the belief are specified in the affidavit.

[105] Under rule 39.02, an adverse party may cross-examine a deponent who has sworn an affidavit for an Application. Rule 39.02 (1) provides:

**EVIDENCE BY CROSS-EXAMINATION ON AFFIDAVIT**

**On a Motion or Application**

**39.02 (1)** A party to a motion or application who has served every affidavit on which the party intends to rely and has completed all examinations under rule 39.03 may cross-examine the deponent of any affidavit served by a party who is adverse in interest on the motion or application.



[106] In *Ontario v. Rothmans Inc.*, 2011 ONSC 2504, at para. 143, leave to appeal denied, 2011 ONSC 3685 (Div Ct), Justice Perell helpfully summarized the principles regarding the scope of cross-examination as follows:

The case law has developed the following principles about the scope of the cross-examination of a deponent for an application or motion:

- The scope of a cross-examination of a deponent for an application or motion is narrower than an examination for discovery: *BOT Construction (Ontario) Ltd. v. Dumoulin*, [2007] O.J. No. 4435 (S.C.J.) at para. 6.
- A cross-examination is not a substitute for examinations for discovery or for the production of documents available under the Rules of Civil Procedure: *BOT Construction (Ontario) Ltd. v. Dumoulin*, supra at para. 7; *Westminster Canada Holdings Ltd. v. Coughlan*, [1989] O.J. No. 252 (Master), aff'd [1989] O.J. No. 3038 (H.C.J.).
- The examining party may not ask questions on issues that go beyond the scope of the cross-examination for the application or motion: *Thomson v. Thomson*, [1948] O.W.N. 137 (H.C.J.); *Toronto Board of Education Staff Credit Union Ltd. v. Skinner*, [1984] O.J. No. 478 (H.C.J.) at para. 12; *Westminster Canada Holdings Ltd. v. Coughlan*, [1989] O.J. No. 3038 (H.C.J.).
- The questions must be relevant to: (a) the issues on the particular application or motion; (b) the matters raised in the affidavit by the deponent, even if those issues are irrelevant to the application or motion; or (c) the credibility and reliability of the deponent's evidence: *Superior Discount Limited v. N. Perlmutter & Company; Superior Finance Company v. N. Perlmutter & Company*, [1951] O.W.N. 897 (Master) at p. 898; *Re Lubotta and Lubotta* [1959] O.W.N. 322 (Master); *Wojick v. Wojick*, 1971 CanLII 538 (ON SC), [1971] 2 O.R. 687 (H.C.J.); *Toronto Board of Education Staff Credit Union Ltd. v. Skinner*, [1984] O.J. No. 478 (H.C.J.) at para. 11; *BASF Canada Inc. v. Max Auto Supply (1986) Inc.*, [1998] O.J. No. 3676 (Master) at paras. 6, 10-11; *Caputo v. Imperial Tobacco Ltd.*, [2002] O.J. No. 3767 (Master) at paras. 14-15; *BOT Construction (Ontario) Ltd. v. Dumoulin*, [2007] O.J. No. 4435 (S.C.J.) at para. 4; *Shannon v. BGC Partners LP*, 2011 ONSC 1415 (Master) at para. 8.
- If a matter is raised in, or put in issue by the deponent in his or her affidavit, the opposite party is entitled to cross-examine on the matter even if it is irrelevant and immaterial to the motion before the court: *Wojick v. Wojick and Donger*, 1971 CanLII 538 (ON SC), [1971] 2 O.R. 687 (H.C.J.), at p. 688; *Ferring Inc. v. Richmond Pharmaceuticals Inc.* [1996] O.J. No. 621 (Div. Ct.) at paras. 14 and 15; *Logan v. Canada (Minister of Health)*, [2001] O.J. No. 6289 (Master); *Guestlogix Inc. v. Hayter*, 2010 ONSC 5570 at para. 16.

- The proper scope of the cross-examination of a deponent for an application or motion will vary depending upon the nature of the application or motion: *Blum v. Sweet Ripe Drink Inc.* (1991), 47 C.P.C. (2d) 263 (Ont. Master); *Moyle v. Palmerston Police Services Board* (1995), 1995 CanLII 10659 (ON SC), 25 O.R. (3d) 127 (Div. Ct.).
- A question asked on a cross-examination for an application or motion must be a fair question: *Superior Discount Ltd. v. N. Perlmutter & Co.*, [1951] O.W.N. 897 (Master) at p. 898; *Canadian Bank of Commerce (CIBC) v. Molony*, [1983] O.J. No. 221 (H.C.J.) at para. 3; *Seaway Trust Co. v. Markle*, [1988] O.J. No. 164 (Master); *BASF Canada Inc. v. Max Auto Supply (1986) Inc.*, [1998] O.J. No. 3676 (Master) at para. 6.
- The test for relevancy is whether the question has a semblance of relevancy: *Re Lubotta and Lubotta* [1959] O.W.N. 322 (Master); *Rodrigues v. Madill*, [1985] O.J. No. 1666 (Master). (However, in *Sanctuary et al. v. Toronto (City) et al.*, 2020 ONSC 4708 (CanLII), Justice Sossin at parag.18, clarified that since *Rothmans*, courts have confirmed that the standard of a “semblance of relevance” no longer has application and the threshold issue is now relevance)
- The scope of cross-examination in respect to credibility does not extend to a cross-examination to impeach the character of the deponent: *Moyle v. Palmerston Police Services Board* (1995), 1995 CanLII 10659 (ON SC), 25 O.R. (3d) 127 (Div. Ct.).
- The deponent for an application or motion may be asked relevant questions that involve an undertaking to obtain information, and the court will compel the question to be answered if the information is readily available or it is not unduly onerous to obtain the information: *Bank of Montreal v. Carrick* (1974), 1973 CanLII 381 (ON SC), 1 O.R. (2d) 574 (Master), aff’d *ibid* p. 574n (H.C.J.); *Mutual Life Assurance Co. of Canada v. Buffer Investments Inc.* (1985), 1985 CanLII 1940 (ON SC), 52 O.R. (2d) 335 (H.C.J.) at paras. 9-13; *Caputo v. Imperial Tobacco Ltd.*, [2002] O.J. No. 3767 (Master) at paras. 42, 56; *BOT Construction (Ontario) Ltd. v. Dumoulin*, [2007] O.J. No. 4435 (S.C.J.) at para. 8; *Hinke v. Thermal Energy International Inc.*, 2011 ONSC 1018 (Master) at paras. 36-37.
- The deponent for a motion or application who deposes on information and belief may be compelled to inform himself or herself about the matters deposed: *Rabbiah v. Deak*, [1961] O.W.N. 280 (Master); *Caputo v. Imperial Tobacco Ltd.*, [2002] O.J. No. 3767 (Master) at paras. 42, 46.

[107] In *Sanctuary et al v. Toronto (City) et al.*, 2020 ONSC 4708 (CanLII), at paras 57 and 58, Justice Sossin seemed to accept, and I agree, that proportionality is also factor for the court to consider with respect to refusals’ motions stemming from examinations pursuant to Rule 39.01. In this regard, Justice Sossin stated the following at paragraphs 57 and 58:

As the Court held in *Ravenda Homes v. 1372708 Ontario Inc.*, 2011 ONSC 4277, at para. 29, similar considerations of proportionality apply on refusals in the context of a cross-examination on an affidavit; see also *Price v. H. Lundbeck A/S*, 2018 ONSC 2483, at para 27.

Additionally, Rule 1.04 (1) of the *Rules of Civil Procedure* sets out that the Rules are to be liberally construed in order to secure the just, most expeditious and least expensive determination of every civil proceeding on its merits. Rule 1.04(1.1) specifically requires that proportionality be considered in applying the Rules

[108] Rule 1.04(1.1) specifically requires that proportionality be considered in applying the Rules.

### ***ISSUE #2 - DISCUSSION AND DISPOSITION***

[109] The three refusals in issue are the following:

***Refusal #1 – Question No. 35, page 14 – To produce the statement of work and final report of EY that you state that you reviewed.***

***Refusal #2 – Question No.91, page 32 – To provide a list of the documents that Amdocs provided to EY in the 2021 Engagement.***

***Refusals #3 – Question No.69, page 26 – To check if there was a list of documents EY was going to be receiving through its engagement and further to advise what, if any, documents on that list your objection does not apply to.***

[110] As noted, during oral submissions, the parties confirmed that neither party was able to find a case directly on point in terms of a case where a party was seeking production of documents from a non-party via a refusals' motion stemming from the cross-examination of a non-party for the purposes of obtaining evidence for the hearing of a 30.10 motion.

[111] Relying on *Ontario v. Rothmans Inc.*, 2011 ONSC 2504, at para 143, the plaintiff argues that what is relevant and producible on cross-examination on an affidavit delivered in respect of a motion includes documents which are relevant to a) the issues on the motion or b) the matters raised in the affidavit. The plaintiff argues that the requested documents are both. The plaintiff does not agree with the defendants' position that the plaintiff must meet the Rule 30.10 test in this motion in order to obtain the Order requested.

[112] The plaintiff argues that Referenced Documents and in particular, the 2021 Statement of Work prepared by E&Y at the request of the non-party Amdocs would provide the parties and the Court with greater detail about E&Y's 2021 engagement and what the documents in E&Y's possession would likely include. The plaintiff maintains that this information would assist in determining the issue of relevance and potentially fairness on the main motion and therefore the documents are relevant to the issues raised on this motion and should be produced.

[113] The defendants disagree with the plaintiffs' position that a party can obtain an order to obtain documents from a non-party without meeting the appropriate Rule 30.10 test. The defendants further raise the point, and I agree that the authorities relied upon by the plaintiff in support of this motion are not directly on point, as none of the authorities referenced in the plaintiff's factum, address the issue of the intersection between Rule 34 and Rule 30.10 which is raised in this motion.

[114] The defendants argue that in the context of a refusals' motion relating to an underlying 30.10 motion the onus is on the plaintiff to meet the test that a party is required to meet on the 30.10 motion itself. In support of this position, the defendants rely on *Fairview Donut Inc. v. The TDL Group Corp.*, 2011 ONSC 247 ("*Fairview*"). Although *Fairview* does not address the production of documents from a non-party in the context of cross-examinations relating to a 30.10 motion, the case is nevertheless instructive in terms of the production issue raised in this motion relating to a non-party.

[115] In *Fairview*, the Court was asked to consider the issue of whether a non-party franchisee was required to produce documentation referred to in an affidavit filed in support of a defendants' motion for summary judgment and as part of their record in response to the plaintiff's motion for certification of a proceeding as a class action. The plaintiff served a notice of examination on the franchisee and requested that he produce records known as throw sheets.

[116] Justice Strathy, as he then was, found that the Court had jurisdiction to order the non-party to produce the documents in issue (throw sheets) pursuant to Rule 30.10 and pursuant to Rule 34.10 and section 12 of the *Class Proceedings Act, 1992*, S.O. 1992, c.6.

[117] It is notable, that in considering whether the non-party documents should be produced, the Court, at para 10, applied the legal test with respect to motions under Rule 30.10 as summarized by Perell J. in *Tetefsky v. General Motors Corp.* 2010 ONSC 1675 as follows:

The case law associated with rule 30.10 establishes that the disclosure and production of a document from a non-party is a matter of fairness and necessity. The court determines whether it would be unfair to require the moving party to proceed to trial without a document in the possession of a non-party. Although production can be ordered from a non-party, it is not routinely sought and the threshold for granting it is high: *Olendzki v. W.A. Baker Trucking Ltd.* (2006), 27 C.P.C. (6th) 338 (Ont. S.C.J.). An order under rule 30.10 should not be made as a matter of course and should only be made in exceptional circumstances: *Morse Shoe (Canada) Ltd. v. Zellers Inc.*, 1997 CanLII 1573 (ON CA), [1997] O.J. No. 1524 (C.A.) at para. 19.

In making the determination of whether to order production from a non-party, the court may consider the following factors: (1) the importance of the document to the issues in the litigation; (2) whether production at the discovery stage as opposed to production at trial is necessary to avoid unfairness to the moving party; (3) whether the examination of the opposing party with respect to the issues to which the

documents are relevant would be adequate to obtain the information in the document; (4) the availability of the document or its information from another source that is accessible to the moving party; (6) the relationship of the non-party from whom production is sought to the litigation and the parties to the litigation; and (6) the position of the non-party with respect to production: *Ontario (Attorney General) v. Ballard Estate* (1995), 1995 CanLII 3509 (ON CA), 26 O.R. (3d) 39 (C.A.); *Morse Shoe (Canada) Ltd. v. Zellers Inc.*, 1997 CanLII 1573 (ON CA), [1997] O.J. No. 1524 (C.A.).

[118] Ultimately, applying the Rule 30.10 test outlined in *Tetefseky*, Justice Strathy (as he then was) determined that the non-party records should be produced.

[119] In *Rothmans, supra*, at para 37 Justice Perell confirmed that the nature of a motion is a factor in determining whether questions on a cross-examination of a deponent for the motion are proper. The nature of the motion will determine what questions are relevant and is a factor in determining whether refused questions should be answered.

[120] In *Rothmans, supra*, at para 143, Justice Perell also confirmed that a question asked on a cross-examination for an application or motion must be a fair question: *Superior Discount Ltd. v. N. Perlmutter & Co.*, [1951] O.W.N. 897 (Master) at p. 898; *Canadian Bank of Commerce (CIBC) v. Molony*, [1983] O.J. No. 221 (H.C.J.) at para. 3; *Seaway Trust Co. v. Markle*, [1988] O.J. No.164 (Master); *BASF Canada Inc. v. Max Auto Supply* (1986) Inc., [1998] O.J. No. 3676 (Master) at para. 6.

[121] In terms of what is considered to be a fair question, Justice Perell provided the following helpful commentary which I find is of some assistance to the determination of the issues raised in this motion (*Rothmans, supra* at para 144):

There are some subtle points about these principles that are worth noting. First, although the case law establishes that a cross-examination question must be “fair,” the nature of fairness is not explained in the case law. This principle would appear to be the source of the court’s jurisdiction to stop abusive questioning and questioning designed to discomfort a witness but having little probative value. In my opinion, the fairness principle would also provide the court with the jurisdiction to stop a party from using a cross-examination in a way that disturbed the fairness of the procedure or the fairness of the adversary system under which justice is administered in Ontario.

[122] In considering Rules 1.04, 29.2 and the fairness principle discussed by Justice Perell in *Rothmans*, in my view, it would be unfair to conclude that a document or documents should be produced in the context of the immediate motion in circumstances where they were referred to in an affidavit, for the first time, for the purposes of explaining why they cannot or should not be produced in the 30.10 motion. It should be clarified that this Court is not suggesting, in any manner whatsoever, that the plaintiff’s questioning was abusive or designed to discomfort the witness.

Rather, the focus here is on the issue of fairness of the procedure and fairness of the adversary system.

[123] Moreover, whether considering relevance for the purposes of a refusals motion or applying the applicable 30.10 test for production, if the Court were to grant the plaintiff's motion, the Court will be placed in a position where there may be inconsistent findings in the determination of this motion and the underlying 30.10 motion. Such a situation, resulting in potentially inconsistent results should be avoided.

[124] Therefore, it is my view that ordering production of the requested documents on this motion could result in unfairness and inconsistent results as the very documents being sought on this motion are a subset of the documents which are in issue in the 30.10 motion. Ordering production of the Referenced Documents and the questions refused on this motion will interfere with the orderly, fair and just process of the hearing of the 30.10 motion and disturb the fairness of the procedure in place for seeking productions from a non-party.

[125] E&Y has confirmed that all documents relating to Sourced Group and Amdocs have been preserved under litigation hold pending a court order for production. Therefore, there is no concern with respect to the preservation of the documents in issue.

[126] For all of the reasons expressed above, the plaintiff's motion is dismissed without prejudice to its renewal at some time following the hearing and rendering of the decision in the 30.10 motion and following examinations for discovery, when the issues which are specifically raised in this motion, due to the nature of the pending 30.10 motion, will not present an impediment to rendering a just decision or interfere with the fairness of the procedure in place for seeking productions from a non-party.

[127] The costs of this motion are reserved to the hearing of the main 30.10 motion which is scheduled to be heard before me on October 31<sup>st</sup> 2024.

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ASSOCIATE JUSTICE G. ECKLER

**Date:** September 13<sup>th</sup>, 2024