

CANADA / JUDGMENT

Axion Ventures Inc. v. Bonner

2024 BCSC 46

COURT

Supreme Court of British Columbia

DECIDED

11 January 2024

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2024 BCSC 46 Axion Ventures Inc. v. Bonner

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Axion Ventures Inc. v. Bonner,

2024 BCSC 46

Date: 20240111

Docket: S210438

Registry: Vancouver

Between:

Axion Ventures Inc. and Axion Interactive Inc.

Plaintiffs

And

John Todd Bonner, Nithinan Boonyawattapisut, Monaker Group, Inc.,

William Kerby, Cern One Limited, Red Anchor Trading Corp.,

CC Asia Pacific Ventures Ltd., Jonathan Chen, HotPlay Enterprise Limited,

HotPlay (Thailand) Ltd., Christopher Bagguley, Mark Henry Saft,

Longroot, Inc., Jane Doe and ABC Corp.

Defendants

- and -

Docket: S213309

Registry: Vancouver

Between:

Yuki Hirakawa

Plaintiff

And

John Todd Bonner, Nithinan Boonyawattanapisut, Cern One Limited,

Red Anchor Trading Corp. and Axion Ventures Inc.

Defendants

- and -

Docket: S217835

Registry: Vancouver

Between:

NextPlay Technologies Inc., John Todd Bonner,

Nithinan Boonyawattanapisut, Cern One Limited

and Red Anchor Trading Corp.

Plaintiffs

And

Axion Ventures Inc., Axion Interactive Inc. and Ying Pei

Digital Technology (Shanghai) Company Limited

Defendants

- and -

Docket: S227954

Registry: Vancouver

Between:

Grant Kim, Stephen Willey, Yasuyo Yamazaki

and Peemtat Utsahajit

Plaintiffs

And

NextPlay Technologies, Inc.

Defendant

Before: The Honourable Mr. Justice Walker

Reasons for Judgment

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Place and Dates of Hearing:

Vancouver, B.C.

December 14-15, 2023

Place and Date of Judgment:

Vancouver, B.C.

January 11, 2024

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Introduction

- [1] On November 2, 2023, I found the defendants, NextPlay Technologies, Inc. (who is still shown in the style of cause by its former name, Monaker Group, Inc.), Todd Bonner, Nithinan Boonyawattapisut, and Longroot, Inc., in contempt of a sanction order I issued on June 8, 2023 ("June 8 Sanction Order") requiring them to post security on account of their contempt of prior court orders. My reasons for judgment where I found them liable for contempt are indexed at 2023 BCSC 1924 ("Liability Reasons").
- [2] These reasons address the fit and appropriate sanction that should now be ordered.
- [3] For ease of reference, when I refer to those defendants/contemnors collectively, it is as "Contemnors". There are times when I refer to them individually:
- (a) John Todd Bonner as "Mr. Bonner";
 - (b) Monaker Group, Inc. as "NextPlay" to reflect its name change;
 - (c) Ms. Boonyawattapisut as "Jess", since the parties consistently refer to her by that name (and in doing so, I do not intend any disrespect); and
 - (d) Longroot Inc. (whose shares are owned by NextPlay) as "Longroot Delaware", which refers to where it is based in order to distinguish it from another related entity based in the Cayman Islands, Longroot Limited.
- [4] Mr. Bonner was a co-founder and formerly a director of the plaintiff, Axion Ventures Inc. ("Axion"), a publicly traded company incorporated in British Columbia, whose shares were traded on the TSX Venture Exchange ("TSXV") until the BC Securities Commission issued a cease trade order in August 2020 ("Cease Trade Order"). Mr. Bonner was employed as Axion's chief executive officer until his position was terminated for alleged misconduct at a board of directors' meeting in July 2021. Jess, who is Mr. Bonner's spouse, was also a director and officer of Axion and some of its subsidiaries, including the plaintiff, Axion Interactive Inc. ("Axion Interactive"), until her position was terminated in July 2021 as well. NextPlay is a publicly traded Nevada corporation with an address in Florida. Its co-chief executive officer, William Kerby, resides in Florida
- [5] The June 8 Sanction Order required the Contemnors to post C\$250,000 as security for good behaviour ("Security") by July 10, 2023, on account of their contempt of three prior court orders (see 2023 BCSC 978). As part of the June 8 Sanction Order, the plaintiffs were granted liberty to apply to increase that amount "should the Contemnors fail to abide by their recent assurances and persist in their failure to engage in prompt compliance with court orders." The Contemnors were also granted liberty to apply, at the earliest 10 days before the commencement of the trial of this and related actions, to reduce some or all of the posted

amount if their "non- or inexcusable delayed compliance" with court orders "is no longer an issue." Costs were left to be determined at a further appearance.

- [6] In the Liability Reasons, I rejected the Contemnors' ongoing assertion that it was impossible for them to purge their contempt because they lacked the assets and financial means. To the opposite, I found there were assets available to do so. For example, I found that Jess has assets available to her, from real property she owns in Thailand with substantial equity, from her British Virgin Islands-based holding company (and a defendant in this action), Cern One Limited ("Cern One"), and from her co-ownership with Mr. Bonner of another corporate entity and co-defendant, Red Anchor Trading Corp. ("Red Anchor"). I also found the Contemnors had not acted in good faith to comply with the June 8 Sanction Order and that they had not been candid in their disclosures to the Court: Liability Reasons at paras. 103-145.
- [7] Key background facts concerning the nature of this hard-fought, complex commercial litigation, related actions in this Court, and the prior contempt proceedings that led to the June 8 Sanction Order are summarized in the Liability Reasons. Additional information is also contained in other reasons for judgment issued in this action and in a related proceeding, indexed at 2021 BCSC 963, 2021 BCSC 1899, 2022 BCSC 945, 2023 BCSC 149, 2023 BCSC 181, 2023 BCSC 204, 2023 BCSC 313, and 2023 BCSC 974. I will not repeat them here.
- [8] A brief synopsis of the plaintiffs' claims, all vehemently denied by all defendants, found at para. 15 of the Liability Reasons, will suffice:
- [15] The plaintiffs claim the defendants conspired and acted unlawfully in concert in an evolving civil conspiracy and common scheme to unlawfully take control of the assets of the plaintiff, Axion Ventures Inc. ("Axion Ventures"), and of its subsidiaries, including their intellectual property, digital marketing and in-game advertising software, and corporate opportunities. Included in the plaintiffs' claim are allegations that since January 2017, Mr. Bonner and Jess:
- (a) acted secretly with NextPlay and others to attempt to take control of Axion Ventures and its subsidiaries;
 - (b) wrongfully used Axion Ventures' funds and funds provided by investors to advance their personal interests;
 - (c) effected an unlawful transfer of control and ownership of the digital assets of Axion Ventures and its subsidiaries, including the plaintiff, Axion Interactive Inc. ("Axion Interactive"), such as its digital marketing and in-game on-line advertising software and intellectual property to entities within their control, including NextPlay, for their benefit; and
 - (d) breached their fiduciary duties owed to the plaintiffs.

- [9] In their application response, the Contemnors say that lesser sanctions are available and appropriate. In August 2023, prior to the hearing of the contempt application, the Contemnors advised the plaintiffs that they would deliver a proposal for an appropriate sanction if they were found in contempt. None was provided despite follow-up requests from the plaintiffs. At the sanction hearing, the Contemnors told me in their submissions that they had no proposal or suggestion to put forward. In effect, their contempt of the June 8 Sanction Order would continue.

Axion's Proposal

- [10] On the other hand, Axion renewed a proposal it made during the liability phase of the application that has led to this sanction hearing (see Liability Reasons at paras. 131-133) that, if ordered, would purge the contempt ("Axion Proposal").
- [11] Axion is prepared to post the Security on terms that would result in NextPlay no longer owning any of its shares of Axion it currently owns.
- [12] According to Axion, who relies on NextPlay's filings with the United States Securities and Exchange Commission ("SEC") and its press releases, NextPlay beneficially owns 71,993,358 shares of Axion ("Axion Shares"), some of which are held in Singapore by the Bank of Singapore, some by PI Financial, a brokerage firm in Vancouver, and some in certificate form ("Certificates") by Mr. Yuki Hirakawa, who is a plaintiff in a related action, VA S213309 (Mr. Hirakawa claims ownership of those Axion Shares that he says should have been transferred to him by Mr. Bonner).
- [13] Based on public records, Axion says the Axion Shares owned by NextPlay are currently held by these parties:
- (a) Cern One;
 - (b) Uniq Ventures;
 - (c) Michael Bonner, who is Mr. Bonner's brother; and
 - (d) CC Asia Pacific Ventures Ltd. ("CC Asia Pacific").
- [14] Although NextPlay agrees that the number of Axion Shares in issue is properly stated by Axion, NextPlay took inconsistent positions in its submissions and tendered inconsistent evidence concerning its ownership of all of the Axion Shares (my findings are set out in the next section).
- [15] The Axion Proposal contemplates the following steps to be taken.

- [16] First, Axion's transfer agent is ordered to cancel all of the Axion Shares not held in Certificates by Mr. Hirakawa. Axion submits that since its transfer agent is situated in the province and subject to the jurisdiction of the Court, cancellation is a certain and much more efficient means to implement its proposal than seeking to enforce in Singapore a cancellation order directed against the Bank of Singapore.
- [17] Second, concurrently with its transfer agent cancelling those shares, Axion will post the Security with the Court or in trust on appropriate undertakings with the plaintiffs' law firm so that interest may be earned. The term included in the June 8 Sanction Order (see 2023 BCSC 978) allowing the Contemnors to apply to reduce the amount of the Security if compliance with court orders is no longer an issue, would remain unchanged. The question of whether, upon any such application succeeding, NextPlay or Axion would receive any funds returned from Court would be a live issue.
- [18] Third, Mr. Hirakawa will continue to hold the Certificates in accordance with a Mareva injunction issued by Justice Davies on April 14, 2021 ("Davies J. Order"), pending the outcome of his ownership dispute with Mr. Bonner and Jess (Justice Davies' reasons for judgment are indexed at 2021 BCSC 2387). If Mr. Hirakawa succeeds with his claim, then the Axion Shares he currently holds will be transferred to him. If Mr. Hirakawa fails to establish ownership, then Axion's transfer agent will cancel the Axion Shares encompassed by the Certificates.
- [19] The net effect of Axion's Proposal is that with the possible exception of Mr. Hirakawa, NextPlay, along with any of the other parties listed in para. 13, such as Cern One, will no longer hold or own in any manner any of the Axion Shares.

The Number of Axion Shares in Issue

- [20] The total number of Axion Shares that fall within the ambit of the Axion Proposal is reduced by just over 3.4 million shares on account of a settlement agreement reached between Mr. Bonner, Jess, and Cern One with the plaintiffs in VA S213370 (which the parties refer to as the "Japanese shareholders action"), brought by investor plaintiffs against Mr. Bonner, Jess, Cern One, and Axion (who did not oppose the relief sought by those plaintiffs). In late spring 2023, Mr. Bonner, Jess, and Cern One reached a settlement with the plaintiffs in that action to transfer to them a certain number of the Axion Shares. The settlement agreement was confirmed by a consent order issued and entered on June 14, 2023. The order was necessary since the Davies J. Order was also issued in that action.
- [21] Completion of the settlement was delayed until the latter stage of the sanction hearing, when Mr. Bonner, Jess, and Cern One consented to an order that authorized Axion's transfer agent to cancel 3,470,626 of the Axion Shares and to issue new shares of Axion in that amount to those plaintiffs.

- [22] Nonetheless, a discrepancy was raised on the evidence during the hearing concerning the specific number of the remaining Axion Shares held by each of Cern One, Uniq Ventures, Michael Bonner, and CC Asia Pacific for NextPlay that fall within the ambit of the Axion Proposal. The parties' differences do not take into account the completion of the settlement with the Japanese shareholder plaintiffs that occurred at the latter stage of the sanction hearing.
- [23] Axion relied on information contained in a press release issued by NextPlay in 2020, which differed from evidence from Mr. Bonner and Jess.
- [24] In Mr. Bonner's recent affidavit no. 23, sworn December 16, 2023, he deposed the number of Axion Shares NextPlay owns (beneficially, as they have yet to be transferred) is 71,993,358. According to Mr. Bonner, NextPlay acquired the Axion Shares through an amended share exchange agreement dated January 6, 2021 and said to be made effective November 12, 2020. Since NextPlay referred to that agreement in some of its filings with the SEC as the "Axion Exchange Agreement", so will I.
- [25] According to Mr. Bonner, 26,053,490 of the Axion Shares are held in Vancouver by PI Financial and in Singapore by the Bank of Singapore, of which, he says, 24,804,757 are held by Cern One but owned by NextPlay (they have yet to be transferred). That statement is confirmed in his next affidavit, no. 24, also sworn on December 16, 2023. If his evidence is correct, then it would leave 1,248,733 shares held by Cern One not encompassed within the Axion Exchange Agreement.
- [26] Mr. Bonner's evidence contradicts Jess' evidence in her affidavit no. 10, sworn August 17, 2023, where she deposed that once the Axion Exchange Agreement is completed, Cern One would be left with 8,278,808 Axion Shares. However, in her 12th affidavit, sworn December 16, 2023, Jess deposed that after "reviewing our records, we have determined that the statement in my affidavit above [no. 10] contains an accounting error." She confirmed that Mr. Bonner's evidence is accurate. No other explanation is provided by either Mr. Bonner or Jess.
- [27] The discrepancy is, I find, resolved by the most reliable (and objective) evidence available, which is NextPlay's Form 8-K filed with the SEC on January 11, 2021, for the date January 6, 2021 ("8-K"), which was put into evidence by the Contemnors.
- [28] In the 8-K, NextPlay updated its reporting to the SEC concerning the Axion Exchange Agreement, as shown in the excerpt below. The 8-K also attaches a copy of an amendment to an amended and restated version of the Axion Exchange Agreement, which NextPlay called the "First Axion Amendment" (and I will as well). The 8-K was signed by William Kerby on behalf of NextPlay as chief executive officer:

Item 1.01 Entry into a Material Definitive Agreement

Additionally, as disclosed in the Current Report on Form 8-K, filed with the SEC on November 18, 2020, on November 12, 2020, the Company [NextPlay] entered into an Amended and Restated Share Exchange Agreement (the "Axion Exchange Agreement") with certain stockholders holding shares of Axion Ventures, Inc. ("Axion" and the "Axion Stockholders") and certain debt holders holding debt of Axion (the "Axion Creditors")(the "Axion Share Exchange", and collectively with the HotPlay Exchange Agreement, the "Exchange Agreements" and the transactions contemplated therein, the "Share Exchanges"). The transactions contemplated by the Axion Exchange Agreement closed on November 16, 2020.

[Underlining in original]

[29] NextPlay also advised the SEC in the 8-K that it acquired the Axion Shares from the following third parties:

Schedule 1.1

Stockholder

Number of Axion Shares Being Exchanged

Uniq Ventures

34,688,098

Cern One Limited

24,804,757

CC Asia Pacific Ventures Ltd.

7,560,633

Michael Bonner

4,939,870

71,993,358

[Underlining and Bold emphasis in original]

[30] NextPlay also reported to the SEC that one of the purposes of the "First Axion Amendment" is to allow the parties to it to mutually determine to not transfer record ownership of the Axion Shares acquired by NextPlay until NextPlay determines it is in its best interests to do so:

Also, on January 6, 2021, the Company, the Axion Stockholders and Axion Creditors entered into a First Amendment to the Amended and Restated Share Exchange Agreement (the "First Axion Amendment"), which amended the Amended and Restated Share Exchange, to:

· allow for the parties to mutually determine to not transfer record ownership of the shares of Axion which the Company [NextPlay] acquired pursuant to the Amended and Restated Exchange Agreement to the Company and that the parties can instead enter into an agreement providing the Company voting and economic rights to such shares, until such time, if ever, as the Company determines it is in its best interests to affect such transfer of record ownership of such shares;

[Underlining in original; italics emphasis added]

- [31] In the First Axion Amendment, the "Company" is shown as NextPlay. The "Axion Stockholders" are Uniq Ventures, Uniq Other Ventures, Cern One, CC Asia Pacific, and Michael Bonner. The "Axion Creditors" are listed as Mr. Bonner, Jess, Cern One, and Red Anchor.
- [32] The First Axion Amendment is signed by: (a) Mr. Kerby as NextPlay's chief executive officer; (b) Mr. Bonner and Jess as individual "Axion Creditors"; (c) Jess on behalf of Cern One and Red Anchor; (d) Michael Bonner on his own behalf; (e) Michael John Fawdry, as the sole director of Uniq Ventures; and (f) Chen Chung Hong, as the managing partner of CC Asia Pacific.
- [33] From the information reported to the SEC by NextPlay, I find the allocation of Axion Shares held by each of the third parties is as shown in the First Axion Amendment to the Axion Exchange Agreement, attached to the 8-K, and described in the excerpt from the 8-K in para. 29 above.
- [34] Of those Axion Shares, Mr. Hirakawa holds a significant number - 36,086,287 - in Certificates, which he alleges were given to him by Mr. Bonner and that he now holds pending the outcome of his ownership dispute. The parties agreed during submissions that the Certificates are comprised of Axion Shares which NextPlay claims to beneficially own, subject to Mr. Hirakawa's claim, acquired from the following sources - 23,585,984 from Uniq Ventures, 4,939,670 from Michael Bonner, and 7,560,633 from CC Asia Pacific. Those shares are enjoined from further dealing per the Davies J. Order.

Does NextPlay Own All of the Axion Shares?

- [35] Even though NextPlay reported to the SEC in the 8-K that it beneficially owns all of the Axion Shares held by Cern One, Uniq Ventures, Michael Bonner, and CC Asia Pacific, the Contemnors took a different position at the outset of their submissions during the sanction hearing. They relied on recent affidavit evidence from Mr. Bonner, delivered both just prior to the start of and during the hearing, to support their assertion that Axion Shares held by Cern One are not owned by NextPlay.

- [36] Just prior to the start of the hearing, Mr. Bonner delivered an unsworn version of his 23rd affidavit. The Contemnors' counsel advised that it was about to be sworn by Mr. Bonner who resides in Thailand (a copy of the sworn version was eventually handed up). In that affidavit, Mr. Bonner deposed that Cern One holds some of the Axion Shares for certain third parties. NextPlay relied on that evidence to support its assertion that it did not own, even beneficially, approximately 22,094,034 of the Axion Shares.
- [37] In the text of affidavit no. 23, Mr. Bonner said that Cern One "holds" Axion Shares for the following individuals in certain amounts:
8. I confirm that Cern holds the following Axion shares for third parties:
 - a. 2,397,017 for Michael Bonner;
 - b. 2,300,000 for Stefan Stein;
 - c. Approximately 1,000,000 for John Rohal;
 - d. Approximately 2,397,017 for Anand More;
 - e. Approximately 1,000,000 for Lee Battia;
 - f. 6,500,000 for Mark Saft; and
 - g. 6,500,000 for Chris Bagguley.
- [38] Yet, in one of Mr. Bonner's subsequent affidavits, no. 25, also initially tendered unsworn but ultimately sworn on December 16, 2023, the same day as his affidavit no. 23, the word "held" in para. 8 was changed to "owes". In affidavit no. 25, Mr. Bonner said his prior statement was a mistake. According to Mr. Bonner, the mistake was due to "a typographical error":
2. I make this affidavit to correct a typographical error made in my 23rd Affidavit at paragraph 8.
 3. Paragraph 8 of my 23rd affidavit should read:
 8. I confirm that Cern One owes the following Axion shares to third parties:
- [39] No other information, let alone any particulars or supporting documents, concerning the purported rights of those third parties was provided by Mr. Bonner or the other Contemnors.
- [40] It is difficult to conceive of the word "holds" as a typographical mistake for the word "owes".
- [41] Regardless, Mr. Bonner's evidence is inconsistent with another paragraph of his 23rd affidavit, where he confirmed that NextPlay acquired and owns all 71,993,358 Axion Shares as of July 2020:

5. In response to paragraph 6 of Mr. Kim's affidavit, I confirm that none of the 71,993,358 shares contemplated by the Share Exchange Agreement have been transferred to NextPlay. However, as of July 2020, NextPlay (then Monaker) has beneficial ownership of all of the shares.

[Emphasis added]

- [42] Mr. Bonner's evidence that Cern One either holds or owes the Axion Shares for others is also inconsistent with NextPlay's report to the SEC in the 8-K and with the contents of the First Axion Amendment to the Axion Exchange Agreement.
- [43] It is also inconsistent with NextPlay's Form 10-K it filed with the SEC for its fiscal year ending February 28, 2022 ("10-K"). In the 10-K, certified by Jess as NextPlay's co-chief executive officer and another individual who was its chief financial officer, NextPlay reported that it acquired all of the Axion Shares on account of the Axion Exchange Agreement:

Acquisition of Axion Shares

The investment in affiliate of \$4,856,825 as of February 28, 2021, represents the Company's acquisition of approximately 33.85% of Axion on November 16, 2020. Pursuant to the Axion Exchange Agreement (as defined in Note 7, below), which closed on November 16, 2020, the Axion Stockholders, exchanged ordinary shares of Axion equal to approximately 33.85% of the outstanding common shares of Axion, in consideration for 10,000,000 shares of Series B Convertible Preferred Stock of the Company, which automatically converted into 7,417,700 common shares of the Company on June 30, 2021.

[Emphasis added]

- [44] Mr. Bonner's evidence is also inconsistent with the position NextPlay has taken in this Court. One example is found in NextPlay's Response to the Axion plaintiffs' Amended Notice of Civil Claim, filed in this action on April 9, 2021, where, at paras. 23-25 and 27, NextPlay confirmed its continued ownership of the Axion Shares:

The Axion Agreement

23. On or about July 23, 2020, Monaker entered into a share exchange agreement (the "Axion Agreement") with certain shareholders and creditors of Axion including the defendants Cern, CC Asia Pacific Ventures Ltd. ("CC Asia"), Red Anchor, Bonner, and Jess.
24. Axion was not a party to the Axion Agreement.
25. Under the Axion Agreement, among other things,
- (a) the Axion shareholders, including Cern and CC Asia, agreed to exchange their shares of Axion - totalling approximately 33.9% of Axion's outstanding shares - for shares of Monaker;

- (b) the Axion creditors, including Red Anchor, Cern, Jess, and Bonner, agreed to exchange debt owed to them by Axion for shares of Monaker; and
 - (c) the Axion shareholders and creditors represented and warranted that they were lawfully entitled to transfer to Monaker their shares of Axion and debt owed to them by Axion.
27. The transactions agreed to in the Axion Agreement completed on or about November 16, 2020. Since then, Monaker has owned approximately 33.85% of Axion's outstanding shares and Axion has been indebted to Monaker for approximately \$7.675 million (USD).

[Bold in original; underlining emphasis added]

- [45] The response to civil claim filed on behalf of Mr. Bonner, Jess, and other related defendants in this action on May 14, 2021 (at paras. 67-71) is to the same effect.
- [46] Mr. Bonner's evidence is also inconsistent with NextPlay's position before the Court of Appeal. One example comes from an affidavit sworn on May 6, 2021, by Mr. William Kerby. His affidavit was filed in support of NextPlay's application to be added as a party to the action brought by Mr. Yuki Hirakawa (VA S213309) so that it could join in an appeal of the Davies J. Order. In that affidavit, Mr. Kerby deposed:

Monaker's Ownership of Axion Shares

- 4. On July 23, 2020, Monaker entered a share exchange agreement (the "Axion Agreement") with certain shareholders and creditors of Axion including the appellants John Todd Bonner, Nithinan Boonyawattapisut, Cern One Limited ("Cern"), and Red Anchor Trading Corporation.
- 5. Under the Axion Agreement, among other things, the Axion shareholders, including Cern, agreed to exchange their Axion shares - totalling approximately 33.85% of Axion's outstanding shares - for Monaker shares.
- 6. The transactions agreed to in the Axion Agreement completed on November 16, 2020. Monaker acquired 71,993,358 Axion shares from Cern and others, being about 33.85% of Axion's outstanding shares. Monaker acquired 18,167,682 of those Axion shares from Cern (the "Shares"); Monaker acquired the remainder from entities who are not parties to this appeal. Monaker still owns the Shares. Monaker also acquired rights to repayment of about \$7.66 million in debt owed by Axion in exchange for shares and warrants in Monaker. Attached hereto as Exhibit "A" is a copy of Monaker's November 12, 2020 Form 8-K filed with the United States Securities and Exchange Commission.

[Bold in original; underlining emphasis added]

- [47] In addition to the Form 8-K referred to in Mr. Kerby's affidavit, NextPlay issued a press release to the public on November 18, 2020 confirming its acquisition of the Axion Shares.

- [48] In the face of this evidence contradicting Mr. Bonner's statement that Cern One owes the Axion Shares to third parties, NextPlay resiled from its initial position it took in submissions. Ultimately, NextPlay confirmed in its oral submissions that:
- (a) it does not challenge or resile from its statements in its filings with the SEC and to this Court and the Court of Appeal;
 - (b) it continues to own all of the Axion Shares, including those held by Cern One, and has authority to deal with them; and
 - (c) any potential dispute that the third parties described in Mr. Bonner's 23rd and 25th affidavits may have concerning Axion Shares held by Cern One is a matter between them and Cern One (although new evidence adduced by the plaintiffs at the instant sanction hearing showed that in mid-2023, Cern One was struck as a registered corporate entity in the British Virgin Islands).
- [49] In all of these circumstances, I reject Mr. Bonner's evidence that the Axion Shares held by Cern One are not owned by NextPlay. That evidence is wholly inconsistent with NextPlay's filings with the SEC, its statements to the public, its position taken with this Court, the evidence it put before the Court of Appeal, and the position NextPlay ultimately took at this sanction hearing.
- [50] The overwhelming weight of reliable evidence establishes, I find, that NextPlay owns all of the Axion Shares described in its 8-K, 10-K, and the Axion Exchange Agreement, including those held by Cern One, subject of course to the outcome of the dispute with Mr. Hirakawa. All of those Axion Shares fall within the ambit of the Axion Proposal.

Value of the Axion Shares

- [51] As a result of its change of position concerning shares held by Cern One, the Contemnors' remaining objection to the Axion Proposal is that it would result in an economic windfall to Axion. Their objection is based on their contention, grounded on Mr. Bonner's evidence in his affidavit no. 23, that the current market value of the Axion Shares is C\$0.20 per share (their objection was not said to be based on any potential upside in value of the Axion Shares and no evidence was adduced nor any submission made in that respect). In contrast, Axion points to the value of US\$4,415 that NextPlay reported to the SEC in its various filings.
- [52] According to Mr. Bonner, the C\$0.20 per share value is based upon the last trading price before the Cease Trade Order and upon a value stipulated in an investment from a private equity fund. In his affidavit no. 23, he deposed:
10. An accurate market value of Axion's shares is CAD \$0.20 per share, which is derived from its most recent trading price on the TSX Venture Exchange prior to it being delisted. The price of CAD \$0.20 per share is also the price at which Yamazaki controlled Kuni Umi private equity fund agreed to invest over \$20 million into Axion.

[53] The only other explanation offered by Mr. Bonner for his valuation is contained in his affidavit no. 23 and is said to reflect a discount for litigation risk:

9. Axion claims that NextPlay values the 71,993,358 shares of Axion that it agreed to receive per the Share Exchange Agreement of \$4,415. It relies on NextPlay's statement in its 10-K for the fiscal year ended February 28, 2022 for this valuation, but that is misguided. NextPlay's choice to write down the value of shares that are subject to litigation is not indicative of the market value of those shares. If the market value for 71,993,358 shares of Axion is \$4,415, that would mean each share is valued at \$0.000061.

[54] Mr. Bonner's evidence is silent as to particulars of that write-down.

[55] The Contemnors seek to support Mr. Bonner's evidence in his affidavit no. 23 regarding the value of the Axion Shares with a screenshot from the Yahoo Finance website showing the price of C\$0.20 per share paid at the last trading at the TSXV in August 2020, which was prior to the US\$4,415 value NextPlay reported to the SEC in its subsequent filings.

[56] If Mr. Bonner's evidence is correct, such that the current value of the Axion Shares is over \$13.7 million (after the shares encompassed by the settlement with the Japanese shareholders are deducted), it is highly troubling that the Contemnors have not suggested pledging or depositing enough of them into court as a means to purge their contempt (as opposed to their submission that they have no suggestion to put forward).

[57] It is also significant that Mr. Bonner's evidence is belied by NextPlay's filings with the SEC.

[58] In the 10-K, NextPlay reported the value of the Axion Shares as at February 28, 2022 to be US\$4,415, based on a change in market price (and not said to be based on litigation risks):

During the year ended February 28, 2022, the Company recognized the loss on valuation of \$2.4 million to Consolidated Statements of Operations and Comprehensive Loss due to the change in the market price of Axion shares, the outstanding amount of this investment as of February 28, 2022 was \$4,415.

[Emphasis added]

[59] No evidence was tendered from Jess at the sanction hearing, who certified the accuracy of the contents of NextPlay's 10-K, explaining how the value of the Axion Shares of US\$4,415 was determined.

[60] During her cross-examination on affidavit in December 2022 and early January 2023, Jess confirmed she certified the contents of the 10-K were accurate and that to the best of her belief, they were:

69 Q A 10-K filing is something that public companies in the United States file with the Securities and Exchange Commission?

A Yeah.

70 Q And it is effectively an annual report; correct?

A Correct.

71 Q And it will contain audited financial statements?

A Yes.

76 Q And you would have certified the contents of this 10-K to be accurate?

A I do.

81 Q You're signing both as co-CEO and the principal executive officer of NextPlay?

A Yes.

82 Q Being the principal executive officer means that there's no one higher than you in the hierarchy of officers within NextPlay; correct?

A Correct.

88 Q You should see a certification page?

A Yes.

89 Q And you read that? That is your digital signature at the bottom of that page?

A Yes.

90 Q And you understood that by applying your digital signature you were confirming the items above, 1 through 5?

A Yes.

92 Q If we look at number 2, at the time you reviewed it and signed it, you were not aware of any untrue statements of material fact contained in the 10-K?

A Correct.

95 Q I take it when you signed this, you were confident that this document was accurate?

A That was my belief, yes.

96 Q And you understood it was important to be accurate because this is the sort of things members of the public might review as it relates to NextPlay?

A Yes.

[Emphasis added]

[61] In its Form 10-Q NextPlay filed on January 18, 2023 with the SEC for the quarterly period ending November 30, 2022 ("10-Q"), NextPlay reported no change in the market price of the Axion Shares in the nine months since it had filed its 10-K:

Acquisition of Axion Shares

The investment in affiliate at cost of \$4,856,825 represents the Company's acquisition of approximately 33.85% of Axion on November 16, 2020. Pursuant to the Axion Exchange Agreement (as defined in Note 7 below), which closed on November 16, 2020, the Axion Stockholders, exchanged ordinary shares of Axion equal to approximately 33.85% of the outstanding common shares of Axion, in consideration for 500,000 shares of Series B Convertible Preferred Stock of the Company, which automatically converted into 370,885 common shares of the Company on June 30, 2021. As of November 30, 2022, the outstanding amount of this investment was \$4,415; there was no change in market price in the nine-month period ended November 30, 2022.

[Italics and underling in title in original; underlining in text added]

- [62] Mr. Bonner's evidence of value also overlooks the careful lengths to which NextPlay described its valuation analysis in the 10-Q. In it, NextPlay set out at some length the considered approach it took to arrive at its determination of a fair value of US\$4,415, including its adherence to generally accepted accounting principles (known as "GAAP").
- [63] His evidence also fails to mention that NextPlay's reports of value to the SEC in the 10-K and 10-Q were made after Axion's shares stopped trading on the TSXV in August 2020 on account of the Cease Trade Order. It also does not mention that the last trade occurred in August 2020 and hence, well prior to NextPlay's valuation for the period ending February 28, 2022 in the 10-K and its updated valuation for the period ending November 30, 2022 in the 10-Q.
- [64] There is no evidence regarding the \$20 million investment from the Kuni Umi private equity fund that Mr. Bonner referred to in his affidavit. There is, however, evidence (from a news release) adduced by the Contemnors concerning a \$20 million investment from KUAM (Hong Kong) Investment 01 Ltd. ("KUAM") which was made prior to the 10-K and 10-Q. The news release, dated April 1, 2021, announced that KUAM agreed to advance up to C\$20 million by way of unsecured convertible debentures (with an initial tranche of C\$8 million), with interest accruing at 4% per annum and convertible to common shares in Axion at KUAM's discretion until maturity at a conversion price that is equal to the higher of C\$0.20 per share or a discounted market price as defined by policies of the TSXV.
- [65] Mr. Bonner's valuation also overlooks his own testimony when he was cross-examined on affidavit in January 2023, that if Axion were to be listed on an exchange for public listing "today", its listing price would probably be one cent:

This isn't exactly a good market environment. Axion has not been publicly traded for three years. If listed it would probably go down to a penny. This is a very bad market environment. Not easy to raise money.

- [66] Even if Mr. Bonner's value of one cent per share is used, then after taking into account the shares transferred to the Japanese shareholder plaintiffs, so that the total number of Axion Shares in issue is rounded to 68,530,000 million (71,993,359 less 3,470,626 to those plaintiffs), the total value of the Axion Shares would be \$68,530, which is significantly less than the Security amount of \$250,000.
- [67] There is no evidence from the Contemnors addressing the inconsistency between Mr. Bonner's valuation and the value NextPlay continued to ascribe to the Axion Shares in its reports to the SEC. There is no evidence to support the Contemnors' oral submissions that generally speaking, since market values for publicly traded shares change daily, it is possible that Mr. Bonner's valuation is correct. Nor is there any evidence to explain the inconsistency between the Contemnors' oral submission that the value in the 10-K represents "book value" (as opposed to market value) and NextPlay's reference to market price in its valuation statements in the 10-K and 10-Q (excerpted in paras. 58 and 61 in these reasons). There is also no evidence from the Contemnors to explain the difference between Mr. Bonner's valuation evidence and their position prior to the sanction hearing that there was little to no value in the Axion Shares as part of their impossibility to comply with the Sanction Order defence.
- [68] I find the only reliable evidence of value comes from NextPlay's reporting to the SEC, which it certified to that regulatory authority as accurate. Based on the evidence adduced at this sanction hearing, I find the value of the Axion Shares to be US\$4,415. I reject the Contemnors' submission that the Axion Proposal if ordered would result in a "windfall" to Axion.

Determination

- [69] In determining the appropriate sanction, I am to consider these factors: (a) individual and general deterrence; (b) the seriousness of the offence; (c) the protection of the public; (d) the ability to pay a fine; (e) the degree of intention in the contemptuous conduct; (f) the past record and character of the Contemnors; (g) whether there was any past contempt; and (h) any aggravating and mitigating factors. The sanction must be proportional and commensurate with the gravity of the offence: *Law Society of British Columbia v. Gorman*, 2011 BCSC 1484 at para. 39; *College of Physicians and Surgeons of British Columbia v. Ezzati*, 2021 BCCA 422 at paras. 56, 64.
- [70] Applying those factors to the present circumstances, and as shown in the Liability Reasons and the other reasons for judgment referred to in para. 7, this is not the first instance where the Contemnors have failed to comply with orders of this Court.
- [71] In one instance, Mr. Bonner and Jess admitted in cross-examination that their non-compliance with an order to produce a contract document was intentional and that they were prepared to risk being found in contempt (see 2023 BCSC 313 at paras. 150-172; 2023 BCSC 978 at paras. 60-74).

[72] Although the Contemnors did eventually purge their contempt of court orders that led to the Security, it was, as I found (see excerpts below from 2023 BCSC 978), only as a consequence of the plaintiffs' continued efforts to pursue compliance:

[Failure to comply with an order issued in March 2021]

[47] The plaintiffs submit that while there is now belated technical compliance with the March 2021 Order, they take issue with the propriety of that filing. They argue that Mr. Bonner and Jess filed the wrong document - an "8-K" as opposed to a "10-KA" - which makes it difficult for members of the public to readily identify the correction of the misrepresentations contained in the original impugned 10-K.

[49] Thus, absent specific knowledge of the purpose of recent 8-K filing, there is no means to identify it as an amendment to correct the misstatements in the impugned 10-K filing without taking additional steps to access the contents of the 8-K. In this respect, compliance with the March 2021 Order remains illusory.

[Failure to comply with an order issued on August 24, 2022]

[56] However, the Contemnors continued to refuse to disclose the name of the counterparty to the Stock Purchase Agreement. During hearings held on November 7 and 8, they insisted the purchaser's identity was not a relevant particular required by the terms of the August 24 Order. The Contemnors were unsuccessful in that argument, and on November 9, 2022, following contested submissions on the merits, I ordered the defendants to deliver an unredacted copy of the Stock Purchase Agreement by November 14, 2022.

[57] The Contemnors advised the plaintiffs they would not comply.

[Failure to comply with an order issued on November 9, 2022]

[70] As noted earlier in these reasons, the Contemnors only complied with the production term of the November 9 Order after they were found in contempt and even then, only after they were pursued for production of a copy of the actual Stock Purchase Agreement when the plaintiffs challenged the provenance of the draft document they produced.

[73] Also, and as I explained in those reasons, I ordered the Security as a means to promote future compliance with court orders in the wake of the Contemnors' ongoing failure to abide by court orders until they had no other option:

[77] Fourth, the plaintiffs' ongoing efforts to secure compliance with other orders provide additional corroborative evidence to support their submissions regarding the Contemnors' overall attitude towards compliance with court orders (i.e., non- or delayed compliance only when left with no other option as a cost of doing business, and the plaintiffs' ongoing need to chase the Contemnors' compliance at significant cost and use of court time).

- [78] Since November 2022, the parties have appeared in this Court relating to the plaintiffs' pursuit of the Contemnors' compliance with the three impugned orders for at least 23 days. Not included in that tally are court days related to contempt in respect of other terms of the November 9 Order and the Contemnors' delay in responding to the terms of the March 30, 2023 Order, and the plaintiffs' efforts to pursue document production.
- [82] The contempt remedy is intended to be coercive but at the same time, the case authorities recognize the need in certain cases for a sanction to address specific and general deterrence. Punishment may be used to secure future compliance with court orders and deter the contemnor from its continuing conduct while also addressing general deterrence. Another purpose of the power to sanction for contempt is to deter violations of court orders to encourage respect for the administration of justice. If court orders are not followed, others will be encouraged to do likewise, and the rule of law is compromised: *Ezzati* at para. 57; *Carey* at paras. 31, 41.
- [83] In this case, the Contemnors' eventual compliance with the impugned terms of the March 2021 Order and the November 9 Order occurred only when left with no other option after being chased by the plaintiffs at significant expense.
- [84] As *Savage J.A.* said in *XY*, at para. 93, "The appellants' failure to comply with court orders and remedy their defaults in a timely way, once again, forms part of a pattern of disregard for the rule of law." Those comments are clearly apposite to this case. Findings of contempt alone have had little impact on the Contemnors. To repeat the instructive remarks of the Court of Appeal in *Bea*, at para. 90, the court's power to punish for contempt "exists to prevent a court from being rendered feckless in the face of the continued abuse of its process."
- [85] The delay in rectifying the 10-K so as to comply with the March 2021 Order is one example. Even more troubling is that the Contemnors' ongoing failure to comply with the November 9 Order to deliver an unredacted copy of the Stock Purchase Agreement was wilful. Jess and Mr. Bonner made it clear in their testimony that they had no intention to comply. In light of evidence disclosed over time on this application and the Contemnors' conduct, I now view their explanation for failing to comply with the notice provisions of the August 24 Order because they thought it applied to Longroot Limited and not Longroot Delaware to be highly questionable.
- [86] These are not isolated events of contempt. Mr. Bonner and Jess, who are the directing minds of the corporate Contemnors, are sophisticated businesspersons with ready access to legal advice, were clear that they were prepared to risk contempt rather than comply.
- [87] In all, I am satisfied and find that the Contemnors' conduct throughout is indicative of their disregard for the authority of the Court.

- [88] I have determined that an appropriate and fit sanction is to require the Contemnors to post security for good behaviour to foster compliance with future court orders. In addition to addressing the gravity of the Contemnors' lengthy course of conduct and specific deterrence, the punishment addresses general deterrence. The range of fines ordered in the case authorities cited by the Contemnors is wholly insufficient to address their attitude towards compliance. Imprisonment is not an option because the personal Contemnors reside in Thailand and the corporate Contemnors have no representatives within the province.
- [89] In XY, Fitzpatrick J. ordered security in the amount that was inappropriately taken by the contemnor. The comparable factors in this case are the impact on the administration of justice, the consumption of scarce judicial resources, and the expense to the plaintiffs from the amount of court time used to address compliance with the three impugned orders.
- [90] I am cognizant of the very recent apologies from Mr. Bonner and Jess, their recent assurances that the Contemnors will comply with court orders, and their submission that I should accept that they have learned from their past mistakes. Yet, as the Contemnors (together with the other defendants) pointed out in August 2022 when seeking an order allowing Monaker to increase its borrowing capacity to the potential detriment of the value of its shares targeted by the plaintiffs' proprietary claim, history is an instructive guide for the future.
- [74] There is no evidence, let alone submission, from the Contemnors to explain what efforts they have undertaken to raise funds from available assets that I have found (see the Liability Reasons) are more than sufficient to post the Security. Nor have they offered to pledge or post any of the Axion Shares they acknowledge they beneficially own in an attempt to purge their contempt. They have made no efforts towards partial compliance. Instead, the Contemnors' position is that no sanction order should be made. These aggravating factors highlight the serious nature of the ongoing contempt.
- [75] It is difficult to discern any mitigating factors.
- [76] The Axion Proposal, which calls for sequestration of the Axion Shares, is the only means available at this juncture to purge the contempt. Since the Contemnors will not post the Security or even some of it, and have not suggested any means in which to purge, it is clear, I find, that they will not pay a fine. A custodial sentence is not available since Mr. Bonner and Jess reside in Thailand and there are no persons from the corporate Contemnors located in the province. Sequestration has been ordered in other appropriate cases: see, e.g., *Bea v. The Owners, Strata Plan LMS2138*, 2014 BCSC 826 at paras. 47-68 [Bea SC], *aff'd* 2015 BCCA 31 at paras. 76-78; *S.G. & S. Investments (1972) Ltd. v. Golden Boy Foods, Inc.* (1991), 60 B.C.L.R. (2d) 305, 1991 CanLII 5735 (C.A.) at paras. 24-25. As Justice Grauer (as he then was) pointed out in *Bea SC*, courts are not rendered feckless when traditional remedies offer no reasonable prospect of halting a contemnor's conduct: *Bea SC* at para. 54.

- [77] The Axion Proposal does not result in a windfall to Axion since the amount of the Security vastly exceeds the value NextPlay reported to the SEC that it places on the Axion Shares. Subject to the modification discussed below, I am satisfied that the Axion Proposal should be implemented in order to purge contempt without any further delay, as there is no other remedy currently available.
- [78] When the value of the Axion Shares is compared to the Security amount, I am not satisfied that the Axion Proposal appropriately addresses the principles of denunciation and deterrence. Consequently, when considering a fit and appropriate sanction, I have determined that the Axion Proposal should be modified so that if an application to decrease the amount of the Security is successfully brought by any party to this action as per my June 8 Sanction Order, funds paid out of court will be paid back to Axion.

Disposition

- [79] In addition to the consent order I made during the sanction hearing concerning the settlement in the Japanese shareholders action, I order Axion's transfer agent to cancel all of the remaining Axion Shares, except for the Certificates held by Mr. Hirakawa, and as noted above, Axion's transfer agent shall cancel those shares in the event Mr. Hirakawa's ownership claim is unsuccessful. Axion shall forthwith post, concurrently with the cancellation by its transfer agent, the full amount of the Security of \$250,000. Axion shall post it into court or with its counsel acting for it in this action so long as I am satisfied with the terms of the proposed undertakings (which Axion may address in a follow-up court appearance). Upon the success of any application to reduce the amount of the Security, funds paid out of court or trust shall be paid to Axion.

"Walker J."

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