

2019 ONSC 849
Ontario Superior Court of Justice

Amphenol Canada Corp. v. Sundaram, 2019 ONSC 849

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**AMPHENOL CANADA CORP. (Plaintiff) and NANDAKUMAR SUNDARAM
a.k.a. KUMAR SUNDARAM, CHANDRA DEVAPPA, SUNDEV
TECHNOLOGIES INC., MTECH LTD., JOHN DOE, JANE DOE, and other
persons unknown who have conspired with the named Defendants
(Defendants)**

M.D. Faieta J.

Heard: January 28, 2019
Judgment: February 4, 2019
Docket: CV-18-00604127

Counsel: Brendan Wong, Graham Splawski, for Plaintiff
Nikolay Y. Chsherbinin, for Defendants, Nandakumar Sundaram, Chandra Devappa & Sundev Technologies Inc.
Bradley Phillips, for MTech Ltd.

Subject: Civil Practice and Procedure; Contracts; Corporate and Commercial; Insolvency; Property; Torts

M.D. Faieta J.:

1 The Plaintiff, Amphenol Canada Corp., brings this motion to continue the *ex parte* Mareva injunction granted by Justice Akbarali on January 15, 2019 that granted a Mareva injunction, a Certificate of Pending Litigation on two properties owned by the individual defendants and a continuation of certain Norwich Orders (“Ex Parte Order”).

2 As required by the Ex Parte Order, the Plaintiff served a complete copy of its Motion Record on the Defendants on or about January 17, 2019. This continuation motion was returnable on January 23, 2019 however it was not on the Court’s list. Messrs. Wong, Phillips and Chsherbinin appeared before Justice Glustein who ordered that this continuation motion be heard on January 28, 2019 and extended the Ex Parte Order until that day.

3 Only the Defendants Chandra Devappa (“Devappa”) and MTech Ltd. (“MTech”) ask for the Ex Parte Order to be set aside as against them. The other defendants do not ask for the Ex Parte Order to be set aside against them nor did the Defendant Nandakumar Sundaram (“Sundaram”) deliver any affidavit evidence. There have been no cross-examinations on the affidavits delivered by, or on behalf of, the other parties.

ANALYSIS

4 A freezing order, commonly referred to as a Mareva injunction, is an equitable remedy that is granted pursuant to s. 101(1) of the *Courts of Justice Act* where it is “just and convenient to do so”. The purpose of a Mareva injunction is to “freeze assets in order to prevent their dissipation pending the conclusion of a trial or action”: *Google Inc. v. Equustek Solutions Inc.*, [2017] S.C.J. No. 34, 2017 SCC 34, para. 33. Caution must be exercised in deciding whether to grant a Mareva injunction as a court must not allow a plaintiff to use this exceptional remedy as a weapon to force an inequitable settlement from a defendant who cannot afford the risk of ruin by having its assets tied up for a lengthy period of time awaiting trial merely because it is involved in litigation: *Chitel v. Rothbart*, [1982] O.J. No. 3540, para. 62.

5 The requirements for the issuance of a Mareva injunction are as follows:

- The plaintiff must make full and frank disclosure of all material matters within his or her knowledge;

- The plaintiff must give particulars of the claim against the defendant, stating the grounds of the claim and the amount thereof, and the points that could be fairly made against it by the defendant;
- The plaintiff must demonstrate a strong *prima facie* case on the merits of the claim;
- The plaintiff must give grounds for believing that the defendant has assets in the jurisdiction;
- The plaintiff must give grounds for believing that there is a serious risk of the defendant’s assets being removed out of the jurisdiction, or disposed of within the jurisdiction or otherwise dealt with so that the plaintiff will be unable to satisfy a judgment awarded to him or her; and
- The plaintiff must give an undertaking as to damages in order to compensate the defendant for damages suffered in the event that the injunction is found to have been unjustified.

See *Sibley & Associates LP v. Ross*, 2011 ONSC 2951, at paras. 11-12, 63; *Chitel*, paras. 44, 56.

6 The parties addressed two issues on this motion:

- Has the Plaintiff demonstrated a “strong prima facie case”?
- Is there a serious risk that the Defendants will remove or dissipate their assets prior to the final determination of this action?

ISSUE #1: HAS THE PLAINTIFF DEMONSTRATED A STRONG PRIMA FACIE CASE AGAINST DEVAPPA AND MTECH?

7 A strong *prima facie* case is established if the plaintiff shows that there is a “. . . strong likelihood on the law and the evidence presented that, at trial, the applicant will be ultimately successful in proving the allegations set out in the originating notice.”: *R. v. Canadian Broadcasting Corp.*, 2018 SCC 5, para. 18.

Background

8 The plaintiff manufactures a variety of connectors, cables and other interconnect systems. The plaintiff has manufacturing facilities in Toronto and other locations in Canada. At its Toronto facility, the plaintiff has four workshops, including a tool and die workshop (the “Tool Shop”).

9 The Tool Shop makes metal products that the plaintiff uses within the Toronto facility in order to manufacture products that are sold to its customers. The Tool Shop only makes parts for the plaintiff’s internal use. Orders for parts, along with their related drawings, are typically sent to the Tool Shop from the plaintiff’s engineering department. The Tool Shop prepares an estimate for the cost of making a part, and if such cost is approved, the Tool Shop will create the design and manufacture the part. Normally, there are no customer purchase orders or invoices involved as the part is created for internal use.

10 On occasion, the plaintiff outsources the manufacture of parts when the Tool Shop is too busy to do so. In these cases, the Tool Shop sends a purchase order and the drawings to the external supplier. After the plaintiff receives the part from the supplier, the Tool Shop approves the supplier’s receipt so that the plaintiff’s accounting department can match the purchase order and pay the supplier.

11 Sundaram worked for the plaintiff for about 18 years until his employment was terminated on April 16, 2018. The plaintiff worked as a Tool and Die Maker until 2004. He was promoted to a first-line supervisory role of Lead Hand. In 2012, the plaintiff was promoted to Supervisor of the Tool Shop as well as the plaintiff’s mold shop. In August, 2013, Sundaram was promoted to Manufacturing and Facility Manager with oversight responsibility for all four of the plaintiff’s in-house shops and its facilities.

12 In around 2014, Sundaram was often absent from the office despite having been verbally reprimanded by his supervisors for leaving the premises during work hours without valid reason. His responses were either short term

corrections or aggressive, volatile responses.

13 In April, 2015, Sundaram was also given oversight responsibility for the plaintiff's maintenance and mechanic shop.

14 As a result of the continuation of these unexplained absences, Sundaram was transferred to the position of Supply Chain Manager in April 2017 because that role was in the physical sight of his immediate supervisor. In this role, he was responsible for developing suppliers to provide their best cost, quality and delivery to the plaintiff for components that the plaintiff outsourced.

15 Ultimately, the plaintiff's employment was terminated, effective April 16, 2018, because of his continued absences.

16 Sundaram returned to the plaintiff a cell phone and a laptop computer that had been provided to him solely for the purpose of carrying out his duties as the plaintiff's employee. Following his termination, the plaintiff discovered suspicious text messages on the cell phone. The messages suggested that Sundaram may have been engaged in external business interests while working for the plaintiff and that he may have been competing with the plaintiff.

17 In May, 2018, the plaintiff retained a private investigator, Alexander Fishbei ("Fishbein"), to investigate Sundaram's activities. He conducted interviews with the plaintiff's employees and retrieved and reviewed the Defendant's files held by the plaintiff, which included the examination of the cell phone and laptop computer used by Sundaram.

18 Fishbein's affidavit, sworn August 30, 2018, states that Sundaram used the Tool Shop to manufacture metal machine parts for third parties at the plaintiff's expense. These parts would then be delivered to intermediaries — often MTech, who would then deliver the parts to the third parties and invoice them for the cost. The intermediary would then keep a portion of the payment from the third party, typically 10%, and the remainder would be transferred to Sundaram's company, the Defendant Sundev Technologies Inc. ("Sundev"). Fishbein states that, as a result of this scheme, Sundaram operated a metal parts business using the plaintiff's resources and kept the profits for himself and MTech.

19 Fishbein states that the third parties who purchases these metal parts from MTech included Kinectrics Inc., Castool Tooling Systems, Curtiss-Wright Corporation, Multimatic Engineering and NPSI Nuclear Power Services Inc. None of these companies were the plaintiff's customers, so there was no legitimate reason for the plaintiff to be producing parts for them. Further, the Tool Shop was only supposed to manufacture parts for internal use.

20 At the time of these transactions, Sundaram dealt with many of the plaintiff's employees including:

- Jean Johnson. Johnson's affidavit, sworn August 31, 2018, states that he is the Supervisor of the Plaintiff's Mould Shop, Tool Shop and Maintenance at its Toronto facility. He was hired by the plaintiff in 2010 as a tool maker in the Tool Shop. After a few years he was promoted to Tool Shop Lead Hand and after three or four years he was promoted to Supervisor for the Tool Shop and the Mould Shop. In 2016 he assumed his current duties. Sundaram was his direct supervisor until Sundaram was transferred to the Supply Chain Manager position in August, 2017. Even after his transfer, Sundaram continued to act like he was Johnson's boss. Goudar worked under Johnson's supervision as the Team Leader of the Tool Shop. Sundaram was an aggressive supervisor and would often raise his voice and yell at employees working under him. He would not tolerate questions about his orders. Johnson states that on multiple occasions Sundaram asked him to do work or to instruct the Tool Shop to do work that did not follow the normal course of business. Once completed, Sundaram instructed Johnson to have a Tool Shop employee deliver the completed materials to third parties, often MTech and Kinectrics Inc.. His explanation was often that these parts were intended for the plaintiff's Belleville location but he never explained the connection with MTech. The Tool Shop kept a log of these deliveries from September 19, 2017 onwards. It shows that deliveries were made to MTech, NuVision, Techtronic and others. Johnson states that he did not ask Sundaram any questions about these parts as he was his manager, ordered him to make them and had an aggressive personality. Fung admits, at paragraph 12 of this affidavit that he was involved in creating fictitious orders with Sundaram:

In early 2018, Sundaram instructed me to create fictitious orders in respect of existing approved account receivable numbers that had been approved for the Tool Shop for the creation of various tools. Sundaram told me that these were ultimately intended to total \$38,500 but by the time Sundaram was terminated we had only created \$18,820, at which point I stopped working on these fictitious orders.

- Raj Goudar. Mr. Goudar worked in the Tool Room. His immediate supervisor was Jean Johnson. In turn, Sundaram was Johnson's immediate supervisor. Goudar states that Sundaram would occasionally assign work to Goudar in the Tool Shop. On completion, Sundaram would direct Goudar to have one of the Tool Shop employees (often Kent Fung) deliver the completed work to external locations such as MTech. Goudar states that Sundaram told him that this work was being completed for the plaintiff's Belleville, Ontario facility;
- Kent Fung. In May 2018, Fung had worked for the plaintiff for about two years and was employed as an Operator in the Tool Shop. His supervisors were Johnson and Goudar. When he began working for the plaintiff, Sundaram would ask Fung to make deliveries from the Tool Shop to external locations and later Johnson and Goudar asked him to do the same. Fung recorded these deliveries in a log book. The log book shows that Fung made about 50 deliveries to MTech from September, 2017 to May 9, 2018. He also kept text message with Sundaram related to some of these deliveries. Fung was the most junior member of the Tool Shop.

21 Fishbein states that the common transaction proceeded as follows:

- Kinetrics or Castool would issue a purchase order for, and/or send a schematic drawing of, a part it required to Sundaram, on behalf of MTech, at his Sundev email or to Sundaram via an MTech email address that he appears to have been given;
- If Sundaram did not receive the purchase order and/or schematic drawing directly, MTech would transmit these to Sundaram;
- While the original schematic drawing would be labelled as Kinetrics or Castool drawing, Sundaram would electronically alter the schematic drawing so that it would be labelled as an Amphenol Canada drawing;
- Sundaram would send the drawing to a Tool Shop employee with instructions to make the part depicted in the drawing in the Tool Shop. Sundaram would often explain that the part was intended for the plaintiff's facility in Belleville, Ontario;
- The Tool Shop would produce the part;
- An employee of the plaintiff would, at the direction of Sundaram, Johnson or Goudar, deliver the part to MTech;
- MTech would invoice the third party customer for the part and receive payment from them; and
- Sundev would then invoice MTech for 90% of the total amount that MTech invoiced to the third party customer, and receive payment of same, leaving MTech a 10% cut.

22 Fishbein states that on some occasions the common transaction described above was modified so that the manufacture of the required part was outsourced rather than made by the Tool Shop:

- Sundaram would secure an account number from someone in the plaintiff's accounting department which was the usual process by which the plaintiff would make legitimate purchases;
- Sundaram would then provide the altered schematic drawing and the fraudulent account number to Johnson or Goudar with instructions to outsource production of the part;
- Johnson or Goudar would outsource the production of the part to one of the plaintiff's usual suppliers, such as Techtronic Innovation Ltd.;
- The supplier would deliver the completed parts to the Tool Shop;
- Johnson or Goudar would requisition a purchase order from the plaintiff's accounting department to provide to

the supplier;

- Personnel from the Tool Shop would deliver the parts to MTEch;
- The supplier would invoice the plaintiff, which would pay the supplier using the account number previously obtained by Sundaram;
- MTEch would invoice the third party customer for the part and receive payment; and
- Sundev would invoice MTEch for \$90 of the amount that MTEch invoiced to the third party customer and receive payment from MTEch.

23 The Statement of Claim was issued on August 28, 2018. It alleges that that the Defendants are liable in **fraud**, conspiracy and unjust enrichment.

24 Amphenol Canada estimates that the amount of the loss resulting from the Fraudulent Scheme is about \$900,000.

25 A Norwich Order was granted on September 11, 2018 requiring BNS, RBC, TD and Questrade to disclose the accounts of Sundaram, Devappa, Sundev and MTEch so that Amphenol Canada could trace the proceeds of the Fraudulent Scheme. Further Orders were made that extended and expanded the Norwich Order.

The Case against Chandra Devappa

26 The central allegation against Devappa in the Statement of Claim is that she knowingly assisted and participated in the Fraudulent Scheme, including by facilitating transaction (including by creating Sundev invoices), maintaining the ledgers of Sundev and coordinating with MTEch.

27 The following facts are not in dispute:

- Devappa is Sundaram's spouse;
- They reside in Pickering, Ontario and have been married since 2009;
- Sundaram and Devappa have been the sole officers and directors of Sundev since its incorporation on July 13, 2015;
- Sundaram is the President and Devappa is the Treasurer of Sundev; and
- Devappa earns a base salary of \$150,000 per year as the Chief Executive Officer of Dixie Electric Ltd.

28 Amphenol Canada also makes the assertions described below.

No Denial

29 Amphenol Canada asserts that Devappa has not denied knowledge of, or participation in, the Fraudulent Scheme.

30 However, in an affidavit, sworn January 22, 2019, Devappa does "vehemently" deny that she knowingly participated in the Fraudulent Scheme described in the Statement of Claim. She also notes that the Fishbein affidavit, sworn August 30, 2018, in support of the Plaintiff's *ex parte* motion for a Norwich Order did not name her as a participant in the Fraudulent Scheme that he described.

Preparation of Sundev's Invoices

31 Amphenol Canada submits that Devappa sent emails and invoices on behalf of Sundev to Kinetrics in respect of orders.

32 A further affidavit from Fishbein, sworn January 24, 2019 attaches a number of emails sent by Devappa that were taken from Sundaram's laptop computer. In those emails, Devappa appears to be conducting business on behalf of Sundev. For instance:

- An email dated February 6, 2017 from Devappa to Sundaram which states "Inv Y1 is ready. The amphenol and kinetrics, I was wondering about the date of the invoice and also if I should put the quantity So I did not save them as PDF yet. I will check with you tomorrow morning";
- An email dated March 27, 2017 from Devappa to K. Sugi, Accounting, MTech, which states "Please find attached the Invoice no 1005 and packing slip #97 for Kinetrics PO #280048421";
- An email dated April 10, 2017 from Devappa to K. Sugi, Accounting, MTech, which states "Please find the invoice for UV Pure PO#14741"; and
- An email dated April 10, 2017 from Devappa to K. Sugi, MTech, whose subject is "Kinetrics PO 28004895 — Inv #1010" which states "Please find attached invoice #1010 for 95% of 30% advance payment of \$71,530.93 which is the first line item in PO subject".

Preparation of Sundev's Spreadsheets

33 Amphenol Canada submits that Devappa created and edited a number of key spreadsheets that tracked Sundev's fraudulent activity.

34 Fishbein states that the metadata associated with spreadsheets related to Sundev found on Sundaram's computer shows that Devappa was the author of those documents or that she had edited them. These documents include the "Part History 0103" spreadsheet, last saved by "Chandra Devappa"; the "Master Tracker" spreadsheet, last saved by "Chandra Devappa"; and the "Sundev Technologies Inc." spreadsheet last saved by "Chandrasen".

35 Devappa delivered an affidavit, sworn January 27, 2019, from Chandrasen Bhambhani who states that he is a Chartered Professional Accountant in the Province of Ontario and has been Sundev's accountant since 2017. He states that the username "Chandrasen", described above, belongs to him not Devappa. He states that he authored and edited the file based on the information that he received from Sundev. Nevertheless, he does not dispute that Devappa edited the other spreadsheets given that they were last saved by "Chandra Devappa".

No Legitimate Basis for \$35,000 Payment from MTech

36 Amphenol Canada submits that there is no legitimate basis for her receipt of \$35,000 from MTech on June 25, 2018 and subsequent deposit to her personal bank account at RBC ending in 894.

37 Devappa states that there is an innocent explanation for MTech's payment of \$35,000. She states that Sundaram had been working on a part-time basis for Sundev prior to being terminated by Amphenol Canada in April 2018. After his termination, MTech paid for expenses that Sundev incurred in respect of work that it did MTech. Later, Sundev repaid MTech and in fact had made an overpayment of \$35,000.00. Devappa states that MTech was directed (presumably by Sundaram) to pay these funds by cheque to Devappa so that she and Sundaram would have enough money to pay their living expenses given that he had been unemployed for two months.

Conclusions

38 Devappa states that Amphenol Canada's encouragement to work outside of his employment, led to Sundaram incorporating Sundev. She estimates that MTech paid him a total of \$648,880.59 for goods and services between 2014 and 2018. I have difficulty believing that Amphenol Canada encouraged Sundaram's outside work to any significant degree, if at all, given its repeated complaints to him about his absences from work and his eventual termination on that ground. In any event, based on the evidence before me, I reject the suggestion that Amphenol Canada allowed Sundaram to operate his part-time business using *their* resources in the manner described by Fishbein. Had that been the case, then I would have expected that Sundaram and Devappa would have provided such evidence. Sundaram did not file evidence nor does he seek to have the Mareva Injunction set aside as against him or Sundev. Based on the

record before me, I accept that Sundaram and Sundev undertook the Fraudulent Scheme as outlined in the Fishbein affidavits.

39 I reject Devappa’s suggestion that Amphenol Canada’s claim against her is based solely on the fact that she was the Treasurer of Sundev. Devappa was actively involved in its fraudulent business activities as reflected by the emails and the spreadsheets described above. I find that Amphenol Canada has established a strong *prima facie* case against Devappa.

The Case against MTech

40 The central allegation against MTech in the Statement of Claim is that it was aware of the Fraudulent Scheme as it received purchase orders and payments from third party customers, received finished goods from Amphenol Canada, transferred finished goods to third party customers and retained a portion of the profits.

41 Balasubramaniam Murugesu is the President of MTech. Murugesu met Sundaram in 1999 when they both worked for Amphenol Canada. He states that they worked different shifts but “knew each other in passing”. Murugesu established MTech in November, 2010. He describes MTech as a tier two automotive parts supplier that also focuses on the aerospace, machine building and nuclear sectors. MTech’s primary expertise is machining. Its sales have grown steadily. In 2018, MTech’s sales were more than \$7 million. Its operations are run out of its only facility, a 30,000 square foot facility in Toronto, and it employs 65 people. MTech operates 24 hours a day, seven days a week. Murugesu states that MTech regularly uses 60-70 who provide it with various services including tool and die work. Sundev is one of 15 subcontractors that it uses for tool and dye work.

Close Relationship

42 Murugesu states that he met Sundaram in 1999 when they both worked for Amphenol Canada. He states that they worked “. . . different shifts but [we] knew each other in passing”. After he started MTech, Murugesu states that Sundaram approached him about providing tool and die services to MTech. Murugesu began subcontracting work to Sundaram as he knew that Sundaram had expertise in that area.

The Typical Transaction between Sundev and MTech

43 Murugesu states that his dealings with Sundev, as with other vendors, was as follows:

- MTech would receive an order from a customer for tool and dye services and, where suitable, would ask vendors, including Sundev, for a quote on the order;
- If MTech determined that Sundev was the best vendor for the job, a formal order would be issued;
- Sundev would complete the order, usually using MTech’s facility or, where other equipment was required, the work was done at other machine shops; and
- After adding its margin, MTech would provide an invoice to its customer and would ultimately pay Sundev’s invoice.

Sales by Sundev to MTech

44 Murugesu states that Sundev’s services currently account for about 3% or less of MTech’s revenues.

45 Murugesu states that Sundevs sales to MTech for the period 2014-2018 were as follows:

Year	Amount Paid by MTech to Sundev	Number of Invoices Issues by Sundev to MTech
2014	\$114,133.84	20
2015	\$129,467.67	9
2016	\$89,988.03	31
2017	\$285,150.65	63
2018	\$140,398.08	20

Total

\$759,138.27 143

46 I note that Andrew Toffelmire, the General Manager, Aerospace for Amphenol Canada states that the Fraudulent Scheme applies not only to sales made by Sundaram and Sundev to MTech but also to sales made by Sundaram and Sundev to:

- Almag between January 1, 2015 and July 31, 2018: \$15,946.74;
- NuVison between January 1, 2015 and July 31, 2018: \$86,620.07; and
- Techtronic between 2015 and 2018: Approximately \$355,000.

Denial of Participation in Fraudulent Scheme

47 Murugesu states that although he was aware that Sundaram was still employed by Amphenol Canada during the period that he did business with MTech, he had no reason to believe that Sundaram was precluded from doing outside work. He states that from his own personal experience and from dealings with others, it was common for tool and dye workers to do outside work.

48 Murugesu states that he had no reason to believe that Sundev did any work for MTech or other companies using Amphenol Canada's facilities or resources. He states that he exercised no control over where Sundev completed its work, however generally Sundev's work for MTech was performed at MTech's facility. Murugesu believes that Sundaram was free to use the facilities and equipment of other machine shops.

49 Murugesu states that if he were aware that Sundev was using Amphenol Canada's facilities to complete orders for MTech without Amphenol Canada's permission, he would not have done business with Sundaram as he does not condone that type of behaviour with his own employees

Unsecured Loan of \$200,000 by MTech to Sundaram

50 Murugesu states that in February 2018 Sundaram approached him for a bridge financing loan of \$200,000 in order to help finance the purchase of a house. Sundaram explained that he was selling his condo and buying a house and needed funds to finance the purchase pending the sale of the condo. Murugesu agreed that MTech would provide the funds and that he would be repaid once the condo was sold. A bank draft in the amount of \$200,000 was delivered to Sundaram's lawyer on February 23, 2018. The same amount of funds were returned to MTech by cheque dated April 26, 2018. No documentary evidence of the terms of the loan was provided.

51 There was no contradictory evidence presented by Amphenol Canada.

Payments of \$259,000 by Sundev to MTech

52 Murugesu states that Sundev was sometimes required to subcontract work that MTech has hired Sundev to perform. Because Sundev did not have accounts with these subcontractors and did not have the financial ability to pay for the work in advance, MTech would often advance payments to the subcontractors on Sundev's behalf. Murugesu states that the payment of \$259,000 (in three parts - \$35,000, \$14,000 and \$210,000) by Sundev to MTech is on account of the repayment of these advances. No documentary evidence of the terms of the loan was provided.

53 There was no contradictory evidence presented by Amphenol Canada.

MTech Invoice to Amphenol for Work Performed by Sundev

54 Murugesu states that a cheque dated April 3, 2017 in the amount of \$6,122.35 paid by MTech to Sundev reflects an order from Amphenol Canada to MTech for which MTech subcontracted the tool and die work to Sundev. Murugesu describes the process as follows:

- MTech received a purchase order from Amphenol Canada which required work from Sundev;

- MTech then directed Sundev to complete the work and upon completion of the order, MTech invoiced Amphenol for the work completed; and
- Upon payment by Amphenol, MTech paid Sundev for the amount received from Amphenol after subtracting its 10% margin.

MTech Invoices to Kinectrics for Work Performed by Sundev

55 Murugesu states that some customers, particularly Kinectrics, often required tool and die work that was beyond MTech’s expertise but within Sundev’s expertise. For efficiency, MTech provided Sundev’s contact information directly to Kinectrics and created an email address for Sundaram for this purpose.

Conclusions

56 Murugesu understated the strength of his personal and business relationship with Sundaram (given that the various personal and business loans and the willingness of Murugesu to subcontract a substantial amount of work to his former colleague). As well, the exchange of funds expressed to be loans and the repayment of loan lacks any documentary support and appears questionable. Nevertheless, given the competing and untested evidence, I am not satisfied that the evidence discloses a strong *prima facie* case that MTech was a knowing participant in the Fraudulent Scheme. I note that no such allegation has been made by Amphenol Canada against Techtronic or NuVision even though they appear to be similarly situated leaving aside the personal relationship between Murugesu and Sundaram.

ISSUE #2: IS THERE A SERIOUS RISK OF THE DEFENDANTS REMOVING OR DISSIPATING THEIR ASSETS PRIOR TO THE FINAL DETERMINATION OF THIS ACTION?

57 The assessment of whether there is a serious risk of removal or dissipation of the Defendant’s assets prior to the final determination of this action may be based on direct evidence as well as inference from the circumstances: *Sibley*, para. 63. There is no exception to this requirement even when the plaintiff has established a strong *prima facie* claim of **fraud**. However, the risk of removal or dissipation of the Defendant’s assets may, in an appropriate case, be inferred from the surrounding circumstances of the Defendant’s fraudulent conduct: *Sibley*, paras. 64, 66; [2092280 Ontario Inc. v. Voralto Corp., 2018 ONSC 2305](#), paras. 22-23.

Devappa

58 Devappa states she and Sundaram “have no intention to immigrate or relocate to any other city or country in the foreseeable future.”

59 I have found that Devappa’s participation in the business activities of Sundev, given her position and work with Sundev, establish a strong *prima facie* case that she knowingly participated in the Fraudulent Scheme.

60 While it is not evidence of active dissipation of assets, it appears that Devappa and Sunderam have arranged their affairs to remove the equity from the two properties that they own. They purchased a house for \$979,000 in February, 2018 and a placed a mortgage of \$910,000 on that property which was given to RBC. Devappa and Sundaram have also owned a condominium in Scarborough since December 2014. At the time of purchase, a mortgage was placed on title in the same amount as the purchase price.

61 Records obtained as a result of the Norwich Orders show that Devappa has about \$17,000 in next assets with RBC, Sundaram has about \$16,500 in his bank accounts and Sundev has about \$6,000.00 in its bank account.

62 In all the circumstances, I am satisfied that there is a serious risk that Devappa of removal or dissipation of Devappa’s assets prior to the final determination of this action.

MTech

63 If I had found that there was a strong *prima facie* case of **fraud** against MTech, I would not have found that there was a serious risk or removal or dissipation of the MTech’s assets prior to the final determination of this action considering all the circumstances including the alleged **fraud**. On its face, Murugesu’s statement that MTech is “not

going anywhere” and that he has no intention “. . . to shutter the business or move operations out of Ontario” seems self-serving. However, Amphenol Canada’s submission that there is a real risk of dissipation on the basis that Murugesu could establish another company and easily transfer MTEch’s business, equipment, and other assets to the new company is a theoretically possible but not a real risk in these circumstances. I am not satisfied that there is a serious risk that MTEch will remove or dissipate its assets prior to the final determination of this action when one considers the steady growth of MTEch’s business over the last eight years, the fact that they have purchase orders four years into the future from major automotive suppliers and the fact that MTEch’s most recent financial statement shows that it is a substantial company whose net earnings in the most recent year were significant and whose net worth far exceeds the amount of loss for which they are alleged to be responsible.

CONCLUSIONS

64 I dismiss Amphenol Canada’s motion to continue the Ex Parte Order against MTEch and I grant Amphenol Canada’s motion to continue the Ex Parte Order against Sundaram, Sundev and Devappa.

65 There is no dispute that Devappa’s salary from Dixie Electric is required to pay her living expenses as well as Sundaram’s living expenses. However, Devappa’s salary is deposited on a bi-weekly basis into a bank account that has been frozen. Similarly, Devappa’s bank credit card has been frozen. I direct that the parties discuss an approach to ensure that Devappa’s salary and credit card are not frozen by this Mareva Injunction. There is more than one way to achieve this result. A teleconference shall be held on February 5, 2019 at 8:30 a.m. to advise if the parties have agreed on how to address these matters through a draft Order as well as terms for the delivery of costs submissions.