CITATION: Sherif Gerges Pharmacy Professional Corporation et al. v. Niam Pharmaceuticals Inc. et al, 2025 ONSC 2058
COURT FILE NO.: CV-24-00731492-00CL
DATE: 20250402

SUPERIOR COURT OF JUSTICE – ONTARIO
(COMMERCIAL LIST)

RE: SHERIF GERGES PHARMACY PROFESSIONAL CORPORATION on its own behalf as shareholder of and in the name and on behalf of SEVA DRUG MART INC. ~~and~~, SHERIF GERGES on his own behalf and as shareholder of and in the name and on behalf of EGLINTON DRUGS INC., and SHERIF GERGES on his own behalf and as a shareholder of and in the name and on behalf of WOODBINE DOWNS HEALTHCARE REALTY INC., Applicants

-and-

NIAM PHARMACEUTICALS INC., CONNECT RX INC., o/a SRX HEALTH WHOLESALE & DISTRIBUTION, ADESH VORA PHARMACY PROFESSIONAL CORPORATION and ADESH VORA., Respondents

BEFORE: Jane Dietrich J.

COUNSEL: *Robert Brush, Cristina Borbely* for the Applicants

Christopher A.L. Caruana, for the Respondents

HEARD: March 27, 2025

REASONS FOR DECISION

Introduction

[1] The applicant, Sherif Gerges Pharmacy Professional Corporation ("**Gerges PC**") and Sherif Gerges (together with Gerges PC, "**Gerges**") seeks an order:

(a) appointing an inspector under Part XIII of the *Business Corporations Act* (Ontario) (the "***OBCA***") pursuant to s. 161 or s. 248 of the OBCA to investigate and report on the business and financial affairs of Seva Drug Mart Inc. ("**Seva**"), Eglinton Drugs Inc. ("**Eglinton**", together with Seva, the "**Pharmacies**") (the "**Investigation**") including:

(i) transactions between the Pharmacies and other companies owned or controlled by Adesh Vora, including SRX Health Solutions Inc. ("**SHSI**") and its affiliates and/or pharmacies its owns and operates (the "**SRX Group**"); and

(ii) transactions between Seva and the Seva International Charitable Foundation (the "**Seva Foundation**");

(b) that the costs of the Investigation be borne by Mr. Vora, Niam Pharmaceuticals Inc. ("**Niam**"), Adesh Vora Pharmacy Professional Corporation ("**Vora PC**"), ConnectRx Inc. ("**Connect Rx**"), the SRX Group, and/or the Pharmacies; and

(c) granting leave to the applicants, pursuant to s. 246 of the *OBCA* to bring and prosecute actions (the "**Proposed Actions**") in the names and on behalf of the Pharmacies, and Woodbine Downs Health Care Realty Inc. ("**Woodbine**") with the costs of the Proposed Actions to be borne by the Pharmacies and Woodbine.

[2] With respect to the appointment of the Inspector, Gerges requests that a determination be made that the appointment of an Inspector and the proposed scope of the Investigation is appropriate, but requests that the identity of the Inspector and specific form of order appointing the Inspector be subject to further court order after discussions between the parties. A request is also made that the respondents, or the Pharmacies bear the costs of the Investigation.

[3] The form of order requested by Gerges also sought certain preservation related language. However, at the hearing counsel for Gerges advised that they were not proceeding with that relief.

[4] The respondents' position is that the appointment of the Inspector is not justified as a *prima facie* case has not been met by Gerges and there are other more appropriate methods to obtain the information in question. Further, the respondents take the position that the scope of the Investigation should not cover claims which are statute barred for limitation reasons and object to the costs of the Inspector being born by the respondents.

[5] With respect to leave being granted to prosecute the Proposed Actions on behalf of the Pharmacies and Woodbine, the respondents take the position that (i) the Proposed Action with respect to the Pharmacies should proceed by way of arbitration; (ii) certain of the claims contained in the Proposed Actions are statute barred for limitation reasons; and (iii) the Proposed Actions could be advanced by oppression remedy instead.

Background

[6] Mr. Vora and Mr. Gerges have been business partners since in or around 2010. At one point, they indirectly owned nine pharmacies together, however, they currently only own Seva, Eglinton and Woodbine together (indirectly through personal corporations).

[7] Mr. Vora and Mr. Gerges each directly or indirectly own 50% of the issued and outstanding shares in the Pharmacies and Woodbine.

[8] Mr. Vora, either directly in his name or indirectly through the respondents Niam and Vora PC, holds a majority interest in SHSI, a parent company of the respondent ConnectRx. SHSI also operates, through the SRX Group, various other pharmacies in which Mr. Vora has an interest.

[9] Neither the Pharmacies nor Mr. Gerges own shares directly or indirectly in SHSI or ConnectRx.

Pharmacies and Conduct of Concern

[10] A number of the issues which formed the basis for the application arise from Mr. Gerges' claims that the respondents have treated the Pharmacies as part of the SRX Group, even though Mr. Gerges has no interest in the SRX Group. Specifically, the evidence is that:

(a) The SRX Group provides certain administrative or operational support functions to the Pharmacies, such as processing certain accounts payable and supporting information technology systems. The SRX Group management coordinates inventory ordering with the Pharmacies along with other SRX Group locations.

(b) Mr. Vora admits that at least as of July 2023, inventory purchases of the Pharmacies were pooled with the SRX Group through SHSI, such that the rebates associated with those inventory purchases were received by SHSI and remain owing, to some extent to the Pharmacies (the "**Rebate Issue**"). Some information has been provided by the respondents to BDO Canada LLP ("**BDO**") who has been retained by Gerges. However, the evidence is the information provided by the respondents is not complete and that BDO cannot verify the rebates at issue and the amounts paid by SHSI to the Pharmacies in respect thereof.

(c) BDO has also identified a concern that the amount of inventory contained in the invoices paid for by the Pharmacies is much larger than that amount of inventory which was received by the Pharmacies (the "**Overstated Inventory Issue**"). Mr. Vora has explained certain of the Overstated Inventory Issue by way of duplicate entries, but even accepting the evidence regarding duplicate entries, a discrepancy of over $3 million remains.

(d) Mr. Vora also admits that other members of the SRX Group were experiencing credit problems and so at points in time, the Pharmacies were used to purchase inventory for members of the SRX Group, including from a supplier referred to as McKesson. This led to the Pharmacies eventually being cut off from McKesson and amounts of at least approximately $500,000 owing to the Pharmacies by members of the SRX Group (the "**Credit Issue**"). It may be that the Credit Issue

relates to the Overstated Inventory Issue, however, BDO has not been able to perform a full reconciliation based on records it has previously been provided with.

(e) Seva was also purported to be required to make certain charitable donations under the terms of a contract it had entered into related to a Hepatitis Medications Program. BDO has been unable to verify a number of matters related to the Donations Issues. Of specific concern is that the required donations were not made directly by Seva to the required Hospital Foundation, but rather to the Seva Foundation (which Mr. Vora is a director of). The Seva Foundation then made certain donations to the Hospital Foundation. BDO has also raised concerns that the underlying program did not benefit Seva from a commercial or economic perspective and therefore questions if benefits were received by other parties related to the respondents (collectively these are referred to as the "**Donations Issues**" and together with the Rebate Issues, the Overstatement of Inventory Issues and the Credit Issues, the "**Issues**").

[11] Gerges claims that the Issues show a pattern of related party transactions that Mr. Vora, as a director of the Pharmacies, was required to disclose.

[12] Gerges previously brought an application for production of records. On May 27, 2024, Justice Conway granted an order, on consent of the parties, requiring Niam to provide various records, including a list of all related parties and a list of transactions between the related parties identified and both Pharmacies. Although numerous documents were provided, there is a dispute as to whether the required list was produced. The parties provided brief written submissions following the hearing on this matter. There was production of a condensed excerpt from the general ledgers that lists certain parties and certain transactions. However, Gerges' view is that the production was so incomplete as to be unresponsive. The respondents' position, however, is that at no point prior to the application did Gerges communicate that there were issues with the production.

[13] A second court order was made by Justice Kimmel, again on the consent of the parties, on December 6, 2024, which required the respondents provide the applicants or their accountants with full and unfettered access to the Pharmacies' financial records.

[14] Despite the previous court orders, the respondents have not provided information sufficient to allow Gerges to reconcile the extent of the related party transactions and the effect on the Pharmacies. The evidence is that relevant records are with SHSI or other members of SRX Group controlled by Vora.

[15] Subsequent to the Kimmel J. Order, Mr. Gerges took over exclusive operation of the Pharmacies, changed the staff and opened new bank accounts.

[16] A draft of the Proposed Action by the Pharmacies against Niam, Connect RX, Vora PC, Mr. Vora and SHSI was uploaded to Case Center.

Woodbine Downs Conduct of Concern

[17] The background related to Woodbine Downs was the subject matter of *Sherif Gerges Pharmacy Professional Corporation et al v Niam Pharmaceuticals Inc. et al*, 2025 ONSC 970 where I provided reasons for decision in respect of a *maerva* injunction requested by Gerges.

[18] In brief, Mr. Gerges and Mr. Vora are both directors and 50% shareholders of Woodbine Downs. Mr. Vora, without the knowledge or consent of Mr. Gerges, on or about April 12, 2024, amended the provincial corporate profile report for Woodbine Downs to remove Mr. Gerges as a director.

[19] Mr. Vora then proceeded to sell the real properties owned by Woodbine Downs without the knowledge or consent of Mr. Gerges. Unit 11 was sold for gross proceeds of $780,000 on April 18, 2024. Units 9 and 10 were sold for gross proceeds of $2,450,000 on April 30, 2024.

[20] Together, the sale of the properties, after payment of outstanding loan and transaction costs resulted in net proceeds of $2,911,842.79. After payment of outstanding taxes, utility and water arrears, Mr. Vora then proceeded to transfer the remaining funds from Woodbine Downs – again without Mr. Gerges knowledge or consent. This included approximately $2 million transferred to Niam. As of October 31, 2024, Woodbine Downs had a closing bank account balance of $158.90.

[21] A draft of the Proposed Action by Woodbine Downs against Vora was uploaded to Case Center.

[22] Although I denied Gerges' request for *mareva* injunction, I previously found that there existed a strong *prima facie* case, at least in conversion in respect of Woodbine Downs.

Arbitration Clauses

[23] Each of the Pharmacies entered into shareholder agreements dated June 14, 2011. No shareholder agreement was entered into in respect of Woodbine Downs. The relevant parties to those agreements are Mr. Gerges, Gerges PC, Mr. Vora, Niam and either Seva or Eglington (referred to as the Corporation) respectively.

[24] Section 11.07(a) (the "**Arbitration Provision**") of both shareholder agreements provides: "...any dispute or difference between the Shareholders which cannot be resolved or settled by the Shareholders, shall be settled by arbitration in accordance with *Arbitration Act, 1991* (Ontario)..."

[25] Section 11.07(h) of both shareholder agreements provides that the arbitration provisions do not prevent a party to one of the shareholder agreements from applying to a court with respect to (i) the detention, preservation and inspection of property; or (ii) interim injunctions.

[26] A "Shareholder" is defined in both shareholder agreements as "each of the parties to this Agreement, other than the Corporation, so long as such party is a shareholder of the Corporation, together with all other Persons who become shareholders of the Corporation in accordance with the provisions of this Agreement".

[27] Based on these provisions, the respondents argue that the request for leave pursuant to s. 246 of the OBCA to bring and prosecute the Proposed Actions in the names and on behalf of the Pharmacies is subject to arbitration and Gerges' request for such relief from this court should be stayed. The respondents, however, have not brought a motion seeking to stay the application in this regard.

[28] Counsel to the respondents acknowledges that the Arbitration Provision does not apply to the request for the Inspector or to any relief in respect of Woodbines Downs.

Issues

[29] The issues to be determined on this motion are:

(a) Should the Inspector be appointed in respect of the Pharmacies and if so, what are the appropriate terms of that appointment;

(b) Should the request for leave to pursue the Proposed Actions in respect of the Pharmacies be dismissed on the basis that the subject matter should be arbitrated; and

(c) If the answer to (b) is no, should leave be granted pursuant to s. 246 of the OBCA to bring and prosecute the Proposed Actions in the names and on behalf of the Pharmacies and Woodbine Downs and if so, what are the appropriate terms of such?

Analysis

Appointment of Inspector

[30] Under the *OBCA*, an inspector may be appointed pursuant to ss. 161 and/or 248 of the OBCA.

[31] Section 161 of the *OBCA* provides:

Investigation

> 161 (1) A registered holder or a beneficial owner of a security or, in the case of an offering corporation, the Commission may apply, without notice or on such notice as the court may require, to the court for an order directing an investigation to be made of the corporation or any of its affiliates. 2006, c. 34, Sched. B, s. 33 (1).
>
> Idem
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> (2) Where, upon an application under subsection (1), it appears to the court that,
>
> (a) the business of the corporation or any of its affiliates is or has been carried on with intent to defraud any person;
>
> (b) the business or affairs of the corporation or any of its affiliates are or have been carried on or conducted, or the powers of the directors are or have been exercised, in a manner that is oppressive or unfairly prejudicial to, or that unfairly disregards, the interests of a security holder;
>
> (c) the corporation or any of its affiliates was formed for a fraudulent or unlawful purpose or is to be dissolved for a fraudulent or unlawful purpose; 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. R.S.O. 1990, c. B.16, s. 161 (2).

[32] The language of s. 161(2)(b) of the *OBCA* echoes in part the oppression remedy provisions under s. 248 of the *OBCA*.

[33] In *Akagi v. Synergy Group (2000) Inc.*, 2015 ONCA 368 [***Akagi***], the Ontario Court of Appeal at footnote 3 in para. 69 confirmed that the purpose of appointing an inspector under s. 161 of the *OBCA* is:

> ... to ensure that a corporation discharges its core obligation to provide shareholders with an accurate picture of its financial position …

[34] The following is required to appoint an inspector under s. 161 of the *OBCA*:

(a) the applicant must be a security holder;

(b) there must be a *prima facie* case that one of the circumstances set out in s. 161(2) of the *OBCA* 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.

See *AnalytixInsight Inc. v. Kondragunta*, 2024 ONSC 2556 at para 72, citing *Kerbel v Morris Kerbel Holdings Limited*¸ 2023 ONSC 529 [***Kerbel***] at para 48. See *Khavari v. Mizrahi*, 2016 ONSC 4934 [***Khavari***] at para 35

[35] There is no dispute that Gerges is a security holder.

[36] With respect to the second part of the test, the *prima facie* case, this court has held that the required evidentiary threshold is low and is satisfied if there is good reason to believe the conduct complained of may have taken place or there at the very least there exists an index of suspicion or appearance that reasonable shareholder expectations have not been met. See *Jones v Mizzi*, 2016 ONSC 4907 [***Jones***] at paras 13-14 citing *Consolidated Enfield Corp. v. Blair,* 1994 CarswellOnt 249 at para 87 and *Catalyst Fund General Partner I Inc. v. Hollinger Inc*., 2004 CarswellOnt 3782 at para. 39. While the threshold for oppressive conduct in order to satisfy the first branch of the test may be low, it is not sufficient for an applicant to merely allege misconduct or raise suspicion. It is incumbent on the Court to review the entire record before determining whether the test has been met (see *Khavari*, at para. 40).

[37] Mr. Vora does not dispute that there are a number of related party transactions that were entered into in respect of the Pharmacies while he was in control. He does not dispute that the Rebate Issue exists and was not disclosed to Mr. Gerges prior to the pooling of rebates. Nor does he dispute that inventory was purchased by the Pharmacies for other members of the SRX Group. Mr. Vora takes issue with the scope of the claim related to the Overstated Inventory Issue and the Credit Issue, but not the underlying facts on which those claims are based. Further, it is not disputed that the Donation Issues exist. The donations were made to Seva Foundation from Seva rather than directly to the Hospital Foundation without prior disclosure.

[38] For a fiduciary to act in a conflict of interest without providing full information about the material circumstances of the conflict before acting on the conflict of interest is *prima facie* a breach of the fiduciary's duty of loyalty and a failure to act in good faith: see *Pushka v Ontario Securities Commission*, 2016 ONSC 3041 at paras 16.

[39] As noted, Mr. Vora does not dispute the underlying facts but rather attempts to provide explanations attempting to justify his actions, however, those partial explanations, are not fully supported by the records produced to Gerges (and are in part the subject matter of the requested Investigation). Based on the record before me, Gerges has met the low bar of establishing a *prima facie* case as at the very least, an index of suspicion that the business or affairs of the Pharmacies have been carried on or conducted, or the powers of Mr. Vora as a director have been exercised,

in a manner that is oppressive or unfairly prejudicial to, or that unfairly disregards, the interests of Gerges as a security holder has been established.

[40] As for the third portion of test, is it appropriate to appoint an inspector, recognizing that the remedy is both discretionary and extraordinary, the court has considered the following factors (a) whether the applicant needs access to the information; (b) whether there are better or less expensive means to acquire the information; (c) whether the proposed investigation would give a tactical advantage to the applicant; and (d) the expense of the investigation as compared to the benefits see: *Khavari* at para 41.

[41] Mr. Vora argues that Mr. Gerges does not need access to the requested information, because Mr. Gerges has assumed control of the Pharmacies and has access to the bank accounts, books and records and information in the Pharmacies' possession. What this overlooks is that the information sought is not in the possession of the Pharmacies. The evidence of BDO is that because the SRX Group members provided certain administrative or operational support functions to the Pharmacies, such as inventory ordering, processing certain accounts payable and supporting information technology systems, the information which is sought resides with SHSI or other members of the SRX Group – not with the Pharmacies. The information sought by Gerges, which relates to the Issues, is required to provide an accurate picture of Pharmacies' financial condition and determine the extent and financial impact of Mr. Vora's related party dealings.

[42] The respondents also submit that there are better or less expensive means to acquire the information. These include bringing a motion to compel compliance with Justice Conway and Justice Kimmel's prior orders, obtaining the information from third party sources such as vendors, having an audit conducted or proceeding through the discovery process. I am not satisfied, based on the record before me, that these alternatives are better.

[43] When comparing the expense of the investigation to its benefits, it would, be helpful to have a budget for the investigation. I accept, however, that it is not practical for a proposed inspector to generate a budget without first understanding the form and scope of documents which are available. When considering the alternative means of obtaining the information proposed above, the appointment of an Investigator should have the benefit of being able to proceed in an efficient and focused manner. The proposed scope is relatively defined – the information requested is that related to the Pharmacies' dealings with parties related to Mr. Vora, including the Issues. I accept that a complete audit of the Pharmacies would be much broader and likely more expensive.

[44] The respondents also submit that Gerges seeks the appointment of the Inspector to permit Gerges to establish oppressive conduct. This, the respondents say is what the Inspector should not be used for – to assist parties to prepare for litigation. The respondents rely on Justice Osborne's decision in *Kerbal* to support that premise.

[45] However, in *Kerbal*, Justice Osborne stated that the purpose of the investigation is not one that should be concerned primarily with disputed or uncertain questions of law: see para 54. In *Kerbal*, it was noted that the respondents had undertaken to provide various material and that the applicants in that case had, or could have, information and materials that are required to determine their positions: see para 62. That is not the present case. Gerges is not looking for the Inspector to determine legal issues, but rather to find facts. Gerges is looking for documents to support an accurate picture of the Pharmacies' financial position – which is, as stated by the Ontario Court of Appeal in *Akagi* the purpose of an Inspector.

[46] The respondents also submit that the scope of the Inspector should be limited to those matters not addressed in correspondence dated October 18, 2022, from counsel to Mr. Gerges to Mr. Vora. In that correspondence, counsel to Mr. Gerges advised that his client had suspicions that Mr. Vora had been funneling money out of the Pharmacies by use of inflated invoices from SRX Group members and requested cooperation with a forensic accountant, or failing such, it was suggested that Mr. Gerges would proceed to seek the court-appointment of an inspector. The respondents therefore submit that any allegations of inflated invoices were therefore known more than two years prior to commencement of the application and would be statute barred by operations of the *Limitations Act*, 2002, S.O. 2002, C. 24.

[47] The respondents submit that matters that are statute barred should not properly form the scope of an investigation see: *Jones* at para 18. However, in my view, it is not clear-cut based on the record before me that certain claims are statute barred based on limitation arguments. It is not clear to me that the suspicions related to inflated invoices referred to in the correspondence are the same as the claims raised in the Issues or whether the conduct complained of consists of a series of discrete events or a pattern of ongoing conduct. That determination is best made in the context of a more fulsome record.

[48] The respondents also raise concerns with Gerges' request that the costs of the Inspector be borne by Mr. Vora or companies related to him. Gerges argues that an Inspector is only sought because Mr. Vora did not comply with his fiduciary duties to provide disclosure regarding related party dealings and has not complied with Justice Conway and Justice Kimmel's previous Orders. As the information should have been provided by Mr. Vora, Gerges argues it should be paid for by him or his related companies.

[49] I am not convinced that the costs should be solely borne by Mr. Vora or his related companies. The parties should be incentivized to work efficiently with the Inspector to minimize costs. This is best accomplished at this time by the parties equally sharing the costs of the Inspector. As submitted by both parties, this can be accomplished by making the Pharmacies liable for such amounts. The costs of the Inspector borne by each party may be further considered when the underlying issues are determined.

[50] Accordingly, the Inspector is to be appointed, with the costs borne by the Pharmacies, to conduct the scope of the mandate outlined in the draft order submitted by the applicant. If there are issues regarding the identity of the Inspector or the terms of the order, the parties should arrange a case conference before me through the Commercial List Office.

The Arbitration Provisions

[51] As mentioned above, both Pharmacies are parties to shareholders agreements where the Arbitration Provisions require that that any dispute or difference between the Shareholders which cannot be resolved or settled by the Shareholders, is to be settled by arbitration. As noted, in accordance with the terms of the shareholders agreements, the Arbitration Provisions do not prevent the relief sought by Gerges in respect of the appointment of the Inspector (and were not engaged in respect of the earlier request for m*areva* injunction). However, the respondents assert that the Arbitration Provisions apply to the request for leave by Gerges to prosecute the Proposed Actions on behalf of the Pharmacies (the "**Pharmacies Leave Request**").

[52] The respondents submit that rather than grant leave to Gerges to prosecute the Proposed Action on behalf of the Pharmacies, under ss. 6 and 7(1) of the *Arbitration Act*, 1991, SO 1991, c. 17 (the "***Arbitration Act***") the Court should dismiss the Pharmacies Leave Request. None of the respondents have brought a motion as contemplated by s. 7(1) of the *Arbitration Act* to stay the Pharmacies Leave Request. Rather the respondents fully participated in the application to date, including filing material responding to the Pharmacies Leave Request (and the other relief requested by the applicants), participating in a case conference and participating in cross-examinations.

[53] Sections 7(1) and 7(2) of the *Arbitration Ac*t provide:

> Stay
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> 7 (1) If a party to an arbitration agreement commences a proceeding in respect of a matter to be submitted to arbitration under the agreement, the court in which the proceeding is commenced shall, on the motion of another party to the arbitration agreement, stay the proceeding. 1991, c. 17, s. 7 (1).
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> Exceptions
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> (2) However, the court may refuse to stay the proceeding in any of the following cases:
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> 1. A party entered into the arbitration agreement while under a legal incapacity.

> 2. The arbitration agreement is invalid.
>
> 3. The subject-matter of the dispute is not capable of being the subject of arbitration under Ontario law.
>
> 4. The motion was brought with undue delay.
>
> 5. The matter is a proper one for default or summary judgment. 1991, c. 17, s. 7 (2).

[54] As noted, the respondents have not brought a motion pursuant to s.7(1) of the *Arbitration Act*. However, if the respondents had brought a motion, the Court has recognized four technical requirements for a stay of court proceedings in favour of arbitration: 1) an arbitration agreement exists; 2) a party to the arbitration agreement has commenced litigation; 3) the court proceedings are within the scope of the arbitration agreement; and 4) the party applying for a stay of the court proceedings has not taken a step in the proceeding: see *Wasylyk v Lyft*, 2024 ONSC 664 at para 19 relying on *Peace River Hydro Partners v. Petrowest Corp*., 2022 SCC 41 [***Peace River***].

[55] Here, there is no dispute over the first two technical requirements: Gerges does not take issue that the shareholder agreements provide for arbitration and that Mr. Gerges and Gerges PC are both parties to the shareholder agreements for the Pharmacies. However, with respect to the third technical requirement, Gerges says that the Arbitration Provisions only apply to disputes between the Shareholders and as defined in the shareholder agreements. As the Shareholders do not include the Pharmacies, to the extent the Proposed Action is brought on behalf of the Pharmacies (and that is the relief before me), the relief does not, on the face of the Arbitration Provisions fall within its scope. Further, to the extent the Proposed Action is against parties other than the Shareholders, it also does not fall within the scope of the Arbitration Provisions.

[56] Gerges also submits that the respondents have not satisfied the fourth technical requirement. A party who is aware of an arbitration provision and yet fully and actively participates in the court process has waived its right to rely on the arbitration provision and has attorned to the jurisdiction of the court: see *Azam v Multani Custom Homes Ltd*., 2022 ONSC 6536.

[57] The Arbitration Provisions were referred in Gerges notice of application. At ground (n) of the Amended Notice of Application, the Arbitration Provisions were referenced along with the following statement: "The within dispute is not a dispute or difference between shareholders within the meaning of the [shareholders agreements], as it involves causes of action being advanced by the Pharmacies and causes of action being advanced against corporations who are not parties to the arbitration agreement." The language referred to was part of the amendments and had existed in the originally issued Notice of Applicaton.

[58] Accordingly, the respondents were aware of the Arbitration Provisions since the delivery of the original Notice of Application. Rather than bring a motion for a stay of the relevant relief under s. 7(1) of the *Arbitration Act*, the respondents have participated in the litigation as noted above only raising the Arbitration Provisions in their responding factum filed for this hearing.

[59] In their factum, the respondents claimed the Arbitration Provisions applied to all relief in respect of the Pharmacies, but during submissions conceded that the Investigation relief was not included in the Arbitration Provisions leaving only the Pharmacies Leave Request at issue. The respondents submit that the principle of *competence-competence* provides that arbitrators should be allowed to exercise their power to rule first on their own jurisdiction and that part of that jurisdiction includes the procedural determination of whether "non-parties" should be added to the arbitral proceeding: see *Ontario Medical Assn. v. Willis Canada Inc*., 2013 ONCA 745, at para 20. That may be, however, even if a motion to stay had been brought, the technical requirements referred to in *Peace River* must first be met. Based on the record before, I find that those technical requirements have not been satisfied.

[60] Accordingly, I would not dismiss the Pharmacies Leave Request as a result of the Arbitration Provisions.

<u>Leave to bring and prosecute the Proposed Actions in the names and on behalf of the Pharmacies and Woodbine Downs</u>

[61] A Court will grant leave to an applicant to bring a derivative action if the following statutory requirements set out in s. 245 and 246 of the *OBCA* are satisfied:

(a) The applicant is a complainant within the meaning of s. 245 of the *OBCA*;

(a) The directors of the corporation were provided with 14 days of notice of the applicant's intention to apply to the court to seek leave, unless all the directors of the corporation are defendants in the action;

(b) The directors of the corporation will not bring or diligently prosecute the action;

(c) The complainant is acting in good faith; and

(d) It appears to be in the best interests of the corporation that the action be brought.

[62] The respondents have conceded that, in respect of the above statutory test, only (e) is in dispute. They also submit that where other alternative remedies are available leave should be denied: see *Binscarth Holdings LP v. Anthony*, 2024 ONCA 522 and *Crescent (1952) Ltd. v. Jones*, 2011 ONSC 756 [***Crescent***], at para. 21.

[63] Here the respondents argue that the key question to be asked when assessing the best interest of the corporation is "[i]f the claim were allowed and were successful, what would the result be?" see *Crescent* at para 31. Moreover, the court should look at whether the claim, if leave were granted, would be more beneficial to the company or to the shareholders and balance these aspects and, ultimately decide if, overall, the proposed action would benefit the corporation.

[64] The respondents argue that because the only shareholders of the Pharmacies and Woodbine Downs and Mr. Gerges and Mr. Vora (through their holding companies) that only Mr. Gerges will obtain a benefit. Based on the record before, I am not persuaded that this is the case. The Pharmacies and Woodbine Downs may have other stakeholders. For instance, the evidence is that Woodbine Downs held only minimal funds (less than $150) in a bank account, but it is not clear that all creditors have been paid. Similarly, it is not clear on the record before me that there are not other stakeholders in the Pharmacies as well. However, as noted in *Crescent*, looking at the benefits from the point of view of some of the shareholders is the wrong point of view – it is the point of view of the corporation itself is what should be considered: see para 36.

[65] As the court found in *Crescent*, if funds have been diverted from a corporation, it may be that the shareholder will be benefit, but remedying the alleged wrongs must also be in the corporations' interest: see *Crescent* at para 38. Here if Mr. Vora has diverted funds from the Pharmacies to his related companies, then it must be in the Pharmacies' interest to have those funds returned. Similarly, it is not disputed that Mr. Vora has removed approximately $2 million from Woodbine Downs and transferred those funds to Niam (a company related to Mr. Vora). It is in Woodbine Downs' interest to remedy that alleged wrong to Woodbine Downs.

[66] The respondents also rely on *Crescent* for the proposition that here Gerges could assert the claims embodied in the Proposed Actions solely as an oppression remedy application and therefore leave to pursue the Proposed Actions on behalf of Woodbine Downs and the Pharmacies should be denied. However, as in *Crescent*, the wrongs alleged in the Proposed Actions include wrongs done to the corporations, not to Gerges.

[67] As in *Crescent*, Mr. Vora is a director of both the proposed plaintiffs and the proposed defendants, however, the proposed plaintiffs and the proposed defendants do not, as submitted by the respondents, all have the same shareholders. Gerges is not a shareholder of ConnectRx and SHSI. As in *Crescent*, it is alleged that Mr. Vora has preferred his interests and the interests of the proposed defendant corporations over that of the Pharmacies and Woodbine Downs, which is a breach of a director's duties. With respect to Woodbine Downs the Proposed Action also seeks to assert claims of unjust enrichment and conversion. Only the Pharmacies and Woodbine Downs can sue for those alleged breaches.

[68] As such, oppression is not an alternative remedy to address all of the claims asserted in the Proposed Actions. Accordingly, I grant leave to commence the Proposed Actions on behalf of the Pharmacies and Woodbine Downs.

[69] Although the respondents asserted in their factum that certain of the claims are statute barred for limitation purposes, for the reasons set out above, I am not persuaded that limiting the claims at this stage is appropriate.

[70] I do recognize that a substantial benefit for the Proposed Actions will flow to Gerges if they are the successful. In this respect, I am concerned (as the Court was in *Cresent*) that the costs of the Proposed Actions be borne not only by the Pharmacies and Woodbine Downs. Accordingly, I conclude that Gerges should pay one half of the legal costs and the Pharmacies and Woodbine Downs pay the other half of the claims to pursue the claims of the Pharmacies and Woodbine Downs as set out in the Proposed Actions. To the extent that claims of Gerges solely are also asserted in the Proposed Actions, those costs should be borne by Gerges. The allocation of costs is without prejudice to re-adjustment based on the ultimate outcome of the Proposed Actions.

Disposition & Order

[71] For the foregoing reasons, I grant the relief sought by Gerges, subject to the comments above regarding costs of both the Inspector and the Proposed Actions. As noted above, if there are issues regarding the identity of the Inspector or the terms of the order, the parties should arrange a case conference before me through the Commercial List Office.

[72] Fixing costs is a discretionary decision under s. 131 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43. In exercising my discretion, I may consider the result in the proceeding, any offer to settle or to contribute made in writing, and the factors listed in Rule 57.01. These factors include but are not limited to: (i) the result in the proceeding; (ii) the experience of the lawyer for the party entitled to the costs as well as the rates charged and the hours spent by that lawyer; (iii) the amount of costs that an unsuccessful party could reasonably expect to pay in relation to the step in the proceeding for which costs are being fixed; (iv) the amount claimed and the amount recovered in the proceeding; (v) the complexity of the proceeding; (vi) the importance of the issues; and (vii) the conduct of any party that tended to shorten or lengthen unnecessarily the duration of the proceeding. Rule 57.01(1)(f) provides that the court may also consider "any other matter relevant to the question of costs."

[73] In exercising my discretion to fix costs, I must consider what is fair and reasonable for the unsuccessful party to pay in this proceeding and balance the compensation of the successful party with the goal of fostering access to justice: *Boucher v Public Accountants Council (Ontario)* (2004), 71 O.R. (3d) 291 (C.A.) at paras. 26 and 37.

[74] There is a large discrepancy between the bill of costs submitted by the applicants and respondents. The applicants seek $161,502.26 in partial indemnity costs and disbursements and the respondents seek $25,403.77. In part, that difference is attributable to a significant disbursement for BDO incurred by the applicants. However, the bill of costs submitted by the applicant also includes significantly more in terms of legal fees, which is, in part, attributed to multiple counsel. For these reasons, I fix the costs of the motion in the amount of $70,000,

inclusive of disbursements and Harmonized Sales Tax, and order the respondents to pay that amount to the applicants within 30 days of the date of this order.

Jane Dietrich J.

Date: April 2, 2025