IN THE GRAND COURT OF THE CAYMAN ISLANDS

FINANCIAL SERVICES DIVISION

IN THE MATTER OF THE COMPANIES ACT (2022 REVISION)

AND IN THE MATTER OF UPHOLD LTD

CAUSE NO: FSD 134 of 2022 (NSJ)

BETWEEN:

1. **WILLIAM LAGGNER**
2. **BEARING VENTURES LLC**
3. **WEST END CAPITAL II LLC**
4. **CHARLES SIMMONS**
5. **PETER KEARNS**
6. **MICHAEL ZAITSEV**

PETITIONERS

1. **UPHOLD LTD**
2. **ADRIAN STECKEL**
3. **UPHOLD HOLDINGS LLC**
4. **ASP CAPITAL SUB I INC**
5. **AMHERST HOLDINGS LIMITED**

PROPOSED RESPONDENTS

Before: **The Hon. Mr Justice Segal**

Appearances: **Mr Ben Valentin KC instructed by Travers Thorp Alberga appeared for the Petitioners**

Mr Luke Stockdale and Mr Malachi Sweetman of Maples and Calder (Cayman) LLP appeared for the Company

Mr Liam Faulkner and Mr Harry Shaw of Campbells LLP appeared for the Second, Third and Fourth Respondents

Ms Harriet Ter-Berg of Walkers (Cayman) LLP appeared for the Fifth Respondent

Heard: **30 January 2023**
Draft judgment: **9 February 2023**

Judgment delivered: **16 February 2023**

HEADNOTE

Contributory's winding up petition – summons for directions pursuant to CWR O.3, r.11 (1) – the nature of a contributory's winding up petition based on the just and equitable ground – proper characterisation of the petition - whether the proceeding should be treated as a proceeding against the company or as an inter partes proceeding between shareholders - whether and the extent to which the company should be permitted to participate in the proceeding

Introduction

1. On 14 June 2022, the Petitioners (*qua* contributories) presented a winding up petition (the ***Petition***) against Uphold Limited (the ***Company***) and issued a summons for directions (the ***SFD***) in accordance with O.3, r.11 (1) of the Companies Winding Up Rules, 2018 (***CWR***)

2. In the Petition the Petitioners stated that they intended to serve the Petition on the Company and various shareholders (the ***Proposed Respondents***) who they considered had either participated in or benefitted from the conduct complained of in the Petition and against whom alternative relief was sought. These were Mr Adrian Steckel (***Mr Steckel***), Uphold Holdings LLC (***Holdings***), ASP Capital Sub I Inc (***ASP***) and Amherst Holdings Limited (***Amherst***). Holdings and ASP are owned and controlled by Mr Steckel and Amherst is owned and controlled by Mr James Chen (***Mr Chen***).

3. The Petition was served on the Company on 14 June 2022. However, there had been difficulties in effecting service on the Proposed Respondents. The first to the fourth Proposed Respondents instructed attorneys with authority to accept service so that service could be made on them. But the Petitioners were unable to contact Amherst. The SFD had been listed to be heard on 19 July

2022 and at that hearing the Petitioners applied for and I granted an order requiring the Company to provide to the Petitioners the address held by the Company for Amherst. The background to and reasons for my decision are set out in the judgment handed down on 27 July 2022. The hearing of the SFD was adjourned to allow service on Amherst, which was subsequently done.

4. The SFD was relisted on 30 January 2023. In the SFD the Petitioners applied for orders (together with consequential directions) (a) that the Company be treated as the subject matter of the proceeding and shall not participate or incur costs in the proceeding save for the purposes of the preparation of the order to be made on the SFD, discovery and inspection and (b) that the proceeding be treated as an *inter partes* proceeding between the Petitioners and the Proposed Respondents (so that each of the Proposed Respondents be joined as respondents). The Company and the Proposed Respondents opposed the making of these orders and instead sought orders that (a) the proceeding be treated as a proceeding against the Company and that the Company may defend the proceeding and (b) that either none of the Proposed Respondents be joined or to the extent that the Court decided that one or more of them needed to be joined, they only be joined for the purpose of responding to the allegations against them in the Petition and dealing with any claim for relief in the Petition against them (together with consequential directions). The Company and the Proposed Respondents also made it clear that in their view the Petition was without foundation and inadequately pleaded (and that the Court should order the Petitioners to amend the Petition by providing proper particulars of the core pleaded allegations on which the Petition was based).

5. At the hearing on 30 January, Mr Ben Valentin KC appeared for the Petitioners; Mr Luke Stockdale of Maples and Calder appeared for the Company; Mr Liam Faulkner of Campbells appeared for Mr Steckel, Holdings and ASP (the ***Campbells Parties***) and Ms Harriet Ter-Berg of Walkers appeared for Amherst.

6. At the end of the hearing I reserved judgment. I have decided:

   (a). on the characterisation issue that, *based on the Petition as currently drafted*, the proper approach is for the proceeding to be treated as an *inter partes* dispute between the

Petitioners on the one hand and Mr Steckel and Holdings on the other (who will be joined as respondents) but that the Company should be permitted, if the Litigation Committee of the board considers it to be appropriate (and subject to suitable safeguards being in place to ensure that the Litigation Committee can act independently and without improper interference from the Proposed Respondents), to oppose the Petition for the purpose of protecting the interests of the independent shareholders (and otherwise to participate in the proceeding for the purpose of giving discovery and inspection of documents and otherwise for facilitating the fair resolution of the Petition). This means that the main cost of defending the allegations in the Petition relating to the conduct of Mr Steckel and Holdings will fall to be borne by them (in such manner as they agree).

(b). it seems to me that it would be wrong, in light of the allegations made in the Petition, for the Company to be paying the costs of the main defence of the Petition and of responding to the allegations made against Holdings (and Mr Steckel) where the Petition asserts that Mr Steckel and/or Holdings orchestrated and procured the issue to themselves of shares giving a *de facto* controlling interest in the Company and resulting in the improper dilution of the Petitioners' rights as shareholders, and the subsequent use of that *de facto* control for his (or their) own benefit as shareholder. Mr Steckel was a shareholder at the time of the relevant conduct and his conduct is alleged to have been for his benefit as a present and future shareholder (or for the benefit of Mr Salinas). This would be prejudicial to the interests of the other independent shareholders and be inconsistent with the corporate law principle that in the case of a contributory's petition the company needs convincingly, overcoming a high hurdle, to demonstrate that it is proper – necessary and expedient in order to protect an interest of its own – to spend the company's money on the active defence of the petition and that it can do so with the requisite independence.

(c). the Petition does not adequately make out a case relating to the involvement of Amherst (or Mr Chen) in the alleged takeover plan to justify treating it as a party to the proceeding. ASP is in the same position in my view.

(d). Amherst should be joined as a respondent to enable it to respond to the allegations made against it in the Petition and to oppose any buy-out order sought against it by the Petitioners. ASP should be joined for the latter purpose also.

(e). this characterisation is based on the Petition as drafted and is consistent with the case which the Petitioners say they wish to make. However, the Petition needs to be amended to clarify, and refer to further facts which support, this case. The Petition is in important respects ambiguous or incomplete. I therefore propose to direct that the Petitioners file and serve an amended Petition within a period to be agreed by the Petitioners and the Proposed Respondents (or if they are unable to agree, as ordered by me). I explain below the areas which the amended Petition needs to address. I did consider deferring any ruling on characterisation until after the filing of the amended Petition but concluded that doing so would not assist the parties or further the overriding objective. I have formed a clear view that the Petition as drafted pleads sufficient facts to allow me to reach a view on characterisation and that it will assist the parties at this stage to understand the basis on which I have reached that conclusion.

(f). if the amended Petition pleads further facts which justify the proceeding being characterised as a proceeding between the Petitioners and both Holdings and Amherst, then it will be open to Petitioners to seek a further order to this effect. If the amended Petition is pleaded in such a way as to justify a change in the characterisation I have adopted, Mr Steckel and Holdings and the Company can apply for an amendment to my order. However, I do not encourage further litigation on this issue unless there are solid grounds for a review of the position in light of the amendments made to the Petition and the analysis I have provided below. Unnecessary applications are likely to suffer a costs sanction.

(g). it seems to me preferable to defer giving directions for the further conduct of the proceeding until the amended Petition has been filed and served and Mr Steckel and Holdings and the Company (and the other Proposed Respondents) have had an opportunity to consider their position and how they wish to respond. The balance of the SFD should

be adjourned pending the filing and service of the amended Petition. There is one exception. It seems to me that the independent shareholders should be given notice of my decision and order and given an opportunity to make representations to the Company and/or the Court.

(h). I shall invite the parties to draft and seek to agree a form of order to give effect to this judgment which should include a paragraph which provides for the Petitioners (or Mr Steckel and Holdings and the Company or the other Proposed Respondents) to apply for further directions within a specified period after the filing and service of the amended petition and to relist the SFD for a further hearing (or to invite the Court to settle the directions on the papers after the filing of the parties' proposed directions and written submissions explaining their respective positions) if agreement cannot be reached as to the appropriate further directions.

The Petitioners' claims and the issues arising

7. The Petitioners submit that this is a case in which a clear allegation is made against shareholders and in which the petition claims that the shareholders are party to the misconduct on which the petition is based. Accordingly, they submit, in reliance on the analysis of the applicable law in my judgment in *In the matter of China Shanshui Cement Group Limited* (unreported, FSD 161 of 2018, 27 January 2021) (***China Shanshui***), there is "*an adequate and proper ground for joining the shareholder[s] as .. respondent[s].*" The Petitioners argue that the Proposed Respondents are not merely necessary and proper parties to the Petition but that, since the dispute is properly to be characterised as one between the Petitioners and the Proposed Respondents, they should be treated as the parties opposing the Petition and the proceeding should be treated as an *inter partes* proceeding between the Petitioners and the Proposed Respondents, in which the Company is correctly to be characterised as the subject matter of the dispute.

8. The Proposed Respondents oppose these orders (and the Petition). They argue that the factual allegations in the Petition are overwhelmingly (if not exclusively) allegations against the Company and its directors (particularly what is referred to in the Petition as the "*Steckel Faction*" of the board) and not against the Proposed Respondents in their capacities as shareholders. As the Company put it in its skeleton argument "*Given the circumstances of the Company and the way the Petitioners have set out their case in the Petition, it is submitted that these proceedings are not properly characterised as a dispute between shareholders. The Company has its own clear interest in the Petition i.e. in defeating the allegations raised by the Petitioners for the benefit of its diverse range shareholders as a whole*."

9. The Company submits that it should be the only or principal respondent to the Petition and be permitted to participate in the proceeding to oppose the Petition. It says that only it is in a position to address the substance of the Petitioners' complaints and should be allowed to do so since it has an interest of its own in defending the Petition. The Campbells Parties agree that the Company should be permitted to participate in the proceeding to oppose the Petition and that Holdings should also be joined as an additional respondent to allow it to defend itself against the allegations against it in the Petition. The Campbells Parties also seek an order that the Petitioners be required to file and serve further particulars of the claims made in the Petition which the Campbells Parties say are insufficiently particularised. Amherst argues that since the Petition makes no allegations of misconduct against it *qua* shareholder or alleges that Mr Chen was acting as its agent there was no basis on which the Petition should be characterised as an *inter partes* proceeding between the Petitioners and it, and no basis on which it could be joined as a respondent to the Petition. Furthermore, Amherst also submitted that the Petition was insufficiently particularised and embarrassing for lack of particulars such that the Petitioners should be ordered to amend the Petition and provide proper particulars of their complaints.

10. The evidence in support of the Petitioners' applications in the SFD was contained in the First Affidavit (***Laggner 1***) and Second Affidavit (***Laggner 2***) of Mr William Laggner (***Mr Laggner***). Mr Laggner verified the Petition in Laggner 1. Mr Laggner is a shareholder of the Second Petitioner and a former director of the Company. The evidence filed by the Company was contained in the Second Affidavit (***Anderson 2***) of Mr Mark Anderson (***Mr Anderson***). Mr

Anderson is the Company's General Counsel. The Campbells Parties and Amherst did not file any evidence.

The Company, its shareholders and directors

11. The Company is an exempted limited company which was incorporated in December 2013.

12. As asserted in the Petition, the Company is solvent.

13. The Company has a large number of shareholders. There are ordinary and preferred shares in issue. They each give the holder one vote. There are five series of convertible voting preferred shares (series A, B1, B2, B3 and C). In summary, the preferred shares (in descending order from C, B3, B2, B1, and A) have priority in relation to the payment of dividends and liquidation distributions. The preferred shares also benefit from certain protective provisions such that the Company requires the majority approval of each series of preferred shares then outstanding to take certain specified steps, such as varying the priority of dividend payments; allowing the Company to be acquired by a third party; changing the preferences of any series of preferred shares so as adversely to affect their rights or privileges and issuing any shares having a preference over the preferred shares. Holdings individually and Amherst together with Holdings, by virtue of their ownership of Series B3 preferred shares, are able to cast controlling votes on applications by the Company for consent.

14. The shares (and therefore voting power) are held as follows (on a fully diluted basis): Mr Steckel and the companies controlled by him (including Holdings) have approximately 23.5% of the shares (Mr Steckel holds 1.0728% of the Company's shares personally); Mr Chen, only through the shares owned by Amherst, has approximately 14.75% of the shares; the Petitioners as a group hold 1.73% of the shares and there are another 714 shareholders (the ***Unaffiliated Shareholders***), who are unconnected with the Petitioners or the Proposed Respondents, who hold 60.01% of the shares. Eighty-four of these Unaffiliated Shareholders only hold series B3 and/or series C preferred shares.

15. The directors at the date that the Petition was presented, with the date of their appointment, are set out below:

(a). Mr Juan Pablo Thieriot (appointed 13 January 2014) (***Mr Thieriot***).

(b). Mr Steckel (appointed 14 October 2015).

(c). Mr Peter Chapman (appointed 14 January 2020) – Mr Chapman invested in the Company via the Series C funding round and became entitled to a board seat in accordance with rights conferred on holders of the Series C preferred shares.

(d). Mr Stefan Thomas (appointed 17 March 2020) – Mr Thomas also invested in the Company via the Series C funding round and became entitled to a board seat in accordance with rights conferred on holders of the Series C preferred shares.

(e). Mr Chen – Mr Chen first invested in the Company via the Series B funding round. He became entitled to a board seat at that time but nominated Mr Dan Schatt as director from 20 April 2018 until 25 October 2020. Mr Chen became a director on 27 January 2018.

(f). Ms Margaret Slemmer – Mr Greg Kidd invested in the Company through his vehicle, Hard Yaka, in the Series C funding round, and became entitled to a board seat in accordance with rights conferred on holders of series C preferred shares. He served as a director from 9 March 2018 until 27 January 2021, and has since nominated Ms Slemmer to serve as director.

(g). Mr James J. Hilton – Mr Hilton is the chairman of the board and has been a director since 27 January 2021. He was nominated to the board by Mr Chen in accordance with Mr Chen's rights as a holder of the Series C preferred shares.

(h). Mr Simon McLoughlin – Mr McLoughlin is the CEO of the Company and has been a director since 22 December 2022.

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16. The Petitioners complain of conduct that took place in the period 2016 – 2018. In particular, they complain about a transaction (the ***Transaction***) entered into on 30 June 2016 between the Company and Holdings (to which Mr Chen became a party). This involved a revolving credit loan agreement (the ***RCA***) pursuant to which Holdings agreed to make advances to the Company and a warrant (the ***Warrant***) issued by the Company (in consideration of and pursuant to the RCA) in favour of Holdings (and its assigns) under which Holdings was entitled (at any time within ten years) to purchase such number of shares at $0.01 per share as would make Holdings the owner of fifty percent (50%) of the issued and outstanding ordinary shares of the Company on a fully diluted basis.

17. At the time of the Transaction Mr Steckel personally owned 750,000 shares (or 1.390% of the total shares in the Company on a fully diluted basis); Mr Chen (through Chen International Holdings) owned 156,251 shares (0.289% of the total shares in the Company on a fully diluted basis) and the Petitioners as a group owned 736,424 shares (or 1.344% of the shares in the Company on a fully diluted basis). Over 76% of the shares were held by Mr Halsey Minor (***Mr Minor***). Mr Minor was also a director of the Company (see below).

18. At the time of the Transaction, the board of directors comprised:

    (a). Mr Tim Parsa (Mr ***Parsa***) – Mr Parsa was one of the founding members of the Company, and was a director of the Company from 28 August 2014 until 24 October 2016. He has no involvement with the management of the Company now but remains a beneficial owner of 863,273 shares of the Company (representing 0.28% of the shares in the Company on a fully diluted basis) via Maslow LLC, an entity that the Company believes to be wholly owned by him.

    (b). Mr Thieriot – Mr Thieriot was also one of the founding members of the Company and he was CEO from 20 November 2018 until 22 December 2022.

(c). Mr Laggner – Mr Laggner was appointed to the board on 16 September 2014 at the nomination of the Series A shareholders (in accordance with rights conferred on holders of the series A preferred shares) and ceased to be a director on 17 November 2016.

(d). Mr Anthony Watson (***Mr Watson***) – Mr Watson was appointed by the board to be CEO and President and became a director of the Company on 20 May 2015. He ceased to be a director of the Company on 17 October 2020 and remains the holder of 2,853,333 ordinary shares of the Company (0.93% of the shares of the Company on a fully diluted basis).

(e). Mr Jim Milby (***Mr Milby***) – Mr Milby was appointed by the Board as director on 22 June 2015. He ceased to be a director on 18 October 2020 and remains the holder of 533,893 ordinary shares of the Company (0.17% of the shares of the Company on a fully diluted basis).

(f). Mr Steckel – Mr Steckel was appointed to the board at the nomination of the Series B shareholders, in accordance with rights conferred on them, on 22 June 2015. He remains a director of the Company.

(g). Mr Minor – Mr Minor was a founding member of the Company and was a director from the date of its incorporation until 22 June 2016. He resigned two days before the Transaction was voted on by the board and sold the last of his shares in the Company on 17 April 2020.

19. The Company's board has established a Litigation Committee which has responsibility for making decisions concerning the Company's participation (to the extent that it is permitted to participate) in these proceedings. Its members are Mr Hilton, Mr Thomas, Mr Chapman and Ms Slemmer (so that neither Mr Steckel nor Mr Chen are participating in board deliberations concerning these proceedings).

The IRA

20. It is also worth noting that the Petition refers to the Investment Rights Agreement (the ***IRA***) which was entered into initially in 2014 and was revised in 2015 following the issue of the B preferred shares, to which the Company, the Second Petitioner and certain investors (who had been introduced by Mr Laggner and held interests in the Second Petitioner) were parties. The IRA contained the anti-dilution protection that these investors required (paragraph 2.5 of the IRA provided that "*Each time the Company proposes to offer any shares of, or securities convertible into or exchangeable or exercisable for any of its share capital (Shares) the Company shall first make an offering of such Shares to each investor in accordance with the [terms of the IRA*]").

The Discontinued Proceedings

21. The Petitioners have brought proceedings in connection with these matters before. By a petition (the ***2021 Petition***) presented on 3 February 2021 (the ***Discontinued Proceedings***), which were dealt with by Justice Parker, the Petitioners (and three other shareholders) made complaints against the Company and its directors by reference to the transactions and matters which form the basis of the Petition (although there is a dispute as to the extent of the overlap between the two petitions). The summons for directions filed in the Discontinued Proceedings sought an order that the Company be treated as the subject matter of the proceeding and that the proceeding be treated as an *inter partes* proceeding between petitioners and Mr Steckel and Holdings. Joinder was not sought of ASP and Amherst.

22. By an order dated 9 March 2021 (the ***Parker Order***) Justice Parker ordered that the Company be permitted to participate in the proceeding and be treated as a respondent to the petition. No other shareholder was joined as a respondent to the petition. It appears however that the issue of whether others should be joined as respondents was left over for further argument and decision since Justice Parker also ordered that the petition be stayed pending hearing the Company's application, filed before the hearing of the summons for directions, to strike out the petition. Subsequently, the proceedings were discontinued by the petitioners before the

strike out application could be heard and it therefore was unnecessary for the issue of joinder to be further considered.

23. After the hearing before me, the Company filed and served the First Affidavit of Ms Rachel Catherine Baxendale who is a paralegal with Maples and Calder. Ms Baxendale referred to the 2021 Petition which had already been put in evidence and then exhibited further documents relating to the directions hearing before Justice Parker, including a transcript of his oral ruling on the characterisation and joinder issues (the ***Parker Transcript***). I set out an extract from the Parker Transcript below.

The Petition

24. The Petition sets out the facts and grounds on which the Petitioners rely. It is necessary, in view of the manner in which the Petition is drafted, to quote the relevant paragraphs *in extenso* (with the important parts underlined and the parts which I regard as particularly significant for the purpose of deciding on the characterisation of the proceedings in bold):

> **"*Proposed Respondents***
>
> *7. The Petitioners intend to serve this Petition on the Company and the following shareholders who they will seek to join for the purpose of obtaining alternative relief from: Adrian Steckel, Uphold Holdings LLC, ASP Capital Sub I Inc and Amherst Holdings Limited (the "Proposed Respondents"). All of the Proposed Respondents have either participated in or benefitted from the conduct complained of in this Petition and set out in more detail below.*
>
> ……..
>
> ***Mr Steckel and the Salinas connection***
>
> *17. Mr Steckel is a close associate and former employee for over 20 years of Ricardo Salinas Pliego. When Mr. Steckel joined the Company, Mr. Steckel continued his employment with Mr. Salinas. According to an investigation published on 8 April 2021 by the Wall Street Journal, Mr Salinas has a history of using questionable tactics to acquire and then extract profit from businesses he invested in. He has also been subject to regulatory action by the Securities and Exchange Commission of the United States in respect of the company Sarbanes Oxley.*
>
> *18. By the first quarter of 2016, the Company was in a distressed state. A split in the board was emerging. On one side, Mr Minor and Mr Laggner wished the Company*

to pursue a conservative strategy and in particular to conserve cash flow. At the time, monthly expenses were running at $1.2m against revenue of $20,000. Mr Laggner asked Mr Watson to defer his $85,000 monthly salary and make other cuts such as laying off consultants and cutting excess overhead to better manage cash flow in the crisis. Mr Laggner also requested that an audit of the Company be carried out in 2016 for the purpose of investigating the excessive spending and potential misallocation of corporate funds that he felt was being incurred at the executive level. Mr Laggner's concerns were ignored and the audit request was denied by a majority of the board

19. ***On the other hand, Mr Steckel, Mr Thieriot, Mr Parsa and Mr Watson (the "Steckel Faction") appeared determined to run the Company*** *down by maintaining an unsustainable expenses to revenue ratio whilst failing to progress reasonable opportunities to obtain further finance on reasonable terms. For example, there was an offer pending on up to $10m financing at the time from South African firm and a decision on $50m was promised from a Saudi Arabian businessman. Neither was followed through. In addition, one of Mr Laggner's friends, and founder of the largest fibre optic company in Canada, talked with Mr Watson in early 2016. He said he would invest $2,000,000 for every $1,000,000 invested by Mr Watson, yet Mr Watson ignored him and never even returned his call. On another occasion in the spring of 2016, Mr Laggner set up a meeting for Mr Watson with a family office in Los Angeles (which is a family office with assets under management of over $10billion), yet Mr Watson failed to show up and never followed up with the investment group.* ***It is clear that the reason for not pursuing those alternative financing options is because of the Steckel Faction wishing to ensure that the Company came under their, and therefore Mr Salinas', control****.*

20. ***Failing to follow through with any of these potential sources finance was irrational*** *and not in the Company's best interests. Rather it was* ***part of a plan initiated by Mr Steckel*** *to engineer an unnecessary cash crisis so that Mr Steckel could be presented as a lender of last resort on terms which* ***amounted to a take-over of the Company. This was in breach of the duties owed by the Steckel Faction to act in the best interests of the Company, to avoid conflicts of interest, and to act for proper purposes****. Pending discovery, the Petitioners are unable to set out the precise nature of the relationship between Mr Steckel and Mr Salinas* ***or the terms on which they conspired with other members of the board to effect a take-over of the Company****. The best particulars the Petitioners can provide pending discovery are that the plan was discussed and agreed in principle at a series of meetings and discussions which were kept from Mr Laggner and Mr Minor and which culminated in a meeting or meetings which took place in Mexico during late Spring/early Summer 2016. These meetings led to the presentation of a "take it or leave it" offer of finance from Mr Steckel which carried interest at 24% per interest and the right for Mr Steckel to acquire control of at least half the Company's shares for $.01 per share (the "Steckel Transaction").*

The takeover

21. *In early June 2016, Mr Parsa (a former employee of Mr Salinas) reported to the board that a meeting or series of meetings had taken place in Mexico between him, Mr Steckel and Mr Salinas.* ***These were with a view to Mr Salinas providing finance to the business through Mr Steckel****. Mr Parsa emailed the board on 19 June 2016 with a proposed operating plan that* ***he claimed Mr Steckel and he believed would be acceptable to Mr Salinas****. Mr Parsa followed up with details of the main terms of Mr Salinas' offer in another email to the board sent on 22 June 2016,* ***which left no room for any doubt from these terms that this was intended to be a Salinas takeover of the Company****. At this stage, the intent appeared to be for 30% of the Company's shares held by Halsey Minor to be purchased by Mr Salinas. This would have required Halsey Minor's consent, which he had made clear would not be forthcoming.*

22. *The board met later the same day that Mr Parsa had purported to communicate Mr Salinas' terms (22 June 2016) to discuss the term sheets****. At the meeting it appeared to Mr Laggner that a majority of the board had already committed the Company to agreeing Mr Salinas' terms****. There was no meaningful examination of the proposed terms, the alternatives, or of what was in the best interests of the Company. Halsey Minor made it clear that he wanted no part in the takeover and resigned in protest. Mr Laggner made his objections known (the minutes incorrectly omit this), but decided to remain on the board in order to attempt to protect the interests of the shareholders he represented.* ***The meeting then resolved to approve the Salinas terms without any qualification and Mr Steckel was appointed as Chairman in Mr Minor's place. The board meeting was a sham, for the sake of appearances only, because a majority had already agreed to commit the Company to the Steckel Transaction at the Mexico meetings and had no intention of deviating from their plan. This was in breach of their duties to act in the best interests of the Company.***

23. *Mr Laggner and Mr Minor were in regular contact throughout this time. They were both convinced this proposed takeover was disastrous for the Company. They agreed to try to persuade the board to change its mind and find alternative sources of funding on less egregious terms, which became known as the White Knight terms. Mr Laggner and Mr Minor had discussed bridge financing and related operational changes at the Los Angeles board meeting on 17 June 2016, after* ***Mr Watson confirmed he had run the company out of money by pursuing large acquisition targets along with Mr Thieriot without prior board approval****. Mr Laggner and Mr Minor decided to contact Bechtel (Increscent LLC) and other investor groups in order to provide bridge financing to the Company. Bechtel, Mr Minor and Mr Laggner agreed that the Laggner/Bechtel group would propose bridge financing, operational changes and a plan to get the company to break even over the subsequent months. By 23 June 2016, there was a mutually agreed upon document.*

24. ***Mr Minor*** *sent Mr Laggner and other board members a message on 24 June 2016 asking them to use a different email address for him because his company account had been shut down unexpectedly and confirming to them that he had* ***declined Mr***

Salinas' offer to purchase 30% of the Company's shares from him. Having appreciated there was no prospect of acquiring Mr Minor's shares, the Steckel Faction decided to have the Company issue a warrant which would, upon its exercise, give Mr Steckel compete control of a majority of the Company's shares for nominal consideration *at the same time as borrowing from him on egregious terms such as an annual interest rate of 24%. The same day (24 June 2016)* ***a majority of the board approved a term sheet submitted by Mr Steckel reflecting these terms*** *and eliminating the offer to purchase Halsey Minor's shares.*

25. *On 29 June 2016, Mr Laggner submitted what was termed the White Knight term sheet to the board as (what he believed was) a competitive alternative to the Salinas offer. By this point, Mr Laggner had received commitments and signed term sheets from a variety of sources for approximately $8m. This number was based on a spreadsheet Mr Watson prepared and which showed his estimation of the Company's needs. Mr Laggner even went so far as to ask one of his investors, James Chen, to wire $540,000 in good faith and so as to both support immediate cash flow needs and demonstrate the availability of funds. Mr Salinas had done no such thing. The same day (29 June 2016 – the minutes are incorrectly dated 27 June 2016)* ***there was another board meeting at which the White Knight term sheet was rejected out of hand and following no meaningful consideration. Two reasons were given in the minutes, both of which were incorrect.***

26. *The first reason was that Mr Laggner's terms did not provide for sufficient capital on a timely basis. This was not the case at all. One member of his group had already advanced over half a million dollars to cover immediate cash flow. This was more than Mr Salinas had been prepared to do at this stage. A capital injection of $8m would have been more than sufficient to keep the Company afloat, especially if management could be persuaded to keep costs under better control. Further, and importantly, the terms proposed by Mr Laggner were far less dilutive and onerous on the Company as against the Salinas proposal.*

27. *The second reason given was that funding timing and success was somewhat uncertain in that it was dependent on Outpost Capital Management securing written subscriptions and funds from third party investors that Outpost considered committed but who were not yet under written contract. This purported reason was just as fictitious as the first. Mr Laggner's investors (who were all existing shareholders at the time) were committed and had signed term sheets. Mr Salinas had not.*

28. ***On 30 June 2016, Mr Theriot went ahead and signed Mr Steckel's Revolving Credit Facility and Warrant (which were amended several times afterwards) constituting the Steckel Transaction****. The Steckel Transaction consisted of (i) a Revolving Credit Facility gave the lender the power to advance up to US $15,000,000 to the Company at an interest of 2% per month; and (ii) a Warrant issued on the same date in favour of Uphold Holdings LLC. This warrant gave Mr Steckel a right to acquire such number of shares at $0.01 per share so as to make*

Uphold Holdings LLC the owner of fifty percent (50%) of the issued and outstanding ordinary shares on a fully diluted basis – and thus reduced the percentage of shares owned by all other shareholders, including the Petitioners (including the shares beneficially by that time held by Mr Laggner following the purchase from Mr Minor). The Company also gave a guarantee on behalf of all of its subsidiaries and affiliated entities.

29. *Mr Laggner emailed the board on 6 July 2016 to express his concern that the Company should not commit to the Steckel Transaction in the face of opposition from a majority of the Company's shareholders and when a vastly superior alternative in all material respects (including the terms for interest and not having to give away half of the Company) in the form of the White Knight term sheet was available. Mr Watson responded the next day noting that the board had a fiduciary responsibility to consider the White Knight terms and supported a request for a general shareholders meeting.* ***Around this time there was a call between Messrs Bechtel, Steckel, Thieriot and Laggner. They discussed the White Knight terms. On the call, Mr Steckel admitted the White Knight terms were far better terms for the Company but would not be acceptable to his group because they did not give him control of the Company. There was never in fact any prospect of any alternative to the Steckel Transaction being considered because the Steckel Faction had agreed to pursue the Steckel Transaction regardless of the interests of the Company****.*

……

Mr Laggner removed from the board

32. *In the end the Steckel Faction had had enough of being questioned and caused* ***Mr Laggner to be removed from the board on 17 November 2016*** *(unbeknownst to Mr. Laggner). The reason provided by Mr Thieriot for Mr Laggner's removal was that he was in a position of conflict given he was seeking to enforce an agreement with Halsey Minor through the courts. There was no conflict. The real reason for Mr. Laggner's removal was to eliminate a source of scrutiny and questioning of the Steckel Transaction, its consequences and subsequent implementation.*

Mr Chen changes sides

33. ***At some point between July and December 2016 Mr Steckel reached an agreement with one of Mr Laggner's investors, another existing shareholder Mr James Chen, pursuant to which the benefits of the Steckel Transaction would be shared between them. In the event Mr Steckel (acting through Uphold Holdings LLC) was allowed to advance $10m and Mr Chen (through Chen International Holdings Ltd and subsequently Amherst Holdings Limited) was allowed to advance $5m and subscribe for 42 and 21 million shares in the Company respectively****. They were both also allowed to deploy the interest accrued at the extortionate rate of 24% to settle the already heavily discounted price payable per*

share of under the Warrant of $.01. Further they ***were allowed to subscribe for preference shares, which carried additional rights to the ordinary shares that they were to receive under the terms of the Warrant agreed in June 2016. In approving these terms the board paid no regard to the interests of the Company or its shareholders other than Messrs Steckel and Chen and their companies.*** *There was for example no attempt to comply with the IRA or to secure better terms from any other shareholders or new investors.* ***Instead Mr Steckel was permitted to amend the terms of his transaction with the Company to suit his needs at the time without reference to the interests or rights of the Company and its other shareholders****.*

Further mismanagement after the Steckel Transaction

34. ***The Steckel Faction and Mr Chen have since caused the Company to operate without regard to the principles of proper corporate governance and have continued to cause the Company to prefer their interests over those of the Company and its shareholders generally****. For example :*

a. ***The Company purported to amend its Memorandum and Articles*** *in February 2017.The amendments made to the Articles of Association in February 2017 included the creation of 5 additional classes of shares and the authority to issue* ***additional Series A and Series B Preferred Shares****, a large proportion* ***which were issued to Mr Steckel and Mr Chen through their companies****. Notice of the general meeting was not given to all shareholders. No actual meeting took place. Instead* ***the only individual shareholder to sign the purported resolution approving the amendment was Mr Steckel himself,*** *acting purportedly through powers of attorney or proxies for those entities* ***which he did not have authority to represent as a director****. Further a Caroline Turner was allowed to cast votes despite the fact that she was not a shareholder in the Company.*

b. ***Mr Steckel and Mr Parsa caused the Company*** *to license its intellectual property to a rival cryptocurrency platform called AirTM through an entity called Cloud Money Ventures LLC in which Mr Steckel and Mr Parsa were interested.* ***Mr Steckel and Mr Parsa caused the Company (improperly) not to enforce the licensing agreement and/or to waive their breaches of contract*** *from AirTM's nonpayment, and in doing so* ***Mr Steckel and Mr Parsa acted in breach of their own fiduciary duties to Uphold*** *by failing to take any steps to secure any meaningful payment to the Company from AirTM for the license of its intellectual property. Subsequently, and as a result of the concerns raised by the Petitioners, the Company purported to undertake an investigation into the AirTM transaction. The purported investigation was completely meaningless because amongst other things it proceeded on the assumption that there were no contemporaneous records and that the story put forward by Mr Steckel and his associates was true. Unsurprisingly, the purported investigation concluded there was no issue. The reason given for the lack of records was an apparent loss of data from the loss of a laptop.*

c. ***The Company has failed to take any steps to enforce a breach of Mr Steckel and Mr Watson's duties to the company in relation to a corporate opportunity of the Company involving the Bank of London*** *("TBOL") which they have benefitted from personally to the detriment of the Company. In 2016 the Company was in the process of applying for a digital bank license to be able to trade in the UK through a shareholding in TBOL. The digital bank license application process began with the hiring of KPMG in London. Subsequent to the application filing KPMG and Uphold BOD's sent Mr Laggner the Uphold Bank deck which he shared with prospective institutional investors in early 2017. Former CFO, Lee Westerfield, mentioned to Mr Laggner in early-mid 2017 that the Bank of England may not be able to issue a bank license to a crypto currency company so Mr Laggner suggested that Uphold issue shares of Uphold Bank to existing shareholders followed by a capital raise. Instead, Messrs Steckel, Salinas and Watson altered the application while carving out significant equity for themselves. It has subsequently become apparent through correspondence with Uphold's Cayman counsel that Uphold had entered into an agreement under which it was only given 9% of TBOL.* ***There are clear conflicts of interests and breaches of the directors' duties to act in the best interests of the Company*** *from this transaction, and the Petitioners understand that the Company is itself pursuing a claim against TBOL for breach of a share purchase agreement for the 9% in any event.*

d. *The Steckel Faction have benefitted from share options since the Steckel transaction.* ***Following Mr Laggner's removal from the board in late 2016, the Articles of Incorporation were changed in early 2017 through resolutions which were passed by virtue of Mr Steckel's controlling interest in the Company****, both on his own behalf and via proxies and powers of attorneys that were granted to him for the shareholder resolutions to be executed. Following those changes, the Company issued Series C shares in 2018, once again following the rejection of alternative funding arrangements put forward by, amongst others, Mr Laggner, and issued further stock options to Messrs Steckel, Chen and Kidd subsequently.*

e. *In 2018, Messrs Steckel, Kidd and Thieriot (and others) developed a cryptographic protocol called "Universal Protocol" which was designed to compete with other smart contract platforms enabling various forms of value to flow thru blockchains. In launching Universal Protocol, Messrs Steckel, Kidd and Thieriot appointed the founder of Cred, Dan Schatt, to be CEO. As CEO of Cred, Schatt had built a decentralized credit product whereby token holders could put their tokens into a smart contract and borrow up to a certain percent of their collateral. Messrs Steckel, Thieriot and Kidd failed to disclose this to Uphold shareholders while Cred partnered with Uphold and subsequently filed bankruptcy. In essence, Cred was rehypothecating Uphold customer funds while Steckel, Thieriot and Kidd were raising money for Cred.*

Uphold was subsequently sued for illegally issuing securities by a Universal Protocol investor.

Conclusion

35. *The Petitioners humbly seek an order pursuant to section 92(e) of the Companies Act (2022 Revision) (the "Act") for the winding up of, or alternative relief in respect of, the Company on the basis that it is just and equitable that the Company be wound up for the following reasons:*

    a. ***The board has failed to act in the best interests of the Company and its shareholders*** *and [acted] in a manner which perpetrates ongoing* ***misconduct in the management of the Company****.*

    b. ***The directors have demonstrated a lack of probity in their actions and have committed clear breaches of their fiduciary duties by engaging in a series of actions tantamount to a conspiracy to allow one of the Company's shareholders and directors, Adrian Steckel, to gain de facto control of the Company.***

    c. ***The directors have caused the Company to act*** *in a manner which is inconsistent with its contractual obligations to certain shareholders, the Articles and/or basic principles of corporate governance.*

    d. ***The effect of the aforementioned is that the Steckel Faction has allowed Mr Steckel, and therefore Mr Salinas, to take control of the Company*** *to the detriment and prejudice of the Petitioners.*

    e. *The Petitioners have therefore justifiably and irretrievably lost* ***all faith and confidence in the directors of the Company and the board's ability*** *to manage the Company's affairs in the best interests of the Company as a whole.*

    f. ***Consequently, the Petitioners' rights and interests have been oppressed, wilfully disregarded, and undermined.***

36. *In all the circumstances, the Petitioners consider it to be just and equitable that the Company be wound up by the Court pursuant to section 92(e) of the Act, and that alternate relief sought be granted pursuant to section 95(3) of the Act for the purchase of the Petitioners' shares (which for the avoidance of doubt the Petitioners seek as their primary remedy)."*

25. The Petition also alleges that at some point in July 2016, after the Company had been legally committed to the Transaction by Mr Thieriot signing the relevant documents, the Steckel Faction

came to appreciate that the Company was in breach of the IRA by failing to provide the existing holders of preference shares (in order to avoid their interest being diluted) with the right to subscribe for shares in an equivalent amount to the shares to be issued under the Transaction. On 21 July 2016, preference shareholders were sent an email containing a term sheet for the issue of B2 shares that they could acquire to avoid dilution. The Petition alleges that this purported offer did not comply with the IRA for three reasons. First, because the B2 shares were not offered on the same terms as the shares to be issued under the Transaction (the former were offered at $.255 a share compared to $0.01 offered to Mr Steckel). Second, because the IRA required the Company to offer equivalent shares before and not after they were offered to Mr Steckel. Thirdly, because the Company was required to hold a general meeting in order to increase its share capital in respect of the B2 shares which it did not do.

The Parker Transcript

26. The note of Justice Parker's brief ex tempore judgment records him as having said this:

> *"The first thing is that having very carefully listened to both of you and reviewed the evidence that was put in late by the Company which I had a chance to look at and which Ms Moran took me through in terms of the exhibit, the right course in this case is to order that the Company is entitled to participate in this petition. It is a proper party under the Companies Winding Up Rules order 3 rule and it may participate. I am also going to order a case management [inherent jurisdictional] stay of the petition against the Company pending evidence to be agreed between you. As to timing for the proposed application that Ms Moran has heralded to strike out the petition, that needs to come on in due course so those matters can be fleshed out. I'm going to make no order as to joinder or service on Mr Steckel or Uphold Holdings LLC for the time being. You may have liberty to apply on that Mr Huskisson. And costs will be in the petition."*

The Petitioners' submissions in outline

27. The Petitioners submit that:

(a). the Petition is focused on the conduct of the Proposed Respondents *qua* shareholders in the Company (in reliance in particular on [7] of the Petition).

(b). the core allegation is that Mr Steckel (for the benefit of or with the support of Mr Salinas) engineered a takeover of the Company (so that he obtained further shares in and *de facto* control of the Company) on a basis which prejudiced the Petitioners, in their capacity as shareholders (in reliance in particular on [24] of the Petition).

(c). this occurred by means of the Transaction which in June 2016 initially benefitted Mr. Steckel and Holdings by giving Holdings the right to lend the Company up to $15 million at an interest rate of 24% per annum and then deploy the Company's indebtedness to subscribe (via the Warrant) for a controlling interest in the outstanding ordinary shares of the Company at 1 cent per share. This involved an agreement by the Company to (i) an unjustifiably high rate of interest and therefore to assume an unjustifiably high liability to Mr Steckel (through Holdings) and (ii) an unjustifiably low exercise price under the Warrant, for the purpose and with the effect of allowing Mr Steckel through Holdings to acquire shares without having to pay a proper price for them and the improper dilution of all other shareholders, including the Petitioners (in reliance on [28] of the Petition).

(d). ASP is the assignee of some of the shares that Holdings acquired as a result of the Transaction.

(e). Mr. Steckel subsequently reached an agreement with Mr. Chen which allowed Mr. Chen (ultimately through Amherst) to subscribe for shares issued pursuant to and on the terms of the Transaction, again improperly diluting and to the prejudice of the other shareholders, including the Petitioners (see [33] of the Petition).

(f). this constituted an improper takeover of the Company (by Mr Steckel with the agreement of the majority of the board for the benefit of or with the support of Mr Salinas) and thereafter there had been further mismanagement of the Company's affairs for the benefit of Mr Steckel (through Holdings) and Mr Chen and to the prejudice of the other shareholders which was only possible because of the *de facto* control that Mr Steckel exercised over the Company (see [34] of the Petition).

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28. At the hearing, Mr Valentin submitted that reliance could be placed on the evidence of Mr Laggner for the purpose of determining the nature and basis of the Petitioners' complaints. He noted that in Laggner 1, Mr Laggner had alleged that Mr Steckel had "*gained effective control of the [Company's] board"* (at [8]) and that the terms put to the board on 22 June 2016 were "*intended to be a Salinas takeover of the Company [with] the intent [appearing to be] for 30% of the Company's shares held by [Mr Minor] to be purchased by Mr Salinas [which would have] required [Mr Minor's consent which he had made clear would not be forthcoming*" ([50]) and said that he "*firmly [believed] that the majority of the board acted in concert with Mr Salinas and Mr Steckel to impose the [Transaction] on the Company ([79]) … [and was] confident that discovery will reveal the full extent of a conspiracy to wrest control of the Company unlawfully from [himself and the investors he had introduced]*." ([80])

The submissions of the Company and the Proposed Respondents

29. The Company argued that given the circumstances of the Company and the way that the Petitioners had set out their case in the Petition, these proceedings were not properly characterised as a dispute between shareholders. The Company had its own clear interest in the Petition i.e. in defeating the allegations raised by the Petitioners for the benefit of its diverse range of shareholders as a whole. The factual allegations in the Petition were overwhelmingly (if not exclusively) allegations against the Company and its directors (particularly in relation to what had been described as the Steckel Faction of the board) and not against the Proposed Respondents in their capacities as shareholders. The Company submitted that the Petitioners did not plead facts or matters from which it could be concluded that the proceeding was, in substance, a dispute between shareholders. For example, the Petition did not explain the basis on which it was suggested that the alleged Steckel Faction of the board acted in concert with one another, or that the alleged Steckel Faction of the board acted at the behest of the Proposed Respondents or on their behalf, such that those actions were really the actions of the Proposed Respondents.

30. The Company argued that given Mr Steckel's recusal in relation to the approval of the Transaction, it was unclear what he could say in response to the Petitioners' complaints that the Transaction was improperly approved by the Company. Further Mr Chen was not involved on

the part of the Company in relation to the Transaction, and was not a director at the time. None of Amherst, Holdings or ASP were shareholders at the time, and Holdings' only involvement was as a counterparty to the Transaction. Neither Mr Steckel nor Mr Chen had anything like a controlling interest in the Company and did not control the board at the time (or indeed, now). Accordingly, it was only the Company which was in a position to address the substance of the Petitioners' complaints. Further, to obtain the buy-out order they seek as their primary remedy, the Petitioners would need to succeed on their claims of serious misconduct and mismanagement by the Company and its board. If the Company was not permitted to refute those allegations and was forced to rely on parties which are not well placed to do so, that could have serious consequences for the Company's reputation, future fundraising and business more generally.

31. The Company submitted that there were additional reasons why it should be permitted to oppose the Petition. As noted already, the Company says that it is not under the control of the Proposed Respondents and the Petitioners hold only a small fraction of the Company's shares. The Company is widely held and is not a quasi-partnership. There is a sizeable number of shareholders holding both large and small parcels of shares of different classes whose interests in the Company need to be properly protected. As relief (in the form of a buy-out order) had been sought against the Company itself, the interests of these shareholders could not be properly protected by any of the other Proposed Respondents as their interests did not necessarily align (particularly since the Company itself may ultimately be liable for the net cost of any buy-out order made against Holdings and Amherst pursuant to indemnities which arguably it owes to them). There are more than 700 shareholders who each hold less than 2% of the Company's fully diluted share capital and who are not affiliated with the Petitioners or the Proposed Respondents. Certain shareholders, such as Mr Greg Kidd, had invested significant amounts in the Company via the Series C share issuance, and there was no allegation made against them in the Petition. For the small shareholders, it would not be practical, nor proportionate, to order joinder of all of these other shareholders to the Petition and it would be much more efficient to have their interests represented by the Company's participation.

32. The Company also relied on the decision of Justice Parker and the Parker Order. While the Petitioners were not bound by the Parker Order for the purpose of these new proceedings, Justice

Parker's decision was made by reference to the same dispute and similar pleadings and should be given substantial weight.

33. The Campbells Parties made similar points. They referred to the grounds of the Petition as pleaded at [35] and submitted that they were exclusively directed to the actions of the Company's directors. The Petitioners' primary complaint related to the entering into of the RCA and the Warrant in June 2016. The complaints made in [34] were ancillary thereto. No complaints were made against the Proposed Respondents in their capacity as shareholders. Holdings was not a shareholder at the time that entry into the RCA and Warrant had been approved. To the extent that the Petitioners had challenged these transactions it would be appropriate for Holdings to be joined but only to respond to that challenge. While Mr Steckel has a small direct shareholding in the Company and an interest in Holdings, the complaints made against him all relate to his actions as a director. It was neither necessary nor appropriate for him to be joined (and there was no basis for treating him as the alter ego of Holdings or to assume that Holdings acted on his behalf). No reference had been made to ASP and Amherst save for the general reference in [7] and so the basis for their joinder was wholly unclear.

34. In addition, the Campbells Parties argued that the core averments in the Petition were insufficiently particularised. For example, at [35(b)] the Petition pleads that the directors (whose names were not specified) had "*committed clear breaches of their fiduciary duties by engaging in a series of actions tantamount to a conspiracy to allow one of the Company's shareholders and directors, Adrian Steckel, to gain de facto control of the Company.*" However, despite the serious nature of the allegation made, it was not entirely clear what was meant by "*tantamount to a conspiracy*." The Campbells Parties submitted that the Petition made serious allegations of misconduct against the Company and the past and current directors including Mr Steckel and that the pleading of these allegations was wholly inadequate. Furthermore, Laggner 1 had been prepared without regard to the rules of evidence in that it contained commentary, argument, submission, opinion and hearsay statements. Such that it was liable to be struck out under GCR O.41, r.6 (or the Court's inherent jurisdiction). They sought an order, if they were to be joined, that the Petitioners be required to correct the deficiencies in the Petition and Laggner 1 and to file and serve further particulars within twenty-one days.

35. The Campbells Parties said that only the Company was in a position to respond to the allegations made against the Company's former board going back over six years. The fact that the Petitioners sought a buy-out order against the Company demonstrated that it had an independent interest in opposing the Petition.

36. The Campbells Parties also submitted (in their written submissions) that the Petitioners' complaints amounted to "*little more than an airing of [an] historical grievance that the majority of the Company's then Board preferred the [RCL and warrant with Holdings] over the* alternative financing "proposal" put forward by Mr Laggner in 2016 and were "stale and lacking in merit."

37. Amherst argued that the Petition made no allegations of misconduct against Amherst *qua* shareholder and made no allegations that any of the Company's directors had been acting as agent for Amherst. Furthermore, any complaints in the Petition which could relate to Amherst were all embarrassing for lack of particulars, liable to be struck out as currently pleaded, and in any event would not (even if proved) justify the grant of relief as against Amherst. There was no basis for the Petition to be deemed *inter partes* between the Petitioners and Amherst and there was no basis for Amherst to be joined as a respondent to the Petition. If however Amherst was ordered to be joined to the Petition, this joinder should be conditional upon the Petitioners' taking steps to provide proper particulars of any alleged complaints against Amherst and the basis for any relief sought (in light of the deficiencies in the Petition as drafted, in no circumstances should it be treated as the Petitioners' particulars of claim unless further amendments were made with an appropriate order as to costs).

38. Amherst relied on the fact that the Petition had not identified it as a party against whom buy-out relief was sought; contained no allegations of misconduct against it (or Chen International Holdings Limited) *qua* shareholder or of a breach of duty by directors appointed by it (or Chen International Holdings Limited) acting as their agents and on their behalf or specific allegations made against Mr Chen *qua* director. The only complaints in the Petition which could in any way be intended to relate to Mr Chen, it argued, were two vague allegations as to the conduct of the board as a whole (at [35(a)] and [35(c)]. However the Petition failed to identify the time period

to which these complaints related so that it was unclear as to which directors the allegations referred.

39. Amherst argued that the Petition appeared to rely upon alleged benefits received by Amherst from the Transaction as a basis for joining it as a Proposed Respondent, without any explanation as to basis upon which that allegation in and of itself, even if proved, would justify an order requiring Amherst to purchase the Petitioners' shares. Furthermore, at [33] of the Petition it was alleged that: (a) Mr Chen either owns or controls, or owned or controlled, Chen International Holdings Limited and Amherst and that (b) at some point after the Transaction had taken place (between July and December 2016), Mr Chen (via his companies) had agreed with Mr Steckel effectively to participate in the RCA by providing US$5 million of the US$15 million loan in exchange for shares and preference shares in the Company and preference shares. The complaint was then made (at [33]) that, in approving these terms, "*the board paid no regard to the interests of the Company or its shareholders other than Messrs Steckel and Chen and their companies…[and]…[i]nstead Mr Steckel was permitted to amend the terms of his transaction with the Company to suit his needs at the time without reference to the interests or rights of the Company and its other shareholders.*" But Mr Chen was not a director of the Company at the time the Transaction is alleged to have occurred or at the time that it is alleged that the board of the Company approved entry into an agreement between Mr Steckel and Mr Chen (to which it is not even alleged that the Company was party). Further, the complaint was directed at the conduct of the board and Mr Steckel, not Mr Chen or the companies he is alleged to control or have controlled.

40. At [34] of the Petition, it was alleged that following the Transaction, Mr Chen and the Steckel Faction had "*caused the Company to operate without regard to the principles of proper corporate governance and have continued to cause the Company to prefer their interests over those of the Company and its shareholders generally*." But only one example had been given which in any way related to Mr Chen, being that "*The Company purported to amend its Memorandum and Articles in February 2017. The amendments made to the Articles of Association in February 2017 included the creation of 5 additional classes of shares and the authority to issue additional Series A and Series B Preferred Shares, a large proportion of which were issued to Mr Steckel and Mr*

Chen through their companies…" Accordingly, Amherst submitted, the only allegation of misconduct pleaded in the Petition related to Mr Steckel's alleged improper use of powers of attorney or proxies by signing the shareholders' resolution on behalf of various shareholders, including Chen International Holdings Limited. Significantly, no allegations of misconduct were made against Mr Chen.

Discussion and decision

The proper approach to applications by the company to be the principal respondent to a contributory's petition on the just and equitable ground

41. The starting point is the nature of a contributory's winding up petition based on the just and equitable ground. This was clearly set out by Mr Justice Harman in *Re Hydrosan* [1991] BCLC 418 at 421e-g (in a passage quoted by Justice Foster in *Re Freerider* [2009 CILR 604] (***Freerider***):

> *"The claim on the petition in Re A & B C Chewing Gum Ltd was purely, simply and only for a just and equitable winding up. The claim on a contributories' petition for a just and equitable winding up is not in truth hostile litigation by a shareholder against a company. It is in truth a claim by a shareholder based upon wrongful acts by other shareholders or directors which have amounted to some equitable mal-doing even within the articles as is exemplified in Ebrahimi v Westbourne Galleries Ltd [1972] 2 All ER 492, [1973] AC 360 which went to the House of Lords and reinstated the width of just and equitable petitions.*
>
> *It is quite clear in my judgment that the nature of a petition based by a creditor against the company, which seeks the winding up of the company, is wholly different from the nature of relief where there is a just and equitable petition by a shareholder against the company, which may also lead to an order for the winding up of the company. It is quite true that if a winding-up order is made on a contributories' petition the company will suffer what I usually refer to as death, that is, its coming to an end and eventual dissolution, but the wrongs claimed and the nature of the allegations are of wrongs by those in control of the company against a shareholder rather than by the company itself in any real sense."*

42. This principle is not limited to cases involving quasi partnerships. The proceeding is grounded on a dispute between the shareholder petitioner and those in control of the company where those

in control have behaved in a way that is fundamentally inconsistent (see Lord President Clyde in *Baird v Lees* 1924 SC 83 at 92) with the basis on which the shareholder subscribed for or purchased his/her shares as to justify the termination of the corporate relationship. It is usually the case that those accused of misconduct should pay for the costs of defending the petition.

43. A winding up order may be made on the basis of the directors' conduct. It may be just and equitable to wind up a company if directors whom the petitioner cannot remove have shown a lack of probity in the conduct of the company's affairs. But the petitioner must show that there is some reason why the misconduct cannot be dealt with by other means. A mere wrong to the company is insufficient to justify a winding up order on the just and equitable ground. If however those in control of the company act improperly by refusing to sue the directors, that failure could be part of a course of conduct by those in control constituting oppression of the minority and justify a winding up order on the just and equitable ground. As Lord Greene Mr said in *Re Kitson and Co Ltd* [1946] 1 All ER 435 at 441:

> *"It is to be remembered that the winding up procedure does not exist for the purpose of keeping boards of directors in order, or indeed of preventing them from misapplying the funds of the company. It may very well be (I express no opinion) that in cases where directors have complete control of the company and are impossible to control, those circumstances, coupled perhaps with others, may make it just and equitable for a company to be wound up, although in these days of minority actions it would not seem that winding up proceedings in order to prevent that kind of thing are likely to be so necessary as before minority actions became common. But, apart from that, it seems to me that the winding up procedure ought not to be used for regulating the internal affairs of the company. If directors are misbehaving themselves, there lies a remedy to the shareholders to stop it, and it would be quite wrong to my mind that the partnership between shareholders, so to speak, should be dissolved merely because the persons carrying on the business on behalf of the company, namely the directors, are misbehaving themselves. It is for the shareholders to stop them. They can get rid of the directors or stop them by means of an injunction if they are doing anything improper, and, therefore, I do not think it is putting it too high to say that in the ordinary way of things winding up is not the proper procedure for dealing with that type of situation."*

44. So a contributory's winding up petition will usually need to be based on (or include) a claim that not only have the directors misbehaved but that other shareholders have assisted or been party to the misconduct or refused to support action to remove the directors or by the company to remedy or obtain compensation for the directors' wrongdoing and it is then that shareholders' conduct

that is a critical component in the petitioner's case for a winding up order and which justifies treating the real dispute as being between the shareholders rather than between the petitioning contributory and the company. And this is why the principle of company law (identified in *Freerider* and *China Shanshui* at [36]) that a company's money should not be spent on disputes between shareholders is engaged in a contributory's petition based on misconduct.

45. The company (usually the board of directors) has to establish that there is a proper basis for spending the company's money in opposing the petition (see *China Shanshui* at [39] and [40]). The company must show that its proposed participation is necessary or expedient and that it has an interest of its own to protect.

46. As Foster J said in *Freerider*, the company has to discharge the onus of showing that this test is satisfied. This is not an easy threshold to overcome. This is why Lindsay J in *Re a Company* (No 1126 of 1992) [1994] 2 BCLC 146 (***Re a Company***) (a case which involved claims of misconduct against directors who had been nominated by the shareholders for whose benefit the misconduct was said to have been undertaken) said (at 156 a-e) that:

> *"… in considering that test the court's starting point is a sort of rebuttable distaste for such participation and expenditure, initial scepticism as to its necessity or expediency. The chorus of disapproval in the cases puts a heavy onus on a company which has actively participated or has so incurred costs to satisfy the court with evidence of the necessity or expedience in the particular case. What will be necessary to discharge that onus will obviously vary greatly from case to case.*
>
> *… if a company seeks approval by the court of such participation or expenditure in advance then, in the absence of the most compelling circumstances proven by cogent evidence, such advance approval is very unlikely.*
>
> *Mr Moore would have me add that such participation and expenditure should never be approved in advance, or at all, unless there is a clear demonstrable and unchallenged independence between the company and the protagonists under s 459. Obviously, where that independence is present the task of satisfying the tests I have described is likely to be easier than in those cases where it is absent, but I am reluctant to specify that independence as either a sufficient or a necessary condition. It is not sufficient because even truly independent board members can be swayed by partisan or other considerations they should not have entertained. It is not necessary because even where that independence is lacking, directors, for all their lack of independence, could arrive at a true view of what*

was necessary or expedient in the interests of the company as a whole and might even arrive at that view for the right reasons."

47. In applying this approach to the facts of the case, Lindsay J went on to say this:

> *"Next I ask whether the company satisfies* ***the onus of proving by cogent evidence that its proposals are, to a compelling degree, necessary or expedient in the interests of the company as a whole****. The company's evidence, at para 12 of the first affidavit of the company secretary, is that it is the considered view of the board, having taken the advice of leading counsel, that it should participate in the petition. The directors' considered view, he says, is that the position and interests of the company should be stated independently and that it is inappropriate that justification of the company's conduct in the refinancing should be left to the consortium when in fact the company's affairs were conducted by its directors acting on independent legal and financial advice in what they considered to be the interests of the company as a separate legal entity and in the interests of the members as a whole. In his second affidavit, the company secretary says the company's course of conduct generally was decided by the board acting on independent financial and legal advice.* ***It will be remembered that the present board is comprised solely of persons appointed by the respondent consortium members or by their subsidiaries or alternates to those persons. In that circumstance I do not see the company's evidence as satisfying the onus I have described****. I do not know what independent legal or financial advice was given to the board as to its participation in the petition, nor what facts were put to the advisers on the subject. I do not know the degree to which the board members studied that advice before concluding as they did. I do not know whether they acted exactly as it suggested they should. Beyond the brief summary given I do not know what reasons emerged in the course of the board's deliberations for its decision that it should participate. I can quite see that the company might not wish to disclose information of this kind to the petitioner but it is, after all, the company that has chosen to go by notice of motion with the petitioner as respondent rather than by a process analogous to a Re Beddoe application, as would have been more appropriate (at any rate in the first place) had it wished both to disclose the advice it received to the court and yet to have retained confidentiality of the subject (see [1893] 1 Ch 547). I do not know either how far, if at all, when considering the necessity or expedience of its participation, the company had in mind that its officers and advisers are all likely to be able to make any relevant evidence of theirs available to the court by way of evidence given voluntarily or under subpoena.*
>
> *I am not ruling that the company's position here is so far from satisfying the onus that I have mentioned that an application of the present kind, even if renewed on further evidence, could never succeed.* ***I am saying that, given the close relationship between the board and the respondent consortium members, it is not enough merely to assert that it is the board's view, having taken the advice of leading counsel, that it should participate in the petition. If the onus is to be discharged the court will need to be satisfied not merely that the board's decision to participate could have been, but that it was, arrived at by an honest and reasonable board properly looking to what was necessary or expedient in the interests of the company as a whole****.*

> *Mr Hildyard makes an attractive case for the need for the company to participate. However, in a case such as this where intervention by the company could so easily be motivated either by a wish to advance the consortium respondents or to hinder or increase the burden on the petitioner, what is relevant is not argument, however attractive, as to what the board could properly have regard to in coming to its conclusion but rather what the board did have regard to in coming to its conclusion. As to that, in my judgment, the facts so far proved fall short."*

48. I appreciate that in *Re a Company* Lindsay J was considering an application for an order in advance that expenditure by the Company in defending the petition would not be treated as misfeasance. Applications on a summons for directions pursuant to CWR O.3, r.11 (1), as Foster J noted in *Freerider* and I confirmed in *China Shanshui* at [37], are interlocutory and do not involve a final determination of whether the company can pay all or any of the costs of opposing the petition. These applications need to be decided as expeditiously as possible and on a cost effective basis by reference primarily to the allegations as set out in the petition but also taking into account any evidence filed by the company and other shareholders. They therefore do not impose the same high threshold or require the same heavy evidential burden. But, as it seems to me, since the principle is engaged, the core features of the approach set out by Lindsay J do apply. The company must put forward a cogent case which justifies its participation.

The facts and the construction of the Petition in this case

49. In the present case, there is no doubt that the main allegations set out in the Petition focus on and relate to actions taken by the directors. The action said to have been taken by the Steckel Faction must I think be understood as referring to action taken by them as directors. They were four out of seven directors at the time of the Transaction and therefore a majority of the board. However, the Petition goes further. It alleges that these actions (of the majority of the board) were taken pursuant to a plan and agreement, to which the relevant directors were a party, whose purpose was to allow Mr Steckel (or Mr Salinas) to obtain control of the company without paying fair value and without treating all shareholders fairly (or in accordance with their contractual rights). The Petition avers that there was a conspiracy (that is an agreement) between the Steckel Faction, acting as directors, and Mr Steckel, acting for Mr Salinas, to effect a take-over of the Company

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on terms that were both prejudicial to the Company and to the Petitioners (since their shareholding would be unfairly and improperly diluted). Mr Steckel was the instigator of and party to the alleged conspiracy and a shareholder at the time of the relevant conduct. His conduct is alleged to have been for his benefit in his capacity as a shareholder since its purpose was to secure the issue of a controlling (by *de facto* control) interest in the Company's share capital to him or a company he controlled (for the benefit of Mr Salinas). It is, in my view, implicit and to be inferred that the Petition avers that Mr Steckel acted not only as a director but also as shareholder in order to benefit himself as shareholder (by acquiring more shares). The plan is to be seen as a shareholders plan, in Mr Steckel's case to increase his shareholding improperly.

50. This can be seen in the following paragraphs of the Petition, which can in my view reasonably be interpreted in the manner I describe below:

(a). [19], in which it is averred that the Steckel Faction's purpose was to give Mr Salinas control of the company (although it is not stated what form this control would take, and whether it would take effect by controlling the majority of the board without Mr Salinas acquiring shares in the Company, although it seems to me that the allegation, when the Petition is viewed as a whole, is that the Steckel Faction's purpose was to give Mr Salinas control by creating the conditions in which a transaction would be entered into pursuant to which Mr Salinas would acquire shares and by taking steps to arrange for the board to approve such a transaction).

(b). [20], in which it is averred that there was a plan initiated by Mr Steckel to obtain more shares in and control of the Company, in a manner prejudicial to and oppressive towards the other shareholders. The existence of the plan is evidenced by or to be inferred from the actions of the Steckel Faction, the proposals put to the board by Mr Steckel (on behalf of Mr Salinas) and the allegedly irrational decision making of the board (which failed to adopt alternative approaches which were clearly more favourable to the other shareholders).

(c). [21], in which it is averred that Mr Salinas' purpose was to obtain control of the company by acquiring shares.

(d). [24], in which it is averred that the purpose of issuing the Warrant was improperly to give Mr Steckel (presumably still acting for or on behalf of Mr Salinas although this is not stated) control of the Company (or to acquire such control) by fixing a very low exercise price under the Warrant and allowing this to paid by applying or setting off the loan interest which was fixed at an unjustifiably high rate.

(e). [29], in which it is averred that Mr Steckel admitted that his purpose (once again there is a reference to Mr Steckel's purpose without an averment that he was acting on this occasion on behalf of Mr Salinas) was to obtain control of (in this context this must mean control via the acquisition of shares in) the Company.

(f). [33], in which it is averred that there was an agreement between Mr Steckel (although once again it is not stated whether he was acting for Mr Salinas) and Mr Chen to share and participate in the benefits of the Transaction and so obtain shares at a discount to their true value and by applying or setting off the improperly high level of interest payable to them in order to pay for the shares, and to acquire preference shares; and that the majority of the board who agreed to these arrangements were acting pursuant to the plan for the purpose of benefitting Mr Steckel (or Holdings through whom Mr Steckel was acting and to whom the shares were issued) and Mr Chen (or Chen International Holdings Limited through whom Mr Chen was acting and to whom the shares were issued), in both cases as shareholders.

(g). [34], in which it is averred that the Steckel Faction and Mr Chen have acted (in part by exercising their rights as shareholders) to prefer their interests over the interests of the Company's other shareholders including by Mr Steckel exercising his rights as shareholder and improperly acting as a proxy for other shareholders in purporting to amend the Company's memorandum and articles in order to issue additional Series A and Series B Preferred Shares, to himself (through Holdings) and Mr Chen (through Chen International Holdings Limited); by Mr Steckel and Mr Parsa (as directors of the Company) causing the Company to grant an intellectual property licence to a company in which they were

interested and then failing to collect sums due from that company to the Company; by failing to enforce the Company's rights against Mr Steckel and Mr Watson (as directors of the Company) for exploiting for their own benefit a corporate opportunity which should have been pursued for the Company's benefit and that of all its shareholders; by Mr Steckel exercising his controlling rights as shareholder (and acting as a proxy for other shareholders) to obtain the issue of share options and by Mr Steckel, Mr Kidd and Mr Theriot causing the Company to enter into a damaging arrangement with a company called Cred.

(h). [35], in which it is averred that the directors, in breach of duty and with a lack of probity, were managing the Company and acting pursuant to Mr Steckel's plan to obtain control of the Company and to oppress the Petitioners. While [35] only specifies actions of the directors, read with the other paragraphs in the Petition it is to be, or can fairly be, understood as referring to the action taken pursuant to the alleged conspiracy and to implement Mr Steckel's shareholder initiated plan improperly to obtain further shares, thereby to obtain an improper benefit as a shareholder and in that capacity to oppress and dilute the interests of the other shareholders.

51. It seems to me that this construction of these paragraphs in the Petition is reasonable, when the Petition is read as a whole, although, as I explain below, I find, in agreement with the Company and the Proposed Respondents, that a number of these paragraphs are insufficiently particularised and parts difficult to understand.

Characterisation

52. Understood in this way, and standing back, it seems to me that the Petition is based on and pleads a dispute between certain groups of shareholders over how *de facto* control of the Company was acquired and how it has subsequently been exercised. The real dispute is between the Petitioners as shareholders on the one hand and Mr Steckel (said to be acting through Holdings for the benefit of Mr Salinas) on the other, in circumstances where there is alleged to have been an agreement between Mr Steckel (Holdings/Mr Salinas) and certain directors pursuant to which the directors

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(including Mr Steckel) took action with a view to Mr Steckel (Holdings/Mr Salinas) obtaining a substantial shareholding in (and thereby *de facto* control of) the Company and for the purpose of diluting the interests of other shareholders in a manner that was prejudicial and oppressive to them. The agreement (conspiracy) which is relied on was, as I say, for the purpose of giving Mr Steckel (Holdings/Mr Salinas) shares in the Company and control through the shares that were acquired by them. The benefits which the Petition avers that Mr Steckel acquired were, in large part, the shares acquired at an undervalue, and it is reasonable to infer that the *de facto* control which it is alleged that Mr Steckel exercised and exercises for his (and Mr Salinas') benefit was and is at least in large part derived from their position as shareholders.

53. This interpretation of the Petition is consistent with the Petitioners' position as explained at the hearing. The Petitioner's explanation is, of course, of only limited weight in coming to a view on characterisation, which must be based on the Petition and does not justify the characterisation I have provided but it does mean that the characterisation coincides with the case that the Petitioner wishes and intended to make. For the purpose of characterising the Petition, the Court is entitled in my view to take into account and give weight to facts averred in the Petition provided that they are on their face credible and not obviously untrue and to inferences provided they are not hopeless.

54. I note that those alleged to have been parties to the conspiracy represented the majority of the board until January 2020. The new directors who are not alleged in the Petition to be party to the conspiracy were appointed after January 2020. Mr Chapman was appointed on 14 January 2020; Mr Thomas was appointed on 17 March 2020); Mr Hilton was appointed on 27 January 2021and Mr McLoughlin was appointed recently on 22 December 2022. Mr Kidd was appointed on 9 March 2018 but his conduct is challenged in the Petition and Ms Slemmer is his nominee.

55. However, the Petition does not plead facts from which it could be concluded that Amherst (or Mr Chen) were parties to the alleged conspiracy or plan to acquire control of the Company, or facts which establish the terms and nature of Mr Chen's alleged agreement with Mr Steckel. It would therefore be wrong, in my view, to treat Amherst (let alone Mr Chen) as a party to the underlying dispute.

56. It seems to me that Justice Richards' decision in *Re Madera* is distinguishable. There was no question in that case of action being taken by directors at the instigation of and in concert with shareholders in order (or of an alleged conspiracy) to acquire shares in and *de facto* control of a company and improperly to dilute the rights of the petitioners. It was a case involving disputes between the petitioner and the company (the petitioner had previously filed writ proceedings against the company). The company had sought, it was alleged, unlawfully to redeem compulsorily the petitioner's shares, had failed to convene an EGM when under an obligation to do so and had unlawfully converted the petitioner's shares to non-voting shares. It is true that Justice Richards found it to be important that the petitioner did not mention that the directors whose conduct was complained of were shareholders and their role as shareholders and anything done in that capacity was not detailed or referenced in the petition. As I have explained, while the Petition in this case in parts suffers from a similar deficiency, it does plead a case which alleges improper conduct by a shareholder and a conspiracy instigated by a shareholder for the purpose of his benefit (or for the benefit of a person for whom he held or his company held shares).

The Company's participation in the proceeding

57. I have considered the Company's submissions and justifications for being permitted to be the lead respondent in opposing the Petition. I have also noted the Company's evidence (in Anderson 2 at [15]) that responsibility for its participation in the proceeding has been delegated to the Litigation Committee of the board whose members are Mr Hilton, Mr Thomas, Mr Chapman and Ms Slemmer.

58. In light of my view as to the nature of the real dispute on which the Petition is based, I do not consider that the Company should be spending Company funds in defending the conduct of Mr Steckel in instigating and carrying out the alleged conspiracy and plan to acquire *de facto* control of the Company. That must be left to Mr Steckel and Holdings.

59. It follows that the Company may not conduct the whole defence to the Petition. But I accept that in this case, where there is a very substantial group of independent shareholders, who hold a majority of the shares, there is a separate constituency who are not parties to the underlying dispute whose interests need to be protected and who the Company is best placed to protect, assuming that those independent shareholders do not wish to appoint a representative to act for them. The interest of this independent group of shareholders is to be treated as an interest of the Company and it is both necessary and expedient, absent these shareholders wishing to adopt a different course, for the Company to participate in the proceeding for the purpose of protecting their interests.

60. How this is to be done is primarily a matter for the Litigation Committee with the benefit of legal advice. It is neither appropriate nor practicable for the Court to give detailed directions as to what the Company may do and not do. But the Litigation Committee will need to take care not to overstep the mark and ensure that where appropriate and practicable, Mr Steckel and Holdings take the lead and incur the cost of defending against the allegations made against them. The Company will obviously need to have some involvement and oversight of what is being said and done by Mr Steckel and Holdings but this must be for the purpose of protecting the position of the independent shareholders (who will be interested in avoiding damage to the value of the Company, its business and prospects). As I have noted, the final decision of whether the directors have properly spent the Company's money will only fall to be decided subsequently and after the event, when the basis and justification for that expenditure can be properly and fully reviewed.

61. But it does seem to me that the Company needs to demonstrate the independence of its decision making process. I have explained above that the Court is concerned critically to scrutinise the manner in which the Company will conduct itself and authorise expenditure and action in the proceeding. Mr Anderson's evidence as to the existence and membership of the Litigation Committee is very helpful and goes a long way towards providing the Court with the assurances that it needs. But I do think that this evidence needs to be supplemented slightly by a confirmation that the decisions of the Litigation Committee will be taken without the need for consultation with and independently of the other members of the board including in particular Mr Steckel and Mr Chen and on the basis of independent legal advice (this means only that those advising the

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Litigation Committee have confirmed that they are satisfied that they are not conflicted by any relationships with Mr Steckel and Holdings). It needs to be clear that the Litigation Committee's decision making is genuinely independent without improper influence.

Joinder

62. It seems to me that Mr Steckel and Holdings should be joined as parties to the *inter partes* dispute with the Petitioners. Amherst should be joined to enable it to respond to the allegations made against it as respondent and for the purpose of opposing a buy-out order in respect of its shares. There are no allegations made in the Petition with respect to ASP's conduct but since it may be subject to the Petitioners' application for a buy-out order it should be joined to enable it to oppose such an order.

The Parker Order

63. I have reached a different view as to characterisation from that reached by Justice Parker.

64. As can be seen from the note of Justice Parker's ex tempore judgment, Justice Parker did not set out his reasons for the decision he reached. In any event, while there is clearly an overlap between the Petition and the 2021 Petition, it is also clear that the petitions are differently formulated and that the learned judge reached his decision on the basis of different (and more extensive) evidence. I have to base my decision on the Petition and evidence before me.

The need for further particulars

65. While as I have said I am satisfied that I can, and should, determine the proper characterisation of the proceeding at this stage, based on the Petition as currently drafted, I do agree with the Company and the Proposed Respondents that the Petition is in need of further particularisation. I accept that some matters are incapable of being particularised before discovery but the Petition is at present in parts unclear and unspecific such that the Company and the Proposed Respondents reasonably struggle to understand the case made against them. The most cost effective and fair

way to proceed is to require the Petitioners (and to give them the opportunity) to deal with the deficiencies at this stage.

66. In my view, further particulars are required at least in relation to:

(a). [7] – the facts on which the Petitioners' case for joining the Proposed Respondents is based should be set out or cross-referred to.

(b). [19] – the statement that "*It is clear that the reason for not pursuing those alternative financing options is because of the Steckel Faction wishing to ensure that the Company came under their, and therefore Mr Salinas', control"* needs to be clarified. It appears that this is another allegation that the Steckel Faction were implementing Mr Steckel's plan in accordance with their agreement with (and obligations owed?) to him but the statement is cryptic and unclear.

(c). [20] – the capacity or capacities in which Mr Steckel is alleged to have acted when formulating and implementing the plan referred to, and in which the benefits derived from the alleged plan would be received, should be stated. To the extent that it is the Petitioners' case that Mr Steckel was acting (at all times?) for and on behalf of or for the sole or primary benefit of Mr Salinas this should be stated (in this paragraph and in other paragraphs where necessary or appropriate) with any relevant facts which are relied on (beyond those referred to in [17]) that establish or are relevant to the asserted relationship between Mr Steckel and Mr Salinas. The "*best particulars*" provided are sparse.

(d). [21] – whose "intent" is referred to? What facts are relied to establish this?

(e). [24] – what facts are relied to establish that the Steckel Faction decided to procure the issue of the Warrant in response to their appreciation that Mr Minor would not sell his shares and when it is said that the Warrant would give Mr Steckel control is it alleged that Mr Steckel was acting for Mr Salinas (I believe it is but this should be particularised).

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(f). [28] – when is it alleged that the Company's board approved the terms of the RCA and the Warrant (which Mr Theriot signed)? What are the facts relied on to show that Mr Steckel (rather than Holdings) had rights under the Warrant? What facts are relied on to show that the per share price and the interest rates were uncommercial and improper?

(g) [29] – who are the shareholders referred to as "*a majority of the Company's shareholders*" and what facts are relied on to show their "*opposition*"?

(h). [30] – the relevant terms of the term sheet circulated to preference shareholders on 21 July 2016 should be set out or referenced as should the relevant terms of the IRA which are said not to have been complied with.

(i). [33] – further particulars to the extent they are known of the terms of the agreement between Mr Steckel and Mr Chen should be provided or the Petitioners should state that they need to await discovery and will do so thereafter. The Petition pleads that Mr Steckel and Mr Chen were allowed to obtain various rights. To the extent that it is the Petitioners' case that Mr Steckel and Mr Chen (or the other Proposed Respondents) sought and procured the granting of such benefits and exercised powers and right for that purpose, this and the relevant facts should be pleaded.

(j). [34] – further particulars are needed of the facts relied on to support the assertion that Mr Chen had (with Mr Steckel) "*caused the Company to operate without regard to the principles of proper corporate governance and have continued to cause the Company to prefer their interests over those of the Company and its shareholders generally*." Furthermore, sub-paragraphs (a) – (e) need to be redrafted more clearly and precisely to plead what is complained about and to particularise, to the extent that this can be done before discovery, the facts relied on. To be candid, as I indicated at the hearing, I find it very difficult to understand what is being complained of and what is said to have happened in these sub-paragraphs. [34] is important since it sets out the post Transaction conduct relied on by the Petitioners.

(k). [35] – if, as I understand to be the case, the Petitioners allege that the action by the directors referred to were taken pursuant to and to carry out Mr Steckel's plan, [35] should say so. To the extent that the Petitioners rely, for the purpose of making out a case that it is just and equitable to wind up the Company because the directors have acted with a lack of probity justifying a loss of confidence by the Petitioners, on the action of Mr Steckel (and Mr Chen) in procuring and assisting the directors in their breaches of duty and in acting to protect the directors or failing to act to remedy the breaches and remove the directors, the Petition should set out the relevant facts relied on to support this assertion.

(l). I would note that at the hearing Mr Valentin indicated that it was the Petitioners' case that the directors were acting at the direction of and under the control of Mr Steckel. If that is the position, the Petition should say so and set out the facts relied on.

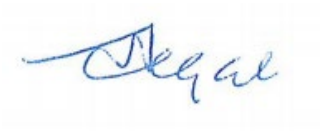
67. These are the issues that seem to me to need to be better particularised and addressed but it will be a matter for the Petitioners and their advisers to decide precisely how to amend the Petition

Other issues arising in relation to the Petition

68. I should add that I have noted the other challenges made to the Petition by the Company and the Proposed Respondents. I shall simply say at this stage that I can see the force of a number of these.

69. One point which is troubling is the reliance in the Petition only on conduct that took place in the period 2016-2018. Whether or not it is just and equitable to wind up a company must be decided in light of the circumstances which exist at the date of the presentation and the hearing of the petition. Past wrongdoing is generally insufficient. It is not clear to me that the Petition makes out a case and pleads relevant facts that would support the conclusion that the misconduct relied on has continued and exists as the date or presentation of the Petition.

70. Another issue relates to the asserted relationship between Mr Steckel and Holdings and Mr Chen and Amherst. Attention needs to be paid to the basis on which it is said that the individuals were acting rather than the company and the facts relied to support the Petitioners' averments on this.



The Hon. Mr Justice Segal
Judge of the Grand Court, Cayman Islands
16 February 2023

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