SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

COUNSEL SLIP/ENDORSEMENT

COURT FILE NO.: **CV-22-00685876-00CL & CV-23-00693370-00CL** **DATE:** **1 February 2024**

NO. ON LIST: **4**

TITLE OF PROCEEDING: **MELIA, et al**
v.
EVASHKOW and bLUEROVER INC.

and

SACCUCCI, et al
v. MELIA et al

BEFORE JUSTICE: **OSBORNE**

PARTICIPANT INFORMATION

For Plaintiff, Applicant, Moving Party, Crown:

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ENDORSEMENT OF JUSTICE OSBORNE

1. These two related Applications were heard together. Both relate to the ownership, governance and operations of blueRover Inc. ("blueRover"). These proceedings represent the epitome of dysfunction in a privately held company. blueRover is itself in perilous financial circumstances, with the result that ironically, at least in some ways, the dispute is about which group inherits the problems and challenges.

The Smith Application and the Smith Motion (Interim Monitor Appointment)

2. In the first Application, Court File No. CV-22-00685876-00CL (the "Smith Application"), issued on August 22, 2022, the Applicants David Melia ("Melia"), Ralph Goldsilver ("Goldsilver"), Robert MacBean ("MacBean") and Michael Smith ("Smith") (collectively, the "Smith Parties") seek oppression relief (as further described below) against Douglas Evashkow ("Evashkow") and blueRover.

3. Within the Smith Application, the Smith Parties brought a motion for interim relief. Citing what they described as a chaotic situation that was materially impairing the business, operations and indeed the survival of blueRover, they sought an order to "create an environment for the company to function as close to normally as is possible" through the appointment of a Monitor, the naming of interim officers and directors, and imposing significant limitations on the authority of Evashkow as interim CEO.

4. On November 4, 2022, I released my decision on that motion (the "Smith Motion Decision") and appointed B. Farber Riley Inc. as Court-appointed Monitor of blueRover. The appointment of the Monitor was on the consent of all parties, (including for greater certainty, Evashkow). However, the balance of the relief sought on that motion was contested. That relief included, among other things, directions as to the governance and management of blueRover in the interim period pending a final determination of the only proceeding then outstanding - the Smith Application.

5. In the Smith Motion Decision, I also directed, among other things, that:

    a. the Monitor was appointed effective immediately, with full visibility into all revenue, receipts and deposits. All payments, withdrawals or transfers outside the ordinary course of business or in the amount of $10,000 or more, required Monitor approval;

    b. Melia would continue as President in the interim period and until such time as he was removed or replaced by a Board constituted on the consent of all parties or as ordered by the Court. He was to continue to have signing authority with Meridian Credit Union ("Meridian"), blueRover's banker;

c. Smith was to remain as COO and MacBean was to remain as CFO, each on the same terms as above;

d. Evashkow was to remain as CEO, albeit with his role and responsibilities restricted as per the terms of the order made on that date; and

e. the Board of Directors was to include Goldsilver, Smith, MacBean, Evashkow and Robin Patterson, and was not to make any decisions outside the normal and ordinary course of business nor terminate any officer or restrict or materially amend the powers of any officer in the interim period, without the consent of all parties or as ordered by the Court.

6. My objective was to restore some degree of normalcy with blueRover's banking operations on an urgent basis and to facilitate a functioning business atmosphere at blueRover, without prejudice to the rights of any party as may be determined when the Smith Application was heard on the merits and on the basis of a full record.

7. In my Endorsement, I urged the parties, both in their own self-interest and with a view to maximizing the viability of the company and preserving the rights of other stakeholders who are effectively strangers to their dispute, to cooperate with themselves and with the Monitor, to lower the temperature in their correspondence and all dealings with one another, and to act in all respects in a businesslike manner.

The Saccucci Application

8. Very shortly after the release of the Smith Motion Decision, the other group of shareholders immediately commenced their own Application for oppression. They are supported by Evashkow, who is a close associate of the principal of Korona Group Limited ("Korona"), Josip Kozar ("Kozar"). As further described below, Evashkow was nominated to the Board of blueRover by Kozar.

9. Loreto Saccucci ("Saccucci"), Korona, Leonardo Suglio, Daryle Delafosse, Cale McEwan and Karen McEwan (collectively the "Saccucci Parties") commenced a second application (Court File No. CV-23-00693370-00CL) in which they seek competing oppression relief against Melia, Goldsilver, MacBean and Smith (the "Saccucci Application").

Background

10. blueRover is a technology company located in Cambridge, Ontario, that has developed advanced cellular monitoring sensors and software technology. Each of the Smith Parties on the one hand and the Saccucci Parties on the other hand is effectively a group of blueRover shareholders, and each group makes competing allegations of oppression against the other in the respective Application that each group has commenced.

11. The parties (and by that I mean to refer to the Smith Parties on the one hand, and the Saccucci Parties and Evashkow on the other hand) cannot agree on anything related to blueRover. They cannot agree on who the shareholders are, who the directors should be, who the officers should be, nor can they agree on the validity of certain key agreements including but not limited to the validity of a voting trust, the propriety of the incorporation of certain subsidiaries, and the validity of certain other obligations of blueRover.

12. Melia, Goldsilver, MacBean and Smith are directors, officers and shareholders of blueRover who allege oppression. Smith was one of two initial shareholders and sole officers and directors until 2020. The other original shareholder, Saccucci, is a non-party in the first Application but, as noted above, is an Applicant

in the second Application. Smith remains a director and the Chief Operating Officer. He is also the largest shareholder in blueRover, holding approximately 25% of the outstanding shares.

13. As of April, 2021, a new shareholders agreement (the "Shareholders Agreement") was entered into between blueRover on the one hand and all of its shareholders on the other. Pursuant to that shareholders agreement, each of Saccucci and Smith were entitled to a designated seat on the board, provided that they or their family members held at least 15% of the company's shares.

14. The Shareholders Agreement also provided that one of the key investors in blueRover, Kozar, ("Kozar") (indirectly, through his company, Korona) was also entitled to nominate a director to the board, conditional upon the same 15% shareholding requirement.

15. There are other minority shareholders in addition to the shareholders referred to above. A number of minority shareholders are parties to a voting trust agreement dated March 2, 2017 (the "Voting Trust Agreement" or "VTA").

16. Goldsilver and MacBean were appointed as independent directors in November, 2021. MacBean is also the CFO, having been introduced to the company and its principals by Kozar.

17. Melia is an executive with technology and finance experience who first became involved with blueRover in April 2020 through the provision of consulting services relating to sales and strategic planning. He became Chief Strategy Officer in May, 2020, and was then appointed President by the Board on an interim basis in December, 2020 which appointment was made permanent by the shareholders in November, 2021.

18. Evashkow became a director of blueRover on June 28, 2022. He was known to Kozar, since Kozar was an investor in a technology company called QDAC Systems of which Evashkow was the president.

19. QDAC is a competitor of blueRover. Those two parties were negotiating the potential licensing of blueRover technology to QDAC in May, 2022, during which Evashkow was first introduced to blueRover and the Smith Parties by Kozar. That negotiation, however, did not result in an agreement since, according to the Smith Parties, an agreement would have eroded blueRover's sales margins and therefore shareholder value. In any event, no agreement with QDAC was reached.

20. Approximately six weeks after the negotiations were aborted, however, Kozar named Evashkow to the board of blueRover as his nominee, and that appointment became effective at a board meeting of June 28, 2022. Evashkow was also appointed interim CEO on the same date, and at the same (very acrimonious) Board meeting.

21. The Smith Parties, as Applicants in the Smith Application, allege that Evashkow immediately destabilized the company's operations and governance by (among other things) demanding the resignation of MacBean as CFO. Evashkow took the position that he was properly appointed, and that the efforts of the Melia Parties were thwarting and frustrating the very type of change he was appointed to bring about at blueRover.

22. The parties returned to Court after the hearing of these Applications to seek advice and directions on various issues.

23. Now, both sets of Applicants request that this Court grant declaratory relief with respect to oppression, which shareholdings in blueRover should be recognized, and determine the status of the Voting Trust Agreement discussed below.

24. The Smith Parties take the position that the Saccucci Parties, with and, at least in part, through the actions of Evashkow, have acted oppressively and to the prejudice of blueRover in various ways. In essence, they submit that Kozar and Saccucci resigned and introduced Evashkow to the company as a result of which chaos and confrontation reigned, to the detriment of all shareholders.

25. Evashkow immediately sought to effect the removal of the company's entire existing management infrastructure and, the Smith Parties submit, following the Smith Motion Decision, the Saccucci Parties commenced the Saccucci Application which, they allege, contains "a litany of inflammatory allegations against the Smith Parties that are uncorroborated, overstated in several cases and expressly contradicted by their own prior statements and conduct."

26. The Smith Parties seek in their Notice of Application, an order:

    a. validating the current shareholders' register in the Minute Book of blueRover;

    b. declaring that the Voting Trust Agreement is valid and remains in full force and effect;

    c. declaring that Evashkow has caused the business and affairs of blueRover to be carried out oppressively and providing directions for the determination of compensation payable to the Smith Parties as a result thereof;

    d. permanently removing Evashkow as a director and CEO of blueRover and directing Kozar to nominate a replacement director;

    e. declaring that the current lawful directors are Smith, MacBean, Goldsilver, Saccucci and the new nominee of Kozar (to replace Evashkow); and

    f. invalidating or voiding resolutions passed at shareholder meetings of July 27, 2022 and August 19, 2022, and providing directions for the calling, holding and conduct of a shareholder meeting.

27. At the hearing of these Applications, the Smith Parties submitted further and/or in the alternative a compromise of sorts in the form of a proposed order providing that they should be given a limited period of time (60 days) to present to the Monitor and to the Saccucci Parties a plan, arrangement or process for the refinancing, reorganization and/or the sale of the company, and that the Saccucci Parties should be at liberty to present any proposed plan, arrangement or process for the refinancing, reorganization and/or sale of the company within a limited period of time (60 days).

28. They also sought terms that would effectively constitute a standstill during such period of proposed transition, and an order directing the Monitor to remain in place and to file a report expressing its views and recommendations on any proposed arrangement for blueRover.

29. In the event that the parties (i.e., the Applicants in both competing Applications) were not able to agree upon an arrangement, the parties would return to court to seek directions or determinations as necessary.

30. The Saccucci Parties seek an order providing in relevant part:

    g. declaring that the respondents in the Saccucci Application have managed the affairs of blueRover in a manner that is oppressive and declaring that they have breached their fiduciary duties;

    h. rescinding any shares issued by the respondents to themselves directly or indirectly, that were not approved by a valid directors' resolution;

i. removing Melia as president, and removing Goldsilver and MacBean as directors and officers;

j. declaring that the current lawful directors are Evashkow, Smith, Saccucci (in place of his nominee Robin Patterson) and Kozar;

k. removing Melia as banking and signing authority and granting that authority to Kozar and Evashkow;

l. rescinding the December 1, 2022 appointment of Todd Bissett as legal counsel to blueRover and directing him to turn over all books and records;

m. an order determining the proper shareholdings of the company and directing rectification of the share register;

n. declaring that the parties to the Voting Trust Agreement were released therefrom on November 16, 2021 and that the Voting Trust Agreement is no longer of any force or effect;

o. giving directions for the holding of a shareholders meeting to vote on and appoint directors for blueRover; and

p. an order setting aside the Smith Motion Decision.

31. The fundamental nature and scope of the relief sought in the competing Applications itself illustrates the total dysfunction at blueRover that goes to the very core of its ownership, governance and operations.

Analysis

32. In my view, the correct approach is to determine first who the proper shareholders are, as that issue drives everything else. Ownership of the company brings with it the right to appoint the members of the Board of Directors, and the Board in turn appoints the officers. A determination of the shareholdings is also a relevant factor in considering the reasonable expectations of stakeholders and any analysis of whether there has been oppression, and if so to whom and how.

33. I pause to observe that this is consistent with the approach urged upon the Court by the Saccucci Parties who submit in their factum that "the vast majority of issues in these proceedings flow from disagreements at the shareholder level … once those shareholder matters are determined, the proper shareholders should be given the opportunity to determine the future operations of [blueRover]".

34. Finally, in the circumstances, it is necessary to make limited directions effectively to ensure some level of stability until the legal shareholders determine, as is their right, whether and the extent to which they wish to implement changes to the composition of the Board of Directors and the appointment of officers of blueRover.

The Shareholders and the Shareholders Register: The Disputed Kaajenga and Additional Korona Shares

35. Smith and Saccucci were the initial shareholders in blueRover, with equal shareholdings. Over a period of several years, the company received investments, largely from friends and family of those two shareholders, as well as from Korona (Kozar's company).

36. A series of share split and exchange agreements approved in March, 2017 granted to existing investors Class A common shares. Approximately 1.5 years later in December 2018, blueRover approved the conversion of accrued wage and other debt also to Class A common shares. Most of that debt was owed to Smith and his family members.

37. The shareholders and directors also resolved, unanimously, to have blueRover enter into the Voting Trust Agreement effective March 2, 2017. The VTA was executed by blueRover and each of the minority shareholders. It was prepared by the company's corporate solicitor, Mr. Todd Bissett ("Bissett"), who had been the corporate solicitor for blueRover since January 2014 (with the exception of brief periods between July and December 2022 when he stepped away as a result of the disputes at issue in these two Applications).

38. Bissett maintained the Minute Books for the Corporation and has been the recording secretary for shareholders meetings and Board meetings including the shareholders meeting of November 16, 2021 discussed below.

39. The VTA and its relevant terms are also discussed further below.

40. Many of the shareholdings reflected in the current Shareholders Register (in respect of Class A Common Shares) are not at issue. Those that are at issue include the shareholdings of Kaajenga Inc. ("Kaajenga") and Kozar's company, Korona.

41. The Shareholders Register reflects that Kaajenga owns 937,969 shares, and Korona owns 1,800,038 shares.

42. With respect to Kaajenga, the parties agree with respect to its ownership of 937,969 shares (344,444 + 593,525). The position of the Smith Parties is that a majority of directors agreed to issue those shares to Kaajenga and that the Shareholders Register accords with the records, ledgers and meeting records.

43. With respect to Korona, the parties disagree as to whether it owns an additional 175,458 shares not reflected in the Shareholders Register (which, if recognized, would bring the total number of shares owned by Korona to 1,975,496). The Smith Parties submit that there is no written instrument confirming any agreement to issue those shares and they are not reflected in the Shareholders Register, ledgers or meeting records.

44. The Saccucci Parties submit that they hold 5,469,262 shares in the aggregate, including the Korona shares described above. As there are 10,076,182 shares outstanding, they submit that they would control a majority of shares unless all of the shares issued to Kaajenga are found to be valid, in which case, they concede, the Smith Parties would control a majority of the outstanding shares.

45. The Smith Parties submitted in argument on these Applications various charts illustrating the outcome of various scenarios:

    a. if the Kaajenga and additional Korona shares are recognized, and the VTA is valid and in force, the Smith Parties control a majority. If the VTA is not valid, the Saccucci Parties control a "bare" majority;

    b. if the Kaajenga shares are recognized but the additional Korona shares are not, and the VTA is valid and in force, the Smith Parties control a majority. If the VTA is not valid, the Saccucci Parties control (barely) a majority;

    c. if neither the Kaajenga shares nor the additional Korona shares are recognized, and the VTA is valid and in force, the Smith Parties control a majority. If the VTA is not valid, the Saccucci Parties control a majority; and

d. if the Kaajenga shares are not recognized and the additional Korona shares are recognized, and the VTA is valid and in force, the Smith parties control a majority. If the VTA is not valid, the Saccucci parties control a majority.

46. In sum, much turns on the issue of whether the VTA is in force, since in any of the above scenarios, it is the determining factor: while the precise number of shares issued to various of the parties changes in the different scenarios, in any case if the VTA is valid, the Smith Parties control a majority, and if it is not, the Saccucci Parties control a majority.

47. In no scenario, however, does either shareholder group control two thirds of the shares (i.e., a special majority).

The Voting Trust Agreement and the November 16, 2021 Meeting of Shareholders

48. The VTA was made effective March 2, 2017, pursuant to a unanimous resolution of each of the directors and the shareholders. It was executed by blueRover and each of the minority shareholders (Saccucci and Korona were not included).

49. The VTA was prepared by Bissett as corporate solicitor. His evidence on these Applications was to the effect that he prepared the VTA with the purposes of avoiding difficulty in managing small shareholders, and providing some certainty to potential funding partners or investors about the shareholdings in blueRover.

50. Pursuant to section 2.1, the parties irrevocably granted to the Trustee the right to vote their shares at all meetings, deliver any and all proxies, and sign all resolutions. The initial Trustee was Saccucci, later replaced by the controller of blueRover, Vilho "Willie" Joki ("Joki").

51. Following the execution of the shareholders agreement as of April, 2021, the Board was composed of Smith, Saccucci and Kozar. The November 16, 2021 shareholders meeting was called, in part, to address the composition of the Board since the shareholders agreement required that it have a minimum of five and a maximum of seven directors. The Circular distributed in advance included the proposed slate of directors comprised of the existing three (Smith, Saccucci and Kozar) together with MacBean and Goldsilver.

52. Bissett was the recording secretary at the meeting, in his capacity as corporate solicitor for the company. The meeting commenced at 4 PM.

53. There is no issue between the parties that the VTA was valid and enforceable at least until this meeting. It is this meeting, however, that gives rise to the dispute about the continued validity of the VTA.

54. The Smith Parties maintain that the VTA remains valid and enforceable. The Saccucci Parties assert that Saccucci and Kozar, in their capacity as directors, voted to dissolve the VTA at a Board meeting held immediately prior to the shareholders meeting of November 16, 2021 that began at 4 PM. They assert that Saccucci and Kozar determined at that meeting that, given the governance and business issues that blueRover was experiencing at the time, every shareholder should be able to vote their shares. Saccucci's affidavit is to this effect, and states that he and Kozar, on behalf of the Board, released the impacted shareholders without any reservations or conditions with the result that, as he put it: "as such, it is my view… that the VTA is effectively dissolved".

55. The Saccucci Parties rely, in part, on advice given by Bissett to the directors and officers about the request of certain shareholders to vote their own shares at the November 16, 2021 meetings. The advice, in writing

(as they emphasize), was to the effect that only the Board could release members of the voting trust in order that they could independently vote their shares. Bissett's advice was further to the effect that the parties to the VTA could not be removed for a single meeting and that "either a shareholder is part of the trust or not part of the trust, so if removed will be removed permanently (unless voluntarily rejoining)".

56. The evidence of Saccucci and Kozar is to the effect that they voted to release the parties at the November 16, 2021 Board meeting, and since they constituted majority of the Directors at that meeting, the VTA was thereby dissolved.

57. I am unable to conclude that there was any valid meeting at which the VTA was resolved to be dissolved.

58. Such is not reflected in the minutes of the shareholder meeting, nor in the audio recording of the relevant Board meeting or indeed in any other compelling documentary evidence.

59. The minutes of the shareholders meeting of November 16, 2021 and the corresponding scrutineers report, reflect that for shareholders who had signed the VTA, they voted or directed the votes of their own shares at the meeting, and that Joki, as the replacement Trustee under the VTA, voted the balance of the shares in trust. Moreover, the report of Joki reflects that the number of shares voted at the meeting matches the number of shares reflected in the Shareholders Register (as well as the cap table on which the Smith Parties rely), all including, for greater certainty, the 937,969 Korona shares.

60. The resolutions passed at the shareholders meeting of November 16, 2021 include ordinary course governance issues including the appointment of signing officers, the appointment of directors, the appointment of Melia as President and MacBean as CEO and authorizations to the Board to approve options and accruals.

61. Perhaps most tellingly, the evidence of Mr. Bissett in this regard is to the effect that he has no knowledge of the VTA ever being dissolved at or in advance of the November 16, 2021 meeting, which he attended and in respect of which he took minutes as recording secretary. Moreover, Bissett testified that nor, to the best of his knowledge and recollection, was there any vote or resolution of the Board after that to remove or release one or more of the shareholders from the VTA on a go forward basis.

62. In addition, in my view the advice from Bissett does not support the assertion that the VTA was dissolved. The email chain in which the advice was provided reflects that, four days prior to the meeting, Saccucci asked Bissett whether, if shareholders were removed from the voting trust, they had the right to vote. Melia responded first, to the effect that they could vote [their] shares anyway they wanted if [Joki] agrees. Thereafter in the email chain, Bissett then replied to the effect that: "confirmed that [Joki] that would let the shareholders each be heard and have max impact on the vote at this meeting, and the Board can consider any appropriate adjustments to the voting trust with proper care and not on a rush basis."

63. In short, and in addition to the absence of any direct evidence of a pre-meeting or prior Board meeting at which the VTA was dissolved before the shareholders meeting, there is nothing in the contemporaneous documents relating to the shareholders meeting itself that suggests or implies, let alone states, that the VTA had just been dissolved. To be clear, there was no mention by either Saccucci or Kozar at the shareholder meeting that occurred on November 16, 2021, literally just some hours after they had purportedly voted to dissolve the VTA at the meeting of directors. This, notwithstanding that there was clearly discussion of whether and how shareholders could vote at the meeting, and other issues with respect to which the VTA and the validity and operation thereof would have a direct impact. Kozar's evidence to the effect that he "didn't think it was his place to bring that up" is irreconcilable with the position that the Saccucci Parties now advance.

64. Nor is there any corroboration for the evidence of Saccucci and Kozar that they themselves voted to dissolve the voting trust either at a Board meeting of November 16, 2021, or at any other time. Each of those two individuals admits that there are no written notes or records of the resolutions purportedly passed to dissolve the VTA (or release shareholders from its effect and operation) and they never requested anyone (i.e., Bissett or anyone else) to prepare any such resolutions.

65. Finally in this regard, I accept the submission of the Smith Parties to the effect that it is significant that the shareholders meeting was recorded and it indicates that the VTA was not dissolved. A portion of the transcription of the recording reflects that Elliot Saccucci (Saccucci's son, who was also a shareholder in the company and a lawyer himself) requested that the issue of the dissolution of the voting trust be tabled. The transcript reflects that Melia then discussed the purposes of the trust and Bissett noted that the issue would be flagged for discussion at the Board level, a position with which Elliot Saccucci agreed. Not only does the transcript not reflect anything having been discussed to the effect that the VTA had already been dissolved literally hours before, but the whole discussion, and the plan going forward, is entirely inconsistent with such an event having occurred.

66. This is surprising, to put it mildly, if that had in fact occurred, since the dissolution of the VTA would be a significant event in the governance and history of the company, particularly when important matters of governance, such as the appointment of directors and officers, among other things, was clearly addressed at the shareholders meeting.

67. Thereafter, the Board, as then constituted, met several times following the November 16, 2021 shareholders meeting. There is no reference to the dissolution of the VTA in the minutes of those subsequent meetings either. Even as events transpired over the next several months, and discussions became heated and there were passionate disagreements at the Board about important matters, there is still no reference to the purported dissolution of the VTA. This is the case right up to and including the contested meeting or meetings of July 27, 2022 and the contested meeting of August 19, 2022.

68. In the result on this issue, there is no evidence of any valid resolution of the Directors to either dissolve the VTA or remove any shareholders. In my view, it would be highly unusual if such an important and fundamental governance agreement were dissolved other than by resolution. There is no corroborating contemporaneous evidence, including but not limited to minutes of meetings or correspondence, from which I can infer that such occurred, even in the absence of direct evidence such as a resolution. As stated, the evidence about the discussions at the shareholders meeting is to the opposite effect.

69. In my view, the VTA remains valid, and in full force and effect.

The Kaajenga Shares

70. In or around 2020, Melia had developed a proprietary video learning network platform for potential sales and marketing efforts of blueRover. The platform had been developed through Kaajenga, and thereafter Melia provided to blueRover sales and strategic planning services both directly and through Kaajenga. The relationship was formalized in a memorandum of understanding dated September 11, 2020 (the "MOU") signed by Melia, Smith and Saccucci. It was later acknowledged by Kozar as well.

71. The MOU provided for, among other things, the issuance of shares to Kaajenga if certain performance milestones were met.

72. I am satisfied that there was no dispute at the time among the directors of blueRover that Kaajenga had met the deliverables as agreed upon in the MOU with the result that it was issued two corresponding

tranches of shares in the amounts described above: 593,525 shares issued as of April 10, 2021, and 344,440 shares issued as of September 2, 2021.

73. Both tranches of shares, totaling 937,969 shares in the aggregate, are reflected in the shareholder register and ledger maintained in blueRover's Minute Book.

74. The Saccucci Parties take the position that it was oppressive for the Smith parties to have recognized the Kaajenga shares, since Kaajenga had failed to satisfy its contractual requirements and there was no valid Board approval for the second tranche of shares (344,444). They take the position that Kaajenga is not entitled to any shares, or, in the alternative, is entitled to only the first tranche of shares (593,525).

75. With respect to the first tranche of Kaajenga shares, the evidence establishes that at least Saccucci acknowledged and agreed more than once that Kaajenga had met the milestones and was entitled to the issuance of the shares. Among other places, this is reflected in the resolution to this effect dated April 10, 2021, prepared by Bissett and signed by both Saccucci and Smith in their respective capacities as directors. Saccucci conceded on his cross-examination that he executed the resolution to issue shares and instructed Bissett to the same effect.

76. With respect to the second tranche of Kaajenga shares, there is similarly in the Minute Book and Shareholders Register a resolution dated September 2, 2021 authorizing the issuance of the additional 344,444 shares. It, too, was prepared by Bissett, whose evidence was to the effect that he would have received the resolution from at least one of the directors.

77. That resolution was signed by Saccucci, Kozar and Smith. Bissett's evidence confirmed that they were the only directors of the Company as of that date, and that he included the resolution in the Minute Book because he would have received it from at least one of those directors at or around that time.

78. In connection with these Applications, however, (indeed, on the evening prior to, or the morning of, their scheduled cross examinations), and after the cross-examination of Bissett by the Saccucci Parties, Saccucci and Kozar delivered further affidavits stating that they had not signed the resolution that bears their signatures. On cross-examination, correspondence dated October 6, 2021 (i.e., approximately one month after the date of the resolution) was put to them which correspondence advised that Bissett had prepared a resolution for execution. Both of those individuals also signed other resolutions the following day on October 7, 2021 Neither conceded that the signature on this resolution, however, was theirs.

79. I find that they signed the resolution. The October 6, 2021 email referred to above from Smith to Saccucci enclosing the direction to [Bissett] to issue share certificates to Kaajenga "as per our agreement with Kaajenga shares are to be issued as milestones are met. Attached is the document you and I initialed confirming the milestones that have been met." Finally, in this regard, Melia emailed the resolution to Bissett that same evening, and it bears the same signatures as the resolution version produced by Bissett in the Minute Book.

80. Bissett, a lawyer and the secretary, has no side or stake in this issue. There is no evidence to suggest that he would have simply, unilaterally, created or included this resolution in the Minute Book. I reject the assertion of the Saccucci Parties that it was forged. The objective fact is that the signed resolution is in the Minute Book. The available inferences, given the positions of the parties, are either that Melia forged the signatures, or Kozar does not recall having signed the resolution. Having considered all of the circumstances, my view is that the latter inference is by far the more likely and is to be preferred.

81. The record includes subsequent emails dated the same date from Saccucci, including emails among Saccucci, Melia, Smith and Kozar about this very resolution, in which Saccucci states that he "[didn't]

want to hold anything up for David [Kaajenga]". I cannot reconcile that with his later assertion that he did not sign the resolution. The evidence is further to the effect that Kozar, Smith and Saccucci met the following day to discuss and execute other resolutions. I find on a balance of probabilities that Kozar executed the resolution on that date.

82. Moreover, approximately six months later in March 2022, Saccucci (still a director) further confirmed that the remaining milestones in the Kaajenga memorandum of understanding (pursuant to which the shares were issued) had been met. This was sent in connection with the $20 million valuation for the company. This, too, is inconsistent with his assertion that he never signed the resolution.

83. There are no documents in the record inconsistent with the Kaajenga shares having been properly issued until the affidavits delivered immediately prior to the cross-examinations in these Applications, some two years later.

84. I find that the Shareholders Register accurately reflects the issuance to Kaajenga of each of these two tranches of shares, and that this is corroborated by the evidence described above.

The Additional Korona Shares

85. As stated above, the parties disagree on whether Korona was validly issued an additional 175,458 shares in 2021. The Smith parties take the position that no such additional shares were issued. The Saccucci parties submit that the additional shares were issued in 2021 as payment or consideration for interest owing on a promissory note issued by blueRover in favour of Korona.

86. I begin by observing that there is no written instrument in the record confirming the issuance of these additional shares or even any agreement to issue the shares. In particular, they are not reflected in the Shareholders Register. Moreover, Bissett's evidence was to the effect that he had no record, approval or resolution authorizing or directing the additional 175,458 shares, and had no recollection of there having been any such discussions. In short, he, as corporate solicitor and secretary, had never heard of these additional shares.

87. I note that the evidence of both MacBean and Smith was to the effect that they were aware of (and agreeable to) a proposal from Kozar pursuant to which Korona would receive the shares in return for an abatement of interest for the 2021 year. However, I agree with the submission of the Smith Parties that there is no evidence in the record to the effect that any agreement was ever finalized, let alone reduced to writing. The absence of any final agreement is corroborated by the evidence from Bissett.

88. Moreover, there is no evidence in the record as to the exact terms of the purported agreement to forgo, or at least pay, interest by way of the issuance of shares in any event. Neither Kozar himself (on behalf of his company, Korona) nor any of the other Saccucci Parties, has put forward any evidence as to any calculations; i.e., precisely what amount of interest, for what precise period, was to be forgiven, or how the specific number of shares to be issued (175,458) was calculated. Given such a precise number, it would be reasonable to expect there to be some evidence of how the number was arrived at.

89. Kozar himself is unable to determine how the interest was calculated and in particular whether (or even if) it was reduced or adjusted on account of the purported issuance of shares in 2021.

90. Finally, subsequent to the release of the Smith Motion Decision, Kozar sent written correspondence dated November 24, 2022 to blueRover's directors and officers said to constitute formal notice that Korona intended to require full payment on the promissory note, with all interest computed and accrued thereon.

91. The letter is specific and particular, quoting directly from the terms of the promissory note, a copy of which is attached to the notice. It states, in part, that: "blueRover's debt to KGL will amount to $2,139,389.65 as at the maturity date when calculated in accordance with the terms of the promissory note."

92. There was no reference whatsoever to any purported reduction or abatement of that accrued interest for the shares that Korona was allegedly issued in 2021, nor to any such share issuance or relationship to the note whatsoever. The letter demands that the addressees - the interim directors and officers - "kindly advise the undersigned immediately if blueRover does not intend to comply with its obligations under the promissory note.".

93. I find that this is completely inconsistent with the assertion now made that the interest had been previously forgiven in exchange for the issuance of the additional shares.

Conclusion re: Shareholdings

94. The starting point is the Shareholders Register. Unless and to the extent it is proven to be inaccurate, I find that it is the best objective evidence of the respective shareholdings of the parties.

95. It was not before the Court on the interim motion resulting in the Smith Motion Decision in the Smith Application, largely as a result of the ongoing disputes between and among the shareholders. While these Applications were pending, however, the parties jointly sought a consent order that the Minute Book and all other records of blueRover referenced in sections 140(1) and (2) of the OBCA, as well as memoranda, notes, minutes or written instructions relating to blueRover's corporate maintenance, governance or decisions that are in the possession of Gowling (Bissett's law firm), be produced. Bissett and the law firm consented to the order, but in the circumstances understandably wanted it in place before the documents were produced. Once the order was issued, the documents were produced to both parties.

96. It is a contemporaneous document in that it was created, and updated from time to time, at or around the time of the events (i.e., the issuance of shares) reflected therein. It was prepared and maintained by the corporate solicitor, Mr. Bissett. I am satisfied that he is a disinterested party and maintained the records, including the Shareholders Register and the Minute Book, accurately and objectively to the best of his ability.

97. The shareholdings as I have concluded above correspond with the Shareholders Register in the record as at March 6, 2023. They also accord with how the shares were voted at, for example, the meeting of November 16, 2021, which is also in the record in the form of the scrutineers report.

98. The Smith Parties rely upon the current Shareholders Register, as maintained in the company's Minute Book, by Bissett as secretary. As stated above, Bissett has historically maintained the Shareholders Register and corresponding ledger based upon what he submits are valid corporate approvals or resolutions, in accordance with the company's constating documents.

99. As against this, the Saccucci Parties rely on a cap table, hotly disputed, used for the shareholders meeting of August 19, 2022, chaired by Evashkow and also hotly contested. That cap table excludes both the Kaajenga shares and includes the additional Korona shares. None of Saccucci, Kozar nor Evashkow have any direct knowledge of the information on which that disputed cap table is based. Evashkow concedes that he did not handle the Shareholder Register in any way, and did not do anything to verify the numbers contained therein.

100. For all of the above reasons, I find that the VTA continues to be valid and in full force and effect, that the Kaajenga shares were properly issued, and that the alleged additional Korona shares were not in fact issued.

Allegations of Oppression

101. The oppression remedy is an equitable remedy that gives the Court a broad jurisdiction to enforce not just what is legal, but what is fair corporate conduct. In assessing a claim for oppression, a court must answer two questions:

    a. does the evidence support the reasonable expectation the claimant asserts?; and

    b. does the evidence establish that the reasonable expectation was violated by conduct falling within the terms "oppression", "unfair prejudice" or "unfair disregard" of a relevant interest?

    See: *The Investment Administration Solutions Inc. v. Pro-Financial Asset Management Inc.,* 2018 ONSC 1220, at para. 85, citing with approval *BCE Inc. v. 1976 Debentureholders*, 2008 SCC 69.

102. A complainant who alleges oppression must identify their reasonable expectations, establish that they were reasonably held, and show that they were violated by corporate conduct that was oppressive, unfairly prejudicial to, or that unfairly disregarded the reasonable expectations of the complainant. For a complainant to successfully prove that there was oppressive conduct, it must prove more than that it was prejudiced or adversely impacted by a particular decision, but also that its reasonable expectations have been unfairly disregarded, having regard to the particular circumstances of the case. Mere prejudice, adverse impact, or disregard for the interest of another is not enough; the consequences must be unfair having regard to the particular circumstances of the case and the complainant's reasonable expectations: *The Investment Administration Solutions* at para. 86.

103. Reasonable expectations will be determined objectively and contextually and the actual expectation of a stakeholder is not conclusive; reasonable expectations do not consist of a complainant's subjective aspirations. The question for the court is whether the expectation is reasonable having regard to the facts of the specific case, the relationships at issue, and the entire context, including the fact that there may be conflicting claims and expectations: *The Investment Administration Solutions* at para. 87.

104. The allegations of oppression in this matter are advanced both ways and are asserted by each of the two shareholder groups against the other.

105. In the main, I conclude that the dysfunction and level of acrimony increased exponentially following the involvement of Evashkow in the business, governance and affairs of blueRover. Much of this is set out in my earlier Smith Motion Decision. That has not changed.

106. As stated in the Smith Motion Decision, it had been my objective in making that interim order, to restore some degree of normalcy, civility and functioning at blueRover and among the parties to these competing Applications. Regrettably, that did not occur, and the dysfunction and acrimony continued and indeed increased.

107. That began with the commencement, shortly after the release of the Smith Motion Decision, of the Saccucci Application alleging oppression against the Smith Parties. The Smith Parties responded to the effect that the allegations were without merit and were raised only for tactical reasons, belatedly, in an attempt to justify the conduct of Evashkow, disenfranchise the Smith Parties and entrench their (the Saccucci Parties') own control of blueRover.

108. The Smith Parties maintain their allegations of oppression advanced in the Smith Application, and in particular submit that Evashkow has caused blueRover's affairs to be carried out oppressively, by among other things:

a. attacking without any basis the competence and qualifications of the Smith Parties and other blueRover personnel in correspondence with shareholders and employees;

b. purporting to suspend blueRover's CFO and Controller, without pay, and threatening that individual with allegations of fraud;

c. failing to attend (in person or by video conference) key Board, shareholder and management meetings and failing to disclose the terms of his purported mandate and other business interests;

d. failing to provide adequate or any notice of significant business to be transacted at shareholder meetings (such as the removal of directors); and

e. purporting to vest in himself and/or his designates, the sole discretion to determine the validity of blueRover's shareholdings, proxies and the validity of the VTA.

109. The nature and scope of these allegations alone illustrates the level of dysfunction and, the Smith Parties submit, justifies a declaration that Evashkow has caused the business and affairs of blueRover to be carried out oppressively, and an order removing Evashkow as director and CEO.

110. In particular, the Smith Parties submit that the oppressive conduct on the part of Evashkow began even before his formal appointment as a director when he attempted to exclude Melia from a Board meeting, and proposed a resolution to have Melia removed as President and struck from the officers' register, notwithstanding his appointment by the shareholders. They allege that, to exacerbate matters, "Evashkow accompanied his demands with sarcastic, suggestive and belittling comments about MacBean, Smith and the state of blueRover".

111. I addressed these allegations, and the evidence on which they were then based, on an interim basis in the Smith Motion Decision:

> 24. The dispute about the composition of the board arises because the warring factions each delivered competing notices of a meeting of shareholders for July 27, 2022.
>
> 25. The Board of Directors consisted, as of that date, of Messrs. Melia [director and president], Goldsilver [independent director], MacBean [independent director and CFO], Smith [shareholder, director appointed by himself and COO], Robin Patterson [director appointed by Saccucci], and Evashkow [director appointed by Kozar and CEO].
>
> 26. As stated above, Evashkow had been appointed interim CEO a month earlier, by the board at a meeting of June 28, 2022. The Applicants allege that he was appointed on a temporary basis to assess the company and its strategic alternatives. It seems even this meeting was acrimonious. Evashkow moved to be appointed as interim CEO. MacBean and Smith voted against the motion. Patterson voted in favour. So too did Evashkow, apparently despite advice from corporate counsel that he was in a position of conflict.
>
> 27. According to the Applicants, Evashkow then made it clear that he expected, and would recommend, that Kozar would demand repayment of his debt owed by blueRover if Evashkow was not appointed CEO. As against that threat, Goldsilver voted in favour. That resulted in a majority, and Evashkow was appointed interim CEO [Smith Affidavit, para 13].

28. However, the Applicants allege, Evashkow immediately destabilized the company's operations by demanding the resignation of MacBean as CFO, seemingly arising out of a dispute over the practice of circulating draft minutes, and by disparaging others.

29. For his part, Evashkow takes the position that he was properly appointed to fulfil his role, and the conduct of the Applicants has been obstructionist and intended to thwart and frustrate the very change he was appointed to bring about.

30. The Applicants put in the Record various electronic mail exchanges among the parties which, whether factually accurate are not, were unhelpful and inflammatory in the circumstances in which blueRover found itself.

31. I observe that this board meeting of June 28 was Evashkow's very first board meeting. As a result of the ensuing acrimony, the Applicant directors called another board meeting for the following week, on July 6. Evashkow was opposed to this, objected to the need for a meeting, and did not attend.

32. Evashkow did, however, acknowledge that it was Smith's "right under existing bylaws" to call a meeting.

33. That further board meeting was held on July 6, 2022 with all directors except Evashkow present. There is no dispute that quorum was achieved. The directors present unanimously voted to call a shareholders meeting and to limit Evashkow's mandate specifically limiting his ability to terminate any personnel or make material changes to blueRover's business.

34. The Applicants take the position that Evashkow almost immediately ignored those resolutions and purported to terminate MacBean as CFO and disrupt blueRover's banking relationships, with the effect that automatic and ordinary course payments to employees and suppliers were disrupted.

35. The Applicants rely on the Smith Affidavit and particularly email correspondence with Meridian, blueRover's banker, attached as Exhibit 16. Apparently as a result of Evashkow contacting the bank and "representing himself as the new duly-appointed CEO", Meridian has blocked all access to the account, with the result that the company is without a functioning banking relationship [Smith affidavit, paragraphs 32 – 34].

36. The Applicants point to further disruption resulting from electronic mail messages that Evashkow sent to MacBean and the Controller of blueRover on July 23, 2022, alleging that they were unprofessional and incompetent and suspending them without compensation. Both messages are entitled: "Cease and Desist".

37. The email message to the Controller, Mr. Joki, stated in part that: "obviously you are not professional nor competent as it appears you do not understand that you have no authority to act against any of my board authorized directives ….. You've made it clear you do not understand either rules or laws".

38. The email message to Mr. MacBean stated that he could not be trusted, that he was not professional nor competent, and included other statements similar to those in the message to Mr. Joki.

39. The email messages stated that any attempt to counter Evashkow's suspension notices to them would be considered an act of fraud [see Exhibits 31 and 32 to the affidavit of David Melia sworn August 29, 2022].

40. The directors other than Evashkow called a shareholders meeting for July 27, 2022, scheduled to begin at 6 PM. On the agenda was a discussion about the scope of the mandate given to Evashkow.

41. Evashkow retaliated by delivering [or causing to be delivered] on July 26, the day before the proposed meeting, and amended notice of the shareholders meeting which accelerated the start

time [to 4 PM, two hours earlier] and amended the agenda, the latter specifically to include the removal of MacBean as CFO and director. Evashkow asserts that the 4 PM start time was consistent with the previous notice circulated by MacBean on July 15. The Applicants assert that the start time was unilaterally accelerated.

42. The Applicants state that "both meetings went ahead on July 27, 2022, where votes were held on conflicting resolutions and on the basis of inconsistent shareholder registries, with the result that there were competing claims to director and officer position following those meetings".

43. The Respondent Evashkow has a different perspective and states that the Applicants convened a separate meeting following the conclusion of the properly constituted 4 PM meeting

44. At the 4 PM meeting called by Evashkow, a majority of shareholders [56.4%] voted to remove MacBean as director and CFO. However, the Applicants allege that the validity of the shareholder register used at the meeting was and is disputed. They also state that the voting trust among the other minority shareholders referred to above was disputed, since Evashkow [who was brand-new to the company] took the position that it had been dissolved at a November 16, 2021 shareholder meeting. The minutes of that earlier meeting and the voting trust documents, can be found at exhibits 12 and 37 to the Melia affidavit.

45. Evashkow, in his affidavit sworn September 1, 2022, states at paragraph 35 that he is "particularly concerned about the accuracy of the minutes and validity of the resolutions passed at the….. meetings conducted on November 16, 2021. He of course was not present, since these meetings occurred months before he was involved with blueRover. He states, however, that he is advised by Messrs. Kozar and Saccucci that the directors agreed to dissolve the voting trust agreement although the resolutions are not included in the minutes.

46. Neither Mr. Kozar nor Mr. Saccucci filed an affidavit on this motion. Nor has Mr. Evashkow directed me to any evidence in the record of either of those two directors, or anyone else, challenging the validity or accuracy of the minutes of the meetings of November 16, 2021.

47. However, Evashkow disputes whether Melia is or was entitled to vote shares said to be issued to Kaajenga blueRover which Melia controls. He references a memorandum of understanding among the company, blueRover, and Kaajenja Inc. and submits that since it expressly contemplates the parties to that memorandum entering into a definitive agreement thereafter of which there is no evidence, and since Melia has not produced share certificates confirming that the company in fact issued the disputed shares, Melia had no right to vote those shares at the November 16, 2021 meeting or otherwise. [See, for example, the Evashkow affidavit at para. 29].

48. Those disputed shares represent approximately 9% of the issued and outstanding shares of blueRover. As can be seen from the narrow margins by which various competing resolutions referred to were passed, that 9% is relevant since it could be sufficient to carry or defeat a resolution.

49. Evashkow also submits that the voting trust agreement was the subject of a resolution to dissolve at the November 16, 2021 board meeting and states in his affidavit that two of the three directors present so assert. However, as noted above, neither of those two directors has put forward evidence on this motion.

50. Two hours later, at 6 PM on July 27, the second shareholders meeting proceeded, albeit without the presence of Evashkow, Kozar or Saccucci. The Applicants take the position that a quorum was nonetheless reached [with Melia abstaining] and that those present voted to reaffirm the voting trust, remove Evashkow as interim CEO and appoint Melia, and reaffirm MacBean as CFO and director.

51. Not surprisingly, the acrimony and dysfunction continued. On August 2, after a particularly inflammatory email exchange, Evashkow demanded that Smith attend for an evaluation of his fitness to serve as COO by one of his [Evashkow's] associates and another director, Robin Patterson. Smith was told by Evashkow that if he failed to attend, [Evashkow] in the shareholders copied on the note would "understand that you've chosen to tender your resignation as both a director and officer" [see Exhibit 22 to the Smith affidavit].

52. In an email to Goldsilver, Evashkow referenced his "meaningless and obviously intellectually challenged rhetoric", in the course of demanding his resignation [see Exhibit 23 to the Smith affidavit].

53. Evashkow then contacted Meridian, the company's banker, with respect to control over the operating account.

54. The Applicants further allege that Evashkow frustrated the normal and ordinary course of business of blueRover, harassed and disparaged the Applicants and other staff. Evashkow alleges various forms of wrongdoing and also that the Applicants were obstructing his "investigation".

55. Evashkow called or caused to be called a further shareholders meeting for August 19, 2022. The day before the meeting, Evashkow delivered or caused to be delivered a letter purporting to detail an agenda for the meeting including proposed resolutions to amend the shareholders agreement to change the number of directors on the board and to appoint a new director.

56. The Applicants objected to the calling of a meeting and proposed withdrawal of the notice. Evashkow advise that he would seek resolutions at the meeting to remove both Smith and Goldsilver as directors and to reduce the number of board seats, including the elimination of all designated board seats.

57. Evashkow proceeded with the shareholders meeting of August 19, 2022 over the objection of the Applicants, and put forward resolutions to remove Smith and Goldsilver as directors and to appoint a new director. The Applicants say that they again objected to the shareholder register being used for the meeting.

58. Nevertheless, the meeting proceeded and by a simple majority [56.16%] resolutions described above were passed. The Applicants, in addition to objecting to the validity of the shareholder register or the propriety of the notice, argue that special shareholder approval of at least 60% was required pursuant to the shareholder agreement.

59. As is obvious, the result of the two competing meetings on July 27, 2022 and the disputed meeting of August 19, 2022 was that blueRover was now in a situation where the two competing shareholder groups each purported to have convened a meeting of shareholders, properly achieved quorum, and then proceeded to pass resolutions which resulted in completely contradictory and inconsistent versions of who was a properly appointed director and/or officer of the Corporation.

60. As noted, the Applicants objected to the accuracy and validity of the shareholder register on which the 4 PM meeting of July 27 was premised, with the further chaotic result that there is not even an agreement as to who was a registered shareholder as of that date. Following the meeting on August 19, the new director, Mr. Beck, was said by Evashkow to be properly elected but that is disputed by the Applicants.

112. Evashkow submits in these Applications that his proposals and requests for information from blueRover's officers and corporate counsel, which he concedes were made in advance of the June 28, 2022 Board meeting (and therefore before he held any office or authority at blueRover whatsoever), were reasonable and appropriate.

113. Evashkow further submits that Kozar would have been entitled to raise such issues and make such requests, so it was immaterial whether the request came from Kozar directly or from Evashkow "in either case in anticipation of Evashkow's upcoming appointment to the board". Evashkow submits that the primary objection was to his "direct, thorough and detail oriented approach to the role of a director".

114. Evashkow also submits that similarly, it was reasonable and appropriate for him to seek to exclude Melia from the Board meeting. Evashkow argues that the by-laws of the company require that the President be

a Director and while Melia had clearly been appointed President, the validity of his appointment was in question and he had no entitlement to attend Board meetings.

115. Part of the problem is that Evashkow took all of these positions before he was even appointed to the Board himself, and prior to what would be his very first meeting on June 28, 2022. Whether or not he was properly invited to the meeting as Kozar's nominee, he was brand new to the company and its challenges.

116. I accept the position of the Smith Parties that his confrontational and aggressive positions, taken even before he was appointed to the Board, materially contributed to the acrimony and confrontational atmosphere.

117. I do not accept the submission of Evashkow that it was immaterial whether the demands came from him, prior to his appointment as an officer or Director, or from his nominating shareholder. The fact is that the demands did not come from the nominating shareholder. They came from Evashkow, and that was not immaterial. At the time he made those demands prior to the Board meeting, he had no authority whatsoever, and the demands themselves were unreasonable in those circumstances. Matters were made worse by the tone in which they were made in that the level of confrontation and tension increased dramatically.

118. While I have no difficulty accepting that Kozar, as a shareholder with at least 15% of the shares, was entitled to nominate a director, I find that the conduct of his nominee, Evashkow, beginning with his first involvement with blueRover, was inconsistent with the reasonable expectations of the Smith Parties.

119. This was exacerbated throughout by the needlessly confrontational tone and language that Evashkow used, and that was equally inconsistent with the reasonable expectations of the Smith Parties. Evashkow submits on these Applications that: "to the extent that the [Smith Parties] interpreted Evashkow's style and tone as being "sarcastic", that did not impact the substance of his communications".

120. In fact, it did. It is beyond question that, as Evashkow essentially admits, his tone was sarcastic and confrontational. But it does not end there. I find that the substance of the communications was in fact impacted as well. Evashkow further submits that he "had legitimately held doubts about the professionalism and competence of certain individuals associated with blueRover, and he set out the basis for those doubts in his communications."

121. Again, I am not persuaded that Evashkow's conduct was not oppressive in purporting to require, for example, clinical examinations of certain directors, simply by him asserting on these Applications that his views about the competence of others were legitimately held. Regrettably, and unnecessarily, these messages, and the tone in which they were delivered, served only to exacerbate and continue the confrontations to the point where the very core of blueRover - its ownership, governance and management - were all impaired to the point where the business was effectively paralyzed.

122. For example, the underlying substance of the requests was not simply to request financial information. Electronic-mail messages that make allegations of fraudulent conduct and purport to demand that other directors or shareholders undergo clinical examinations, (to be conducted by the Saccucci Parties or related parties), squarely affects the substance of the communications and not just the tone. It transcends a level of civil discourse and the reasonable request for information, and was oppressive.

123. This conduct continued after the June 28, 2022 Board meeting as well. Evashkow submits on these Applications that he moved to be appointed as the CEO "on the condition that he be given a clear mandate to undertake an unrestricted and unobstructed investigation into blueRover's operations". He submits that there was no conflict in he himself voting in favour of the resolution to appoint himself as CEO, and bases

this argument on the same theory as his requests and demands for information even prior to the meeting. He argues that if Kozar had continued to hold the designated seat on the Board, he would have voted in favour of Evashkow becoming CEO, and therefore there was nothing wrong with Evashkow doing it himself. The difficulty is that this is not what happened, in fact. Kozar did not vote his own shares (and there is nothing in the record to indicate why he could not have done so). Evashkow voted for himself, in the face of advice from the corporate solicitor to the effect that such was improper.

124. Even benign and ordinary course practices such as the distribution for comment of draft minutes following meetings became acrimonious. Evashkow submits that he "had grave concerns regarding the apparently long-standing practice of the [Smith Parties], along with Bissett, of permitting certain directors to "edit" and make substantial changes to the draft minutes of Board meetings that were prepared by Bissett as secretary."

125. With respect to the positions of MacBean and Joki, and the position of the Smith Parties that Evashkow purported to terminate them, Evashkow submits that he had "significant and well-documented concerns regarding their conduct and activities" and that he did not terminate them, but rather advised them that he was "suspending (not terminating) them "pending an investigation"". In my view, the effect is the same, and whether they were called terminations or suspensions, the actions of Evashkow were oppressive in the circumstances.

126. The dysfunction and disharmony continued following the release of the Smith Motion Decision, as is further illustrated by, among other things, the email communications between and among the key players. In the course of questioning blueRover's accounting practices, Evashkow:

    a. attacked Smith's professionalism and competency, calling him "bizarre, unprofessional and unstable" and demanding that Smith attend for a mental fitness evaluation, to be conducted, no less, by Evashkow's business associate, Schein and Robin Patterson, Saccucci's spouse (as opposed to any clinically qualified professional), and advising that a failure to attend by Smith would be taken as a choice to resign;

    b. attacked Goldsilver's expertise and professionalism, describing his conduct and communications as "meaningless and obviously intellectually-challenged rhetoric" and demanding that he resign;

    c. demanded that Bissett, who had withdrawn his services to blueRover on July 19, 2022, return all company property and alleged that he [Bissett] was under investigation, prompting the law firm to respond that Evashkow's allegations were "baseless and unwarranted".

127. As noted above, and following the release of the Smith Motion Decision, the Saccucci Parties commenced the Saccucci Application. They now rely on, among other things, affidavit evidence from Saccucci and Kozar, the absence of which I had referred to in the Smith Motion Decision.

128. The Smith Parties assert that the oppressive conduct by Evashkow continued, as highlighted above. They allege that he sought to subvert and undermine the normalcy I had hoped to bring about with that interim decision by appointing a "shadow management team" even while the decision on the motion was under reserve, consisting of himself, Saccucci, Daryle Delafosse (another shareholder and one of the Saccucci Parties) and Ed Van Hooydonk, and immediately set about to execute on behalf of the company, employment or consulting agreements with each of those parties.

129. They further allege that Evashkow has repeatedly challenged and interfered with the performance by the Court-appointed Monitor of its mandate. The Monitor has expressed its concerns in the First and Second Reports, and particularly the Second Report.

130. I pause to observe that the evidence in the record is also to the effect that Evashkow never once attended at person at blueRover's offices. While certainly not determinative of any allegation of oppression at all, his various demands and decrees, issued remotely and from afar, without his ever having bothered to attend at blueRover's offices or meet the key individuals and in particular a number of those about whose conduct he was so critical, did not help the situation.

131. As a result of all of this, the Smith Parties maintain their position that Evashkow's conduct violated their reasonable expectations and constituted oppressive conduct. He has acted, they submit, inconsistently with the terms of his appointment as interim CEO and indeed with what would be expected of any officer, interim or otherwise, acting reasonably.

132. They submit that all of the Smith Parties were appointed to the Board by a lawful shareholder vote in November 2021, and Evashkow:

    a. attempted to seize control of the company, oust each of Melia, MacBean, Smith and Goldsilver;

    b. voted in favour of his own resolution to appoint himself CEO notwithstanding the advice of the corporate solicitor, Bissett, who advised that he was in a position of conflict by so doing;

    c. declined or refused to meet members of the Board or management face-to-face; and

    d. engaged in various forms of other allegedly oppressive conduct as set out in the materials.

133. In short, they allege that his conduct is completely inconsistent with that expected of a director and officer working for the common good of the company and all of its shareholders, as is required by section 134 of the OBCA, nor can it be said to be consistent with the "fair treatment that is most fundamentally what stakeholders are entitled to reasonably expect": *BCE Inc. v. 1976 Debentureholders*, 2008 SCC 69 at para. 64.

134. For the reasons set out above, I am satisfied that Evashkow's conduct is inconsistent with the reasonable expectations of the Smith Parties and was unfairly prejudicial to and unfairly disregarded their interests. I pause to observe that Evashkow himself is not a shareholder of blueRover. He has no stake in the equity of the company. He became involved, as described above, as the nominee of Kozar to the Board. I am satisfied that it would be inappropriate for him to continue as a Director or officer.

135. As to the allegations of oppression made by the Saccucci Parties, principally directed at Melia, I accept the general submission of the Smith Parties to the effect that the substance of these allegations cannot be divorced from the circumstances in which they were made.

136. At the outset in this regard, I observe that most of the alleged conduct of the Smith Parties about which the Saccucci Parties now complain occurred in and around April, 2021. Yet, no such complaints are allegations were advanced for approximately 18 months thereafter, during which period many events occurred as described above. Evashkow knew essentially nothing of the complaints now advanced until after the Smith Motion Decision was released.

137. Moreover, it was only one week after the release of the Smith Motion Decision (which, among other things, restored the Smith Parties to their director and officer positions, albeit on an interim basis) that Saccucci initiated a complaint under the *Occupational Health and Safety Act* to the Ministry of Labour.

138. In response to the Ministry of Labour complaint, the company engaged a consulting firm, Peninsula Canada, to conduct an independent investigation. Then, two days prior to a case conference in this matter

before the Court on February 10, 2023, Saccucci emailed the Inspector from the Ministry of Labour on February 8, 2023 referencing the timing and scope of the investigation.

139. This is reflected in a Field Visit Report of the MOL Inspector, who acknowledged receipt of the February 8, 2023 email from Saccucci and: "felt that the contents of the email required further investigating". The Investigator goes on to record in the Field Visit Report that he had a subsequent conversation with Peninsula, since it [Peninsula] was conducting the harassment investigations. The observations of the Inspector were to the effect that:

    a. the employer [blueRover] has initiated investigations into allegations of harassment in a timely manner;

    b. the employer has made all attempts to ensure the investigation is conducted objectively and without bias, by doing so through Peninsula which have isolated themselves from the investigation process;

    c. the employer has attempted to maintain confidentiality to the best of their abilities; and

    d. it is clear that Peninsula are in their best efforts attempting to be thorough in the investigative process.

140. In contradistinction to those observations made in respect of the employer (i.e., blueRover then being directed and managed by the interim officers and directors - the Smith Parties), the Investigator made the following observations in the Field Visit Report with respect to Saccucci:

    a. from the email of February 8, 2023, it seems that he may not be maintaining confidentiality in colluding with witnesses;

    b. Peninsula has indicated to [the investigator] that they are questioning their own objectivity and bias as a result of Saccucci's inserting of himself into the investigative process;

    c. Saccucci is the primary complainant of the allegations of harassment placed with the MOL. It is the opinion of this Officer that Saccucci is not working in good faith of the *Occupational Health and Safety Act*; not using the *Act* to improve a workplace or make a workplace safe; but rather is using it to further his own agenda. He indicated his email that the harassment investigation will be used in other actions being taken. This cannot be allowed to stand.

141. Saccucci denied discussing the MOL complaint with others. Delafosse, however, who I pause to observe is a co-Applicant with Saccucci in the Saccucci Application, testified on his cross-examination that the MOL Complaint was a "collaboration" between himself, Saccucci and others, which he joined after Saccucci had initiated it.

142. Peninsula subsequently determined that the allegations against Melia in the MOL Complaint were unfounded, and the concerns of the Complainant were unwarranted. This was confirmed in formal correspondence from Peninsula dated April 13, 2023 and was said to be a decision reached after the "careful assessment of all information provided to us and the [interviews of] all witnesses, the complainant and yourself".

143. Various other allegations of oppression are also made by the Saccucci Parties against the Smith Parties.

144. With respect to the creation of subsidiaries of blueRover, it is the position of the Smith Parties that the Board approved the incorporation of one such subsidiary, V-Safe, by resolution dated April 23, 2021. That

resolution was signed by Smith as well as Saccucci who were, at that time, the only members of the Board. Kozar subsequently acknowledged and agreed to the resolution. This resolution predated the Shareholders Agreement which was executed on April 27, 2021 without retroactive effect.

145. The Saccucci Parties allege oppression in respect of two additional things: the allocation of a 15% ownership in V-Safe to Melia or his designate; and the licensing of blueRover technology to that company. It is the position of the Smith Parties that both of these facts were not only disclosed to but expressly approved by Saccucci and Kozar and indeed are expressly referred to in the resolution. I find this to be the case.

146. I also observe that the grant from blueRover in favour of V-Safe is a licence to use, but not a transfer of ownership of, intellectual property, in exchange for the grant to blueRover of an 85% equity ownership stake in V-Safe. With the advice of Bissett on the agreement, the parties elected to value the licence at $4,999,985.

147. Saccucci and Kozar acknowledge that the V-Safe subsidiary and the model (of the use of subsidiaries generally) were discussed at Board and shareholder meetings. Yet they still maintain that it was done in clandestine fashion and was inappropriate and oppressive to other shareholders.

148. At or around the same time, however, Kozar himself, through his company Korona, entered into a subscription agreement in November 2021 to subscribe for shares of V-Safe with a value of $200,000. While that subscription was apparently never filled, the entering into the agreement by Kozar and/or his company is inconsistent with the allegation now made that the whole structure was oppressive to Kozar and his fellow Saccucci Applicants.

149. With respect to another subsidiary about which the Saccucci Parties complain and allege oppression, 2851029 Ontario Inc. operating as Seinn Digital, the blueRover Board approved the formation of the subsidiary on October 7, 2021. That was done as a vehicle for Saccucci himself to explore opportunities in the US market. Its initial officers and directors were Saccucci together with Kozar and Smith.

150. In similar fashion to V-Safe, this subsidiary, Seinn, granted 15% of its shares to an entity called Trell Consulting, and that was a company owned by Saccucci and his family members. Seinn also used technology and intellectual property of blueRover. In addition, it entered into an employment agreement with Saccucci pursuant to which he was entitled to compensation starting at $120,000 per year.

151. I cannot reconcile the position of the Saccucci Parties that the incorporation and equity grant relating to V-Safe was oppressive and unexpected, with their position that the incorporation of Seinn was entirely proper.

152. I also reject the notion advanced by the Saccucci Parties that reasonable expectations of shareholders in a company such as this include the reasonable expectation that shareholder approval would be required for an ordinary course action such as the incorporation of a subsidiary. Generally, in my view, such a step would be well within the realm of things management would undertake in the ordinary course of the operation of the business.

153. In all the circumstances, and given the conduct of the competing shareholder groups with respect to subsidiaries (and particularly V-Safe and Seinn), I am unable to conclude that any of these acts constitute oppression as alleged by the Saccucci Parties.

154. In addition to the reciprocal nature of the conduct and subsidiary structures, I cannot conclude on the evidence that there was any "shifting" of blueRover assets to V-Safe at all, let alone a transfer that was inappropriate to the point of being oppressive, for the reasons set out above.

155. The Saccucci Parties effectively admit in their factum filed in the Saccucci Application that blueRover's assets were "purportedly licensed" to V-Safe as opposed to conveyed by way of an outright transfer. Moreover, they acknowledge that blueRover received the 85% stake in V-Safe as promised and agreed.

156. However, they still allege oppression on the basis that V-Safe obtained control over intellectual property and other assets of blueRover without compensation. This ignores the 85% equity: blueRover owns and controls 85% of the equity of V-Safe. Whether that was a fair bargain, or whether the 85% equity interest represented fair value consideration for a licence of the relevant intellectual property and other assets, I have no basis in the record to conclude one way or the other. However, I can conclude that, based on the evidence that is in the record, such was not on its face oppressive. BlueRover owns the 85% equity interest the licensee entity and, through its 85% equity interest can exert significant control over that entity.

157. In the circumstances, I find that the allegations of oppression by the Saccucci Parties against the Smith Parties are not established on the evidence in the record.

158. Moreover, I find that the Saccucci Parties would not in any event be entitled to oppression relief as an equitable remedy given their own conduct and conduct which is materially the same as that which they now alleged to be oppressive. When claims in equity are made, the court will not reward those who come with unclean hands: *790668 Ontario Inc. v. D'Andrea Management Inc*., 2017 ONCA 1019 at paras. 13-14.

159. In the circumstances, I am unable to conclude that the Saccucci Parties come to court with anything other than unclean hands.

160. While not determinative of the issue, I am reinforced in my conclusions by the observations and conclusions of the independent Court-appointed Monitor as reflected in its Second Report dated May 5, 2023.

161. I am concerned by allegations of Evashkow that the Court-appointed Monitor was "in contempt of my February 10 Endorsement" for allegedly refusing to give him access to data (approved expenses, detailed payroll information, etc.). Again, the language used in the communications was unnecessarily inflammatory.

Result and Disposition

162. An order shall go in the Smith Application:

    a. declaring that the current Shareholders Register in the Minute Book of blueRover is accurate, and, for greater certainty, that Kaajenga holds 937,969 Class A Shares in blueRover and that Korona holds 1,800,038 Class A Shares;

    b. declaring that the Voting Trust agreement remains valid and in full force and effect;

    c. declaring that Evashkow has caused the business and affairs of blueRover to be carried out oppressively;

    d. removing Evashkow as a director and CEO of blueRover and authorizing Kozar to nominate a replacement director as he is entitled to do, so long as he continues to hold his 15% of the Shares;

e. declaring invalid and void resolutions passed at meetings of shareholders held on July 27, 2022 and August 19, 2022;

f. declaring that, pending a meeting of shareholders at which the shareholders may elect new Directors, the current lawful Directors of blueRover are Smith, MacBean, Goldsilver, Saccucci and the new nominee of Kozar (to replace Evashkow); and

g. discharging the Monitor from its duties with respect to blueRover, on terms if necessary that may be sought by the Monitor;

163. In the circumstances, I decline to award damages to the Smith Parties as against Evashkow. On the basis of the record before me, I am unable to conclude that damages have been suffered, and there is no cogent evidence of the quantum of losses incurred in the circumstances.

164. The Saccucci Application is dismissed.

165. The parties submitted Bills of Costs:

a. the Smith Parties submitted a Bill of Costs as Applicants in the Smith Application, inclusive of costs of the interim motion, claiming partial indemnity fees of $57,781.13 and/or substantial indemnity fees of $85,002.20, both amounts inclusive of disbursements and HST;

b. the Smith Parties also submitted a Bill of Costs as Respondents in the Saccucci Application, claiming partial indemnity fees of $65,029.74 and substantial indemnity fees of $93,512.97, both amounts inclusive of disbursements and HST;

c. the Saccucci Parties submitted a Bill of Costs as Applicants in the Saccucci Application claiming partial indemnity fees of $94,079.35 and substantial indemnity fees of $137,770.60, both amounts inclusive of disbursements but exclusive of HST; and

d. Evashkow did not submit a Bill of Costs.

166. Pursuant to s. 131 of the *Courts of Justice Act*, R.S.O. 1990, c.C.43, costs are in the discretion of the court, and the court may determine by whom and to what extent the costs shall be paid.

167. Rule 57.01 provides that in exercising its discretion under s. 131, the court may consider, in addition to the result in the proceeding (and any offer to settle or contribute), the factors set out in that Rule.

168. The overarching objective is to fix an amount that is fair, reasonable, proportionate and within the reasonable expectations of the parties in the circumstances: *Boucher v. Public Accountants Council for the Province of Ontario*, (2004) 71 O.R. (3d) 291 (C.A.), 2004 CanLII 14579 (Ont. C.A.).

169. The Smith Parties were, in the main, successful in both Applications. They are entitled to their costs. In my view, it is appropriate in the circumstances of this matter that costs be payable on a partial indemnity basis. I am not satisfied that costs on a substantial indemnity scale are warranted in the circumstances.

170. Having reviewed all of the Bills of Costs submitted, having considered the success in these related matters that proceeded together, and taking into account all of the factors set out in Rule 57.01 in the particular circumstances of these Applications, and being mindful of the possibility of duplication given the overlap of issues in the two Applications, in my view an appropriate award of costs is $98,000, inclusive of fees, disbursements and HST, which amount is payable to the Smith Parties by the Saccucci Parties within 60 days.

171. I close by observing the obvious, namely that nothing in the orders I made today affects or restricts what may happen in the future. The Shareholders Agreement and the VTA remain in effect until amended or released in accordance with their terms. The shareholders of blueRover may decide to elect new Directors. New officers may be appointed. Either group of shareholders may propose an arrangement, proposal or transaction as they may see fit. Corporate governance laws continue to apply, and those entitled to vote on any such arrangement, proposal or transaction will do so and make their decisions with respect to the future of this private company.

172. In the meantime, however, I echo again the observations I made in the Smith Motion Decision that the interests of all stakeholders are not served by continuing internecine warfare. I urge the parties to exercise restraint, common sense and most of all cooperation.