CITATION: AnalytixInsight Inc. v. Kondragunta, 2024 ONSC 2556
COURT FILE NO.: CV-24-718370-00CL
DATE: 20240501

RE: AnalytixInsight Inc., Vincent Kadar, Scott Gardner, Natalie Hirsh and Aaron Atin, Applicants

AND:

Chaith Kondragunta, Jith Veeravalli and Prakash Hariharan, Respondents

BEFORE: W.D. Black J.

COUNSEL: *Joseph Groia, David Sischy and Cheyenne Parsons,* for the Applicants, AnalytixInsight Inc., Vincent Kadar and Scott Gardner

Ken Dekkar, for the Applicant, Natalie Hirsch

Robert Stellick, for the Applicant, Aaron Atin

Robert Staley, Nathan Shaheen and Douglas Fenton, for the Respondents, Chaith Kondragunta, Jith Veeravalli and Prakash Hariharan

HEARD: April 26, 2024

ENDORSEMENT

Overview

[1] This fast-moving matter first came before me on April 18, 2024, for scheduling.

[2] In view of the need for additional information to determine what to schedule, and when, I saw the parties again on April 19, 2024. On that date, the parties provided some additional documents and brief written submissions.

[3] Owing to the relative urgency to make certain determinations, I put in place an expeditious schedule for exchanging affidavits and conducting cross-examinations, and framed issues to be argued before me on April 26.

[4] The case involves a public company, AnalytixInsight Inc. ("ALY" or the "Company"), registered under the *Business Corporations Act, Ontario, R.S.O. 1990, c.B.16* ("OBCA") with a market capitalization of approximately $5.3 million. ALY's shares trade on the TSX Venture Exchange ("TSXV").

[5] The circumstance giving rise to these proceedings is one in which two factions of ALY's officers and directors are hopelessly deadlocked.

[6] One of the factions consists of two members of ALY's five-member board of directors (the "Board"), (Vincent Kadar and Scott Gardner), the interim CEO (Natalie Hirsch), and the company's corporate secretary/legal counsel (Aaron Atin), (collectively the "Applicant Faction").

[7] The other faction (the "Respondent Faction"), is made up of the three remaining members of the Board: Chaith Kondragunta, Jith Veeravalli and Prakash Hariharan.

[8] Each faction claims to be the legitimate voice of ALY, and based on those competing claims, each side has, over recent weeks, purported to pass various resolutions. The resolutions on each side include resolutions purporting to terminate the ostensible roles of members of the other faction. For example, the Respondent Faction has passed a resolution terminating the employment of ALY's erstwhile corporate secretary and legal counsel, Mr. Atin.

[9] Similarly, the Applicant Faction has passed, among other resolutions, a resolution demanding Mr. Hariharan's resignation from the Board.

[10] To compound matters, each side has published various press releases, purporting to announce their respective resolutions, and advancing their competing narrative accounts of the evolving situation.

[11] The current impasse is toxic and untenable. It is not difficult to conceive that shareholders, and the public market generally, will find the circumstances, and the competing narratives, uncertain and confusing. Indeed, given the ongoing imbroglio, reported to the TSXV by the Applicant Faction, trading in ALY's stock was halted on April 8, 2024, and remains halted.

[12] Moreover, with the ongoing deadlock, basic management and operational functions are constrained and at risk.

[13] In short, the situation cannot be allowed to persist. It is at best counter-productive, and if it continues, it will become an increasingly existential threat to the Company.

[14] Against this backdrop, it is clear that the court must reach a decision and fashion an outcome that will return ALY to normal (or at least adequate) operations, and that will clarify and regularize the control and management of the company.

Relevant Backdrop and Events

[15] The important aspects of the recent history leading to the current impasse began in roughly August of 2023.

A. Allegations of Mr. Hariharan's Misconduct

[16] At that time, Mr. Hariharan was ALY's CEO. Mr. Gardner, an independent member of the Board, alleged that Mr. Hariharan had engaged in breaches of securities law and other instances of misconduct.

[17] Mr. Gardner's allegations included concerns about a consulting company ("Neirin"), of which Mr. Hariharan's spouse was a director and principal, that was engaged, originally by Mr. Kondragunta, to perform consulting services for a fee set at $32,000. It appears that somehow Mr. Hariharan's spouse came to report directly and exclusively to him (Mr. Hariharan), that nobody on the executive team other than Mr. Hariharan was aware of this arrangement, and that over the course of three years Neirin invoiced to ALY and was paid over $550,000, of which Mr. Hariharan's spouse herself received $216,000, during a time frame in which ALY was losing millions of dollars.

[18] Mr. Gardner also alleged that Mr. Hariharan had failed to disclose (adverse) material information known to him about the business relationship between ALY and certain subsidiary companies, that Mr. Hariharan had failed to report the use of funds raised in a financing in July of 2021, and that Mr. Hariharan had breached corporate and/or securities laws, and TSXV policies.

B. The First "Special Committee" Investigation and Report

[19] In the latter part of 2023, ALY established a Special Committee to investigate these and other allegations against Mr. Hariharan. That Special Committee was staffed by Mr. Kadar, an applicant and now a member of the Applicant Faction, as well as Mr. Kondragunta and Mr. Veeravalli, both of whom are part of the Respondent Faction – and aligned with Mr. Hariharan.

[20] The Special Committee engaged external independent legal counsel, MDK Business Law Professional Corporation ("MDK") to assist with the investigation.

[21] The Special Committee issued a draft report dated November 12, 2023. That report, which the Applicant Faction alleges was "watered down" at the behest and urging of Mr. Hariharan, found evidence supporting some of the allegations, including the clandestine dealings and payments involving Mr. Hariharan's spouse, and the material non-disclosures by Mr. Hariharan concerning the business relationship between ALY and two of its subsidiaries. In respect of others of Mr. Gardner's allegations, the Special Committee reported finding insufficient evidence. Having looked at the report of the Special Committee, it does not, in my view, reflect a particularly "deep dive" with respect to a number of the items it was tasked to investigate.

[22] It is important to note a disagreement between the two factions about the timing for certain additional misconduct subsequently alleged against Mr. Hariharan, and whether that misconduct was encompassed and addressed by the November 12, 2023 Special Committee report. Mr. Kondragunta's evidence – the only evidence from the Respondent Faction in the record before me – suggests that it was. The Applicant Faction maintains, and it appears to be the case, that there were a number of allegations of subsequent misconduct, discussed below, that were not yet known or included in the Special Committee's investigation and report in the latter part of 2023.

C. The January 2024 Mediation and Settlement

[23] In any event, the findings of the Special Committee in its November 12, 2023 report, and the continued insistence by Mr. Gardner in particular that these were serious matters that had to be addressed, led to a mediation, apparently culminating in early January of 2024, before the Honourable (former Justice) Douglas Cunningham.

[24] This mediation process led in turn to a settlement agreement, confirmed in minutes of settlement dated January 11, 2024 (the "January Settlement").

[25] The January Settlement included Mr. Hariharan resigning as CEO, voting in favour of Ms. Hirsh becoming ALY's interim CEO, supporting the election of Mr. Kadar, another member of the Applicant Faction) as Chair of the Board, and Mr. Hariharan resigning from the boards of directors of subsidiary companies MarketWall SRI and InvestorPro Sim S.P.A., in addition to various other conditions.

D. Further Allegations of Misconduct

[26] However, following Mr. Hariharan's resignation, the Applicant Faction says that it became aware of further and ongoing instances of serious misconduct by Mr. Hariharan, including but not limited to:

(a) Insider tipping, including disclosure to one or more shareholders of material non-public information ("MNPI") that Mr. Hariharan received solely in his capacity as a director of ALY at a meeting of the Board;

(b) Purporting to enter into fraudulent, backdated non-disclosure agreements on behalf of ALY with shareholders which had no apparent business purpose, and which appear to have been intended to ensure that Mr. Hariharan's actions would not be revealed to the Company;

(c) Making material misrepresentations, false promises (including promises of warrants and Board seats), and other improper disclosure to shareholders;

(d) Repeated violations of the January 11, 2024 minutes of settlement, (and a related transition agreement dated February 9, 2024), including by repeatedly disclosing ALY's proprietary and confidential information to third parties, improperly holding himself out to third parties as the agent and authorized representative of ALY, and withholding access, property, documents and records of the company; and

(e) Self-dealing (including the annual payments to his spouse in amounts not yet finally determined but likely exceeding $600,000 over the past three years), and charging and/or approving improper expenses in amounts of at least $544,269 to the Company.

The Applicant Faction says that it has proposed review by the Board of these expenses but that by failing to attend at the Board meetings called to deal with these and other matters, the Respondent Faction has effectively prevented that review.

[27] Ms. Hirsch sent a letter to Mr. Hariharan, ostensibly on behalf of the Company, on February 20, 2024, advising Mr. Hariharan of his various alleged breaches of the January Settlement (and the related Transition Agreement) and asserting a concern that Mr. Hariharan had forwarded proprietary and confidential information of ALY to the personal email address of a terminated consultant. Ms. Hirsch's letter demanded that Mr. Hariharan immediately cease and desist from further breaches and improper conduct.

[28] On March 18, 2024, with the concurrence of Ms. Hirsch, and having received no satisfactory response from Mr. Hariharan, Mr. Atin sent a further letter to Mr. Hariharan detailing the evidence of Mr. Hariharan's alleged misconduct, again demanding that Mr. Hariharan cease and desist from such conduct, and requesting a summary of and explanation for the disclosure made by Mr. Hariharan of MNPI to ALY's shareholders or any other third party.

E. The March 22, 2024 Board Meeting

[29] On March 22, 2024, there was a Board meeting, which appears to have been the last Board meeting that both sides agree was duly called and constituted.

[30] In attendance were Ms. Hirsch, Mr. Atin (as corporate secretary), Mr. Gardner, Mr. Kadar, Mr. Hariharan, Mr. Kondragunta, and Mr. Veeravalli.

[31] Ms. Hirsch's evidence is that at a certain point in the meeting, Mr. Hariharan was invited to and did leave the meeting, and an in-camera session was held among the remaining attendees to discuss the status of the ongoing inquiry into Mr. Hariharan's alleged misconduct.

[32] At that time, Mr. Atin advised that he would be presenting the known facts to Mr. Hariharan's then lawyer to allow an opportunity for a response by or on behalf of Mr. Hariharan.

F. Mr. Atin's March 25, 2024 E-mail

[33] On March 25, 2024, Mr. Atin did so, sending a detailed email to Mr. Hariharan's then counsel, setting out a summary of the information that was known to date, and advising that the investigation was ongoing. In Mr. Atin's March 18, 2024 letter to Mr. Hariharan, and in his March 25, 2024 email to Mr. Hariharan's counsel, Mr. Atin set out considerable detail about a particular concern that Mr. Hariharan had failed to disclose details about an allegation by MarketWall, ALY's 49% interest in which is said to be ALY's most valuable asset. The allegation was that an entity called Intesa had made MarketWall's proprietary source code available to a competitor of MarketWall, contrary to the terms of a licensing agreement. It was alleged that Mr. Hariharan had known about this issue as a result of attending at a MarketWall board meeting in the fall of 2023, but had withheld this material information from ALY's Board (and its shareholders). Ms. Hirsch had learned about this issue after becoming (and in her capacity as) the interim CEO.

[34] Mr. Atin and Ms. Hirsch advise that there has not, to date, been a substantive response to the items set out in Mr. Atin's March 25, 2024 email.

G. Evidence Supporting Certain of the Applicants' Allegations

[35] I note a couple of matters that are, in my view, important in understanding the bona fides of the allegations advanced by the Applicant Faction, and underlining the concerns about the activities of Mr. Hariharan and his allies in the Respondent Faction.

[36] First, Ms. Hirsch has attached as an exhibit to one of her affidavits in this matter a text exchange that Mr. Hariharan had with an ALY shareholder in which Mr. Hariharan discloses MNPI to that shareholder, and represents that he (Mr. Hariharan), is committed to selecting certain shareholders to receive certain warrants. In my view, albeit that the Respondent Faction has not responded directly to the allegations of Mr. Hariharan's misconduct (in part because of their interpretation of the matters to be addressed before me on April 26, discussed below), there is in this record very concerning evidence appearing to show that Mr. Hariharan in fact engaged in the misconduct alleged.

[37] Second, there is also evidence that Mr. Kondragunta is implicated in aiding and concealing at least some of the misconduct on Mr. Hariharan's part. That is, there is evidence that Mr. Kondragunta approved certain payments by ALY for expenses incurred by Mr. Hariharan in his personal capacity (in relation to a USA L1 Visa for Mr. Hariharan, for his wife, and for their son), and that ALY's payment of those expenses was not disclosed to or approved by the Company.

[38] These are but two examples of evidence supporting the allegations of misconduct against Mr. Hariharan, and showing that those allegations are advanced in good faith and based on tangible evidence of apparent wrongdoing.

H. The Fallout and Fight Commencing in Late March

[39] It is also apparent that shortly after Mr. Atin sent his March 25, 2024 email, the parties engaged litigation counsel and began to assert positions that can be seen as attempts to stake out the "high ground" for litigation purposes.

[40] I do not propose to review the ensuing events in detail, but by way of summary, each side began to call competing Board meetings, purporting in each case to be the legitimate Board meetings reflecting legitimate governance of the Company. In respect of each of those purported Board meetings, the Respondent Faction declined to attend at the meetings called by the Applicant Faction. Likewise, the Applicant Faction did not attend at the meetings called by the Respondent Faction. The evidence suggests that members of the Applicant Faction tried to attend at one of the meetings called by the Respondent Faction, but were unable to do so, either because they were blocked from doing so (the Applicant Faction's version) or were late for the meeting such that it ended before they arrived (virtually) at the appointed platform (the Respondent Faction's version).

[41] As noted above, at their respective parallel meetings, each side has purported to pass resolutions terminating the roles of members of the opposite faction, and each side has issued press releases summarizing the actions taken at the particular side's meetings and purporting to describe a version of events and of the status of the Company.

[42] Since at least late March, and perhaps earlier, these various steps and activities have been "lawyer-driven" and aimed, at least in significant part, at gaining tactical advantage in the litigation.

The Recent Procedural History

[43] It is against this backdrop that the parties first came before me (on April 18 and 19) and in relation to which the motion of April 26, 2024 proceeded.

[44] I had directed the parties to focus their submissions on two issues in particular on April 26: the question of whether or not the counsel for the Applicant Faction (the "Groia Firm") was properly authorized to represent the Company in these proceedings, as it purported to do; and the related question of the ability of the Applicant Faction to commence derivative proceedings on behalf of the Company, as they seek to do.

The Applicants' Contextual Approach to the Hearing

[45] The Groia Firm, joined by counsel now acting for Ms. Hirsch and Mr. Atin, respectively, made the argument that, relative to the second issue in particular, the context of the background events as I have summarized them above is critical to an appreciation of the parties' positions.

[46] These counsel also argue that, pursuant to section 121.6 of the *Ontario Securities Act* (R.S.O. 1990, c. S.5) (the "OSA") the individual applicants should fairly be seen as whistleblowers, and that some of the actions purportedly taken by the Respondent Faction – in particular the purported terminations of Ms. Hirsch and Mr. Atin – can and should fairly be understood as prohibited reprisals thereunder.

The Respondents' (Narrower) Approach

[47] Counsel for the Respondent Faction, to the contrary, has interpreted my direction about the issues to be addressed in the April 26 hearing narrowly.

[48] In Mr. Staley's argument on behalf of the Respondent Faction, he asserts that I need go no further than Rule 15.02 of the *Rules of Civil Procedure*, and the basic corporate law principle, replicated in ALY's constating documents, requiring that "every question before the Board 'shall be decided by a majority of the votes cast' and that the Board, acting through such majority, appoints counsel to act on behalf of the Company".

[49] Relying on this notion, the Respondent Faction points out that they comprise a majority of the Board, and that they have never considered, let alone authorized, the engagement of the Groia Firm nor the commencement of this application (which purports to be on behalf of the Company). It follows, they argue, that the application has not been properly authorized, and must be stayed or dismissed. The control of the Company's business, they argue, must be left in their hands as the majority of the Board.

[50] I accept that Mr. Staley is technically correct in his straightforward recitation of basic corporate law and the requirements of Rule 15.02. If one assumes that the Respondent Faction

constitutes a properly appointed and unconflicted majority of the Board, then it would lead to a finding that this application is unauthorized and must be stayed or dismissed.

Concerns re Conduct of Respondents

[51] However, in my view, there is considerable evidence suggesting significant concerns about the way in which the Respondent Faction, and in particular Mr. Hariharan and Mr. Kondragunta have conducted themselves.

[52] To allow them to speak for the Company in light of the tangible evidence of their apparent misconduct, would also allow, I expect, for them to sweep that conduct under the proverbial carpet, and to continue with their tainted and problematic use of their notional control of the business and its management.

[53] On that note, I observe that, once the renewed and continuing concerns about Mr. Hariharan's conduct were brought to the attention of the Respondent Faction, one of the responses was to advise the Applicant Faction that a further "Special Committee" (the "New Special Committee") had been formed to investigate those concerns. The members of the New Special Committee were Mr. Hariharan, Mr. Kondragunta, and Mr. Veeravalli, i.e. the three members of the Respondent Faction. Given that the New Special Committee was tasked with investigating allegations against two of its three members, the composition of the New Special Committee seems problematic, and the outcome of its investigations strikes me as something of a foregone conclusion.

[54] Other than maintaining their respective positions, neither Ms. Hirsch nor Mr. Atin has anything in particular to gain by raising the concerns that they have raised and continue to express about the conduct of members of the Respondent Faction.

[55] The circumstances of Mr. Atin in particular illustrate this point.

[56] That is, Mr. Atin performs his duties as legal counsel for the Company on a "fractional" basis. In other words, he works part-time in that capacity, at the same time working in a similar capacity for other entities.

[57] In his evidence, Mr. Atin explains, and I accept, that when he became aware of the "unusual and concerning activities undertaken by [Mr. Hariharan], [Mr. Atin] felt duty-bound to raise these concerns with the entire ALY Board". Consistent with that characterization, I note that Mr. Atin sent an email to the entire Board on March 28, 2024, expressing disappointment that a Board meeting scheduled for that date had been cancelled (as a result of members of the Respondent Faction advising just prior to the meeting that they could not attend). In his email, Mr. Atin reiterated that "there were serious issues which needed to be addressed by the Board and that ALY shareholders ought to be made aware of the situation". He also advised that he "would be required to withdraw from representing ALY on a matter under Law Society rules if steps were not taken by ALY to address the serious issues that [he] had brought to the Board's attention". Finally, he told the Board that "to satisfy our fiduciary obligations as officers, we need to show that we took appropriate steps to address these serious issues and, where necessary, raise them to the board in a timely manner. I expected the board to be receptive to such important information" Mr. Atin

explained “and that you each would take these matters seriously enough that you would attend board meetings, particularly those scheduled weeks in advance”.

[58] The Respondent Faction argued before me that Mr. Atin’s actions, and those of Ms. Hirsch, can be seen as motivated largely by a desire to preserve their respective positions, and that their respective evidence should be discounted on that basis.

[59] I do not accept that as a fair characterization. For one thing, having regard to the chronology the suggestion makes no sense. That is, Ms. Hirsch and Mr. Atin joined in Mr. Gardner’s concerns, and expressed significant related concerns of their own, well before the Respondent Faction purported to pass resolutions terminating their employment. At the time they initially raised their concerns they had no reason to fear for their employment. I see no reason to believe that their respective actions were born of anything other than genuine concerns about Mr. Hariharan’s conduct (and to a lesser extent that of Mr. Kondragunta) and its impact on the Company and its shareholders.

[60] I find that there is sufficient evidence before me to confirm that the concerns raised by the members of the Applicant Faction were and are genuine, have a substantive basis in the evidence, and provide a reason for concern about the actions and conduct of Mr. Hariharan and of Mr. Kondragunta.

[61] I believe that if I decide this matter within the narrow confines urged by the Respondent Faction, I will in effect condone and perpetuate inappropriate conduct on the part of the Respondent Faction, or some of them, and continue a scenario in which I already have significant concerns about what has and has not been communicated to ALY’s shareholders. Clearly those shareholders should have a say in what happens here, but I would be concerned, for example, about a potential proxy fight on the basis of conflicting versions of events in the public domain, without running to ground and clarifying whether or not there have been material misrepresentations and other misconduct.

Discussion of the Relief Sought

[62] I am prepared, on the basis of the record before me, to impose certain steps to get to the bottom of the alleged conduct, and to allow the Company to function, at least to the extent to allow it to carry on business, pending a better understanding of what has occurred.

[63] There are various overlapping claims, within the relief sought by the applicants, many of which in my view lead to similar outcomes.

[64] Among those claims, the Applicant Faction seeks a direction under section 161 of the OBCA that an investigation be made of ALY, and such other affiliates as the court sees fit, with the costs of the investigation to be borne by the Respondent Faction.

[65] In order to invoke s. 161 of the OBCA, the order must be sought by a registered or beneficial owner of a security (or by the Ontario Securities Commission, which is not applicable here). I am advised that each of Mr. Kadar, Mr. Gardner and Mr. Atin do hold shares, and that Ms. Hirsch may have a contingent right to acquire shares, and accordingly that condition is met.

[66] In the case of an offering corporation, as here, s. 161(3) of the OBCA requires the applicant to give the Ontario Securities Commission (the "Commission") notice of its application under s. 161(1), and that the Commission is entitled to appear and be heard in person or by counsel.

[67] It is not readily apparent to me whether or not the applicants have provided the Commission with notice of this aspect of the application. If not, then notice should be provided and the Commission should be given the opportunity, if it wishes to be heard, to do so.

[68] Subject to clarification of that item, I am proposing to make an interim order as discussed below.

The Test for an Investigation Under the OBCA

[69] On an application under s. 161(2), if it appears to the court that:

> (b) the business or affairs of the corporation or any of its affiliates are or have been carried on or conducted, or that powers of the directors are or have been exercised, in a matter that is oppressive or unfairly prejudicial to, or that unfairly disregards, the interests of a security holder; or
>
> (d) persons concerned with the formation, business or affairs of the corporation or any of its affiliates have in connection therewith acted fraudulently or dishonestly,
>
> the court may order an investigation to be made of the corporation and any of its affiliates.
>
> I note that the language of s. 161(2)(b) echoes the language of the oppression remedy provisions, discussed below.

[70] It appears to me, based on the evidence of Mr. Hariharan's activities in the record before me, that there is a reasonable basis to believe, as required in s. 161(2)(b) that both the business of ALY, and the powers of its directors, have been exercised in a manner that is oppressive to or unfairly prejudicial to or that unfairly disregards the interests of ALY's shareholders.

[71] It also appears to me that there is a reasonable basis, as required in s. 161(2)(d), to believe that persons concerned with the business or affairs of the corporation or any of its affiliates, in particular Mr. Hariharan and likely Mr. Kondragunta, have in connection therewith acted dishonestly (and likely fraudulently).

[72] Justice Osborne of this court recently considered the provisions and application of s. 161 of the OBCA. After citing the same two provisions of s. 161 that I have cited above [(b) and (d)], His Honour, citing *Khavari v. Mizrahi*, 2016 ONSC 4934, in turn quoting with approval from *Trackcom Systems International Inc. v. Trackcom Systems Inc.*, 2014 QCCA 1136, noted that this court has adopted a three-part test to be applied in a determination of whether to order an Inspector to conduct an investigation, as follows:

> (a) the applicant is a security holder;

(b) there is a prima facie case that one of the circumstances set out in s. 161(2) has been met; and

(c) the court must consider the appropriateness of the proposed investigation, bearing in mind its usefulness and reasonableness under the circumstances, with due consideration to its expected costs and benefits.

[73] For the reasons discussed above, I find that the first two parts of the test are met. In terms of the usefulness and reasonableness of the investigation, and its expected costs and benefits (and whether or not there is a lower cost approach that can accomplish the same outcomes), I find that, on balance, the proposed investigation has benefits compared to other potential alternatives.

[74] For example, another option that I have considered was to order the trial of an issue or issues. While that may yet be possible and helpful, it strikes me that that parties are some distance from being ready for such a trial. Apart from what is contained in their respective records the parties have not made production, and discoveries have yet to be scheduled. Even moving expeditiously, a trial would not likely occur for some months, and the circumstances cry out for an earlier resolution than that (at least on an interim basis).

[75] The proposed investigation, on the other hand, should have the benefit of being able to proceed expeditiously, in relation to certain specified matters, and can be reported back to the court (and other parties to whom it must be addressed, including, pursuant to s. 161(2), the Commission) and can provide clarity on various contested matters.

[76] In terms of the other causes of action asserted and relief claimed by the applicants, it is important to understand that some of the claims, including those seeking orders declaring all acts and resolutions taken at certain meetings held by the Respondent Faction to be null and void, and of no force and effect, are brought in the name of the company, as well as in the names of the individual applicants.

Discussion of the Proposed Derivative Action

[77] Other claims, including the request for authorization to commence a derivative action on behalf of the Company for various relief, are sought only on the part of the individual applicants.

[78] The question of who has brought what claim(s) becomes important in assessing the main thrust of the Respondent Faction's position before me.

[79] That is, I do have concerns about the authority of the Groia Firm to act on behalf of the Company at this stage. It is undoubtedly true, as a technical matter, that there has been no authorization under Rule 15.02, or by a majority of ALY's Board, for the Groia Firm to act on behalf of the Company.

[80] The applicants argue that this position on the part of the Respondent Faction is one of the impermissible reprisals, under s. 121.6 of the OSA, that should lead me to quash the Respondent Faction's motion. They also say that the motion to disqualify the Groia Firm relies on the validity of the improper meetings at which the direction to the Groia Firm to stand down was generated, and that, if I find those meetings to be invalid, as the applicants urge me to do, I should likewise

find invalid the attempt to remove the Groia Firm from the fray. The applicants also note that Ms. Hirsch, as acting CEO, confirmed the retainer of the Groia Firm on behalf of the Company, which they maintain in all of the circumstances constitutes a legitimate appointment.

[81] I find that the question of the validity of the engagement of the Groia Firm to act for ALY is not clearcut. At the very least, in my view the Groia Firm ought to have sought a declaration confirming the validity of that retainer, rather than presuming it. Indeed, the application, as noted, seeks authorization for the individual applicants to bring a derivative action on behalf of the Company, which seems at odds, and does not sit comfortably with, the evident assumption that the Groia Firm can presume to act for the Company at first instance.

[82] However, inasmuch as the same relief as sought by the Company, and additional relief, is sought by the individual applicants, and inasmuch as two of the individual applicants now have separate representation, I find that the question of the Groia Firm's authorization to represent the Company would not in any event be a basis to stay or dismiss the majority of the claims, which are brought by the individuals in concert with or in addition to those of the Company. For current purposes, I am satisfied that, by focusing on the claims under s. 161 and 248 of the OBCA, in particular, there is ample basis for the interim order I propose to make.

The Oppression Remedy Claim

[83] On that note, in addition to their claim for an investigation under s. 161 of the OBCA, the individual applicants also seek oppression remedy relief under s. 248 of the OBCA. Under that head, the individual applicants seek a declaration that the Respondent Faction has engaged in conduct that is oppressive, unfairly prejudicial, or that unfairly disregards the interests of the applicants.

[84] The remedies available pursuant to a claim under s. 248 are broad and flexible. Under s. 248(3) the OBCA provides that "the court may make any interim or final order that it thinks fit", and then lists a number of potential orders within that general ambit to fashion an appropriate remedy, including an order "restraining the conduct complained of".

[85] To similar and more specific effect, the individual applicants seek an order pursuant to s. 253 of the OBCA that the respondents comply with ALY's by-laws, in particular with respect to the calling, notice and attendance at Board meetings.

[86] For the reasons set out above, I am satisfied that the applicants have made out the basis for an interim order under this head.

The OSA Whistleblower/Reprisals Claim

[87] Finally, the applicants seek a declaration that the respondents have breached the OSA, including in particular s. 121.6, in terms of the Respondent Faction's alleged reprisals against the whistleblowing activities of Ms. Hirsch and Mr. Atin in particular, and also seek findings under the OSA with respect to Mr. Hariharan arising from his alleged insider trading and self-dealing.

[88] For the reasons discussed above, I am prepared to make certain interim orders among the orders requested by the applicants. I am not prepared to allow the current situation to persist, and

I am not prepared to allow the Respondent Faction, despite its notional majority, to control the Board and/or the Company's management going forward in the near term, and indeed until such time as there has been a more definitive adjudication of the alleged conduct of Mr. Hariharan and Mr. Kondragunta. I am deferring for now the issues under the OSA.

Interim Order

[89] Given the broad powers available to the court under the OBCA, including sections 161 and 248, and my findings that Mr. Hariharan and Mr. Kondragunta have conducted themselves in a fashion that appears oppressive to, unfairly prejudicial to and unfairly disregards the interests of the applicants, I order the following, with a view to allowing the company to function for the time being, and to preclude Mr. Hariharan and Mr. Kondragunta from participating in the activities of the Board until there has been a further investigation and determination of their alleged misconduct:

(a) An inspector is to be appointed immediately to investigate the applicants' allegations against Mr. Hariharan, as set out in Mr. Atin's March 18 letter and March 25 email, including with respect to insider trading, tipping, self-dealing, lack of disclosure of material information to the Company and its shareholders, and inappropriate provision of MNPI to certain shareholder and others, and as against Mr. Kondragunta relative to his alleged assistance to Mr. Hariharan by approving the Company paying for Mr. Hariharan's personal expenses;

(b) The inspector is to be chosen by way of the applicants submitting the names of three candidates to the respondents, and the respondents choosing one of those candidates within three days of receiving the three names;

(c) The inspector is to have broad powers to investigate, including access to all documentary information in the possession of the Company, the Applicant Faction and/or the Respondent Faction, or any of its members, and the Applicant Faction and the Respondent Faction are to cooperate fully with any and all requests for information that, in the opinion of the inspector, is relevant to the issues outlined in subparagraph 86(a) above;

(d) The Company is to provide funding for the investigation, up to an initial maximum of $100,000.00;

(e) The inspector is to prepare a report of his or her findings by a date to be agreed or ordered (to be determined once the inspector has had an opportunity to undertake an initial assessment of what will be required to complete the investigation);

(f) Pending further order of this court, Mr. Hariharan and Mr. Kondragunta are not to participate in meetings or activities of the Board, but are to cooperate with any requests of the incumbent Board members for any and all information in the possession of Mr. Hariharan and/or Mr. Kondragunta relevant to the operations and functions of the Board;

(g) The incumbent members of the Board, again pending further order of this court, are to be Mr. Kadar, Mr. Gardner and Mr. Veeravalli.

(h) Pending further order of this court, the Board is to conduct only such business as is necessary for the ongoing operation of the Company and its management, and if the Board proposes to authorize any business activity out of the ordinary course of business, it is to seek this court's approval for any such activity;

(i) To the extent that the Company is obliged to publish further press releases concerning any ongoing decisions and business of the Company, Mr. Atin is to work with Mr. Woolcombe to draft such press releases, which are to employ language and descriptions that are straightforward, uncontroversial, and agreed between the two of them, acing reasonably. Albeit Mr. Woolcombe was engaged to advise the Respondent Faction, I have found his conduct and actions to be above reproach, and I find that he will provide a fair sounding board for any such press releases to be generated;

(j) In that regard, Mr. Woolcombe has taken the lead to this point in dealing with the Commission with respect to the MCTO, and Mr. Woolcombe should continue to do so, while keeping Mr. Atin apprised of any and all proposed meetings, discussions, steps to be taken or proposed outcomes, in order that Mr. Atin, on behalf of the Company, may provide relevant input;

(k) Once the report of the inspector has been delivered, we will reconvene to consider next steps in this case, including a potential schedule for a trial of an issue or issues; and,

(l) To the extent that issues arise with respect to the orderly execution of the various items above, I may be spoken to.

[90] Again, the foregoing is intended to allow the Company to function for the time being, and to preclude Mr. Hariharan and Mr. Kondragunta from participating on the Board until more information is in hand regarding their alleged untoward conduct.

[91] While I have made preliminary observations with respect to some of the applicants' claims, insofar as those preliminary observations were necessary preconditions to the interim relief set out above, I have not yet made final determinations on many matters, including as to the applicants' claims under the "whistleblower" provisions of the OSA.

Need for Further and Final Determinations

[92] Those determinations, and others, may yet be necessary or appropriate to be made in a future hearing in this case, be it a trial of an issue or issues or otherwise.

[93] In my view, it is likely that the findings from the forthcoming investigation will factor significantly into the need for such further proceedings and determinations, and so the question of next steps should be deferred until the results of the investigation are in hand.

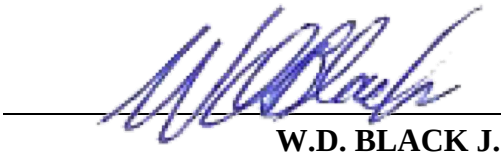
[94] It will also be necessary and appropriate, once additional clarification of the matters at issue here is obtained, to allow the Company's shareholders to exercise voting rights to decide future steps and directions for the Company. The appropriate process and vehicle to enable that all-important shareholder participation is also a matter to be determined as events unfold.

Costs

[95] Given my conclusions on this preliminary hearing, the applicants are entitled to their costs.

[96] I do not see on Caselines a costs outline uploaded by any party.

[97] I direct the parties to attempt to agree on costs. If they are not able to do so, I may be spoken to in order to devise a mechanism for a determination of the appropriate scale and amount of costs to be paid.



W.D. BLACK J.

DATE: MAY 1, 2024