

Court File No. CV-23-00710413-00CL

**ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)**

APPLICATION UNDER SECTION 243(1) OF THE *BANKRUPTCY AND INSOLVENCY ACT*, R.S.C. 1985, c. B-3, AS AMENDED AND SECTION 101 OF THE *COURTS OF JUSTICE ACT*, R.S.O. 1990, c. C.43, AS AMENDED

B E T W E E N

MBL ADMINISTRATIVE AGENT II LLC, as agent for POST ROAD
SPECIALTY LENDING FUND II LP (f/k/a MAN BRIDGE LANE
SPECIALTY LENDING FUND II (US) LP), and POST ROAD SPECIALTY
LENDING FUND (UMINN) LP (f/k/a MAN BRIDGE LANE SPECIALTY
LENDING FUND (UMINN) LP)

Applicant

and

TRADE X GROUP OF COMPANIES INC., 12771888 CANADA INC., TVAS INC.,
TRADEXPRESS AUTO CANADA INC., TRADE X FUND GP INC., TRADE X LP FUND
I, TRADE X CONTINENTAL INC., TX CAPITAL CORP., TECHLANTIC LTD. AND TX
OPS CANADA CORPORATION

Respondents

NOTICE OF CROSS-MOTION

1309767 Ontario Limited and 2601658 Ontario Ltd. (the “**Van Essen Companies**”), the responding parties to the motion brought by FTI Consulting Canada Inc. (“**FTI Consulting**”), in its capacity as the Court-appointed receiver and manager (the “**Receiver**”), without security, of the following property of Trade X Group of Companies Inc., 12771888 Canada Inc., TVAS Inc., Tradexpress Auto Canada Inc., Trade X Fund GP Inc., Trade X LP Fund I, Trade X Continental Inc., TX Capital Corp., Techlantic Ltd. (“**Techlantic**”) and TX Ops Canada Corporation (collectively, “**Trade X**” or the “**Debtors**”) will make a cross-motion to a Judge of the Commercial List as soon as the motion can be heard, at 330 University Avenue, 8th Floor, Toronto Ontario.

PROPOSED METHOD OF HEARING: The motion is to be heard:

In writing under subrule 37.12.1 (1);

- In writing as an opposed motion under subrule 37.12.1 (4);
- In person;
- By telephone conference;
- By video conference.

THE MOTION IS FOR AN ORDER:

- (a) Partially lifting the stay of proceedings provided for in the December 22, 2023, Receivership Order of Cavanagh J., to the extent required, to allow the Van Essen Companies, Responding Parties to the Receiver's Motion, to file the Cross-Motion herein;
- (b) Dismissing the Receiver's motion in its entirety;
- (c) Declaring that Wouter Van Essen did not conduct the December Transactions in his personal capacity;
- (d) Requiring the Receiver to furnish documents relating to the sales of the 2022 Vehicles;
- (e) Declaring that the \$1,723,495 in the Van Essen Companies' accounts, if paid to Techlantic, would have constituted a 'further advance of money' or 'extension of credit' under section 7 of the Information Officer Order;
- (f) Declaring that the Van Essen Companies were entitled to conduct balancing transactions or setoffs before the issuance of the Receivership Order on December 22, 2023;
- (g) Costs of this motion; and

(h) Such further or other order as to this Honourable Court may seem just.

THE GROUNDS FOR THE MOTION ARE:

A. Overview

1. Since November 2021, Techlantic and the Van Essen Companies have engaged in ongoing and cyclical business dealings related to vehicle purchases, sales and exports. As described in detail below, this relationship was overseen by Techlantic's parent company, Trade X, and involved injections of liquidity from the Van Essen Companies, numerous transactions, debits and credits in both directions and periodic balancing transactions where one party would receive a cash payment from the other.
2. The Receiver's motion seeks recovery of \$1,723,495 that was subject to a series of balancing transactions carried out in December 2023, where the Van Essen Companies applied the funds to reduce Techlantic's outstanding indebtedness. These funds are not the Property of the Receiver.
3. When the Van Essen Companies first decided to apply the funds to the outstanding indebtedness of the Techlantic in early December, the Information Officer Order dated December 12, 2023, was not even in place. The Receivership Order was not issued until more than two weeks later.
4. The Van Essen Companies were entitled to undertake the balancing transactions when and how they did.
5. The Information Officer Order, issued on December 11, 2023, introduced a general stay. The stay was subject to an open-ended list of qualifiers and contained no setoff restriction.

6. The Information Officer Order otherwise maintained creditor rights, like the right to cease ‘further payments’ and ‘advances’ and the right to set off under section 97(3) of the *Bankruptcy and Insolvency Act* and other laws.
7. This cross-motion predominantly seeks to establish that the Van Essen Companies acted fully within their rights under the Information Officer Order (to the extent applicable) when the December Transactions occurred.

B. The December Transactions

8. The Receiver brings a motion concerning bank drafts received by the Van Essen Companies between December 7 and December 19, 2023, as applied outstanding amounts owed to them by Techlantic (the “**Bank Drafts**” and the “**December Transactions**”).
9. The critical dates concerning these transactions are as follows:

Dec 7, 2023	Van Essen Companies receive \$350,000 (Bank Draft No. 389621)
	Van Essen Companies receive \$350,000 (Bank Draft No. 389620)
Dec 11, 2023	Justice Penny issues the Information Officer Order, imposing a general stay subject to a non-exhaustive list of qualifiers and maintaining other creditor rights.
Dec 13, 2023	Van Essen Companies receive \$300,000 (Bank Draft No. 389656)
	Van Essen Companies receive \$300,000 (Bank Draft No. 389657)
Dec 19, 2023	Van Essen Companies receive \$300,000 (Bank Draft No. 389685)
	Van Essen Companies receive \$300,000 (Bank Draft No. 389686) ¹
Dec 22, 2023	Justice Cavanagh issues the Receivership Order, including a stay provision expressly barring setoff rights.
Dec 28, 2023	Counsel for the Van Essen Companies begins engaging with the Receiver, offering transparency and assistance and advising that no further setoffs

¹ Copies of these bank drafts have been provided to the Receiver.

	<p><u>would be conducted from the date of the Receivership Order onwards</u></p> <p>As of the Receivership Order date, the Van Essen Companies are owed \$189,093.28.</p>
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10. Setoffs or balancing exercises between Techlantic and the Van Essen Companies were common. The companies arranged their business dealings by mutual debits and credits, periodically settling outstanding amounts by balancing the accounts between them.
11. The Van Essen Companies procured vehicles for Techlantic. Techlantic then facilitated the export of vehicles. The Van Essen Companies would typically reinvest the funds collected upon the sale of the vehicles to procure more vehicles for Techlantic.
12. The December Transactions relate to amounts owing to the Van Essen Companies for 38 vehicles transferred to Techlantic in August 2022 and amounting to \$1,912,588.28 (the “**2022 Vehicles**”)—a debt expressly acknowledged by Techlantic and its parent company, Trade X. There is no dispute about the amount of the debt.
13. The Van Essen Companies assert a constructive trust over the proceeds from the sale of the 2022 Vehicles, relying on invoice terms that state that the title of the vehicles transfers upon payment in full and that Techlantic’s actions—of reselling the vehicles without proper title—constitutes misappropriation, but do not seek a determination of that issue at this interim motion, except insofar as it is required for the court to decide on the equities of the transactions at issue.

C. The Van Essen Companies

14. The Van Essen Companies are incorporated under the laws of the Province of Ontario, with their registered head offices located at 1467 Otis Ave., Mississauga, Ont. for 1309767 Ontario Limited and 700 Third Line, Oakville, Ont. for 2601658 Ontario Ltd.

Wouter Van Essen is a director of both companies. Mr. Van Essen oversees their operations and is responsible for all business dealings.

15. The Van Essen Companies are engaged in the wholesale of vehicles. Until recently, they exclusively supplied Techlantic.

16. Mr. Van Essen does not conduct any business in his personal capacity. The Van Essen Companies completed the December Transactions, not Mr. Van Essen.

D. The Van Essen Companies Owe no Obligations to MBL, the Applicant

17. On February 5, 2021, Trade X entered a senior secured revolving credit agreement (the “**Trade X Senior Credit Agreement**”) with MBL Administrative Agent II LLC (“**MBL**” or the “**Applicant**”).

18. Trade X acquired Techlantic in August 2021.

19. Neither the Van Essen Companies nor Wouter Van Essen are subject to any agreement or obligations with MBL, and the Receivership does not change that.

E. The Van Essen Companies’ History of Financial Support and Credit Arrangements

20. Shortly after the sale of Techlantic closed in October 2021, RBC withdrew a line of credit that had been heavily relied upon for interim liquidity purposes—supporting the buying and selling of vehicles.

21. The withdrawal of the RBC credit line presented challenges for Techlantic, particularly in light of the company’s business model and operational needs.

22. The RBC credit line had been a cornerstone of Techlantic's financial structure, providing

the liquidity necessary for its core operations, which involve exporting vehicles and handling HST remittance services.

23. The company's dealings, which relied on the fluidity and flexibility of funds to purchase vehicles for export and manage HST remittance effectively, found little accommodation in the structure of the Trade X Senior Credit Agreement. This misalignment meant that Techlantic was often left to navigate its financial obligations and operational needs without the necessary support, jeopardizing its ability to maintain the level of service reliability that its customers had expected.
24. Furthermore, the nature of Techlantic's transactions—where payments from the largest clients often came in the form of setoffs against new supply arranged from third parties—exacerbated the liquidity crunch. This deferred payment structure, while facilitating ongoing business relations and enabling a cycle of repeat business, required a level of financial agility and immediate liquidity that the PRG agreement could not provide. The company's strategy to use liquidity, previously supported by the RBC line, became difficult to sustain under the new financial arrangements.
25. At the same time, it became evident that Techlantic's new parent company, Trade X, was experiencing significant liquidity issues. These financial difficulties led Trade X to rely increasingly on Techlantic for liquidity support, draining Techlantic's financial resources. This situation posed a substantial risk to Techlantic's operational stability and financial health.
26. The Van Essen Companies offered to assist in acquiring vehicles in Canada (the **"Liquidity Support Plan"**).

27. On November 15, 2021, Edmund Chiu, Chief Financial Officer of Trade X, sent an email agreeing to proceed with the Liquidity Support Plan from the Van Essen Companies to safeguard Techlantic's business interests and customer relationships.
28. In broad terms, the Liquidity Support Plan was structured to reduce the working capital required by Techlantic, enabling it to repay loans. To this end, the Van Essen Companies were engaged to purchase vehicles on Techlantic's behalf and sell them to Techlantic at cost. Techlantic collected the associated profits upon resale of the vehicles.
29. The terms of this arrangement included a daily interest charge on the outstanding balance, billed monthly to Techlantic, to be recognized as an expense to Techlantic. Additionally, the Van Essen Companies initially implemented a per-vehicle charge to cover the operating costs associated. However, the Van Essen Companies later waived this operational charge.
30. The Liquidity Support Plan involved ongoing business transactions that resulted in mutual indebtedness. At any one point in time, Techlantic and the Van Essen Companies owed each other amounts for different transactions.
31. Techlantic and the Van Essen Companies agreed that instead of settling every single transaction individually, they would periodically settle the net amount owed by one to the other.
32. The ongoing transactions were critical to maintaining business relationships during a period of internal volatility at Techlantic. During the period of November 15, 2021, to approximately October 15, 2023, Techlantic profited from these dealings in the amount of an estimated \$3.2 million.

33. The timing of each settlement was dependent on cashflow, and the Van Essen Companies were sensitive to Techlantic's liquidity to the extent possible.
34. With these considerations in mind, the Van Essen Companies, at their discretion, deferred the settlement of the outstanding amounts for the 2022 vehicles until applying funds to partially settle the outstanding amounts in December 2023.
35. In an email dated January 2, 2024, from Mr. Van Essen to Techlantic, Mr. Van Essen advised, "[the Van Essen Companies] deposited six cheques from Mr. Stephen Zhou, dated from November 28th to December 19th. These funds include a payment due to Techlantic Ltd. of \$1,723,495 CAD for vehicle orders from August 2023". The Bank Drafts were applied against Techlantic's indebtedness associated with the 2022 Vehicles on the dates they were received.

F. The Stephen Zhou Transactions

36. The Bank Drafts were received from 2424081 Ontario Inc., a company understood to be owned and controlled by Mr. Stephen Zhou ("**Zhou Ontario**"). Expanding the description of typical business dealings in paragraph 24 above, the transactions with Mr. Zhou were as follows:

- 1) The Van Essen Companies would purchase vehicles from Zhou Ontario and sell them to Techlantic at cost.
- 2) Techlantic would facilitate the export, shipping and HST remittance services concerning those vehicles, selling them to companies affiliated with Mr. Zhou in China.

3) Zhou Ontario, after selling vehicles to the Van Essen Companies, assisted the Van Essen Companies with collecting payments from end customers in China. Rather than remitting the collected amounts to the Van Essen Companies, Zhou Ontario applied these funds to the acquisition of new vehicles in Ontario.

4) Subsequently, these newly purchased vehicles were sold to the Van Essen Companies, effectively compensating for those previously dispatched to China. This arrangement settled the payments for vehicles delivered to China by providing new vehicles to the Van Essen Companies, streamlining the payment process. Any outstanding balances were addressed in subsequent transactions between the parties.

5) From August 2023 onward, Mr. Zhou was asked to pay for all vehicles by bank draft or wire, to simplify the HST claim process. Bank drafts were predominantly directed to the Van Essen Companies, save for limited exceptions.

6) The Van Essen Companies, at their discretion, set these payments off against debts owed to the Van Essen Companies by Techlantic or remitted them to Techlantic.

G. The Van Essen Companies and Techlantic Dealt at Arms-Length

37. Following the sale, from September 13, 2021 to November 1, 2023, Mr. Van Essen served Techlantic in a consulting capacity through Techlantic Consulting Ltd.

38. Mr. Van Essen's son, Eric Van Essen, remained at Techlantic.

39. All dealings between Techlantic and the Van Essen Companies were overseen by Techlantic's parent company, Trade X.

40. All dealings between Techlantic and the Van Essen Companies, including the Liquidity Support Plan referred to in paragraph 27, were endorsed by Trade X and at arm's length.

H. The Information Officer Order

41. On December 11, Penny J. issued an order (the “**Information Officer Order**”), among other things, adjourning the hearing of the Receivership Application until December 22, 2023, and appointing FTI Consulting as Information Officer in respect of the Debtors.

42. The Information Officer Order stated that no Person was under any obligation to make further advances of money or otherwise extend credit to the Debtors:

7. THIS COURT ORDERS that, notwithstanding anything else contained herein, no Person shall be prohibited from requiring immediate payment for goods, services, use of leased or licensed property or other valuable consideration provided to the Debtors on or after the date of this Order, nor shall any Person be under any obligation on or after the date of the Order **to make further advance of money or otherwise extend any credit to the Debtors.** [emphasis added]

43. The Information Officer Order contained a standard stay provision **subject to a non-exhaustive list of qualifications** and **did not expressly limit setoffs.**

4. THIS COURT ORDERS that during the Stay Period, **and subject to, inter alia, section 101 of the CJA,** all rights and remedies of any individual, natural person, firm, corporation, partnership, limited liability corporation, trust, joint venture, association, organization, governmental body or agency, or any other entity (all of the foregoing, collectively being “Persons” and each being a “Person”) against or in respect of the Debtors, or affecting the Business, the Property or any part thereof, are hereby stayed and suspended except with leave of this Court. [emphasis added]

44. In contrast to the Information Officer Order, the Receivership Order issued on December 22, 2023, by Cavanagh J. (the “**Receivership Order**”) contained a stay provision limiting the setoff right.

10. THIS COURT ORDERS that all rights and remedies against the Debtors, the Receiver, or affecting the Property, **including, without limitation, setoff rights,** are hereby stayed and suspended except with the written consent of the Receiver or leave of this Court[...][emphasis added]

I. The Van Essen Companies' Good Faith Efforts

45. Within two business days of the Receiver's appointment, on December 28, 2023, counsel for the Van Essen Companies engaged with the Receiver's counsel to inform it of the December Transactions. Thereafter, the Van Essen Companies, through their counsel, continually responded to specific information requests, demonstrating a commitment to good faith engagement.

46. The Receiver's response, however, was to demand the return of the funds, bypassing substantive engagement on the issues presented by the Van Essen Companies.

47. These efforts include engaging the Receiver on the issue of the 2022 Vehicles and seeking its assistance to trace the proceeds of their sale. The Receiver has not responded to this request.

48. The Van Essen Companies, as part of this cross-motion, seek documents and information to enable them to trace the sale of the vehicles and the proceeds therefrom.

J. Additional Grounds

49. Section 111 of the *Courts of Justice Act*.

50. Section 97(3) of the *Bankruptcy and Insolvency Act*.

THE FOLLOWING DOCUMENTARY EVIDENCE will be used at the hearing of the motion:

- a. The Affidavit of Wouter Van Essen, to be sworn;

- b. Such further and other evidence as the parties may submit and this Honourable Court may allow.

February 7, 2024

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MBL ADMINISTRATIVE AGENT II LLC and TRADE X GROUP OF COMPANIES INC. et al. Court File No. CV-23-00710413-00CL

Applicant

Respondents

**ONTARIO
SUPERIOR COURT OF JUSTICE
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Proceeding commenced at Toronto

NOTICE OF CROSS-MOTION

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