

**SUPREME COURT OF NOVA SCOTIA**

**Citation: *Hong v Lavy*, 2017 NSSC 329**

**Date:** 2017-12-15

**Docket:** *Halifax*, No. 467757

**Registry:** Halifax

**Between:**

Shae Hong and Hong and Co.

Applicants

v.

Danny Levy, Star Elite Inc. and Elite Group Inc.

Respondents

**Judge:** The Honourable Justice Frank C. Edwards

**Heard:** November 21, 21 & 23, 2017 in Halifax, Nova Scotia

**Written Decision:** December 15, 2017

**Counsel:** Roderick (Rory) H. Rogers, Q.C., & Christopher W. Madill  
for the Applicants  
Jane O'Neill, Q.C. & Peter M. Rogers, Q.C., for the  
Respondents

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**By the Court:**

**A. Summary:**

I have granted the Applicants' motion for an Interlocutory Injunction / Restraining Order. I was satisfied that the Applicants had made out a strong *prima facie* case of shareholder oppression by the majority shareholder Mr. Lavy (Lavy). When the minority shareholder, Mr. Hong (Hong), questioned some examples of questionable financial transactions by Lavy, Lavy acted swiftly to financially cripple Hong and ultimately drive him out of the company.

I was satisfied that, without the injunction, both the company and Hong would suffer irreparable financial harm. In any event, I was satisfied that the only fair thing to do was to level the playing field until the Application can be heard. The Injunction / Restraining Order should do that. Given my findings on the first two criteria, the balance of convenience was a foregone conclusion favoring an injunction.

**I. Introduction:**

[1] This is a motion for an interlocutory injunction pursuant to section 5 of the Third Schedule of the **Companies Act** pending the merits hearing scheduled for June 2018.

[2] The Applicants, Shae Hong and Hong and Co. seek an interim order: (a) prohibiting the Respondents from removing him as director and Chief Executive Officer of Sensio Inc. (“Sensio”) or otherwise interfering with his ability to execute the duties of his corporate office; (b) requiring the Respondents to disclose certain financial and other information to the Applicants; (c) prohibiting the Respondents from engaging in any further depletion of the corporate treasury of Sensio without the Applicants’ prior approval; (d) requiring the Respondents to reinstate the profit draws/commission the Applicants drew from Sensio until August 2017; and (e) requiring the Respondents to make a payment of \$380,000 (USD) to Hong in December 2017 to satisfy his personal income tax obligations, as occurred in the last fiscal year and as clearly occurred in past years based on the Reconciliations prepared by Danielle Agnew which all show sizeable payments being made in December of each year.

[3] This matter involves two almost equal shareholders in a small, privately held company who are “at war”. It is scheduled to proceed to a full hearing on the merits in June 2018. At that hearing, the Court will be called upon to make a final determination on the claims of oppression advanced by the Applicants and the “counterclaims” of oppression advanced by the Respondents. No such final determination is necessary at this point.

[4] The Applicant, Hong, is the beneficial owner of 49.95% of the shares in Sensio Company through the Applicant, Hong and Co. Sensio Company holds 100% of the shares of an operating company, Sensio, which manufactures and sells small kitchen appliances and cookware, primarily in the United States, and which has annual revenues in excess of \$140,000,000 (USD). The Respondent, Danny Lavy, is the beneficial owner of 50.05% of the shares in Sensio Company through the Respondent, Star Elite Inc. (“Star Elite”).

[5] Hong and Lavy are the only directors of Sensio Company and Sensio. Hong is the President of Sensio Company and the Chief Executive Officer of Sensio. Lavy has no operational role within Sensio.

[6] Since the incorporation of Sensio Company and Sensio in April 2003, the financial and accounting functions of both companies have been managed exclusively by the Respondent, Elite Group Inc. Elite Group Inc. is a company owned and controlled by Lavy. Despite his executive role with Sensio, Hong has no control over Sensio’s financial and accounting operations.

## **II. The Applicants’ Position: (as set out in their Post Motion Submission)**

[7] Over the course of the past 18 months, Hong says he discovered that Sensio, since 2013, had issued loans totalling more than \$21,000,000 (CAD) to Lavy, or to

entities in which Lavy has a direct or indirect interest. Hong says that these related party transactions were made without Hong's advance knowledge, consent or approval, either as an executive officer, a director, or an ultimate shareholder of Sensio.

[8] In August 2017, Hong expressed concern to the Respondents with respect to these related party transactions. He requested financial information from the Respondents with respect to these transactions. Draft financial statements for the 2017 fiscal year (February 2016 to February 2017) provided to Hong on August 28, 2017 showed a further increase in the amount of these related party transactions to a sum in excess of \$19M (CAD), from approximately \$11M (CAD) as of February 2016.

[9] The Applicants' position is that the loaning of monies from Sensio to Lavy personally, or to companies associated with him, and especially to companies outside what the Respondents have described as the "Elite Group", establish both a strong prima facie case of oppression or a serious issue to be tried in relation to claims of oppression under the Third Schedule of the Nova Scotia Companies Act.

[10] Hong says that through his control of the financial affairs of Sensio, the conduct of Lavy and the corporate Respondents' has been oppressive and unfairly

prejudicial to, and has unfairly disregarded, the Applicants' interests as minority stakeholders in Sensio in relation to:

(a) The non-recoverable "bad debt" write-off of \$1,103,364 (CAD) in relation to a "company under common control" reflected on the FY2016 Financial Statements. This relates to a loan made by Sensio to Prominence Décor LLC, a Lavy company which is not part of the Elite Group, so that Prominence Décor LLC could pay that money to Elite Lifestyle Products LP, a Lavy company which is also not part of the Elite Group;

(b) Additional loans to Lavy personally or to companies in which he has a direct or indirect interest which are not reflected on the Reconciliation statements as "drawings" taken by Lavy as part of his profit distributions from Sensio;

(c) The failure to "adjust" the costs of Lavy's private plane for 2013 to 2017, totalling five years at an annual cost of \$600,000 (USD) for a total of \$3,000,000 (USD);

(d) The failure to account for an "adjustment" of overhead for the years 2011 through 2017 in the total amount of \$2,106,714.55 (USD);



(e) The loan of \$5,083,437.75 (CAD) reflected on the draft FY2017 financial statements to 9252-8611 Quebec Inc., a Lavy company that is not part of the Elite Group; and

(f) The intercompany loans between Sensio and other member of the “Elite Group” described at paragraphs 4 of the Affidavits of both Marla Ruttenberg and Danny Lavy. The Applicants do not accept that the full amount of any of these loans were legitimate or necessary. That said, the legitimacy of those loans is an issue what will be addressed at the merits hearing in June 2018.

[11] Over and above these examples of improper or oppressive behaviour are an entire series of additional oppressive events after Hong made inquiries as to the appropriateness of the very significant intercompany loans in late August of 2017.

[12] On August 29, 2017, Hong requested specific detailed information from the Respondents regarding the related party loans.

[13] The following day, August 30, 2017 Marla Ruttenberg, the CFO of Elite Group, as instructed by Lavy, told Hong that Sensio “[would], for the foreseeable future, cease to make monthly payments to Hong & Co”.

[14] The result was that the Applicants' monthly income was slashed from an amount in excess of \$73,000 (USD) to an amount below \$13,000 (USD).

[15] Lavy has drawn Hong's wife into the matter in an attempt to bully and intimidate Hong, ominously indicating to Erica Hong that he would get the information he wanted from "other sources" if she did not provide him with what he was looking for.

[16] Lavy, has accused Hong of improperly socializing with Sensio customers and buying them gifts, and improperly taking part of his remuneration from Sensio – when this was in fact done with the Respondents' full and complete knowledge and approval - in the form of "TRV" expenses which are all borne by Hong personally.

[17] Most recently, the Respondents, at Lavy's direction, have stopped paying all of Mr. Hong's business expenses even though Lavy himself admitted under on cross-examination that he had no reason to dispute their legitimacy.

[18] All of these acts, the Applicant's say, individually and cumulatively, constitute acts of oppression.

[19] Lavy's control over the treasury of Sensio to the exclusion of Hong provides him with a significant degree of leverage and control over Hong. Lavy does not

like to answer questions; this much was evident from his time under cross-examination where his general demeanour was hostile and he did everything he could to eschew and obfuscate on the most basic of questions.

[20] Hong's position is that, as is his right as a shareholder and his responsibility as CEO, he asked questions of Lavy regarding millions of dollars which had been withdrawn from his company. Lavy did not like those questions. Lavy did not want to answer those questions. Because he did not like those question and did not want to answer them, Lavy cracked the financial whip on Mr. Hong and cut off his regular draws not because there was any legitimate business reason to do so – indeed, the evidence suggests that Sensio is in a better position currently than it was at this point last year – but because he considered Hong's inquiries to be impertinent. In short, Lavy wishes to use his control over the finances of Sensio to punish Hong. That is oppressive.

[21] Hong says that no other conclusion can be drawn other than that the Respondents' goal was to silence Hong's inquiries. As had happened in the past, Lavy yanked the financial leash on Hong to get him to beg Lavy to turn the financial tap back on so he could cover his family's living expenses. Those bullying tactics did not work this time - Hong had finally had enough. Instead of

running to Lavy with hat in hand to beg for a livelihood from his business, he commenced this proceeding to seek justice from the Courts.

[22] Hong says the Respondents' goal now is to ensure that Hong does not have the ability to fund litigation against the phalanx of lawyers they have hired. While Lavy flies around the world in his multi-million dollar aircraft and has his team of lawyers writing his letters, the Respondents are doing everything in their control to ensure that Hong is paid only a fraction of what he has been paid over many years in the past, in the hope that Hong will exhaust his resources, and not even be able to afford any counsel at all.

[23] Hong says Lavy has the ability to turn Hong's financial world upside down on a whim, and is using this to bring Hong to heel. He has exercised that ability in the past. He exercised that ability on August 30, 2017 when he terminated Hong's profit draw. He has continued to exercise that ability even in the face of this proceeding, the most recent example being the completely indefensible refusal to pay business expenses submitted by Hong when Lavy himself has no reason to dispute their legitimacy. The fact is that Lavy will continue to exercise that ability whenever the opportunity presents itself in order to achieve his goal of snuffing out Hong's ability to hold him accountable for his conduct at the merits hearing in

June. He will almost certainly be successful in achieving that goal unless the Court steps in and levels the playing field by re-establishing the status quo.

[24] The pre-August 28, 2017 conduct of the Lavy and the Respondents with respect to the management of Sensio's financial and accounting affairs was oppressive to the Applicants as minority shareholders. The post-August 28, 2017 conduct of the Respondents which constitutes a bald, transparent and blatant attempt to cripple Hong financially so that he cannot pursue his rights as a minority stakeholder against the Respondents is oppressive.

[25] The Applicants seek an interim order which they say would: (i) preserve the status quo as it existed prior to August 30, 2017, pending the merits hearing; (ii) provide the Applicants with access to important and required financial information; and (iii) restrain the Respondents from engaging in any further unauthorized acts of self-dealing pending a hearing on the merits. Such an order will ensure that fairness is observed, that justice is done between the Parties, and that the playing field, now grotesquely tilted by Lavy in his favour, is levelled. Such an order will allow the parties to then proceed to address the matter in dispute between them at the hearing on the merits.

### **III. The Respondents' Position: ( as set out in their Post Motion brief)**

[26] On the other hand, the Respondents' say that the real reason that the Applicants have brought the Application and are seeking emergency relief from the Court is that it is clear that Sensio is no longer being operated in the irregular way that it has been in the past. Under Ms. Ruttenberg's direction, it will be subject to financial controls and accounting that conform with appropriate business and accounting standards. To date, Hong has been content to take significant funds from Sensio to finance his lifestyle but claims that he has not even read the financial statements that, on their face, show that Sensio cannot continue to do so. Stricter financial controls are not in Hong's interest and the real reason he has started this Application and brought the motion for an injunction is to resist those changes.

[27] Ms. Ruttenberg was hired as CFO in February 2016 and she immediately began to reform the way that Sensio is run. Under her mandate, Sensio's financial statements are now audited, the Company is now paying income tax and expenses must now be supported and will be paid only if they are incurred for true business purposes. Most importantly, the shareholders will no longer be able to take money from the Company using a system that ignores the Company's actual profit and results in the Applicants drawing more from Sensio than the Respondents. The

practice of using “notional” profits to reward the shareholders, a practice that has resulted in a significant shareholder deficit, cannot continue.

[28] At the outset of his business relationship with Hong in 2003, Lavy financed Sensio’s operations and, over the years, has continued to financially support Sensio’s operations by providing collateral and a personal guarantee to obtain a credit facility (the pooling agreement) from the HSBC Bank, which benefits Sensio as well as the other entities in the Elite Group. Although Hong indirectly holds 49.95% of all issued and outstanding shares of Sensio, he has never assumed any personal financial risk in connection with the business and refuses to do so now.

[29] For many years, Sensio’s two shareholders met once a year to agree upon the way that each would take money out of Sensio. The result of these agreements is what the parties refer to as “reconciliations”. Taking money from Sensio in accordance with these “reconciliations” is irregular and the amounts taken do not reflect Sensio’s profitability, which can only be determined by looking at Sensio’s financial statements.

[30] Each of the shareholders received salary in the conventional way. Hong received \$250,000 from Sensio and Lavy received the same amount from Elite Group Inc., which, according to Ms. Agnew, was charged back to Sensio as a portion of the Elite Group overhead charges allocated to Sensio (52% in F2017).

[31] The other amounts that the shareholders took from Sensio are not conventional. The irregularity in this practice is two-fold. First, through the reconciliations, the shareholders agreed to distribute “notional” profits, not real profits which are properly reflected in the financial statements. Second, the shareholders did not take funds in the form of dividends, but instead took the money out to cover personal expenses and commissions/management fees in the case of Hong; and as shareholder loans in the case of Lavy. If they had taken their return on investment as dividends in the conventional manner, the amounts distributed would have been taken from the retained earnings of the company as shown on the balance sheet in the financial statements and would automatically have been taken pro rata according to the respective shareholding percentages of the shareholders.

[32] Instead, the shareholders met each year and agreed to apply various adjustments to the financial statement amounts. This practice had the effect of creating a notional profit figure for the year that the shareholders considered available for distribution. This is the exercise shown on the left-hand side of the page on the reconciliation sheets in Danielle Agnew's Affidavit. Invariably the notional profit figure significantly exceeded the financial statement profit (the real profit).



[33] The shareholders would then take their share of these notional profits for the year and deduct that from the cumulative balance available from previous years. This is reflected on the right hand side of the page of the reconciliation statements attached to Ms. Agnew's Affidavit. Since the amount shown for notional profits was higher than the real profit, the difference between the cumulative notional profits and the actual profit shown on the balance sheet would naturally grow each year unless the shareholders refrained from taking their full "notional" profit share each year. This is the reason the shareholders agreed to leave an amount in the Company and also explains why that amount had to increase over time from \$3 million each to \$4 million each.

[34] Until Ms. Ruttenberg arrived as CFO, the two shareholders may not have appreciated the magnitude and consequences of engaging in this exercise. Ms. Ruttenberg, who was hired to specifically clean up Sensio's finances, explained that this practice cannot continue. In May 2016, she explained to Hong that the notional equity he asserted to be in the Company based on reconciliation documents was a "fiction" and was not available for distribution.

[35] The Respondents say that it is inconceivable that Hong did not understand that the reconciliations did not reflect the financial statements both of which he received every year, whether he chose to read them or not. Hong took as much

money out of Sensio as Lavy would allow, and more, through TRV expenses. Hong abhorred the idea of the Company paying taxes on profits. He understood that if the Company paid taxes, there would be less cash to distribute to him. It is clear from Ms. Ruttenberg's affidavit, at paragraph 10, that Hong strongly resisted Lavy's initiative in having the financial statements of the Elite Group audited (which led to greater scrutiny of Sensio's stand alone financial statements which are issued on a Notice to Reader basis). The insistence on having the combined financial statements audited and on Ms. Ruttenberg's insistence on tightening the way that expenses are allowed and funds are accounted for were resisted by Hong because these measures impacted the cash available to Hong.

[36] The Respondents argue that the real issues underlying Hong's allegations of oppression are not the ones asserted in the Notice of Application in Court. Hong's purported surprise at the fact that notional equity in the reconciliation statements was completely different from actual retained earnings or deficits on the financial statements, and his supposedly belated understanding that Lavy was taking his share of the profits by shareholder loans, is not credible. Those things were never hidden from him but were openly disclosed in the financial statements that he himself approved each year. Even if it were true that he did not look at the financial statements, he must accept that the fault rests with him and not with

Lavy or others. As a director and officer of Sensio, Hong cannot rely on his failure to take any interest in Sensio's finances as a form of oppression. Lavy also acknowledges not reading much - but unlike Hong, he accepts that he is bound by the financial statements and must act in the best interests of Sensio.

[37] Mr. Kriel's affidavit, which was not contested by cross examination, states in paragraph 20 that Hong asked for and received the F2014 and F2015 financial statements for his review. It is hard to believe that Hong did not read a basic component like the balance sheet. Hong's own original affidavit sets out at pp 12-14 numerous excerpts showing related party loans. Ms. Agnew testified that the second and third pages of her reconciliation document (except footnotes) were also provided to Hong. These included Lavy's shareholder loans taken as draws. Hong had every opportunity to inquire how Lavy was taking his profit draws, if he cared. One of the most striking features of the record is the absence of any record of complaints, inquiries or concerns of any kind raised by Hong until days before the Notice of Application was filed in these proceedings. Lavy testified that nothing was raised until recently. Ms. Agnew's affidavit (paragraph 27) indicates she answered any questions Hong had about Sensio, and Mr. Kriel (paragraphs 22 and 26) states that Lavy directed him to provide any information requested by Hong or the Sensio operating personnel.

[38] The real cause of the shareholders' dispute is twofold: firstly, Hong realized that Ms. Ruttenberg was determined to have the Company finances operated and accounted for properly; secondly, Lavy drew out some of his cumulative share whereas it had been his historical pattern of under-drawing (shown on the large blow-up of Exhibit G to Hong's original affidavit) that had previously left sufficient cash in the Company to allow Mr. Hong to overdraw as much as Lavy permitted.

[39] Ms. Ruttenberg was hired with a specific mandate to "clean up" the company's financial practices – which for her entailed steps like removing expense items which would not stand up to scrutiny by tax auditors, paying corporate taxes on corporate profits, and weaning the shareholders from continuing to draw notional profits from the Company when the balance sheet did not warrant it. She would not tolerate being forced to acquiesce to either shareholder on matters of adherence to professional accounting and corporate standards, and both shareholders suffered from steps she insisted upon, such as eliminating expense accruals for Chinese agent fees, and paying corporate taxes on time. Unlike her predecessors, she would be unlikely to approve a US \$65,000 expense for renting a summer home in the Hamptons for a shareholder and his family on the basis that

customers came to parties there, even if it were coded as a “TRV” (personal) expense.

[40] The subtle “TRV” coding, looking similar to genuine business expenses except for the addition of those three letters on expense reimbursement reports, which might appear to be a coding for a travel expense to tax auditors, was in fact a code for a personal expense being run through the company by Hong. Claiming these expenses as corporate expenses in the financial statements but as draws in reconciliations had two beneficial features for Hong. First, it helped reduce or eliminate corporate taxes, a major objective of Hong (because it increased the notional profits). Second, because the expense was reimbursed once approved by Ms. Agnew, it provided a mechanism for Hong to draw out money from the Company without having to have her ask for a special cash withdrawal or tax draw that would attract more scrutiny from Lavy. Throughout the period since F2011 (when the records start in the affidavits), Hong has consistently overdrawn notional profits beyond the level permitted by the agreement between the parties.

[41] In effect, Sensio and therefore indirectly Lavy, was lending money to Hong to the extent of the overdrawn amount. It was logical for Lavy’s permission to be required any time Mr. Hong sought to exacerbate his deficit, and it was equally logical that Lavy did not require Hong’s permission to take some of the share that

was owed to him, keeping in mind that Mr. Lavy had left more in the treasury than he was obligated to do. These TRV expenses effectively allowed Hong to overdraw about \$200,000 more per year without much scrutiny, than would otherwise be available. The TRV expenses are accounted for on both the left hand and the right hand side of the reconciliations – so Lavy does not ultimately pay for the TRV, but it is a mechanism both to reduce corporate taxes and to quietly obtain a further overdraft from Hong's notional equity account.

[42] Hong was disingenuous in his evidence when Your Lordship was obviously seeking information from him on the reason for doing TRVs. He pretended that he did not know how they were treated for tax purposes. But he stated in his affidavit that they were personal expenses with a business nexus. There is only one reason for having a business nexus, which is tax deductibility. Every year TRVs are shown as an add-back to the financial statements on the left hand side of the reconciliations, but described as personal expenses. So they were taken as expenses on the financial statements but not treated as real expenses for calculating notional profits.

[43] By August 2017, Hong had, according to his own evidence, retained counsel for the purpose of seeking legal advice about his shareholder rights for the previous 9 months. A meeting on August 21, 2017 was an attempt to see if Lavy could be

induced into offer a high purchase price for the Sensio business, by bringing in a notional purchaser who had been given some financial information but who had obviously not conducted due diligence and offered a price that did not reflect the potential tax issues and other concerns that would have shown up in a due diligence exercise. At that meeting, Hong discussed that both Macy's and J.C. Penney had closed stores which would affect sales. The industry was feeling the effects of online competition and Sensio was not active in that area of the business. Accordingly, the business required investment in product design, it had to hire people with online selling experience and Lavy mentioned the need to invest in more upscale brands. All of these factors, together with the fact that Sensio was now paying corporate income taxes, would result in less money being available for notional profit distributions. When it was obvious that the strategy of having Lavy buy him out for a high price was not going to work, he filed his oppression claim 10 days later.

[44] The oppression claim is not the result of Hong learning information about loans for the first time. It is the result of Hong's ability to draw too much money out of the company being curtailed.

#### **IV. Issues**

[45] To succeed on the motion, the Court must be satisfied that: 1) the Applicants have established a strong prima facie case of oppression; 2) the Applicants will suffer irreparable harm if the injunction is not granted; and 3) the balance of convenience favours the relief the Applicants are seeking.

#### **V. 1. Prima Facie Acts of Oppression before August 29, 2017**

[46] **The ELP Loan:** \$1,103,364.00. The Applicants' summarize the transaction as follows:

Prominence, a Lavy company outside of the Elite Group in which Hong has no interest, was owed money by Elite Lifestyle Products LP ("ELP"), another Lavy company outside of the Elite Group in which Hong has no interest. ELP did not have the ability to reimburse Prominence for advances made on its behalf by Prominence. Thus, the Respondents caused Sensio to pay Prominence over a million dollars to satisfy a debt owed by ELP to Prominence and recorded it as a loan owed by ELP, which is now defunct. In other words, Sensio paid money to one of Lavy's companies to satisfy a debt owed to it by another of Lavy's companies.

(Applicants' Post Motion Brief Para 57)

[47] This was a non recoverable bad debt write-off. The Respondents acknowledged the debt at the outset of this litigation and agree that a credit is due to Hong for 49.95% of the total. At the same time the Respondents point out that the loan was noted in the 2016 financial statement. That statement was signed and



approved by Hong. They state further that Hong never asked for details of the debt.

[48] When assessing the significance of the ELP loan, I am careful to consider the way in which Hong and Lavy did business. It was very informal. Neither Hong or Lavy is an accountant. I accept Hong's evidence that he trusted Lavy. Hong had nothing to do with the financing of Sensio; Lavy had exclusive control of the finances. I accept that, while Hong signed off on the yearly financial statements, he did not read them. At least he did not read them closely enough to notice this particular entry. Hong testified that he is "embarrassed" by that fact. I am satisfied that Hong did not know about the ELP loan until after this litigation commenced.

[49] If the ELP loan was simply a mistake, it was a big one. For the purposes of this injunction motion, it lends credibility to Hong's contention that Lavy was self dealing with Sensio's money. The loan had to have been made with Lavy's knowledge and consent. Lavy would have been aware that such a loan (which was of no benefit to Sensio) should have been accounted for in Lavy's drawings. It is ironic that Lavy is effectively arguing that Hong should not have missed it but understandable that Lavy did.

[50] I accept Hong's counsel's suggestion that this bad debt might never have been acknowledged save for the commencement of these proceedings. I also accept that reimbursement of this debt alone would cover Hong's requested 60,000.00 (USD) payments for September, October and November and Hong's \$380,000 (USD) tax payment due this month.

[51] Below I identify other accounting problems which come up to the serious issue threshold. This one might be seen as the tipping point where a number of serious issues become a strong *prima facie* case.

**2. The "9252-8611 Quebec (9252) Loan; \$5,083,437.75:**

[52] 9252 is a Lavy company outside the Elite group. It is not part of the credit facility for the Elite group and there is no legitimate reason for it to receive money from Sensio.

[53] The Respondents point out that the entry was referenced in the draft financial statements for Fiscal Year 2017 which contains a note that they were "subject to change". They say that it was a mistaken entry and that the external accountants have made a Journal Entry to correctly account for it. "this is simply the correction of an error and there is no evidence of anything nefarious about it". (Respondent's Post Hearing Submissions, Para. 67).

1. The Applicants say that “in the absence of such an explanation by Ms. Ruttenberg, the logical inference here is that the Respondents knew that Hong would discover that Lavy had siphoned off more than \$5M (CAD) to one of his companies outside the Elite Group and they took steps to “correct” or “wash” the transaction to make it appear as though the loan had been made to an entity within the Elite Group. If there was a benign explanation for this loan, it defies reason that one would not have been provided by the Respondents as part of their affidavit filings on October 24, 2017. The fact that nothing is said about the loan to 9252-8611 Quebec Inc. is telling”. (Post-Motion Submission of the Applicants, Para. 109).

[54] It is not my function to resolve this issue at this interlocutory stage. It may ultimately turn out that the Respondents are correct. At a minimum, in the context of all the evidence I have heard, this \$5 million plus entry constitutes a serious issue to be tried. When one party raises enough serious issues, one has to consider that perhaps their cumulative effect is to transform the matter into a strong *prima facie* case. What is clear is that access to the external accountants’ records will be required to discover how this entry came to be made.

### **3. Lavy’s charges for the use of his personal jet plane:**

[55] Again I heard a lot of conflicting (and complicated) accounting evidence on this issue. Lavy and Hong had agreed that Lavy’s share of the notional profits would be adjusted each year (by US \$600,000) to account for Lavy’s use of the plane. Hong claims that the plane expense has not been properly accounted for and Lavy says it has. The plane expense is supposed to be shared 50/50 between

Sensio and the other members of the Elite group. Resolution of this debate will thus require access to the relevant Elite records.

[56] The Respondents noted the following in Paragraph 18 of their Post Motion Reply:

“In any event, the treatment of the aircraft and overhead issues need to be dealt with at the merits hearing when the court will have more opportunity to consider the evidence outlining the history of the parties’ agreements and reconciliations from the inception of the business relationship, and can determine, likely with assistance from experts filing reports”.

[57] Although the Respondents are confident of an outcome in their favor, I take the above comments as an acknowledgement that there is a serious issue to be tried with respect to the aircraft expenses. There is an abundance of accounting evidence re the aircraft. I am satisfied that the aircraft expenses constitute a serious issue to be tried. Lavy testified that the plane costs approximately \$2 million a year in operating costs alone. He also said that he goes everywhere in the plane (including to a wedding in Israel earlier this year). It would be important to know to what extent the plane is used for business related purposes as opposed to Lavy’s personal use, and how each is accounted for. The key issue of course, is how the accounting for the plane impacts Lavy’s share of Sensio’s profits.

**4. Loans to Lavy personally (or to his companies that are personal in nature):**

[58] Same problem as identified with the aircraft expenses above. I am satisfied that the Applicants have at least raised a serious issue to be tried. The above quoted Respondents' Reply, paragraph 18 is equally applicable here. There is a serious issue to be tried.

## **VI. Acts of Oppression after August 29, 2017:**

### **(a) Unilateral termination of Hong's profit draws:**

[59] As noted earlier, Ms. Ruttenberg was engaged as Elite Group's CFO in February, 2016. In May, 2016 she advised Hong that the notional profits set out in the reconciliations "did not exist" and that the cash was not in the company. I am satisfied that this came as a surprise to Hong and that he became concerned. There is no evidence that Hong asked for an explanation from Lavy or Ruttenberg. He did seek legal advice months later to determine his legal options.

[60] The next significant event did not take place until August 21, 2017. The Respondents summarized what happened as follows:

(At that time) Hong arranged for Lavy, Ms. Ruttenberg, Mr. Rutigliano (Sensio's President) and Ms. Normandeau (General Counsel for the Elite Group) to join him for a meeting with representatives of a publicly traded company which expressed an interest in purchasing a part of the business. Although Ms. Ruttenberg had not provided the documents requested to initiate the due diligence process, it was evident during the meeting that Hong had provided some financial information and the publicly traded company made an informal proposal to purchase an interest in the Company. The proposal would have resulted in Lavy

losing his majority interest in Sensio and he considered the price unrealistic in light of the fact that the Sensio could not have, at that time, satisfied the due diligence process. Lavy refused the proposal and that same day Hong asked that Lavy purchase his shares of Sensio for US \$20 million (approximately 50% of the evaluation that had been tabled earlier that day). Lavy told him that he had no interest in buying him out for that price. (Respondents' Post Motion Brief, Para. 52)

[61] Between May 2016 and August 21, 2017, Hong undoubtedly reassessed his position in Sensio. In addition to his concerns about Sensio's internal finances, he would also have been aware that both Macey's and J.C. Penny (two of Sensio's biggest customers) had closed stores. Hong would have been aware that Sensio was not well positioned to deal with online competition. In that situation it is not surprising that he sought a buyer for Sensio or, alternatively, sought to have Lavy buy him out. Hong knew Lavy well enough to know what would happen the moment he started asking questions about what Lavy was doing with Sensio's money. Thus, when the attempts to sell Sensio or have Lavy buy him out went nowhere, Hong had only one move left; to start asking questions. The Applicants continue the chronology in their brief:

“115. Hong wrote to Ms. Ruttenberg on August 29, 2017 requesting information with respect to the contents of the draft FY2017 Sensio financial statements he received the day before.

...

117. On August 30, 2017 - one day later – Ms. Ruttenberg wrote an email to Hong advising him that “... Sensio Inc. will, for the foreseeable future, cease to make monthly payments to Hong and Co.” This put an end to the \$60,000 (USD) monthly commission/profit draw that Hong has taken out of Sensio for years.

No valid business reason was identified by Ms. Ruttenberg in this email, which reads in full as follows:

*Further to our meetings of August 21, 2017 during which you expressed concerns for the future of our business and industry, Sensio Inc will, for the foreseeable future, cease to make monthly payments to Hong & Co.*

*We are also looking into other cost cutting endeavors as part of a right-sizing exercise needed to keep the business back on track during these uncertain times.*

118. At paragraph 96 of the Affidavit of Marla Ruttenberg, Ms. Ruttenberg offers the following explanation regarding the events giving rise to her email:

*Following the meeting of August 21, 2017, in light of the agreement by the principals that that monthly payment to Mr. Hong of US \$60,000 was contingent on Sensio's profitability, Mr. Lavy directed me to inform Mr. Hong that Sensio would for the foreseeable future cease to make the monthly payments to Hong and Co. which I did on August 30, 2017. My email to Mr. Hong is reproduced at paragraph 238 of Mr. Hong's Affidavit. At that date, the financial information showed a loss of more than US \$2 million. The financial information is attached as Exhibit "U".*

(Emphasis added)

...

120. This notion of the payment of the monthly commission/profit draw of \$60,000 (USD) being contingent on profitability is also reflected at paragraph 31 of the Affidavit of Peter Kriel, formerly the Director of Finance at Elite Group. It states, in relevant part, as follows:

... In addition to a set annual salary, Mr. Hong generally received a distribution of profits of US \$60,000 per month (described as "commissions" on the reconciliations). Further to the agreement of the principals, the monthly payment to Mr. Hong of US \$60,000 was contingent on Sensio being profitable ...

(Emphasis added)

121. The monthly payments of \$60,000 (USD) were made to Hong as a draw on his entitlement to 49.95% of the profits of the Sensio for the year in each of March, April, May, June, and July 2017. Importantly, these payments were made in each of those months even though the budget for Sensio for FY2018 (March 2017 to February 2018) anticipated net losses for each of those months save July, where a modest net income (profit) of \$16,082 was anticipated.

122. Hong's monthly payments of \$60,000 (USD) have been made with regularity throughout the year. In certain months, the amounts may have been less, but they were never eliminated and were generally "trued up" in later months when Sensio generated significant returns.

123. For example, the backup documents to the 2016 Reconciliation contained in the Affidavit of Danielle Agnew show that Mr. Hong received: \$30,000 (USD) in March; \$45,000 (USD) in April; \$60,000 (USD) in May and June; \$120,000 (USD) in July; \$30,000 (USD) in August; \$280,000 (USD) in September; \$235,000 (USD) in October; \$135,000 (USD) in November; and \$60,000 (USD) in December.

124. For FY2017, the Reconciliation documents at Tab "N" to the Affidavit of Danielle Agnew show \$60,000 (USD) payments being made for each of March through July, a \$30,000 (USD) payment in August, a \$90,000 (USD) payment in September, \$60,000 (USD) payments in each of October and November, and December payments of \$260,000 (USD), \$191,000 (USD) and \$60,000 (USD), and a \$60,000 (USD) payment in February.

125. Contrary to what Lavy and Ms. Ruttenberg have asserted on this motion as the basis for terminating the monthly payments to the Applicants, this establishes that the \$60,000 (USD) monthly profit draws were made based on Sensio's projected annual profits and were not dependent on Sensio's financial position in any particular month.

126. The rationale attributed to the termination of Hong's monthly remuneration by the Respondents is self-serving and nothing more than a shallow attempt to couch a clearly abusive decision with an air of business legitimacy which is simply not supported by the facts or information presented in their own affidavits.

[62] I agree. Undoubtedly, after the June, 2017 hearing, shareholder draws will have to be formalized and based on actual rather than notional profits. I accept the Respondents' evidence that Sensio's position in the marketplace is facing challenges particularly with respect to online sales. But I do not accept that these challenges justified the abrupt curtailment of Hong's remuneration. For the interim period Hong should continue to receive his usual monthly draws. Sensio can afford to do it in the short-term. Rutigliano's evidence is that the company



will generate \$4.5 million in profits this year. While I acknowledge the Respondents' arguments about the usefulness of that figure, I am satisfied that it does speak to the company's financial health and, in particular, its ability to pay Hong during this litigation.

[63] I also agree with the Applicants' submission that this decision was unfairly prejudicial to Hong. It unfairly disregarded Hong's expectations and interests as a minority shareholder. It was a clear-cut and unequivocal act of oppression by Lavy against Hong.

**(b) Lavy's Refusal to continue financing Sensio:**

[64] As noted, the original shareholder's agreement for Sensio saw Lavy as the majority shareholder (50.05%) with Hong (49.95%). It was obvious during Lavy's cross-examination that he does not consider himself and Hong to be on near equal terms. Lavy considers himself as the one in control and is clearly dismissive of the notion that Hong might be his near equal.

[65] Levy kept exclusive control of, and responsibility for, the financing of the company. This was achieved through a pooling agreement with HSBC Bank which covered all of Lavy's companies in the Elite Group (including Sensio). I am satisfied that this arrangement was exactly as Lavy wanted it; exclusive control of

the financing gave him exclusive control of Sensio. It was Lavy who determined what money Sensio spent and, in particular, how much money went to Hong. Hong testified that he does not have a corporate credit card. He is thus obliged to use his own credit card for all company related expenses he incurs. Hong must then seek reimbursement from Sensio (Lavy) for even the most minor expenses. That was fine when he and Lavy were on good terms. But when war broke out, Lavy used his power to financially immobilize Hong.

[66] As long as everything was going well, Lavy was more than content to finance Sensio using his own collateral and personal guarantees. But now that the shareholders are at loggerheads, Lavy has decided that Hong has got to share the financing load.

[67] Again, this obvious abuse is put forward under the guise of an objective business decision. Hong had questioned the pooling agreement and indicated that Sensio should be financed as a stand alone entity. Hong was reacting to what he perceived as improper charges for overhead (including loans) from other companies in the Elite Group. Lavy (after this proceeding had begun) wholeheartedly agreed to end the pooling agreement and incidentally his willingness to continue to finance Sensio alone. He therefore advised Hong – whom he had just financially hobbled – that Hong would have to provide a \$1

million guarantee to Sensio's bank. And the Respondents' have pressed this point in their submission indicating that financing has to be in place in the very near future.

[68] Should I grant the Injunction, it will contain a provision to ensure that Lavy continues to secure requisite interim financing for Sensio until the full hearing of the Application. Lavy's decision to stop unilaterally financing Sensio is telling. It demonstrates that Lavy is willing to take Sensio to the financial brink – and maybe beyond – in order to defeat Hong. Lavy knows that Hong is currently in no position to help finance Sensio. Put another way, Lavy is willing to risk irreparable financial harm to Sensio if that is what it takes to get rid of Hong. The Respondents themselves recognize that there are “important risks” to Sensio associated with the gridlock between the two shareholders. (See Respondents' Post-Motion Brief, Para. 109)

**(c) Refusal to pay Hong's car expenses:**

[69] For years, Hong billed Sensio \$5000.00 per month for this service. The actual amount for which Hong was invoiced was \$4325.00 per month, a difference of \$675.00. Because of this difference, the Respondents have cut off Hong's reimbursement for car service. I am not clear on why Hong chose to submit the

higher figure but obviously he should only have sought the invoiced amount. I am inclined to believe it was a matter of convenience. I seriously doubt that Hong thought this was a good way to make an extra \$600.00 per month. I am sure that this invoicing issue would never have been a concern to Lavy in the absence of this litigation. Hong should continue to receive the invoiced amount until the application is heard. This relatively minor discrepancy (in the context of the millions at issue) does not justify allowing Lavy to cut off this reimbursement to Hong off altogether.

**(d) Lavy cut off payment of all business expenses:**

[70] As noted, Hong does not have a corporate credit card and must therefore seek reimbursement of all business expenses from Sensio (Lavy). Exhibit 34 is an email dated November 6, 2017 from Lavy to Hong. Lavy asks seven questions about certain expenses incurred by Hong. Notably, question number 5 queries a \$9.99 item. This email was followed up on November 9, 2017 by an email from Ruttenberg which reads in part: "...Until satisfactory answers to these questions are received, I have been advised that reimbursement of expenses will be suspended." Hong's email to Lavy dated November 14, 2017 contains Hong's answer to each question.

[71] I agree with the following submissions in paragraphs 147-152 of the Applicants' Post Motion submission:

147. Mr. Lavy acknowledged on cross-examination that he has no reason to question the legitimacy of a variety of expenses submitted by Mr. Hong, including meals with customers, courier charges, coffee with customers, web service charges and storage fees.

148. However, even in the face of his admission that he does not take issue with many of the expenses submitted by Mr. Hong, Mr. Lavy has refused to authorize the payment of those expenses. Mr. Lavy has refused to authorize the payment of what he acknowledges to be legitimate business expenses incurred by Mr. Hong in his role as CEO of Sensio.

149. The refusal to pay legitimate business expenses is both phenomenally detrimental to the business and a clear and brazen attempt to further financially choke Mr. Hong and his ability to have this claim addressed on the merits. It is also an abuse of Mr. Lavy's total power over the finances of Sensio.

150. Mr. Hong has a reasonable expectation that the business expenses he picks up will be reimbursed by the Respondents on behalf of Sensio. The refusal to pay legitimate business expenses is highly prejudicial to Mr. Hong given his current financial circumstances.

151. There is no legitimate business purpose to the decision to refuse payment of legitimate business expenses incurred by the CEO and minority shareholder. It is a plain and simple bully tactic designed to further cripple Mr. Hong financially. The oppression remedy is about curtailing abuse. There could not be a more clear cut example of Mr. Lavy's abusive behavior than his refusal to pay what he acknowledges are legitimate business expenses that are being carried personally by Mr. Hong when Mr. Lavy is already in the process of choking the financial life out of Mr. Hong.

152. This is a clear and brazen bully tactic by Mr. Lavy, and yet another clear example of his oppressive behaviour.

[72] I am not satisfied that the Respondents' proposed undertaking to reimburse properly backed expenses is adequate. In the interim, I have more confidence in

the method proposed by the Applicants to have expenses approved by Mr. Rutigliano.

**(e.) Lavy's approach to Erica Hong – Hong's spouse:**

[73] This event is accurately described in paragraphs 153-160 of the Applicants' Post-Motion Submission. I agree entirely with the Applicants' depiction of this unseemly litigation tactic by Lavy. It reinforces an already strong argument that Lavy will do anything to win. I will have more to say later about the inappropriateness of so-called "TRV" expenses. Suffice to say here that I have no doubt but that Lavy was aware and approved of Hong putting such claims through Sensio. Lavy was also aware and that any such claims were coming out of Hong's share of the profits.

[74] Paragraphs 153-160 inclusive are set out below:

153. Amazingly, the scope of Mr. Lavy's attempts to intimidate and bully Mr. Hong are not limited to Mr. Hong himself. They extend to his family members.

154. On October 17, 2017, Mr. Lavy wrote the following email directly to Erica Hong, Mr. Hong's wife, regarding a benefit item purchased at an auction held at the school attended by Mr. Hong's children:

It has come to our attention that you purchased an item at the Calhoun School auction in March, 2014 for US\$29,650 and that Sensio paid for this item, while you apparently received a charitable receipt. Please advise whether this information is correct and provide details regarding what item was purchased. We would prefer to obtain this information from you rather than from other sources.

155. Amazing as it is that Mr. Lavy had the gall to involve Mr. Hong's spouse in this matter, even more amazing is the fact that Mr. Hong himself was not included on the email.

156. Mr. Hong and Mr. Lavy are locked in a shareholder dispute involving serious allegations of misconduct. Litigation has been commenced and is ongoing. All parties are represented by counsel. In the event Mr. Hong has questions for Mr. Lavy, those questions are appropriately put to Mr. Lavy or delivered through counsel, not to Mr. Lavy's spouse.

157. Yet here, Mr. Lavy, without even including Mr. Hong on the correspondence, wrote directly to Mr. Hong's wife with the ominous and veiled threat that he would obtain the information from "other sources" if she did not respond. The "other sources" is undoubtedly the school then attended by both of the Hong's children.

158. We submit that the intent was clear - to intimidate, bully and scare Mr. Hong's spouse into coughing up information that Mr. Lavy could use in this litigation without Mr. Hong's knowledge, thereby turning Mr. Hong's wife into a witness against him in this proceeding. This is an inappropriate litigation tactic.

159. With respect to the merits of the inquiry from Mr. Lavy to Mrs. Hong, there is none. Mr. Hong provided a detailed description of this event and the manner in which it was treated (as a "TRV" expense) at paragraph 70 of the Supplemental Affidavit of Shae Hong. The fact is that Mr. Hong purchased an auction item at a fundraising event for the Calhoun School held in March 2014; the auction item was for a catered dinner event at a New York City art gallery space; Mr. Hong used the catered dinner event to host an event in the name of our Sensio brand, "Bella", in association with a global charity, Smile Train, which assists children in developing countries with cleft repair surgery to help facilitate eating, breathing, speaking and smiling; the event had Bella promotional materials and signage; Mr. Hong arranged for Kristen Taekman and Countess LuAnn De Lesseps from the television show "Real Housewives of New York" to attend in order to generate positive publicity for the event and for Bella; executives from one of Sensio's key customers, Macy's, attended the event; Sensio's Senior Director of Marketing was involved in the promotion of the event for Bella; the event was reported on in online celebrity media magazines; and despite the obvious business connection, Mr. Hong submitted it as a "TRV" expense which was approved and processed by Elite Group.

160. It is also worth highlighting the fact that the Respondents did not ask him a single question with respect to this expense item during cross-examination.

**(f) Tax Threats**

[75] This aspect of the Applicants' argument is set out in paragraphs 161-166 of their post-motion brief. Paragraphs 161-166 read:

161. Mr. Lavy's attempts to use his control over Sensio's financial and accounting functions to financially cripple Mr. Hong have continued unabated since this proceeding was commenced.

162. Mr. Lavy has taken steps to reduce Mr. Hong's income by over 80%. Mr. Lavy has directed the Respondents to refuse payment of Sensio business expenses charged to Mr. Hong's credit card when Mr. Lavy himself does not dispute their legitimacy. Incredibly, Mr. Lavy is also taking steps to create significant and completely unwarranted tax liabilities for Mr. Hong under the flimsy guise of making accounting "corrections".

163. On October 30, 2017, Mr. Hong received the following email from Danielle Agnew:

Good Afternoon Shae,

As a result of an internal review of our records, certain inconsistencies have come to light which ought to be corrected as soon as possible. Please provide any comments or corrections so that accurate documentation can be provided to the taxation authorities.

1. It appears that between 2007 and August 2017, you received reimbursement of personal expenses and cash for which you did not provide receipts of approximately US \$1,100,000. The annual W2 form issued to you and the taxation authorities did not reflect these amounts. It is intended that the W2 forms be corrected and sent to the taxation authorities without delay.

2. According to the records of Prominence, you have provided a residential address in the State of Washington and W2 forms have not been sent to the State of New York or to the City of New York since you moved to Manhattan in 2013. It is intended that the W2 forms be corrected and sent to the State of New York, the City of New York and the Internal Revenue Service without delay.



164. This is yet another clear example of oppression on the part of Mr. Lavy and the corporate Respondents.

165. Given the timing, this has to be seen for what it clearly is, which is a “scorched earth” litigation tactic designed to create additional costs and tax liabilities for Mr. Hong when Mr. Lavy has a financial blade at Mr. Hong’s throat. This is a grotesque abuse of power by Mr. Lavy and the Respondents, particularly where Mr. Lavy, in his own words, is “responsible for the financial aspects of Sensio’s business, including overseeing the financial team ...”. To the extent that any corrections are actually required, which is highly questionable, the error lies with Mr. Lavy and his mismanagement of Sensio’s financial team.

166. There is no convincing or reliable evidence that corrections of any kind are actually required to Mr. Hong’s US tax forms. There is convincing evidence, and this is yet another example of it, that Mr. Lavy intends to destroy Mr. Hong financially and that he will use every single tool at his disposal to make that a reality before June 2018 unless the Court intervenes to level the playing field and protect Mr. Hong pending the outcome of the merits hearing.

[76] It would be inappropriate for the Court to intervene to prohibit the Respondents from reporting Sensio’s accounting irregularities to the IRS and to state and city authorities. In any event, this may already have been done. The tactic may be self-defeating because it is clear that Hong will not be the only one with some tough questions to answer.

**(g) Surreptitious seizure and use of Hong’s personal information:**

[77] The Respondents used Hong’s personal information to subject him to a detailed cross-examination. Their intent was to demonstrate that Hong was not forthright about his personal wealth and that he did not need an injunction to continue to fund this litigation. While I have some concerns about Hong’s evidence, I find the Respondents’ (particularly Lavy’s) conduct to be

reprehensible. I accept the Applicants' submission set out in paragraphs 167-179 of the Applicants' Post-Motion Submission:

167. At the motion, the Respondents tendered several documents containing Mr. Hong's personal financial information.

168. The Respondents tendered a homeowners' policy for each of his properties in New York City (Exhibit 13) and Southampton (Exhibit 14). These do nothing but establish the scope of the coverage the insurer agreed to provide for each of those properties.

169. The Respondents tendered a personal financial statement from Chase Bank (Exhibit 15) dated December 1, 2015, which is now almost two years out of date.

170. The Respondents tendered an email between Mr. Hong and his insurance broker dated April 17, 2017 (Exhibit 16), which includes a discussion of the premium for certain valuables with the assignment of notional values to those items, including Erica Hong's wedding ring.

171. Finally, the Respondents tendered Morgan Stanley statements dated November 18, 2015 (Exhibit 28), which are now more than two years out of date.

172. This information is all stale-dated. Mr. Hong was never asked by the Respondents if the information contained in these records is an accurate reflection of his current financial position or that of the Applicant, Hong and Co. It is therefore not reliable as evidence of Applicants' current financial circumstances.

173. That issue aside, this is Mr. Hong's personal financial information.

174. Ms. Ruttenberg confirmed during cross-examination that Mr. Hong did not provide that information to her. She agreed that it was personal financial information. She agreed that she does not provide that kind of financial information to her employer. She agreed that she would not expect an employer to be able to demand this kind of personal financial information. She testified that she did not know how the Respondents came into possession of this information.

175. Mr. Lavy confirmed during cross-examination that Mr. Hong did not provide that information to him. Like Ms. Ruttenberg, he testified that he did not know how the Respondents came into possession of this information.

176. The fact that Mr. Lavy could not “explain” how the Respondents came into possession of these documents is totally lacking in credibility. (I have edited this paragraph to remove the reference to Ms. Ruttenberg.)

177. What we do know is that Mr. Lavy waited until Mr. Hong was traveling on business, and without providing Mr. Hong with any notice whatsoever, swept into the Sensio offices in New York City with Evan Parness - a lawyer from a large multi-national law firm, DLA Piper - and a forensic computer technician and seized the computer of Mr. Hong’s assistant, Fabiola Pierre. As detailed in the Affidavit of Evan Parness, the hard drive of the computer was copied by the forensic computer technician.

178. It is a logical inference that Mr. Hong’s personal financial records that were put to him by counsel for the Respondents - and which had never been disclosed to the Applicants prior to the hearing – came from these actions or from accessing Mr. Hong’s Sensio email. But these are clearly personal records.

179. That Mr. Lavy and the Respondents would seize and use Mr. Hong’s personal records as they did is appalling. It raises very serious ethical questions with respect to the seizure and use of an individual’s personal financial information. It is yet another example of the sort of high-handed and reprehensible conduct that Mr. Hong has been and continues to endure at the hands of Mr. Lavy.

[78] I am satisfied that, despite his apparent wealth, Hong will probably be forced out of Sensio unless I grant the requested Injunction. [See also para. 90 below.] I accept Hong’s evidence that he simply does not have the means in the short term to continue this litigation without this Court’s intervention.

## **VII. Clean Hands Doctrine**

[79] The Respondents have raised this doctrine to suggest that, since Hong does not come to court with “clean hands”, he is not entitled to equitable relief. I agree

with the Applicants that there is no factual basis for the application of this doctrine.

The underpinnings of the Respondents' argument are without merit.

**(a) Cash profit:** I agree with the Applicants' submission contained in paragraphs 193-201 of their post motion brief.

193. The Respondents are critical of cash payments made to Mr. Hong in cash representing part of his profit entitlement or drawings from Sensio each year. The Respondents' argument on this point is completely disingenuous.

194. The un-contradicted evidence is that all cash payments were accounted for and included in the Reconciliations as part of Mr. Hong's drawings on an annual basis. For example, the third page of the 2015 Reconciliation found at Tab "J" to the Affidavit of Danielle Agnew clearly shows that \$63,000 (USD) were paid to Mr. Hong in seven instalments between March and November of 2014.

195. Danielle Agnew confirmed on cross-examination in relation to the 2011 reconciliation that a bonus she received from Mr. Lavy was paid in cash.

196. The evidence is also clear that Mr. Lavy approved all cash payments made to Mr. Hong. Ms. Agnew testified as follows when she was cross-examined on the point in relation to the 2015 reconciliation.

197. At paragraph 80 of his Affidavit, Mr. Lavy testified as follows:

In response to information from Ms. Ruttenberg in 2016, I directed Ms. Ruttenberg to stop this practice of withdrawals of cash without documentation and to inform Mr. Hong that cash (without receipts) was no longer to be provided to him.

198. While this paragraph provides the impression that he was unaware and disapproved of cash withdrawals being taken without receipts, the fact is that Mr. Lavy himself took cash payments, as confirmed by Ms. Agnew during cross-examination.

199. Furthermore, Mr. Lavy took cash payments without providing receipts, which is precisely what he is now criticizing Mr. Hong for doing. As confirmed by Ms. Agnew when she was cross-examined on the 2014 Reconciliation found at Tab "H" of her Affidavit.

200. While Mr. Lavy feigns ignorance in relation to the practice of cash withdrawals, the evidence is that he was fully aware that cash was being paid to Mr. Hong; that he himself was taking cash payments out of the company; and, finally, that he was doing so without providing receipts – the very thing he is now maligning Mr. Hong for doing. According to his own sworn testimony, he controls and oversees the financial operations of the company and cash payments had been made to Mr. Hong for years until 2016. As he swore to at paragraph 26 of his Affidavit, he approves the daily cheque run (from which cash payments result).

201. While Ms. Agnew and Ms. Boivert both seem critical of the failure of Mr. Hong to provide receipts for these amounts, that position is quite astounding since they were amounts being taken by Mr. Hong as part of his profit and one has to ask what Ms. Agnew was expecting Mr. Hong to provide by way of receipts. How Sensio treated those amounts was a matter in the control of Ms. Agnew and the Respondents, not Mr. Hong. Mr. Hong had no role or responsibility in preparing tax returns or internal financial statements or external financial statements for Sensio.

**(b) TRV expenses:**

[80] I referenced these earlier in relation to Lavy's approach to Erica Hong. The other major TRV expense that the Respondents emphasized was the \$65,000.00 for the rental of the summer home in the Hamptons. This expense also came out of Hong's profit share. There is no evidence that Lavy knew about this particular TRV expense. If he had known about it, I am sure that he would not have had a problem with it. It was coming out of Hong's share and was reducing Sensio's tax bill, i.e. for the benefit of **both** shareholders.

[81] Both Hong and Lavy would have been aware of the tax benefits accruing from the TRV expense practice. It is not to be condoned and should immediately

cease. For the purposes of this motion, however, it does not qualify as a strike against Hong. The practice of submitting TRV coded expenses was of longstanding duration with the full knowledge of Sensio's financial people and Lavy.

**(c) Business expenses:**

[82] I agree with the Applicants' submission on this issue. Paragraphs 207-213 of the Applicants' Post Motion submission reads:

207. The Boisvert report appears to identify concerns with respect to the magnitude of the total business expenses submitted by way of expense reports from Mr. Hong.

208. At pages 8-9 of her report (Tab B to the Boisvert Affidavit), Ms. Boisvert tabulates total expenses over a five and a half year period from January 2012 to August 2017 of approximately \$2,600,000 (USD).

209. The apparent suggestion is that there is something improper about these expenses, yet a closer read reveals that there are approximately \$1,600,000 (USD) in charges for travel, office, sales and marketing expenses, accommodations, health, phone, and miscellaneous charges which include office moving expenses and membership fees.

210. This leaves \$1,000,000 (USD) in expenses - \$200,000 (USD) per year – which have been incurred in a business which has generated approximately \$770,000,000 (USD) in top-line revenue over that period at \$140,000,000 (USD) a year. This is almost a billion Canadian dollars.

211. During cross-examination, Ms. Boisvert testified that she thought Sensio's annual sales were in the range of \$20,000,000 (USD), before stating that she simply did not know. Once again the Respondents did not even tell their own expert the whole story – all they cared about was getting a report which would (falsely we submit) portray Mr. Hong in a negative light and label him a “cheat”.

212. Mr. Hong had no ability to issue payments from Sensio since the financial and accounting controls rest exclusively with Mr. Lavy and the Elite Group in Montreal. The bulk of Sensio's business is clearly in the US and the process for payment of those various expenses requires that Mr. Hong put those expenses on his credit card and then seek reimbursement.

213. Mr. Hong is being falsely demonized, maligned and accused of criminality by an expert the Respondents kept in the dark for incurring \$1,000,000 (USD) in business expenses to Sensio over five and a half years. *(I have deleted a reference to Lavy's aircraft expense as I have not been able to make a tentative determination on that issue).*

**(d) Meal, entertainment and gift expenses:**

[83] I agree with the Applicants' submission in paragraphs 216 and 217 of their

Post Motion Brief:

216. Mr. Hong does not dispute that significant (but proportional) costs were incurred for meals and entertainment and gift expenses.

217. The fact is that Sensio has always treated its customers well. The meal and entertainment expenses have always been paid by the Elite Group financial team under the control and direction of Mr. Lavy, and the evidence makes it clear that Mr. Lavy himself approved of gift expenses, as evidenced, for example, by Exhibit "LL" to the Supplemental Affidavit of Shae Hong in which Mr. Lavy approves the reimbursement of nearly \$11,000 (USD) in Christmas gifts for Sensio customers. Despite the sudden and feigned ignorance, none of this was unknown to Mr. Lavy or the Respondents. Quite the contrary – the evidence establishes that they approved of these practices.

[84] I accept Hong's evidence that Lavy always encouraged him to lavishly entertain and buy gifts for Sensio's customers. I am sure that customers' policies prohibiting their people from accepting such benefits would have been of no interest to Lavy. In the context of this motion, I agree with the Applicant's

submission that the policies (contained in the Boisvert report) are pure hearsay and irrelevant.

**(e) The “Valbella” expense**

[85] Hardly worth mentioning but completely and satisfactorily addressed in paragraphs 219-225 of the Applicants’ Post Motion submission.

219. The Respondents have identified one invoice (out of 6846 transactions) which Mr. Hong has acknowledged was submitted in error.

220. The invoice was for a meal at Valbella Ristorante with is attached as Exhibit “J” to the Report of Anne Marie Boisvert (Tab “B” to her Affidavit). The total bill was for \$8,250.58, though the invoice appears to have been split amongst eleven credit cards after a cash payment of \$350.00 (USD).

221. It must be recognized that a very significant number of expense reports are submitted by Mr. Hong’s assistant to Sensio. The Boisvert report at para 34 identified that there were some 6,846 individual items included in Ms. Boisvert’s review. Ms. Boisvert conceded during cross-examination that in her experience as a forensic accountant, finding one or more incorrect expense reports does not necessarily mean any fraudulent intent. Humans are human and mistakes can happen. This was a mistake.

222. The lack of any fraudulent intent is absolutely evident under each supporting documentation that was submitted.

223. The receipt was clearly submitted, since it came back from the file materials produced by the Respondents.

224. Ms. Boisvert in her report very clearly indicates that although the claim submitted was for the full amount of the restaurant bill, that the bill was split by seven cards. It defies reason that, if the intent had been to fraudulently secure payment, the supporting documentation would have been included showing that the bill had been split amongst a number of people. This argument simply does not have an air of reality.

225. Mr. Hong, in Exhibit 32, advised Mr. Lavy on November 17, 2017, that the Valbella expense could be deducted from the 49.95% credit owed to Mr.



Hong on the \$1M (CAD) amount owed to Sensio in relation to the Elite Lifestyle Products.

## VIII. CONCLUSION:

**A. I am satisfied that the Applicants have established a strong *prima facie* case of shareholder oppression. I agree with the following submissions by the Applicants:**

41. The relevant test under the oppression remedy was set out by the Court of Appeal for Ontario in **Nanef v. Con-Crete Holdings Ltd.** as follows:

The law is clear that when determining whether there has been oppression of a minority shareholder, the court must determine what the reasonable expectations of that person were according to the arrangement which existed between the principals.

Reference: **Nanef v. Con-Crete Holdings Ltd.**, [1995] O.J. No. 1377 (C.A.) at para. 28, ABOA, Tab 6

42. As the Court of Appeal for Ontario stated in **Ferguson v. Imax Systems Corp.**:

...[W]hen dealing with a close corporation, the court may consider the relationship between the shareholders and not simply the legal rights as such. In addition the court must consider the bona fides of the corporate transaction in question to determine whether the act of the corporation or directors effects a result which is oppressive or unfairly prejudicial to the minority shareholder. Counsel has referred us to a number of decisions. They establish primarily that each case turns of its own facts. What is oppressive or unfairly prejudicial in one case may not necessarily be so in the slightly different setting of another.

Reference: **Ferguson v. Imax Systems Corp.**, (1983), 43 O.R. (2d) 128 (C.A.) at 8, ABOA, Tab 2

43. The reasonable expectations analysis seeks to provide a framework in which a court can make a determination of fairness. Whether expectations are

reasonable is a question of fact that must be determined objectively. The facts can be proved either by direct evidence or by inference from other facts.

Reference: **Maple Leaf Foods Inc. et al. v. Schneider Corporation**, [1998] O.J. No. 4142 (C.A.) at paras 41 and 50, ABOA, Tab 5

44. As Farley J. noted in **820099 Ontario Inc. v. Harold Ballard Ltd.**, it is much easier in a closely held corporation to consider the factual expectations of the shareholders than in a widely held corporation where the expectations of the shareholders must be determined by proxy, if they can be determined at all.

Reference: **820099 Ontario Inc. v. Harold E. Ballard Ltd.**, [1991] O.J. No. 266 (Gen. Div.) at 50, ABOA, Tab 1

45. Applying the test of reasonable expectations, the Applicants submit that Mr. Hong, at a minimum, had a reasonable expectation that:

- (a) all transactions between Sensio and its shareholders and the shareholders' related parties would be conducted in an equitable manner in so far as this was in the best interests of Sensio;
- (b) the shareholders would not treat Sensio as their own property;
- (c) Lavy, a director, would act honestly and in good faith in the best interests of Sensio and exercise the diligence expected of a reasonably prudent person;
- (d) that Lavy, as a director and former officer of Sensio, contrary to his fiduciary obligations would not permit the diversion of corporate funds from Sensio to benefit Lavy personally, or to benefit other businesses owned and/or controlled by Lavy. (*I have deleted the reference to Ms. Ruttenberg and the word "misappropriation"*).
- (e) no action would be taken by Sensio regarding the loan of any amount to one director or shareholder, or to companies affiliated with them, without the prior consent of the other director or shareholder.
- (f) the shareholders would share in the profits and benefits of the enterprise according to their ownership interests, and that no shareholder would appropriate a disproportionate share of the profits via remuneration, management fees, administration fees, bonuses, loans and other like payments or benefits;
- (g) the approval of any loans to non-arm's length parties would be considered a matter requiring the agreement and consent of both shareholders;

- (h) that Hong, as a director, ultimate shareholder and CEO of Sensio, would be given access to the financial records of Sensio on request and be made aware of, and provided with, material and information which would affect the respective shareholding interests of Hong and Lavy;
- (i) Lavy would not use his control over the treasury and financial affairs of Sensio to withdraw a disproportionate share of the profits from Sensio beyond the agreed upon 50.05% - 49.95% shareholding split in Sensio Company;
- (j) that the financial information provided to him by Lavy and Elite Group including, but not limited to, the owners' equity figures shown on the Reconciliations, would be accurately reported;
- (k) that the financial information provided to him by Lavy and Elite Group would accurately reflect drawings or benefits received by either Lavy or Hong;
- (l) because of their express agreement (as confirmed at para. 23 of the Respondents' Notice of Contest), the total plane expenses charged to Sensio would not exceed an amount of approximately \$600,000 (USD) per year and that the plane expenses charged to Sensio would result in an adjustment on the Reconciliations such that they would have no impact on Hong's personal profit draw calculations;
- (m) that the Respondents would not issue and write-off as unrecoverable, or forgive and fail to credit Hong, for any Related Party Loans; and
- (n) that the Respondents would not terminate the regular and agreed upon monthly \$60,000 (USD) profit draw that Mr. Hong relies upon to support his family; and
- (o) that the Respondents would pay his annual personal income tax obligation;

46. This case is not simply a case of disagreement over a business decision between two partners in a closely held corporation, but a complete lack of regard for the interests of the Applicants as minority shareholders in Sensio, and an abuse of power by the Respondents.

47. The Respondents, without the knowledge of the Applicants, have diverted the corporate funds of Sensio to benefit Lavy and other businesses in which the Applicants have no interest whatsoever. (I have deleted the balance of this paragraph because I have concerns with some of the terminology.)

...

49. The manner in which the financial operations of Sensio has been managed over the years by the Respondents does not negate the basic expectation that the Respondents would not engage in overt acts of self-dealing to the detriment of Sensio and, by extension, to the interests of the Applicants as minority shareholders.

50. Although simple mismanagement may not be oppressive, severe mismanagement that significantly undermines the value of the corporation, or materially breaches the reasonable expectations of a shareholder, is oppressive.

51. It is not possible to craft an exhaustive definition of oppressive conduct. Each case must be determined on its own facts. However, it is helpful to look to other cases where oppressive conduct has been considered. Moreover, courts tend to look for badges or indicia of oppressive conduct. The Ontario Court of Appeal has recognized that the following are amongst the indicia of conduct that may be deemed oppressive:

- (i) lack of a valid corporate purpose for the transaction;
- (ii) lack of good faith on the part of the directors of the corporation;
- (iii) discrimination between shareholders with the effect of benefiting the majority shareholder to the exclusion or the detriment of the minority shareholder;
- (iv) lack of adequate and appropriate disclosure of material information to the minority shareholders; and
- (v) a plan or design to eliminate the minority shareholder.

Reference: **Ford Motor Co. of Canada v. Ontario Municipal Employees Retirement Board**, [2006] O.J. No. 27 (C.A.) at para. 92, ABOA, Tab 3

[86] I am satisfied that the Applicants have demonstrated a strong *prima facie* case that the above-cited indicia of oppressive conduct are present here. In particular, I am satisfied that Lavy has embarked upon a plan or design to eliminate Hong as the minority shareholder. I am also satisfied that there is a strong *prima facie* case that most of Hong's reasonable expectations (listed a to o above) have

not been met. The exception is clause (1) re the plane expenses which is still an arguable issue.

**B. I am satisfied that the Applicants have established that they will suffer irreparable harm if I do not grant the Injunction.**

226. The Supreme Court stated as follows with respect to the meaning of “irreparable harm” in **RJR-MacDonald** at para. 64:

"Irreparable" refers to the nature of the harm suffered rather than its magnitude. It is harm which either cannot be quantified in monetary terms or which cannot be cured, usually because one party cannot collect damages from the other. Examples of the former include instances where one party will be put out of business by the court's decision (**R.L. Crain Inc. v. Hendry** (1988), 48 D.L.R. (4th) 228 (Sask. Q.B.)); where one party will suffer permanent market loss or irrevocable damage to its business reputation (*American Cyanamid*, supra); or where a permanent loss of natural resources will be the result when a challenged activity is not enjoined (**MacMillan Bloedel Ltd. v. Mullin**, [1985] 3 W.W.R. 577 (B.C.C.A.))...

Reference: **RJR-MacDonald**, (AG) [1994] 1 SCR 311, at para. 64, ABOA, Tab 8

[87] As I have indicated, I am concerned that Lavy’s “scorched earth” style of litigating will see him take Sensio to the financial brink and perhaps beyond. Lavy has demonstrated that his primary focus is defeating Hong. That means forcing Hong out of Sensio. I am concerned that if this Court does not intervene, Sensio (and therefore Hong) may suffer irreversible financial damage.

[88] I note that the undertakings provided by the Respondents (Post Motion Brief Tab B) appear to curtail Lavy’s ability to have Sensio make related party loans. I

would have been happier with a more specific undertaking in that regard. But, while the related party loans are a concern, my main concern is that Lavy will use other means to put the financial squeeze on Sensio in order to pressure Hong. As the Respondents have acknowledged the gridlock between the two shareholders threatens the proper operation of the Company.

[89] From an operational perspective, I am satisfied that Hong was, and remains, the driving force behind Sensio's success. I recognize that Lavy played an important role with regard to strategic planning. Lavy was the sole source of any required financing. But the day to day operations, the nuts and bolts of generating revenue, were all in Hong's hands. I see it as vital to Sensio's continued success (at least for the next six months or so) that Hong be as unfettered as possible in his ability to keep Sensio going at its historic levels.

[90] Sensio, at this precarious time, cannot afford to have Hong distracted by trying to survive financially. Much of his wealth is mortgaged or subject to the vagaries of the real estate market. Hong has tried to alleviate the strain by securing a \$1 million demand loan from a friend. He testified that he has already drawn \$400-500,000 of that amount. It would be unfair to insist that Hong now sell his home, move his family, sell his other real estate, or liquidate his personal property (jewellery etc.) and at the same time continue this litigation (and effectively

operate Sensio). I also have no intention of rewarding the Respondents for their surreptitious and high-handed appropriation of Hong's personal financial information. Lavy's financial situation is secure. Hong and Lavy should be able to contest this dispute on more equal terms. (to use a sports analogy, on a level playing field).

[91] Without this Court's intervention, the likelihood is that Lavy will force Hong to relinquish his interest in Sensio at a fire sale price. That would end this litigation. It is therefore artificial to suggest that Hong's potential monetary loss could be compensated in damages. Hong will have suffered irreparable harm.

[92] The other possibility is that Hong is able to continue but, by the time the battle is over, Sensio itself has suffered irreparable financial damage. Sensio is Hong's main source of money. If Sensio suffers irreparable harm, so does Hong.

### **C. Balance of Convenience:**

[93] In the circumstances as I have found them, it is a given that the balance of convenience favors the granting of an Injunction. The granting of an injunction will have a negligible effect on Lavy. On the contrary, as I have outlined, not granting the Injunction would be devastating to Hong.

252. In **RJR-MacDonald**, supra, the Supreme Court of Canada defined the balance of convenience as follows:

The third test to be applied in an application for interlocutory relief was described by Beetz J. in **Metropolitan Stores** at p. 129 as: "a determination of which of the two parties will suffer the greater harm from the granting or refusal of an interlocutory injunction, pending a decision on the merits". In light of the relatively low threshold of the first test and the difficulties in applying the test of irreparable harm in Charter cases, many interlocutory proceedings will be determined at this stage.

The factors which must be considered in assessing the "balance of inconvenience" are numerous and will vary in each individual case. In *American Cyanamid*, Lord Diplock cautioned, at p. 408, that:

[i]t would be unwise to attempt even to list all the various matters which may need to be taken into consideration in deciding where the balance lies, let alone to suggest the relative weight to be attached to them. These will vary from case to case.

Reference: **RJR-MacDonald**, supra, at para. 67 and 68, ABOA, Tab 8

[94] The granting of an injunction will effectively preserve the status quo for a few more months. At the same time, I appreciate that the status quo has to change. The financial management of the company has to be brought in line with accepted accounting principles. The end of the pooling agreement inevitably means that Hong will have to share the responsibility for financing the Company. That contribution will also give Hong some say in how the company is run. But all of that will have to await the conclusion of this litigation.

[95] An Interim Injunction is exactly that: temporary. It is required in order to enable Hong to access the records he requires to assess the validity of the overhead charges, related party loans, and aircraft charges. It is also required to ensure that



Hong is able to maintain his present lifestyle and to effectively continue to operate Sensio.

**D. Status Quo Restraining Order:**

[96] This motion is made pursuant to section 5 of the Third Schedule of the Companies Act. That section empowers this Court, upon satisfying itself that there has been oppressive conduct, to issue an order restraining the conduct complained of [Section 5(3)(a)]. It may also order production of financial statements [Section 5(3)(i)] or make an order compensating an aggrieved person [Section 5(3)(j)].

[97] This restraining order is different in that the showing of irreparable harm that is required in a common law injunction is not necessary in making a statutory restraining order. Rather, the Court can determine what is fair in the circumstances. The order to restrain oppressive conduct is most appropriate in the early stages of oppressive conduct before substantial damage is done. [See Peterson, **Shareholders Remedies in Canada**, looseleaf (Markham: LexisNexis Canada Inc., 1989) at page 17.171-172). ABOA, Tab 12].

[98] I have already determined that the circumstances found here justify the granting of a common law injunction. If there were any doubt about that, I have the authority under the statute to decide what is fair, and issue a restraining order to

reflect that determination. It would be exceedingly unfair to allow Lavy to continue on with no Court imposed restraint. The facts as I have found them speak for themselves. Lavy's abrupt and arbitrary termination of Hong's stream of remuneration was clearly retaliatory and punitive in nature. I have already described other examples of his retributive and abusive conduct. [For treatment by other courts of restraining orders, the reader is referred to the following:

**Pasnak v Chura**, [1999] 2 BLR (3d) 107 at paras. 13 and 25, ABOA, Tab 7  
**Pasnak v Chura**, supra, at para. 17, ABOA, Tab 7  
**Walker v Walker**, [1997] 2 WWR 342 (Sask. Q.B.), at para. 13, ABOA, Tab 11  
**M v H**, [1993], 15 OR (3d) 721, ABOA Tab 4  
**M v H**, (1993), 15 OR (3d) 721 at para. 33. ABOA Tab 4  
**Thomas Scullion et al v Paul Munro et al**, 2016 ONSC 116, ABOA Tab 10  
**Reynolds v Nicholson**, 1996 Carswell Ont 2521, ABOA Tab 9]

[99] I am granting the motion on the terms set out in paragraph 286 of the Applicants' Post Motion submission. Although I am calling it an injunction, it may also be considered a restraining order under the statute. Note that I have changed "direct" to "authorize" in Clause (f) and added "subject to..." at the end of that clause. Clause (f) now reads:

(f) an order requiring the Respondents to **authorize** Richter LLP, as the accountants of Sensio Inc. and Sensio Company, to immediately provide the Applicants with a complete copy of all documents and electronic records in their possession and control relating to Sensio Inc. and Sensio Company which were provided by Sensio Inc., Sensio Company or any of the Respondents to Richter LLP for purposes of preparing the year end financial statements, and, or provided by Richter LLP to the client as a draft deliverable and / or a final deliverable (including tax returns, adjusting journal entries and adjusted trial balances), for

fiscal year 2016 and fiscal year 2017; **subject to Richter's right to withhold their own internal documents which they have not shared with the Respondents.**

[100] In Clause (r), I have incorporated the requested charges. Clause (r) now reads:

- Immediate payment to the Applicants or either of them at their direction the sum of USD \$380,000, as profit/drawing;
- prohibiting the Respondents, pending the hearing and disposition of this Application, or further order of the Court, from taking any steps to put an end to, or delay:
- payment of Shae Hong's monthly salary of \$20,833 (USD);
- payment of Shae Hong's monthly business expenses and Sensio business expenses, subject only to the approval of those expenses by the President of Sensio Inc., Jerry Rutigliano;
- payment of the premiums for health insurance coverage for Shae Hong and his family.

[101] An additional clause must be added to restrain Lavy from refusing to continue to provide the collateral and personal guarantees necessary to secure any requisite interim financing for Sensio. The decision of when and in what amount interim financing is necessary shall be made by Mr. Rutigliano.

**Costs:**

[102] The Applicants shall have their costs in any event. Applicants' brief on costs due January 5, 2018. Respondents' response brief due January 12, 2018. Applicants' Reply brief (limit 5 pages) due January 17, 2018.

[103] The Applicants should prepare a draft Order in accord with my decision and forward to the Respondents for "consent as to form only". I want to issue the Order by January 2, 2018.

[104] I will issue a subsequent separate Order for costs after I have reviewed Counsels' briefs on costs.

Edwards, J.