

**IN THE MATTER OF AN ARBITRATION
UNDER THE *ARBITRATION ACT*, 1991, S.O. 1991, c. 17.**

BETWEEN:

RAZA BOKHARI

Applicant

-and-

FSD PHARMA INC.

Respondent

AWARD

Luis Sarabia
Andrew Carlson
Trevor N. May
Sarah Cormack
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Counsel for the Applicant

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Counsel for the Respondent

Introduction

1. Dismissal for cause has been described as the capital punishment of employment law, an extreme measure not to be resorted to in trifling cases. Conduct amounting to a repudiation of the contract will be required to be proven by an employer alleging cause.

2. In this case, we will explore the surrounding circumstances under which the Claimant, Raza Bokhari (“Bokhari”) was terminated by the Respondent, FSD Pharma Inc (“FSD”).

3. The nature of Bokhari’s alleged misconduct will be examined carefully within the context of his employment. If the alleged misconduct is proven, on a balance of probabilities, the Tribunal will take a proportional approach in determining whether dismissal for cause is warranted. It is an objective exercise.

4. At the time of this dismissal in June 2021, Bokhari had become the largest shareholder of FSD and was its CEO and Executive Chair of its board of directors. In 2020, Bokhari entered into a written employment contract with FSD, having been involved with the company in various capacities since 2018.

5. Importantly, this agreement, in Section 4.5, provided that Bokhari would be paid a severance equal to twice his highest total compensation in any given year of employment. This severance would be paid unless there was termination for cause.

6. Section 4.1 of the Agreement provided:

4.1 Termination for cause. The company may terminate the employment of the Executive at any time for cause by written notice to the Executive. For the purposes of this Agreement, “cause” means a material breach of the material provisions of this Agreement, which has not been remedied by the Executive within thirty (30) business days after receipt of notice from the Board specifying such material breach, if capable of so being remedied.

7. Based upon the provisions of this Agreement and his assertion regarding his best years compensation, Bokhari claims the sum of USD \$30.2 million for his wrongful dismissal.

The Evidence

8. Originally founded as FV Pharma, by 2001 the company had become FSD and in 2013 Zeeshan Saeed (“Saeed”) replaced one of the original founders as an equal partner. Saeed, a Pakistani immigrant, is an engineer who, together with Thomas Fairful, (“Fairful”) the remaining original partner, recruited Anthony Durkacz (“Durkacz”) to join him.

9. The company had secured licenses from Health Canada to produce and market medicinal cannabis at its facilities in Cobourg, Ontario. Fairful and Saeed believed Durkacz, with his financial background, would be able to assist FSD in raising sufficient capital to enable it to be listed on the Canadian Securities Exchange which was ultimately done by way of a reverse takeover of Century Financial Corporation Inc.

10. FSD's capital structure was not unique. It consisted of Class B Shares which permitted one vote per share at shareholders' meetings and Class A Shares which carried the right to cast 276,000 votes.

11. Fairful, Saeed and Durkacz each held an equal number of Class A Shares. The Class B Shares began trading on the CSE in May 2018 at approximately CAD \$25.00 per share.

12. Through the Pakistani diaspora, Bokhari and Saeed had become acquainted in about 2008. A Pakistani immigrant himself, Bokhari was medically trained in Pakistan. Upon his emigration to the USA, Bokhari, rather than practice medicine, founded a medical testing company, Parkway Clinical Laboratories Inc. ("PCL") in the Philadelphia area.

13. Obviously, through his association with Saeed, Bokhari became interested in FSD. Both Saeed and Durkacz thought that Bokhari, with his

US connections, could be useful to FSD, particularly in any effort to gain a NASDAQ listing of its Class B Shares. Unquestionably, Bokhari had an extensive political, government and business network.

14. According to Saeed and Durkacz, it was initially thought that Bokhari could become an advisor to FSD. Bokhari, it would seem was interested in a more significant role so that when Fairful stepped down as CEO in the summer of 2018, FSD appointed Bokhari as a director and together with Durkacz, in October 2018, he became Executive Co-Chair of the Board and was appointed interim CEO. According to the evidence of Durkacz, this interim role was to extend until FSD found a permanent CEO.

15. Shortly after joining FSD, Bokhari was granted an option to purchase 45 million Class B Shares under an Option Plan. This was comprised of an option to purchase three million Class B Shares at CAD \$0.13 per share in August 2018 which were to vest immediately. Upon receiving a certificate for those options, Bokhari acknowledged receiving a copy of the Option Plan which contained certain terms and conditions.

16. In September 2018, FSD granted Bokhari a further option to purchase up to 40 million Class B Shares at CAD \$0.74 per share. As with the August options, these were for a period of four years.

17. The September 2018 options, unlike the August options, did not vest immediately. Rather, they were to vest (a) upon the listing of FSD on the NASDAQ and (b) upon the arrangement of adequate financing to the satisfaction of the Board in connection with the NASDAQ listing. A 2019 Circular, which Bokhari signed, set out these conditions for the September 2018 options.

18. Under Bokhari's leadership in the early days FSD, in order to obtain the NASDAQ listing, transitioned from a cannabis company into the pharmaceutical and biotechnology area. In late 2018, a new CEO, Rupert Haynes ("Haynes") was hired. Unfortunately, there was conflict between Bokhari and this new CEO who was ultimately fired by Bokhari in February 2019.

19. As a result, on the same day the new CEO was terminated, FSD made Bokhari interim CEO and in June 2019 appointed him permanent CEO.

20. Once Bokhari assumed the role of permanent CEO, he re-shaped the Board of Directors such that by early 2020, the Board consisted of Bokhari, Saeed, Durkacz, Gerard Goldberg (a holdover from the CSE listing days), David Urban, James Datin, Robert Ciaruffoli ("Ciaruffoli), Stephen Buyer ("Buyer") and Larry Kaiser. All but Mr. Goldberg were US

citizens recruited by Bokhari and all were highly accomplished in their own fields of endeavour.

21. In order to transition from a medical cannabis business, Dr. Edward Brennan (“Brennan”) was recruited to be President of FSD’s new Delaware subsidiary, FSD Biosciences Inc., which operated from Bokhari’s PCL premises in Pennsylvania.

22. Given the new direction FSD was taking, it acquired a biosciences company, Prismic Pharmaceuticals Inc. (“Prismic”), in the summer of 2019. Without question, both Saeed and Durkacz were in agreement with the direction Bokhari was taking the company.

23. Following FSD’s December 2019 listing on the NASDAQ, and obviously in recognition of Bokhari’s achievements, Saeed and Durkacz transferred to him Class A Shares such that by early 2020, they each held 24 of FSD’s 72 Class A Shares, each carrying multiple voting rights.

24. Given its transition to a pharmaceutical and biotechnology business, FSD gave up its cannabis license and announced it would be liquidating its cannabis-related assets, including its facility in Coburg, Ontario. As well, given the emergence of COVID, the company began to design and conduct a Phase 2 clinical trial for the use of one of its compounds to treat the disease.

25. Without question, 2020 was a busy year for FSD, a year that also included a significant capital raise. It should be noted that the NASDAQ listing came with certain requirements as a result of which FSD developed its Controls Policy including a Delegation Matrix which will be discussed later.

26. In early 2020, the Board's Compensation Committee began a process to deal with Bokhari's remuneration. Bokhari, at the time, did not agree it was timely for the Board to be considering a full compensation package for him. Nevertheless, the issue of Bokhari's compensation resurfaced in July 2020 and he entered into a written Employment Agreement effective July 29, 2020, an agreement fully supported by the Board of FSD, including Saeed and Durkacz.

27. In particular, the Agreement contained a provision that Bokhari's cash compensation would be \$1.00 annually but that the Board could award non-cash compensation to him from time to time in the form of stock grants and/or options.

28. The Employment Agreement, drafted by Bokhari's personal lawyer, John Hogan ("Hogan"), stated in one recital the following: "Whereas the Executive has been employed by the Company since February 5, 2019." Bokhari has taken issue with this recital stating it is

incorrect and that he should be considered to have been “employed” by FSD since 2018. This will be discussed later in the Award.

29. Coincident with the entering into of the Employment Agreement, the Board of FSD approved an award of CAD \$2.5 million worth of Class B Shares to Bokhari as his employment compensation for the year 2020. The Independent Directors had already, as of March 2020, been paid their full annual compensation for 2020 in cash or shares. This was publicly disclosed in May 2020.

30. What really brought this entire matter to a head was a presentation by Durkacz to Bokhari and Saeed in November 2020 urging them to take advantage of a strategic acquisition. The company Durkacz was promoting was Lucid Psycheceuticals Inc. (“Lucid”). During the Lucid presentation, Durkacz, at the time, was complimentary towards FSD’s management, and in fact offered to resign as Co-Chair of the Board, permitting Bokhari to continue on as sole Executive Chair.

31. By the fall of 2020, FSD’s stock price had fallen dramatically from its 2018 high, and according to Durkacz, Lucid presented an opportunity to expand into the psychedelic area. Lucid was an early-stage biotechnology company involved in the research of psychedelic

compounds for the treatment of depression. As well, it was developing other compounds potentially to be able to treat Multiple Sclerosis.

32. Durkacz, who had assisted Lucid in raising capital, held a small interest in Lucid through his own company. According to his evidence, he held a 5.7% indirect, fully diluted interest in the company which in his presentation he disclosed. In an email dated December 14, 2020 to Durkacz, Bokhari advised him he did not “assess any conflicts of interest relating to Lucid.”

33. While, following Durkacz’s presentation, Bokhari might have shown some interest in the possible acquisition of Lucid - an acquisition that could have been done by way of shares - he evidently lost interest after some further investigation of Lucid which included a telephone conversation with one of Lucid’s founders.

34. According to Bokhari, he was advised during this call that Lucid was only an “idea” at that point and was little more than a shell company. Clearly Durkacz and Saeed were taken aback by Bokhari’s decision not to pursue the Lucid opportunity, an opportunity they both felt would be in FSD’s best interests.

35. In a December 17, 2020 email to the Board cancelling the December 18th meeting, Bokhari wrote: “Before I can set up another date

and time, which would very likely be in 2021, may I request Anthony (Durkacz) and Zeehan (Saeed) to present to the member of the BOD, a comprehensive due diligence report on the company.” He as well suggested they “provide a financial valuation of the company to support the deal structure.”

36. As founders of FSD, both Saeed and Durkacz believed they should have a say in any decision about Lucid and were obviously angered by what they believed was a unilateral decision on the part of Bokhari not to pursue the opportunity in mid-December 2020. This, the Tribunal concludes, without difficulty, is when the present dispute arose.

37. Both Durkacz and Saeed were anxious for Bokhari to call an urgent Board meeting over the 2020 holiday season to deal with the Lucid issue and hopefully get the transaction approved. Bokhari refused to call a meeting of the Board. He was the CEO of FSD and he had made the decision not to pursue Lucid.

38. On December 16, 2020, Saeed sent an email to the entire Board in which he stated that the Lucid deal was critical to FSD’s survival. In the email, Saeed described Lucid as the opportunity of a lifetime, an opportunity very beneficial to shareholders. He asked the board members to suggest a suitable time for a meeting in order to resolve the issue.

39. Bokhari, earlier that day, had emailed Saeed and Durkacz, along with all other Board members advising “yet again” that he had no interest in Lucid as an acquisition target.

40. Following Saeed’s email to the members of the board of December 17th, Durkacz sent an intemperate email to Bokhari and all board members which read:

From: Anthony Durkacz [anthony@firstrepubliccapital.com]
 On behalf of Anthony Durkacz
 <anthony@firstrepubliccapital.com>
 [anthony@firstrepubliccapital.com]
Sent: 12/17/2020 1:39:16 AM
To: Raza Bokhari [rbokhari@fsdpharma.com]; Zeeshan Saeed [zsaeed1970@gmail.com]; Larry Kaiser [larry.kaiser@tuhs.temple.edu]; BobCiaruffoli [bciaruffoli@fsdpharma.com]; Steve Buyer [congseb@hotmail.com]; jim.datin@bioagilytix.com; Gerry Goldberg [gerrygoldbergcpa@gmail.com]
CC: Aaron Sonshine [SonshineA@bennettjones.com]; Donal Carroll [dcarroll@fsdpharma.com]
Subject: RE: CONFIDENTIAL INFORMATION – LUCID

Raza, you do not have authority to make a decision on behalf of the Board.

Your direction, if followed by the Directors, exposes the Directors to liability for breach of fiduciary duty. Your direction negligently instructs Directors to disregard their duty to act with skill and care. I strongly encourage the Directors to consider the serious financial consequences of shirking their legal obligations owed to shareholders.

This is an accretive acquisition which will add value to the Company and solve its future capital requirements.

This acquisition is favoured by the Company's two largest shareholders. If the Directors fail to comprehensively consider the potential transaction without justifiable reasons, merely on the instructions of the CEO, we will remove these Directors and pursue actions against those individuals.

At this point, all we are asking is for this acquisition to be fairly considered and voted on at a Board Meeting.

Regards,
Anthony J. Durkacz
Executive Vice President
416-720-4360
www.firstrepubliccapital.com

41. By this point, Bokhari believed Durkacz and Saeed were plotting to have him removed as Executive Chair and CEO of FSD. On December 15, 2020, he emailed Aaron Sonshine ("Sonshine"), FSD's corporate counsel, stating he believed Saeed and Durkacz were contemplating a resolution for board consideration to have him removed. In the email, he attached a summary of his cash and non-cash compensation for the years 2018 to 2020 "to serve as a guide to calculate severance package if such a board resolution is approved."

42. In the document attached to the email, a document prepared by FSD's financial advisors, KAM Consulting, Bokhari's 2018 stock options were valued at USD 15.1 million using the Black-Scholes option pricing model.

43. Following his receipt of Durkacz's December email, Bokhari sent an immediate email to the Board (but not to Saeed and Durkacz) stating he was "disappointed and disturbed" they were "being subjected to email communications from activist directors which appear to be threatening, unwarranted and unbecoming of being a member of a board of Directors." He invited the directors to consider not responding to the emails from Saeed and Durkacz.

44. After some back and forth between directors, it was agreed a meeting of the Board would be held December 18th at 1:00 pm. Accordingly, Durkacz re-circulated the Lucid slide deck he had earlier presented.

45. Bokhari, who initially had agreed to hold a board meeting, abruptly cancelled the meeting before it could occur. Obviously disappointed by this turn of events, Durkacz and Saeed, still believing the entire Board, not just Bokhari, should evaluate the Lucid deal, decided to call a meeting of the Board for December 22, 2020. Notices for this meeting were sent to board members on the evening of December 17th.

46. On December 18th, counsel for FSD, Alan Gardner ("Gardner") of Bennett Jones wrote to Durkacz and Saeed advising that a clear

majority of board members were unavailable on December 22nd. Attached to that letter was a Notice for a board meeting to be held January 21, 2021.

47. Prior to that letter, Bokhari on December 17th had sent an email to Donnell Carroll (“Carroll”), the CFO of FSD copying, among others, Sonshine, Gardner and counsel at Paul Weiss. It read:

From: Raza Bokhari [rbokhari@fsdpharma.com]
Sent: 12/17/2020 10:48:40 PM
To: dcarroll@fsdpharma.com
CC: SonshineA@bennettjones.com;
 ccummings@paulweiss.com; ckurtz@paulweiss.com;
 aabramson@paulweiss.com; GardnerA@bennettjones.com;
 madesso@fsdpharma.com
Subject: Re: Notice of FSD Meeting of the Board of Directors

Dear Team PW & BJ:

I understand that you are talking in the morning.

Please contemplate aggressive and swift actions including filing a formal Complaints before the OSC or a court of law.

1. Disqualify Anthony Durkacz.
2. As an activist director, and a 20% owner of lucid, he is forcing a board meeting to effectuate self dealing.
3. Disqualify Zeeshan Saeed for breach of fiduciary duties in making unauthorized disclosure of company matters.
4. In addition I need swift guidance and communication language to terminate Zeeshan Saeed’s employment.

As a matter of observation, I thought the agenda to set the Director as Five and if there intention is to stay as Director’s, they would have not have enough independent Directors to fill all the committee’s to satisfy SEC filings; unless the same three directions would serve on all committees.

The show goes on!!!

Best

Raza Bokhari, MD
Executive Chairman & CEO
FSD Pharma Inc
(Nasdaq: HUGE; CSE: HUGE.CN)
M 610 329 3839

48. This email outlined Bokhari's intentions regarding Saeed's employment at FSD. Indeed, it was followed up by a letter from Bokhari to Saeed dated December 20, 2020. This letter bears reproducing here:

Dear Mr. Saeed:

Re: Administrative Leave and Investigation

I am writing to you in my capacity as Executive Chairman and Chief Executive Officer of FSD Pharma Inc. ("FSD" or the "Company").

This letter confirms a decision taken by me in consultation with, and with the consent of, a majority of the members of the Board of Directors of FSD (the "Board") to place you on administrative leave, effective immediately, pending completion of an investigation into escalating concerns that you have engaged in serious misconduct inconsistent with your responsibilities as President and a director of FSD. The concerns identified thus far include, but are not limited to, your disclosure of highly sensitive and confidential information about the Company and its partners to third parties in breach of your fiduciary duties, your employment agreement effective May 29, 2019 (the "Employment Agreement"), and FSD's contractual confidentiality obligations owed to third parties, as well as a failure to comply with the FSD's Corporate Disclosure Policy. In addition, you have willfully neglected your duties and failed to perform the essential responsibilities of your roles with FSD, including by, but not limited to, the use of illicit substances, and related intoxication in the workplace, and board and shareholder meetings. Your apparent actions and inactions have caused serious reputational and operational harm to the Company and, if proven, constitute just cause for dismissal.

The Company, in consultation with outside legal counsel and forensic experts, will be investigating these matters further before making a final determination regarding the future of your employment and/or any other legal action it may take against you, including termination for cause, and commencing litigation in respect of any breaches of fiduciary duties, breaches of your Employment Agreement, breaches of confidence, and any other improper conduct causing harm to FSD.

To be clear, this administrative leave applies to all duties and offices that you hold with FSD, including any of its subsidiaries and affiliates. You are instructed that throughout the course of this administrative leave, you shall not attend the Company's premises or contact any employees, customers, investors, agents, or other partners or associates of FSD, its subsidiaries and affiliates.

Your access to FSD's IT systems shall immediately be temporarily suspended. FSD shall advise the senior management team that you are on a leave. In addition, you are directed to turn over to the Company all technological hardware issued by FSD or containing information relative to FSD, including but not limited your Company computer and any laptops or mobile devices in your possession. You are directed to preserve all documents, whether paper or electronic, and to not delete, attempt to delete, or remove any data or messages from any such devices or otherwise. The Company will arrange a courier to attend at your home to collect these computers and devices.

While we cannot provide you with a timeline as to how quickly the investigation will be completed, we can assure you that we shall try to move as quickly, and carefully, as possible. We will also provide you with reasonable updates on the status of the investigation and answer any reasonable procedural questions that you have regarding same. In this regard, you will be required to meet with Company counsel to participate in an interview regarding the Board's concerns, which will be arranged at a mutually convenient time.

At this time, pending the outcome of our investigation, your administrative leave does not constitute disciplinary action or a termination of your employment. Nevertheless, given the seriousness of the matters at issue, and considering the operational and reputational harm that your actions and inactions have already inflicted on the Company, the Company invites you to immediately tender your resignation as an executive of FSD. You may also want to seriously consider resigning as a Director of FSD.

In accordance with your obligations owed to the Company pursuant to your fiduciary duties and Employment Agreement, you are required to keep the fact [sic] and nature of the investigation confidential and to not take any steps that could interfere with the investigation or harm FSD whatsoever. Please be aware that FSD takes these obligations very seriously and shall take any steps necessary to protect its interests. We trust the foregoing is clear. You may contact me or Donal Carroll, FSD's Chief Financial Officer, directly if you wish to discuss the contents of this letter.

Yours truly,
Raza Bokhari, MD
Executive Chairman & CEO

49. This letter was drafted by Gardner who, in an email sending the draft to Bokhari for approval, advised him that any decision to suspend Saeed should come from the disinterested Board members, and that in spite of his desire to "squeeze" Saeed, any leave should be paid and that he should be careful about the allegations of substance abuse.

50. On the same day, December 20th, Bokhari created a "Special Committee" to investigate the allegations against Saeed. This two-man

committee was comprised of Board members Buyer and Ciaruffoli. Given that only the Board could create committees, Gardner later drafted a resolution creating the committee and establishing its mandate. This was signed by five of the independent directors.

51. Notwithstanding the creation of this committee, Bokhari terminated Saeed before the committee had completed its work. There had been a significant amount of correspondence between employment counsel for Saeed and Gardner largely having to do with the allegations against Saeed and the importance of a fair and impartial investigation.

52. On December 27, 2020, Bokhari sent an email to Gardner, Sonshine and Paul Weiss' counsel, among others, with a copy to Buyer and Ciaruffoli which in part read:

3. The special purpose committee (assignment or task force)
I have been forming such committees on an ongoing basis drawing distinguished members of the board, qualified executives and outside consultants to effectively executive [sic] the business of the company.

Nonetheless I have no issue that we have now done a board resolution to appoint honorable Steve Buyer and Bob Ciaruffoli in form of special committee, but it was done in haste; all it needed was to be renamed.

I do have an issue that we did it in a haste to appease counsels of Blake.

I also would urge u to please avoid trying to explain anyone's counsel as to what I really meant.

I always operate from a position of strength, even in the unlikely event that I'm wrong.

The thrust of the issue is the following:

Anthony Durkacz and Zeeshan Saeed are bad actors; we have glaring evidence available to resign from the board, hand over their A shares or face consequences. In addition Zeeshan should also quit. I'm most appreciate [sic] that Steve and Bob have agreed to lead the charge and I will give them all the support in their assignment.

Any other matters, which could be board meetings, possible proxy contentions, AGM, settings up agenda, dates and venue, etc pls direct all those to my attention. With a cc to my cfo and COS.

Also let's try not rush to respond to the lawyers of Anthony & Zeeshan.

53. This letter is revealing for a number of reasons. After describing Durkacz and Saeed as "bad actors", it stated how appreciative Bokhari is that Buyer and Ciaruffoli would be "leading the charge." The email concludes with the urging that FSD "not rush to respond to the lawyers of Anthony (Durkacz) and Zeeshan (Saeed)."

54. Clearly this was in response to a request from counsel for Saeed and Durkacz not only for information regarding the allegations against Saeed but just as importantly for a list of FSD's registered shareholders and beneficial holders.

55. Finally, Gardner, on December 29th, advised employment counsel for Saeed and Durkacz that the “special committee” would as well be investigating specific issues relating to Durkacz.

56. While the prospect of a proxy fight had been in the offing in late 2020, on January 4, 2021, it was clearly out in the open. On that date, counsel for Durkacz and Saeed forwarded a Requisition under Section 105(1) of the OBCA for a special meeting of FSD’s shareholders. It, as well, reiterated the earlier request for a list of the Company’s shareholders which had gone unanswered.

57. The Requisition required the Board to call a special meeting of shareholders no later than March 15, 2021 to remove Bokhari and the current independent directors and to replace them with a slate of five directors proposed by Durkacz and Saeed.

58. Bokhari’s reaction to the Requisition is summed up in a contemporaneous recording of a telephone call he had with Carroll, Ciaruffoli, Sonshine and Gardner on January 4, 2021. Bokhari stated:

Yes. To me, let me react to that. [Responding to a statement from Mr. Sonshine that it would be typical to respond to a requisition on the 20th or 21st day]. Irrespective of what our strategy decision-making and how that would – will flow, but we will drag our feet until the last second before we will respond to them in any manner or fashion. That is just a blanket, you know, policy that I am going to follow and I’m also – but only the people that are excluded from that policy is Mr. Buyer

and Mr. Ciaruffoli's committee, who are running their own schedule and doing what they see fit, is appropriate.

But from my desk and so the time that I continue to serve the chairman and chief executive officer, our communication to Messieurs Durkacz and Saeed is going to be at the last, you know, second before. So they get no extra time whatsoever and they get no privilege whatsoever. Also, I'm going to say this and part of this, somehow, probably is out there. I'm going to also, starting today, going forward now, I'm going to push the envelope and flirt around the edges of the guidelines.

By doing that, if I can inflict any harm, economic, you know, harm and damage onto them whatsoever. That is the strategy and that is what we will do. This is, in the end, it is the winner that take it all. Not, you know – not the one that, you know, followed all the guidelines. We'll follow the guidelines. We'll respect them, but we'll push the envelope. And we'll push it and we'll push it until we can't push it any further. That is how we're going to conduct ourselves.

And that is how we're going to defeat them. And we're going to pile onto them, things after thing, things after thing, things after thing. So that they just don't really know how to – in time, how to breathe. That's the overarching strategy, how we're going to operate. Which included, by the way, and I respected that, and I still respect that, Al, when you told me that I should not really suspend, just that Zeeshan's payment, because it will mean destructive whatever.

And I want to make sure that you know that I respect that. But going forward, whatever is in my control, if I can stop his paycheck, stop the damn paycheck. You know, because in the end, this is now, we are in the fog of war now.

59. After Sonshine suggested calling the meeting for mid-March,

Bokhari stated:

So, my aim and objective is, that I set a date, and I go around it, and then I say actually we need to reset another date, because we have to come up with some good reasons to reset it. I think the last time was – I'm not sure what the reason was, but there was some reason. That a legitimate enough reason to reset it. So I'm going to play with their minds, as much as I can, because that is what I intend to do.

Because in parallel, we also want to continue to do the good work for our shareholders and continue to advance our biotech, you know, our clinical trials. Plus, I have two active compounds that we are talking to one, courtesy to your help, at three o'clock. And then we are obviously in advanced conversations with a (indiscernible) in phase three. And then we also are speaking to this (indiscernible) and see what their intent it.

Because one of my other intentions, also is, which I would also separately take the other board members into confidence, but the one that is – to what I call is the lynch pin and the pivot in all of this is also in the cause. I plan to just do meaningful acquisitions through issuing of securities and raise capital around it by issuing securities.

So I keep on watering down the A shares as much as I can, so that their bite continues to come – by the time an AGM comes, I, right now, have 20 million outstanding shares. And I believe that the A shares currently collectively have a voting power of 40 million.

As I said, remember the overarching principle, make their life miserable. For every dollar the – if there's an extension, then they have to file something. It's going to cost them more money. Do whatever it takes which cost them more money because that's just the way it is. Break them economically and make it, you know, frustrating for them so that nothing gets handed over to them. You know, there are no niceties.

The gloves have come off. All those people that try to confuse my niceties as weakness, they should just know that I'm just like a nice guy. But there is zero weakness. And I'm not even

sure that I'm even a nice guy. I just probably put up a good show. So that pretty much is a – many might argue that I'm the only one trying to put up a good show on this call...”

60. On the same day in a telephone call with Carroll and Gardiner,

Bokhari stated:

I do not want FSD Pharma to pay for a dime of any of like the work which otherwise is related to me. Unless you find some reason that there is some common ground. Yes, of courses. Fuck it. Bill it to FSD Pharma. But otherwise, if that is what, you know, is out there, I like to get my bill. I like to pay them, and I like to go through this process. However, in the world of fighting with them on these proxy wars, that's like the best part. I got the – I have the treasury. They have their own personal money, you know, so good luck.

For every dollar you're going to spend, I'm going to outspend you by, who knows, \$25.00, \$50.00. You know, you can't win. It's a simple thing. They don't really understand how the American thinking process works. Just keep on throwing money and the problem go away. You know, especially when you have just the right set of lawyers and there are all these things are done in a timely fashion. So that's pretty much what really it is.

When I say about that we have to flirt around the edge, still within the confines of the law. We're not going to break the laws. Okay. We're never going to break the laws. I hope that we have a good understanding of that.

61. On January 21, 2021, the Board of FSD met on a Zoom

conference. This meeting was held without Durkacz or Saeed being

present. The Board Book for the meeting was circulated to all directors.

However, the copies sent to Durkacz and Saeed were redacted, deleting

briefings from the CFO, Carroll and from Brennan, the President of FSD Bioscience.

62. Among those attending this meeting were company counsel Sonshine along with Sam Robinson (“Robinson”), a litigator with Stockwoods who had just been retained by Bokhari.

63. While some company business was attended to at this meeting, including the establishment of a new Executive Committee, the censuring of Durkacz and the removal of Durkacz and Saeed from all committees, there was also some discussion of the Requisition and the scheduling of a meeting of shareholders. There had not been a meeting of shareholders since December 2019 and the last approved financials for FSD were for the year ending December 31, 2018.

64. There can be little doubt Bokhari and indeed the other Independent Board members were in no hurry to schedule the shareholders’ meeting. After some discussion of dates and what might be acceptable, June 29, 2021 was agreed upon.

65. As well, at this January 21st meeting, Bokhari requested approval from the Board for Directors’ compensation for 2021. He moved that the Independent Board members receive \$75,000 annually in cash (quarterly)

or shares immediately. As well, there would be a further \$25,000 on the same basis for Committee Chairs.

66. As previously noted, Saeed's employment had been suspended by Bokhari on December 20, 2020 pending an investigation into certain matters outlined in Bokhari's December 20th letter. A Special Committee consisting of directors Buyer, as Chair, and Ciaruffoli was established by Bokhari to investigate the allegations against Saeed.

67. Before the Special Committee had a chance to investigate and report to the Board, on January 25, 2021 Bokhari, in a letter to Saeed, terminated his employment for cause. This letter is reproduced here:

Dear Mr. Saeed:

Pursuant to a letter to you from FSD Pharma Inc. (the "Company"), dated December 20, 2020, the Company place you on administrative leave pending completion of an investigation into concerns that you had engaged in serious misconduct. The alleged misconduct included, without limitation, (1) your disclosure of highly sensitive and confidential information about the Company and its partners to third parties, in breach of your fiduciary duties, the terms of the Amended and Restated Employment Agreement, dated September 16, 2019, between you and the Company (the "Employment Agreement"), the Company's contractual confidentiality obligations owed to third parties, and the Company's Corporate Disclosure Policy, (2) your willful neglect of your duties to the Company, and (3) your failure to perform the essential responsibilities of your role as President of the Company, including, but not limited to, by your use of illicit substances and related intoxication in the workplace and during meetings of the Company's Board of Directors and Shareholders. In addition, the Company has become aware of your suspicious

and unsavory interactions with the Company CEO and CFO with respect to pushing the consummation of the potential acquisition of Lucid Psychedelics by the Company. We judge that your actions, especially between December 9 through December 16, 2020, were to say the least unbecoming of an executive of the Company, or for that matter an executive of any public or private company.

The Company has concluded that grounds exist for the termination of the Employment Agreement and your employment with the Company. Accordingly, effective on January 25, 2021, the Company hereby terminates the Employment Agreement, and your employment with the Company, as President or otherwise, for cause under Section 4.1 of the Employment Agreement, on account of your willful neglect of duty, your willful misconduct, and your taking actions or inactions that constitute just cause for termination of employment at common law. This termination applies to all duties and offices that you hold as an employee of the Company, its subsidiaries and/or affiliates.

In addition, pursuant to Section 4.7 of the Employment Agreement, due to your termination of employment, you are deemed to have immediately resigned all positions that you hold as an officer, director or employee of the Company, its related entities and/or affiliates. You have therefore resigned as President of the Company, as a Director of the Company, and from any other positions that you held in the Company or its subsidiaries or other related entities and affiliates, effective January 25, 2021.

Also, pursuant to the terms of the Company's Stock Option Plan, the termination of your employment for cause has resulted in the termination, effective January 25, 2021, of all options that you hold to purchase capital stock of the Company. All such options are now null and void.

You are reminded that all provisions of the Employment Agreement that survive termination, including without limitation your obligations under Section 6.2, 6.4, 6.5, 6.6 and 6.9, remain in full force and effect. The Company reserves all rights in this

matter, including without limitation all rights possessed by the Company to commence litigation against you.

Yours truly,

Raza Bokhari, MD

Executive Chairman and CEO

68. The attitude of Bokhari is captured in the transcript of a recorded conversation he had with Carroll, Sonshine, Robinson and Hogan, FSD's US employment counsel where on January 25th, he stated in part:

I can still do whatever I want to do with respect to people that are on my charge. That could be Donal, that could be Ed, or that is Zeeshan. Whether the special committee is investigating them, they can keep on doing their own investigation in parallel. [...]
But nonetheless, whatever the letter say, my investigation have made the following conclusions. He is guilty of everything that I've stated in the letter. So I'm going to – today – terminate him. [...]

But I'm terminating him today because, in my conviction, I need to disclose a tab and I then need him to come to his knees because that's usually what happens. [...]

[indiscernible] and his friend's – Al's, you know, discomfort. So I should have his pay – last pay though. I'm not going to pay him. And let him fight that out from me in the end in the settlement. So I pretty much cut his pay off. Because that's what CEOs do. That's what employers do. When they come after you, they just chop you off. I've done that how many times, John, and I have always prevailed?

69. Clearly upset by the Requisition, Bokhari expresses his outrage captured in a recording of a telephone call he had with his CFO, Carroll, on January 4, 2021 where he stated:

“This is not nice. Nobody should be doing this to me....don't fuck with me....it's not right....I am binary....you start fucking with me,

I then think of all sort of devious ways.....I'll start slapping you around, Fuckers. We are not going to go around in any way out of our way to show that we are some very nice guys. We actually want to send the message that we are sons of bitches, and any opportunity we get, if no one is watching, we shoot, and when we discharge, you die.”

70. Discussing the possibility of losing with Gardner and the prospect of him being fired, Bokhari stated during this call:

“I need to find a lawyer because it is \$40 million, sir. Which is then....it's going to be probably...I don't think so, that they can control and then writing out a \$40 million cheque as they fire me.... Personally, I believe I would have to go for a legal fund that would probably go last for about, you know, anywhere from one to two-and-a-half years. But at the end, there'll be a settlement and that settlement would be between \$15 million to \$40 million...that would not be the first time that I would be doing that, I've done that in the past.....Waterstreet Capital still hates me for that.”

71. Also in January 2021, following the receipt of the Requisition from Durkacz and Saeed, Bokhari concerned himself with an issue involving Zack Dutton (“Dutton”) who on January 1, 2021, had entered into a Separation Agreement under which FSD would pay him 10 months of severance based upon his USD \$200,000 salary. As well, under the Agreement, Dutton agreed to be available to FSD for consulting services, at FSD's discretion, for up to 12 hours a month.

72. Dutton, the former CEO of Prismic who had joined FSD, supported the Requisition. Bokhari, in the face of this, instructed Brennan to advise Dutton if he didn't drop his support for the Requisition, FSD

would stop paying him. Dutton refused to back down with the result Bokhari decided to stop paying him.

73. As Bokhari stated in a telephone call with Carroll, Sonshine and Hogan on February 1, 2021:

“The last conversation was, obviously, we just...through second-hand that we communicated with him through Ed. Brennan, you know, like the ... the big lion that he is so I’m not sure what exactly he told him, but he communicates to me that he told him in hard fact, Hey Fuck, either you withdraw your thing, or what has happened to Zeeshan (Saeed) you’re going to be fucked...Ed’s response was he was really scared and did not know what to do and how to even go back, but too late. Whether he go back or not, I’m not about ready to part with frickin’ \$200,000 because Zack Dutton thought that he wants to sign that document, which he did. So go fuck yourself. Actions have consequences.”

74. In December 2020, Bokhari decided to open a new American bank account with the Bryn Mawr Trust Company (the “Bryn Mawr account”) for FSD Biosciences.

75. According to the evidence of Carroll, Bokhari instructed Carolyn Bonner, the President of PCL, to open this account. The signing officers for this new account, in addition to Bokhari, were to be Ms. Bonner and Maryann Adesso, Bokhari’s Chief of Staff at PCL. Neither Carroll, the CFO of FSD, nor Nathan Coyle (“Coyle”), its controller, were involved in the establishment of this account. Carroll learned of this account from Coyle on January 8, 2021.

76. In his affidavit, Carroll stated the reason Bokhari gave for the opening of this account was to enable payment of 401K contributions due to FSD's US-based employees. According to Carroll, these contributions were modest and accordingly, he arranged to have USD \$250,000 transferred from FSD's US dollar account at Meridian Credit Union ("Meridian") to the Bryn Mawr account.

77. Concerned that this account did not comply with FSD's internal controls, Carroll raised the issue with Bokhari which, according to Carroll, upset him. Rather than approach the Board to have the internal controls changed, Carroll told Bokhari he would do so in order to avoid Bokhari's wrath. In the end, he did not change the internal controls.

78. In July 2020, FSD's Board authorized an At the Market Offering ("ATM") of up to USD \$20 million in Class B Shares. This offering had not been activated by the end of January 2021. However, between February 1 and February 10, 2021, FSD issued 7,356,326 shares at a weighted price of \$2.69 per B Share, thereby exhausting the 2020 ATM offering. This, according to Carroll, increased the company's Class B Shares by approximately 38.5%.

79. At the time, FSD's stock price had ticked up, a phenomenon Carroll attributed to it becoming a meme stock in the then-popular

cannabis space. At the time of the July 2020 Board approval for the ATM offering, the stock was trading at approximately USD \$3.81 per share.

80. In any event, the parties disagree as to the motivation for exhausting the 2020 ATM offering in February, which will be discussed later in the Award.

81. On February 10, 2021, a board meeting was held to, among other things, discuss a second ATM offering. While the other directors had been notified earlier, Durkacz received notification for this 4:30 pm ET meeting at 1:20 pm the day of the meeting. In his response to this notice, Durkacz had his counsel prepare a letter objecting to the validity of the meeting which was forwarded to Bokhari and the other directors.

82. The letter from Durkacz's counsel advised that

“... calling a meeting on three hours' notice to consider a material event such as the issuance of securities is entirely inconsistent with the duty of care that the directors owe to the Company and its shareholders. This is an unacceptable approach to consideration of a material undertaking by the Company...these actions are clearly improper defensive tactics undertaken to defeat the exercise by long-time shareholders of their fundamental rights.”

83. Nevertheless, the meeting went ahead. In Bokhari's view, because Durkacz was a “dissident”, his views were irrelevant. With little discussion, the 2021 ATM offering of USD \$20 million was unanimously

approved by the directors present. By March 2021, the 2021 ATM offering had been exhausted.

84. Also of importance, at the February 10, 2021 board meeting, the issue of 2021 compensation for the Board and Bokhari arose. The Minutes of this meeting reflect, again after very little discussion, that Bokhari would receive, as his 2021 compensation, 1,173,709 Class B Shares of FSD. Compensation for the rest of the directors for 2021 was also set at this meeting.

85. After learning of the issuance of the 2020 and 2021 ATM offerings and the grant of compensation shares to Bokhari and the other directors, Durkacz amended a proceeding he had initiated earlier in February in which he sought to confirm the March date for the meeting of shareholders. The amendment sought an Order barring Bokhari and the other directors from voting the recently issued shares and as well to have the court appoint an Independent Chair for any forthcoming shareholders' meetings. The issue of s. 23(3) of the OBCA prohibiting corporations from issuing shares for future consideration was also raised in Durkacz's material before the court.

86. The matter came before McEwen J. on the Commercial List March 4, 2021 and on March 5, 2021, Justice McEwen released his

handwritten Endorsement in which he traced the evolution of the dispute and ordered that one meeting of shareholders would be held on May 14, 2021 to deal with all issues raised by the parties and that the meeting would be conducted by an Independent Chair.

87. As well, McEwen J. ordered that the directors be restrained from voting the shares issued to them since January 4, 2021.

88. It should be noted that the formal Judgment of McEwen J. stated that the shareholders' meeting was to be not only chaired by an independent person but that such person would have to be agreed upon by the parties or appointed by the court. The difference between the judge's handwritten Endorsement and the formal Judgment will be discussed later.

89. At a meeting of the Board on March 15, 2021, which Durkacz attended, there was a discussion about the decision of McEwen J. released March 5, 2021.

90. During this meeting, Robinson explained that the decision was an exercise of the judge's discretion and strongly urged that no appeal be undertaken. The company, he advised, should call the shareholders' meeting for May 14, 2021 as the judge had ordered. Robinson also made it clear that they should work with counsel for Durkacz and Saeed to identify an agreeable candidate to chair the meeting.

91. Despite appearing to accept Robinson's advice at the meeting, Bokhari was clearly upset by the decision of McEwen J. A recording of a telephone call between Bokhari, Carroll and Robinson of March 19, 2021 is revealing. Robinson pointed out that the judge's decision was in fact a very good outcome in that there were no restrictions on the substantial number of shares issued. As he said to Bokhari: "You have gotten away with something with the ... by being able to issue all of the shares that have been issued."

92. Robinson repeated his advice against an appeal of the decision of McEwen J. and urged Bokhari to focus on getting as many shareholders as possible to vote for him.

93. Bokhari was not persuaded. Instead of accepting Robinson's advice, he engaged new counsel, Simon Bieber ("Bieber"), to launch an appeal after being advised by Bieber an appeal should be undertaken immediately. He also told Bokhari that if his firm became involved, McEwen J. would, in all likelihood, step aside because of a conflict.

94. The appeal to the Divisional Court was launched March 30, 2021 and argued May 3, 2021. Focusing on their argument that McEwen J. had erred in failing to give deference to the business judgment rule in establishing May 14th as the meeting date and that he had failed to give

adequate reasons, Lederer J., writing for the panel, concluded the record before McEwen J. clearly established the inference that the directors in issuing shares to themselves did so for the purpose of diluting the voting power of Durkacz and Saeed. He wrote: “It is difficult, if not impossible, to see the actions taken as coincidental and motivated by an understanding of what is in the best interests of the company.”

95. Commenting on the s. 23(3) OBCA issue, he wrote: “How could (these shares) be compensation for work done in 2021 when it was provided less than two months after the year began.” Needless to say, the Divisional Court dismissed the appeal.

96. In mid-2020, FSD had considered the acquisition of a company called Perioavance Inc. (“Perioavance”), a biosciences research company in the very early stages of development. At the time, FSD had offered to acquire 100% of Perioavance for CAD \$22.4 million.

97. Perioavance rejected this offer and no further negotiations were conducted. Then, according to Carroll, in mid-March 2021, Bokhari resurrected the Perioavance acquisition by proposing a new deal whereby FSD would acquire the 60% of Perioavance for USD \$35 million, by way of shares and cash subject to FDA approval of a clinical trial in which Perioavance was involved.

98. During a March 19, 2021 telephone call between Bokhari, Robinson and Carroll, Robinson advised Bokhari that the pursuit of Perioavance, in the context of a proxy fight, would not be considered business as usual by any judge in Ontario. Rather, it would be considered as a defensive tactic such that the issued shares would not be permitted to vote at any forthcoming shareholders' meeting.

99. In fact, Robinson stated that if he were counsel for the Requisitioners, he would bring an emergency application before the court to challenge it.

100. Bokhari was not dissuaded. He provided a Letter of Intent ("LOI") for this prospective purchase to the Executive Committee of the board along with a 2018 market study. On March 22nd, Bokhari asked his independent directors whether they would support this purchase and they all confirmed they would.

101. After some back and forth, a final LOI to purchase 60% of Perioavance was executed by FSD. This LOI contained significant concessions by FSD, quite apart from the fact that it was for a price substantially higher than the 2020 offer and for less than 100% of the company. The proposed price was raised from USD \$35 million to USD \$45 million and the cash component from USD \$15 million to USD \$30

million. As well, the number of Class B Shares to be paid increased from 7.3 million to 7.8 million. This new proposal also called for FSD to make the sellers whole should the market value of the shares be less than USD \$13.5 million by six months from the April 12, 2021 closing date.

102. As part of the due diligence into the Perio Vance transaction, a financial advisory firm, Cassel Salpeter, was engaged on April 6, 2021 to provide a fairness opinion. Brennan and Carroll along with FSD's lawyers were also examining the proposed deal. Brennan, who the evidence reveals, held a 7% interest in one of the sellers, was to review Perio Vance's technology while Carroll was to examine the financial aspects of the transaction. Bennett Jones and Paul Weiss were to examine the legal aspects as their due diligence responsibility.

103. According to the evidence of Carroll, he began to have serious concerns about this proposed transaction. He, along with the company's outside accountants, didn't think the deal made any financial sense. Brennan, on the other hand, provided positive input about the deal. As well, Cassel Salpeter was having doubts about the deal given that FSD had essentially tripled its valuation of Perio Vance in less than one year.

104. The proposed Perioavance transaction was truly a transformational acquisition which would have effectively changed the nature of FSD's business.

105. On April 6, 2021, Bokhari and FSD commenced an Oppression Application against the dissidents, Durkacz and Saeed. According to Carroll, this was part of Bokhari's strategy to forestall the May 14th meeting set by Justice McEwen. This Application alleged that the dissidents' Circular contained material misrepresentations and omissions and requested that the proposed date for the shareholders' meeting be adjourned until the dissidents had remedied the alleged deficiencies in their Circular.

106. This Application, along with a motion brought by Durkacz seeking advice regarding the May 14th meeting, was heard by Pattillo J. on May 5, 2021. His reasons, released May 10, 2021, will be discussed shortly.

107. On April 2, 2021, Bokhari signed the Perioavance LOI. Later that day, he instructed Ms. Adesso to notify board members that there would be a virtual board meeting on April 8th. While this notification went out to all board members, the Briefing Book for the meeting was not provided to

Durkacz until approximately 8:30 pm on April 7th. This was his first notification of the Perioavance transaction.

108. In a recorded conversation between Bokhari, Carroll and Sonshine on April 5, 2021, Bokhari made it clear that the purpose of providing the Board Book to Durkacz late the day before the meeting was to prevent him from having enough time to file for an injunction challenging the Perioavance deal.

109. On April 8, 2021, the Board met to consider the Perioavance transaction and the USD \$25 million private placement Bokhari proposed to use to fund the acquisition. Needless to say, Durkacz seriously questioned the viability and the urgency of the proposed transaction. This, according to Durkacz, would pivot the company into a dental equipment company, something about which neither management nor the Board had any expertise. In his view, this was a matter for the shareholders to decide at the meeting already ordered to be held on May 14th.

110. Rejecting these concerns, Bokhari moved resolutions approving both the acquisition and the private placement. All directors except Durkacz voted in favour of both resolutions.

111. The next day, on the injunction motion, counsel for Durkacz appeared before McEwen J. who had remained seized of the issues in

dispute. As Bieber had predicted, McEwen J. recused himself and arranged for Hainey J. to hear the motion.

112. In his endorsement, after hearing the motion, Hainey J. granted the injunction, writing that there was “no legitimate business reason” for FSD to enter into the Perioavance transaction or for the private placement, and that there was “no legitimate reason for doing so on such a rushed basis” a mere 5 weeks before the May 14th meeting. He termed this as “essentially an end run around Justice McEwen’s decision which ... is under appeal.”

113. In a later decision on a motion brought by Bokhari’s counsel to dissolve his injunction, Hainey J. wrote on April 14th, in refusing the request, that the proposed Perioavance deal was a “transformative transaction that... would fundamentally alter the ‘playing field’ on which the shareholders’ meeting would take place.”

114. He continued: “the transaction itself and the process under which it was approved raise serious questions about its bono fides ... It should be noted that all of the directors were not acting in the best interests of the corporation and not necessarily in good faith.” He remained of the view that the status quo be maintained until the forthcoming shareholders’ meeting.

115. On the evidence before the Tribunal, Bokhari was clearly enraged by the Hainey J. decision. Obviously sensing weakness in his position ahead of the forthcoming shareholders' meeting, Bokhari called a board meeting for April 20, 2021. By that time, Cassel Salpeter had concluded they could not issue a fairness opinion given the price FSD had agreed to pay.

116. At the April 20th board meeting, much of it conducted in the absence of Durkacz who was placed in a "waiting room", the Board considered a number of significant issues. Fortunately, there is a complete tape recording of that meeting.

117. All directors were present along with several invited guests including Bieber, Sonshine, Gardner, Christopher Cummings from Paul Weiss and Ken Racowski, a US lawyer retained by Bokhari.

118. After a lengthy discussion, the Board approved a resolution to sanction Durkacz for what Bokhari, in his motion termed "... leaving the... code of conduct of FSD Pharma and the disclosure policies of FSD Pharma and for breaching his fiduciary duties and also perjuring himself in an affidavit that he filed on April 9, 2021."

119. As well, Bokhari moved a resolution authorizing him and management to engage legal counsel to investigate what actions could be

taken against Durkacz for his breaches. With Durkacz having recused himself, the Board approved the resolution.

120. Next, the Board considered the format for the May 14th shareholders meeting. As earlier noted, the transcribed version of the Judgment of McEwen J. called for the Chair of this meeting to be a person mutually agreed upon or failing that, as appointed by the court.

121. Following that, the remaining directors discussed where the May 14th meeting would be held and whether it should be conducted virtually, in person or in some hybrid fashion. On the issue of the independent chair, Sonshine, counsel for FSD said this: “The independent chair needs to be agreed upon. And we can probably talk about that another time in terms of our recommendations and others.”

122. Ultimately, it was agreed the meeting would be a hybrid meeting with some attending in person and others virtually. It was agreed the in-person portion would be held in Philadelphia at the Union League Club.

123. The final piece of business conducted at this board meeting was its consideration of three further resolutions Bokhari put forward. While Durkacz was still in the “waiting room”, Bokhari, according to the minutes of the meeting, proposed the following:

1. Authorize the management and the Chairman of the Board to continue to pursue the existing litigations which are already in

place and to contemplate new court applications against the dissident shareholders through existing counsels or any additional counsels in the United States and Canada as needed and disburse current and estimated professional fees of ongoing services.

2. Authorize the management and the Chairman to transfer appropriate funds determined by counsel, to either be held in escrow or placed in trust or any other appropriate mechanism proposed by counsel to ensure the sufficient funds are available to cover professional fees and other expenses to indemnify and hold harmless any existing or new claim that may arise against the director and officers of the company.

3. Authorize the management and the Chairman to determine which key executives and employees are under a threat of their employment agreement severance package may not be honoured in an event of change of control of the company and to enter into an agreement with such executives and employees to disburse their severance packages to restore confidence of these executives and employees so they do not abandon their positions in advance of the contested shareholder meeting. Such an arrangement excludes Dr. Raza Bokhari.

124. The motion containing these three resolutions was passed by the remaining directors after limited discussion. The Agenda for this meeting did not contain any reference to this motion. Following the vote to accept the three resolutions, Durkacz rejoined the meeting. Neither the Minutes nor the transcript of the meeting reveal any discussion of the motion after Durkacz was readmitted to the meeting. No one mentioned to Durkacz that the Board had approved a litigation trust or an indemnity agreement.

125. From the transcripts of the meeting, in advance of Bokhari presenting his tri-part motion, there was a brief discussion of directors

indemnity. Durkacz was not present during this discussion. Sonshine outlined what was currently in place. Following that, Bokhari spoke of the establishment of a fund to be available to the directors in the event of a loss of control. He stated:

“And I believe that Paul Weiss is looking into that, that where they can hold funds in escrow in an event that ... that the directors...the board has ... board has lost control. And there are ongoing actions against the...the directors which will be an act of insanity, but nonetheless if they are, there are legal costs and other related costs are covered.” “And I believe there’s a mechanism, and Chris Cumming (from Paul Weiss) will ... is looking into providing some feedback on the matter sometime later this week.”

126. As already noted, the formal judgment of McEwen J. required there to be a mutually agreed upon Chair for the May 14th shareholders’ meeting. Sonshine advised Bokhari that the Independent Chair should be a senior lawyer in Ontario. Bokhari was of the view that a high-profile former US politician should be the Chair.

127. On Bokhari’s instructions, Sonshine on April 23rd provided counsel for Durkacz with a list of 11 names, including Speaker Paul Ryan, Senator Rick Santorum (“Santorum”) and General Colin Powell. No Ontario lawyers were included in the list.

128. In response to this, counsel for Durkacz brought a motion seeking an order appointing Carol Hansell as the Independent Chair. The

Commercial List agreed to add this matter to its list for May 5th to be heard along with the FSD/Bokhari Application.

129. In the meantime, Bokhari made overtures to Paul Ryan, which did not go anywhere, and then to Santorum who, it would appear, showed some interest. Santorum engaged counsel at Stikeman Elliott in Toronto to negotiate with Bieber the terms of his retainer.

130. Ultimately, Bokhari approved the agreement with Santorum, an agreement that would have FSD pay a non-refundable fee of USD \$75,000. In an affidavit sworn by Bokhari on April 30th, in response to the Durkacz motion to have Carol Hansell appointed Independent Chair, he stated that Santorum had agreed to serve as the Independent Chair of the May 14th meeting. In fact, the engagement agreement with Santorum was not executed by FSD, after revisions presented by Santorum's counsel, until May 2, 2021 and signed by Santorum on May 3rd. May 3, 2021 was the date the appeal of the decision of McEwen J. was to be argued in the Divisional Court.

131. As well, on May 3rd, Bokhari had FSD issue a press release announcing the appointment of Santorum as Independent Chair of the forthcoming shareholders' meeting.

132. Santorum was concerned about the press release. An email from Bieber to Bokhari at 1:28 p.m. on May 3rd (the afternoon Bokhari was to be cross-examined by Durkacz's counsel on the Independent Chair motion) reveals the concern. Bieber wrote:

Raza

Aaron and I just finished a call with Rick's counsel. They are concerned about a number of things and told us that Rick is going to stay on as the proposed independent chair subject to the following conditions that they view as absolute. If they feel like we are not complying with the conditions, he will terminate the engagement:

1. You cannot communicate directly with Rick. All communication must go through counsel. This is for everyone's benefit and necessary to maintain Rick's independence.
2. No public statements, press releases, communications to shareholders about Rick. They are very fussed about the communication this morning.
3. Rick's view is that he had not agreed to chair the meeting until the engagement letter was signed. Your affidavit says that he agreed to do it before then. If you are asked on cross-examination about when he agreed to do it, I think the answer has to be that it was your understanding or impression that he had agreed to do as per your affidavit.

133. May 3rd was a busy day. Just before he was to be cross-examined, Bokhari instructed Carroll to wire from FSD's account USD \$75,000.00 to Santorum in order that he could state in cross-examination it had been done.

134. Carroll was concerned about the Santorum engagement. In an email at 7:51 pm on May 3rd to Bokhari and Sonshine, he wrote:

Dear Aaron, I have just had the opportunity to review in detail the engagement for Rick Santorum that you drafted. I have the following questions for you and Bennet Jones as counsel for FSD Pharma.

The agreement seems very off market on a number of points in particular

- 75,000 USD compensation for someone not experienced in appropriate law to conduct such a meeting given the following statement that you included “Waitzer to provide independent Canadian legal advice, which you are entitled to rely on in performing the services.”
- Expenses of legal counsel, travel costs are on top of 75K USD
- The Corporation will provide 10K USD per day in the event that Rick Santorum ends up in ongoing litigation
- If the court rejects Rick Santorum the fee is nonrefundable

Can you provide your professional opinion as to the merits of this engagement, that you drafted, and whether it is in the best interests of FSD Pharma shareholders given your awareness that on May 05, 2021 this is being challenged in court, and Rick Santorum may not be permitted to be the Independent chair.

135. Carroll was concerned that, as a senior officer of FSD, this engagement might be a breach of the Hainey J. injunction and at 8:12 pm that evening, he emailed Bokhari outlining those concerns asking that someone from Bieber’s office or from Bennett Jones advise him so as to alleviate his concerns.

136. Earlier that day, in a telephone call which Carroll recorded, Bokhari had been adamant that Carroll follow his instructions to wire Santorum the funds. The recorded exchange is as follows:

RAZA BOKHARI: Please send this money, ok. In the same way you're sending money, you are essentially – for you, the answer is – Brian, don't go online, I need to finish this call. For you, the answer is the following. I have received a select set of instruction. You have raised your issue. You have received your instructions. You carry out those instructions. If you will not carry out those instructions, you're going to add another dimension to it. I will ask you to step aside and take a leave of absence.

DONAL CARROLL: Yeah, understood.

RAZA BOKHARI: It's the same thing – it's the same instruction that I'm going to send you, but I do not have time between now, so –

DONAL CARROLL: Yeah. No. I get that. Yeah.

RAZA BOKHARI: Don't shoot yourself in the foot by me not sending you \$600,000.00, \$700,000.00 and (indiscernible). What benefit do I have to give you \$700,000.00? Explain that to me. Do I have any benefit to that?

DONAL CARROLL: No.

RAZA BOKHARI: No. Right. So in the same sense that there is no benefit, would you be authorizing, because you are the second signatory on the account. Do you realize that? So, if I tell you to step aside. I need to find a second signatory on the account, before you just – you do that as a matter of a ceremoniously, because you have received that instruction from the guy who you report to. So, if there's any problem, the liability is on me, because I am going to actually, tomorrow, by before Wednesday – before the Thursday board meeting, I'm going to dispense a bunch of these things as we have – as been part of our plan, so that we are done, square, and then you sit and relax. And whatever the liability is, they say, well, rape is imminent. You relax and enjoy yourself. Don't confuse yourself by bringing your lawyer in and how to do your function.

Your lawyer does not work – you work for me and FSD Pharma. You're following your instruction and you just say – and I would

be the proudest person when you say, hey, what could I do? I had reservations, judge. I was instructed by my boss, and I carried out those instruction. What could I do? So fair enough?

DONAL CARROLL: Yeah. No, I understand what you're saying for sure.

RAZA BOKHARI: So, please initiate the wire, the 16; because I'm going to testify in this at 3 o'clock, I have fulfilled the engagement and I have made the payment. So, please don't embarrass me. You are – if this doesn't happen, then I would start that process. I will put you on a leave of absence. I would have to appoint the – appoint somebody as an interim CFO. Then I would have to run around and changing names to qualify all of this, or I would have to move money into United States FSD biosciences and continue the work.

So, why do you want to add all these complications to me, Donal? Do you really want to add all these complications to me?

DONAL CARROLL: No, I want to make sure that I'm not offside on any Canadian court. That's what I'm doing. Like, that's, yeah –

RAZA BOKHARI: And you are not. You have received a letter from Simon Bieber. You have received your instructions from your CEO. And if you are paranoid, step aside. Okay. But I got to go on this.

DONAL CARROLL: Yeah, yeah, yeah.

RAZA BOKHARI: And we are still friends. We are –

DONAL CARROLL: No, I know that. Yeah. Yeah, I understand that.

RAZA BOKHARI: But you must carry out my instructions. I have given you a verbal instruction. I have given you an oral instruction. And I would – tomorrow, I will be instructing you to wire yourself \$700,000.00. Tell your lawyer. What the heck is he going to do about that? Just go online, sir. Okay.

DONAL CARROLL: Yes. Yeah.

RAZA BOKHARI: Donal, when I hang up, I want to see that that wire is initiated. Do we have an understanding, sir?

DONAL CARROLL: I mean, I hear what you're saying loud and clear. Absolutely.

RAZA BOKHARI: Yeah, but and you are going to begin that execution.

DONAL CARROLL: Let me confirm with David Johnson.

RAZA BOKHARI: If you will not, I expect your resignation, sir, or leave of absence. There are only two options.

137. As it turned out, Carroll did not authorize the USD \$75,000 transfer from FSD's Meridian account. Instead, Bokhari, while on a break from his cross-examination on the afternoon of May 3rd, emailed Carolyn Bonner to have her transfer the funds from the Bryn Mawr account, an account over which Carroll did not have signing authority.

138. Upon returning from the break, Bokhari's cross-examination continued as follows:

[62] Q: You'd agree that – surely, that the person that is going to be this independent chair has to be independent from both sides, right?

A: Sir, the company has appointed and the Honourable Senator has agreed. So the independent chair has been appointed. That is the prerogative of the company to appoint the independent chair, and the company has appointed an independent chair who is indeed – is independent and has cleared all or any conflicts that may exist. [...]

[64] Q: But to be clear, you knew that Mr. Durkacz and Mr. Saeed did not agree to Mr. Santorum's appointment, right?

A: I did not – I am not aware of their disagreement, and I do not know. Those are assumptions that you are making, and I have said that before, and I will say that again.

God speaks to me in many ways, sometimes in ways which best serve the greater good of people but, nonetheless, does not speak to me enough to know what Mr. Durkacz and Mr. Saeed would agree and not agree with. And their agreement or disagreement in any way is not a factor in such a decision.

This is a decision that is meant for the FSD Pharma Board of Directors to make and that decision is made while in session and with quorum present. And such a decision has now delivered the

former senator from Pennsylvania, the Honourable Rick Santorum, to chair the meeting.

[65] Q: Was not the Notice of Motion seeking Ms. Hansell's appointment a hint to you that, in fact, they didn't like any of the people that you had proposed?

A: Whether they like any of my people or do not like any of my people is not a matter of consideration for me. Neither is it a matter of consideration for me that they – if they, like Ms. Carol Hansell who I understand is beholden to your law firm for repeated and regular business and otherwise also what I understand has had a – an engagement with my corporate counsellor, Bennett Jones, which did not end, let's say, very favourably.

So Ms. Carol Hansell and then my – and your client's preference for Ms. Hansell to be an independent chair is not of any relevance to me.

139. When confronted in cross-examination that such a payment would be outside the ordinary course of business, Bokhari responded:

“That's your opinion, sir.” “This is ordinary course of business, and it is my authority to authorize such payment, and I have authorized these payments. Your opinion and view does not matter in this...in this context.”

140. Without any doubt, Bokhari was angered by Carroll's refusal to follow his orders. At 8:57 pm on May 3rd, Bokhari sent a lengthy email to members of the Executive Committee of FSD's Board and several of the company's lawyers complaining about Carroll who he alleged was “currently acting outside the scope of his authority” and that he was “actively engaged in disrupting the functioning of the company in general and the upcoming shareholders' meeting in particular.” Bokhari went on to

state that if Carroll continued to “refuse to carry out duly authorized instructions of the CEO” he would place him on suspension, appoint an interim CFO and so notify the markets.

141. Late on May 4, 2021, Carroll sent the following email to Bokhari, members of the Board including Durkacz, and several of FSD’s counsel:

From: Donal Carroll [dcarroll@fsdpharma.com]
 On behalf of Donal Carroll [dcarroll@fsdpharma.com]
Sent: 5/4/2021 8:30:43 PM
To: Raza Bokhari [rbokhari@fsdpharma.com]
Cc: Bob Ciaruffoli [bciaruffoli@fsdpharma.com]; Kaiser, Larry [Larry.Kaiser@tuhs.temple.edu]; Steve Buyer [steve.buyer@10-squareassolutions.com]; Gerry Goldberg [gerrygoldbergcpa@gmail.com]; Simon Bieber [SBieber@agbllp.com]; Aaron Sonshine [SonshineA@bennettjones.com]; Anthony Durkacz [anthony@firstrepubliccapital.com]; Maryann Adesso [madesso@fsdpharma.com]; David Judson [DJudson@mindengross.com]

Subject: RE Rick Santorum honorarium – URGENT and TIME SENSITIVE

Attachments: LT SRS – Appointment as Independent Meeting Chair – 01May21_Executed_PDF; May 03 2021 Donal Carroll Email to Aaron Sonshine requesting further clarity.pdf

Dear Dr. Bokhari and the Board of FSD Pharma,

I appreciate and value the feedback from our Chairman and CEO, Dr. Bokhari. I feel it appropriate to elaborate further to ensure a full understanding of my questions and concerns. I will use the engagement agreement with Rick Santorum as the example for this email as it is spoken of below.

As an officer of the company, I owe both a fiduciary duty and a duty of care to the corporation (which includes the shareholders as a whole), as well as a professional duty to the CPA. To add further complexity, I also have a duty to act in accordance with two court orders being an order issued by Justice McEwen and an order issued by Justice Hainey. All of you are aware of and have read these orders.

I had the opportunity to review the engagement with Rick Santorum for the very first time yesterday late evening. In that regard, I have attached an email I sent to Aaron Sonshine at BJ requesting clarification immediately following my review in respect of some of the terms of that agreement that did not make sense to me. That email and the engagement are attached. My reading and understanding of the court orders, when interpreting my role and duties as a CFO have led me to the following conclusions:

1. The appointment of Rick Santorum as the independent chair, (an independent chair being a necessary component of the May 14, 2021 shareholder meeting as ordered by Justice McEwen), without consultation with the dissident's legal team might be in breach of Justice McEwen's order.
2. The payment of the amount suggested and the terms in the agreement as drafted by BJ might also be a breach of Justice Hainey's order.

I can understand the added stress and workload we are all under with this contested meeting, but I must continue to act properly and in accordance with my legal duties as a CFO, which includes exercising prudence and good judgment over any potential contracts or disbursement of funds. That is the basis for my request for written comfort that the Rick Santorum arrangements, and the various other payments for legal retainers for the company and certain individuals are in the best interests of FSD shareholders and do not violate the court orders.

Regards, Donal

142. Copied in this email was David Judson, a lawyer Carroll had earlier retained to launch a Whistle Blower complaint against Bokhari pursuant to FSD's 2018 Whistleblower Policy regarding certain threatening and bullying emails Carroll had received from Bokhari. Mr. Judson's letter of May 4th informing FSD of the whistle blower complaint was sent to Sonshine at Bennett Jones.

143. After initially suspending Carroll, in a letter dated May 5, 2021, Bokhari terminated Carroll for cause effective immediately for "...insubordination, disobedience, disclosure of privileged and confidential information and other misconduct inconsistent with your legal obligations, including your fiduciary duties owed to the Company ..."

144. In place of Carroll, Bokhari appointed Coyle as Interim CFO whom he instructed to have Meridian change the signing authorities on FSD's accounts.

145. Bokhari took further steps against Carroll. Instructions were given to launch a complaint to the OSC on behalf of FSD suggesting that Carroll had acted improperly by including Durkacz in an email of May 4th to the FSD Board.

146. As well, Bokhari instructed counsel in the US to look into possible criminal or regulatory proceedings against Carroll and Durkacz. Nothing came of either of these initiatives.

147. As a further measure to address what he considered to be Carroll's misconduct, Bokhari engaged criminal counsel at Stockwoods in Toronto at a cost to FSD of USD \$42,000 to investigate the possibility of lodging a criminal complaint against Carroll and Durkacz. This concerned an allegation that Carroll had intentionally interfered with FSD's banking arrangements with Meridian.

148. In a Memorandum dated May 9 2021, counsel at Stockwoods advised that if Carroll had intentionally interfered with FSD's banking so as to disrupt its business, there could be grounds to believe a criminal fraud or a breach of trust had occurred. The memo concluded that while there was a good-faith basis to make a criminal complaint to the Toronto Police Service (TPS), it was unlikely charges would be laid without further information.

149. On the strength of this memorandum, Bokhari instructed counsel at Stockwoods to move forward with a criminal complaint against Carroll with the TPS. Bokhari was also of the view that a press release from FSD concerning the criminal complaint was necessary and so contrary to advice

from Stockwoods, Gryphon Advisors, FSD's proxy solicitation agent and its communications consultant, Longview, Bokhari caused FSD to issue a press release on May 13, 2021.

150. The press release read in part as follows:

FSD Pharma Announces Filing of Criminal Complaint against former Chief Financial Officer

TORONTO – (BUSINESS WIRE) – May 13, 2021 – FSD Pharma Inc. (Nasdaq:HUGE) (CSE:HUGE) (the “Company” or “FSD Pharma”) announced today that it has filed a criminal complaint with Toronto Police Services, Financial Crimes Unit, against Mr. Donal Carroll, the company's former Chief Financial Officer. The complaint asserts that Mr. Carroll has intentionally interfered with the company's banking in order to disrupt FSD's business in the midst of an ongoing proxy contest, in alleged contravention of criminal law and Mr. Carroll's fiduciary and other duties to the company.

The company has grounds to believe that Mr. Carroll through his conduct has committed the criminal offence of fraud (Criminal Code, s.380) as well as the criminal offence of breach of trust (Criminal Code, s.336).

The company knows on good authority that Mr. Anthony Durkacz, dissident director/shareholder made un-authorized contact (s) with an intent to interfere with the company's banking relationships.

The company suspects that Mr. Carroll and Mr. Durkacz aim was to disrupt Company's clinical trials and R&D efforts, its annual and special meeting of shareholders scheduled for May 14, 2021, and other ongoing company business.

The company is assessing all avenues available to it, both to address such alleged wrongdoing.

151. In his evidence, Carroll denied all the allegations being made against him and described the devastating effect the press release had on

him. It was, he said, damaging to his professional reputation within the financial and accounting community, and as well it had put significant strain upon his family.

152. Both Gryphon and Longview later wrote to Carroll disavowing any involvement in the issuance of the press release. Both told Carroll they had advised Bokhari against issuing such a release.

153. On May 10, 2021, Patillo J. issued his decision in which he concluded Bokhari and FSD had deliberately breached the Judgment of McEwen J. by appointing and announcing the engagement of Santorum. The judgment of McEwen J., Justice Pattilo wrote, clearly required agreement between the parties regarding the Independent Chair, failing which the court would appoint.

154. Patillo J. wrote:

“Dr. Bokhari’s actions are particularly galling given that he entered into the Agreement with Santorum after he and FSD were served with the (Durkacz) motion. In light of Dr. Bokhari’s conduct, I would not appoint Santorum as the Independent Chair.”

155. Patillo J. allowed the request by Durkacz to appoint Carol Hansell as the Independent Chair for the May 14th meeting of shareholders which he agreed would be held in hybrid fashion with the in-person portion in Philadelphia. He awarded significant costs against FSD.

156. As earlier noted, following the dismissal of Carroll as CFO, Coyle, the interim CFO, became a signing officer for FSD at Meridian, along with Bokhari, given the requirement of two authorized signatories for all transactions. Meridian required a Board resolution authorizing the signatory change which Bokhari obtained at a board meeting on May 6, 2021.

157. Meridian had become aware of the Hainey J. injunction. Bokhari believed Durkacz had provided the bank with this information and that is what led to the earlier discussed criminal complaint.

158. According to the evidence of Coyle, Meridian required confirmation from FSD's outside counsel that Durkacz had attended the board meeting where the directors changed the authorized signatories on the accounts, as well as an agreement indemnifying Meridian against any claims it had contravened the Hainey J. injunction. This, there can be no doubt on the evidence, upset Bokhari.

159. The only account over which Bokhari had full control was the Bryn Mawr account, and as noted, it was through this account that Bokhari paid the Santorum retainer as well as accounts from Stockwoods and Bieber. Coyle, in evidence, testified that despite being FSD's interim

CFO, he never approved the Santorum payment which he said was a contravention of FSD's Control Policy.

160. Coyle stated that on May 13th, Bokhari instructed him to transfer USD \$12 million from the Meridian Accounts to the Bryn Mawr account in the US. Bokhari, he said, wanted the transfer done that day. Concerned that such a request could be contrary to the injunction prohibiting any transactions outside the normal course of business, and further that there was no apparent business need for the transfer, Coyle contacted the Chair of FSD's Audit Committee, Ciaruffoli. Ciaruffoli did not seem interested in discussing the propriety of the requested transfer and suggested that Coyle take up his concerns with Bokhari.

161. Coyle then decided to telephone FSD's counsel, Sonshine. He had received an email from Bokhari that day, which was copied to Sonshine, responding to concerns Coyle had raised in an earlier email. In his email, Bokhari wrote: "I am also including company counsel on this email for your comfort and reassurance."

162. Coyle, as his evidence reveals, was neither comforted nor reassured by Sonshine who, he said in evidence, seemed unwilling to discuss the matter with him or provide clear advice.

163. Indeed, in an email from Sonshine to Bokhari and Coyle later on May 13th, he wrote:

“... Bennett Jones is unfortunately not in a position to opine or provide comfort or reassurance on this point. Please be aware that counsel to the dissidents have just emailed me (twice) on this subject. They appear to have ongoing communication with the bank and have indicated they will mount a legal challenge to any transfer that they view as inappropriate.”

164. In his evidence at this hearing, in cross-examination, Bokhari maintained the transfer was required to pay Syneos, a company conducting clinical trials for FSD, a significant sum of money (USD \$6 million) and that he had received legal advice permitting the transfer.

165. Coyle was in a difficult situation. He had seen what had happened to his predecessor Carroll and he did not want to cross Bokhari. On the other hand, he felt he was being asked to breach a court order. Coyle decided to email Durkacz about what was going on. He included in the email various emails he had received from Bokhari concerning the transfer of USD \$12 million.

166. Durkacz immediately emailed Bokhari and all board members warning them to stop their improper conduct because they could be exposed to personal liability.

167. Coyle next contacted Meridian and urged them not to make the transfer. As well, on May 13th, Coyle learned that Bokhari had also

directed a number of other payments and transfers including payments to lawyers, the Union League, Gryphon Advisors as well as a USD \$250,000 payment to a law firm in the U.S., Holland & Knight. Ultimately, the USD \$12 million transfer did not occur.

168. The meeting, chaired by Ms. Hansell proceeded as planned in a hybrid fashion. The shareholders, both present and by way of proxy, voted to install the slate of directors proposed by the Dissidents.

169. During the meeting, Bokhari emailed Meridian in a further attempt to have the bank transfer USD \$12 million to the Bryn Mawr account in the US. This strongly worded email directed Meridian, without delay, to transfer the requested funds or face consequences.

170. When questioned during his cross-examination how he could explain contacting the bank in the middle of the shareholders' meeting instructing that the USD \$12 million and the USD \$250,000 to Holland & Knight be transferred, Bokhari's answer was that Mr. Racowski (of Holland & Knight) was acting for FSD Pharma and "was primarily responsible for all our FDA-related efforts and any legal advice that surrounded that."

171. On May 13th, Bokhari had instructed Meridian to pay Holland & Knight from FSD's USD account the sum of USD \$250,000 to satisfy a

request to cover their “expanded scope of representation.” It is uncertain what that retainer was for or how it was related to FSD.

172. During the shareholders’ meeting, it would appear from the voting results that Bokhari did not follow the instructions of shareholders, who provided him with proxies, to vote in favour of the management slate. Bokhari, the evidence reveals, voted only the shares he held personally, and then only for himself, withholding his votes for all of the other nominees on the management slate. This is confirmed in the evidence of Carroll.

173. Immediately following the shareholders’ meeting, the newly elected directors held their initial board meeting virtually. In attendance, as well, were a number of FSD’s new counsel. The newly elected directors were Durkacz, Saeed, Nitán Kaushal, Lawrence Latowsky, Fernando Cugliari, Donal Carroll and Frank Lavelle (“Lavelle”). Lavelle, a close associate of Bokhari’s, was recruited to the slate of directors presented by Bokhari to the May 14th meeting. Previously, at the encouragement of Bokhari, Lavelle retained counsel from Lenczner Slaght, to intervene in the Application before Pattillo J. fees for which were paid by FSD.

174. Following the election of the new slate, Lavelle resigned from the Board. Also at this first meeting, new counsel for FSD advised he had

received a draft Notice of Application from Bokhari, and three former directors seeking to have the new election overturned and, as well, restraining the new Board from taking any action pending the outcome. The draft Application also sought an Order permitting the defeated directors to carry on the business of FSD.

175. At this initial meeting of the newly elected Board, Durkacz and Saeed were appointed as Co-Chairs of the Board and Saeed was reappointed as FSD's President. Durkacz was appointed interim CEO. The new Board also passed a resolution placing Bokhari on administrative leave and appointing two of the new directors, Mr. Kaushall and Mr. Cuglari to a Special Committee to investigate the conduct of Bokhari. Bokhari was advised by letter dated May 14th that he was being placed on "temporary paid leave, effective immediately" pending an investigation into his conduct.

176. All of FSD's banks and suppliers were immediately notified to suspend FSD's accounts until further notification. As well, according to Coyle, all passwords on FSD's email system were changed.

177. Following the May 14th meeting, Bokhari took steps to bar FSD from PCL's premises in Pennsylvania and as well refused to allow FSD any access to its records there.

178. Meanwhile, the Special Committee of the new board retained Dentons Canada to provide advice and to investigate the conduct of Bokhari. During the course of its investigation, Dentons interviewed a number of FSD personal including Carroll and Coyle. As well, Dentons interviewed a representative of Cassel Salpeter. Dentons was provided with Bokhari's Employment Agreement as well as relevant court materials and FSD corporate documents including policies governing the conduct of its employees.

179. According to Matthew Fleming, the partner at Dentons in charge of the investigation, the documents Dentons received included those related to Perio Vance, the terminations of Saeed and Carroll, Bokhari's alleged breaches of court orders, Wheels Up and Bryn Mawr.

180. After learning on June 21st that Bokhari had retained an employment lawyer, John Ormston ("Ormston"), Dentons sent a letter to Bokhari outlining the Special Committee's mandate and advising what matters were being investigated. The letter also invited Bokhari to provide the Special Committee with whatever documentation or information he wished the committee to consider and as well invited him to participate in an interview.

181. In his June 21, 2021 letter, Ormston advised the Board of FSD he had been retained as Bokhari's employment counsel and that based upon a number of concerns, including the fact that Bokhari was placed on leave pending an investigation, the "inescapable conclusion" was that Bokhari had been constructively dismissed. As a result, Ormston wrote, Sections 4.3 and 4.5 of his Employment Agreement were triggered and that Bokhari was thereby entitled to a severance payment of USD \$30.2 million. The letter, as well, requested that the Dispute Resolution Procedure as set out in s. 7.2 of the Agreement be commenced.

182. After being advised by counsel for FSD that Dentons had been retained to conduct an investigation into Bokhari's conduct, Ormston advised that if the matter could not be resolved by July 6th, an arbitration would be commenced pursuant to s. 7.4 of the Employment Agreement.

183. On July 15, 2021, Bokhari initiated a Notice of Arbitration in which, in part, he described the investigation by the Special Committee as a "sham." This had been preceded by an exchange of correspondence between counsel at Dentons and Ormston in which Ormston, in part, indicated he believed the result of the investigation was a foregone conclusion. In order to prepare a response, Ormston advised on July 16th

that Bokhari would require access to all his files at FSD plus access to a number of people including former counsel, Carroll, Coyle and Brennan.

184. In response, Dentons advised that the Special Committee had concluded Bokhari did not intend to cooperate with the Committee but rather was seeking to bolster his position in the arbitration, given the July 15th Notice of Arbitration.

185. On June 30, 2021, FSD had directed its transfer agent, Computershare, to cancel and return to FSD's treasury the 156,278 Compensation Shares issued to previous directors Mr. Datin, Ciaruffoli, Buyer and Mr. Goldberg. As well, FSD contacted Computershare and Haywood Securities to cancel and return to FSD's Treasury the 1,041,868 Compensation Shares issued to Bokhari. As a result of this, Bokhari commenced a legal proceeding in the US District Court against FSD, FSD BioSciences, Durkacz and Saeed alleging tortious interference with Bokhari's Haywood account and seeking a temporary restraining order.

186. The US Court determined these issues were better addressed by the Ontario Courts and dismissed Bokhari's motion for a temporary restraining order.

187. On July 21, 2021, FSD commenced an Application before the Superior Court, Commercial List seeking authority to cancel the shares

previously issued to Bokhari and the former directors. This matter was not heard until December 20, 2021 and in a decision released March 8, 2022, Koehnen J determined Bokhari was entitled to keep compensation shares representing time served until his termination on July 27, 2021.

188. Dentons, in its Report, referred to the finding of the Divisional Court that Bokhari was not acting in good faith and in the best interests of FSD. The Report also referenced Hainey J.’s comment that the Perioavance transaction and the associated private placement were “essentially an ‘end run’ around Justice McEwen’s decision of March 5, 2021” and that “the transaction itself and the process under which it was approved raise serious questions about its bona fides.”

189. The Report also made reference to the findings of Pattillo J. who found Bokhari had deliberately breached the Judgment of McEwen J. by appointing Santorum as Independent Chair of the May 14th shareholders meeting.

190. As the Report concluded:

“In closing, in our view, Dr. Bokhari’s conduct described herein constitutes a breach of his fiduciary duty to FSD and violates the requirements in the Code of Conduct (of FSD) to follow the highest ethical standards in the conduct of business for and on behalf of the Company. Dr. Bokhari also breached the Code of Conduct by placing himself in a conflict, or perceived conflict, between his personal interests and the interests of FSD as his actions were designed to maintain his authority in the Company

rather than promote transparent governance in the best interest of FSD.”

191. On the strength of that Report, on July 27, 2021, Durkacz and Saeed sent Bokhari the following letter, terminating his employment for cause:

July 27, 2021

VIA Email
Private & Confidential
Dr. Raza Bokhari
raza@razabokhari.com
Re: Notice of Termination

Dear Dr. Bokhari:

Further to our letter dated May 14, 2021, the independent investigator retained by the Special Committee composed of independent directors of the Board of Directors of FSD Pharma Inc. (the “Company”) has completed its investigation into the allegations of misconduct against you. The Special Committee understands that you were given an opportunity to participate in this investigation and chose not to do so.

Following a review and consideration of the outcome of the investigation and your conduct, and consistent with the recommendation of the Special Committee, the Company’s Board of Directors (the “Board”) has made the decision to terminate your employment for cause. The misconduct relied upon in coming to this decision includes, without limitation, the material breach of your employment agreement with the Company dated July 29, 2020 (the “Employment Agreement”), including your contractual obligations to carry out your duties in a manner consistent with applicable laws and Company policies, such as the Company’s Code of Conduct, and the breach of your fiduciary duties owed to the Company. In making the decision to terminate, the Company considered, among other things, your flagrant breach of court

Orders, the improper issuance of shares, your actions in respect of the potential purchase of Perioavance, and your attempts to misappropriate Company funds.

In light of the forgoing, the Company no longer has the requisite trust and confidence in your ability to abide by your obligations to the Company and act in its best interests. It is clear that, pursuant to Section 4.1 of the Employment Agreement, the breach of your obligations to the Company are not capable of cure.

You are required to immediately return all Company property. We remind you that you also remain bound by all contractual, fiduciary and other obligations to the Company that survive the cessation of your employment, including the prohibition against the use and disclosure of the Company's confidential and proprietary information.

Sincerely,
Anthony Durkacz, Executive Co-Chairman, FSD Pharma Inc.
Zeeshan Saeed, Executive Co-Chairman, FSD Pharma Inc.

192. In late 2020 at the request of Bokhari, an account was opened at Wheels Up, a private jet company. This required an initiation fee. According to the evidence of Bokhari in the fall of 2020, he asked Carroll to evaluate options for a charter jet service. Bokhari knew of Wheels Up through his membership at the Union League in Philadelphia. Although the normal initiation fee at Wheels Up was USD \$17,500, because of his membership at the Union League, Bokhari was able to negotiate a credit of USD \$7,500 when he opened the account with Wheels Up.

193. Although funds were placed into the Wheels Up account by FSD – USD \$250,000 in December 2020 and USD \$250,000 in March 2021 –

Bokhari viewed the account to be his because his name and personal American Express credit card were used to establish the account. This card, he believed, was the only card linked to the account. Moreover, he had negotiated the USD \$7,500 credit and all Wheels Up statements remained in his name.

194. By the time of the May 14, 2021 shareholders meeting, Bokhari had used Wheels Up on six occasions. These included three round trips for Bokhari and his family to Tampa, Florida having to do with the death of his mother-in-law in January 2021 and her memorial service in February 2021. In addition, there was a round trip from Philadelphia, arranged by Bokhari for friends and himself to Oakmount Country Club for a golf outing with what he described as potential investors in FSD.

195. Such trips were not unusual for FSD as Bokhari had organized similar trips in 2019 and 2020 which included Durkacz, Saeed and Carroll. They were, in his view, important in furthering the business objectives of FSD.

196. On May 14, 2021, after he failed to be re-elected to the Board, Bokhari, in evidence, stated he received a call from Lavelle advising that one item on the new Board's agenda was to freeze the Wheels Up account. Bokhari testified he believed the Wheels Up account belonged to him. It

was in his name and his credit card was linked to the account and he wanted to be able to continue using Wheels Up for his travel needs.

197. As a result of hearing from Lavelle, Bokhari contacted Wheels Up to have them take steps to have the account placed in his name. At the time there was just over USD \$430,000 in the account.

198. The email string involving the interaction between Bokhari and Wheels Up is reproduced here:

From: Wheels Up Members <members@wheelsup.com>
Date: Friday, May 14, 2021 at 3:35 PM
To: Molly Manier <molly.manier@wheelsup.com>
Cc: Rbokhari@bbbricinvest.com <rbokhari@bbbricinvest.com>
Subject: FSD Pharma, Inc – Account: 28059
 Good afternoon Molly, Received a call today from Mr. Bokharil (sic) this afternoon, he would like to change the name on his account from FSD Pharma, Inc to Raza Bokhari. The member is copied in on this email.
 Regards, Jerry Kuntz, Member Service Representative,
 WHEELS UP

On May 14, 2021 at 4:04 PM, Molly Manier <molly.manier@wheelsup.com> wrote:
 Hi Raza, I hope you are well! Absolutely, we will work on changing this now. Our Legal Team will need you to complete a Docusign to update the Flight Service Agreement and Membership Agreement with the new name. I spoke to Noah this afternoon as well and he advised no new bookings moving forward without your approval.
 Please let me know if you have any questions in the meantime, and we will have this paperwork over shortly.
 Best, Molly Manier Account Manager, Wheels Up

From: Raza Bokhari (bbbric) <rbokhari@bbbricinvest.com>
Date: Friday, May 14, 2021 at 4:38 PM

To: Molly Manier <molly.manier@wheelsup.com>
Cc: Members <Members@wheelsup.com>, Doug Clarke <dclarke@wheelsup.com>
Subject: Re: FSD Pharma, Inc. – Account: 28059
 Hi Molly
 Who is Noah? I don't know Noah
 It is my account and it only should require my approval or Maryann Adesso
 Please send me new agreements and i will gladly sign
 Best, Raza Bokhari

From: Molly Manier <molly.manier@wheelsup.com>
Date: Friday, May 14, 2021 at 5:07 PM
To: Raza Bokhari (bbbric) <rbokhari@bbbricinvest.com>
Cc: Members <Members@wheelsup.com>, Doug Clarke <dclarke@wheelsup.com>
Subject: Re: FSD Pharma, Inc. – Account: 28059
 Hi Raza,
 Apologies for any confusion. I spoke to a gentlemen named Noah Coyle who called on behalf of FSD Pharma, I only took down his information, and did not provide him with any documents or approval allowance. The documents will only be sent to you. My team is working on them now and should have them sent shortly. Please let me know if you have any questions in the meantime.
 Best, Molly Manier Account Manager, Wheels Up

On May 14, 2021 at 5:26 PM, Molly Manier <molly.manier@wheelsup.com> wrote:
 Hello Dr. Bokhari,
 Please see attached paperwork for the name change. Once complete I will send to Legal.
 Thank you,
 Molly Manier, Account Manager, Wheels Up

From: Raza Bokhari (bbbric) <rbokhari@bbbricinvest.com>
Date: Monday, May 17, 2021 at 8:56 AM
To: Molly Manier <molly.manier@wheelsup.com>
Cc: Members <Members@wheelsup.com>, Doug Clarke <dclarke@wheelsup.com>

Subject: Re: FSD Pharma, Inc. – Account: 28059

Hi Molly:

Do u need this signed also or the DocuSign is sufficient?

Please guide

Best

Raza Bokhari

On May 17, 2021 at 12:36 PM, Molly Manier

<molly.manier@wheelsup.com> wrote:

Hi Raza,

I am unable to provide you with information in regards to FSD Pharma's account and if you have any questions you can reach out to the below contact:

Christopher Jones

Christopher.jones@blakes.com

From: Raza Bokhari (bbbric) <rbokhari@bbbricinvest.com>

Date: Wednesday, May 19, 2021 at 10:38 PM

To: Molly Manier <molly.manier@wheelsup.com>

Cc: Doug Clarke <dclarke@wheelsup.com>

Subject: Re: FSD Pharma, Inc. – Account: 28059

Hi Molly

Do u have any update on my account;

I need to book travel

Many thanks

Best

Raza Bokhari

On May 20, 2021, at 11:41 AM, Doug Clarke

<dclarke@wheelsup.com> wrote:

Hi Raza,

Our hands are tied in terms of the FSD account – anything having to do with that, including clarifying who originally funded it etc, needs to go through the company or their counsel. I've been instructed from our legal team that I can't discuss any details of it with you.

If you do have upcoming travel we can offer to set you up with your own account and provide the most favorable terms we can for it given the circumstances. We can provide you with a \$7500 flight credit in conjunction with joining on your own.

Molly and I certainly want to try and be helpful to you here but there are significant limitations in what we can discuss as it relates to the original account. Let me know if you have any questions and I will answer what I can.

Doug

Doug Clarke, Senior Vice President, Wheels Up

From: Raza Bokhari (bbbric) <rbokhari@bbbricinvest.com>

Date: Thursday, May 20, 2021 at 12:27 PM

To: Doug Clarke <dclarke@wheelsup.com>

Cc: Molly Manier <molly.manier@wheelsup.com>, Maryann L Eigner <madesso@parkwayclinical.com>

Subject: Re: FSD Pharma, Inc. – Account: 28059

Dear Doug:

Thanks for reaching out and for trying to help

The account was started by charging my personal centurion Amex; we can provide you copies of that charge; if that would help

Alternatively. How do we set up a new account? Will it have same terms and conditions and rates as well as cancellation policies as my original account?

Many thanks for your help

Best

Raza Bokhari

On May 20, 2021, at 2:48 PM, Doug Clarke
<dclarke@wheelsup.com> wrote:

Hi Raza,

Anything account related of that nature would need to be provided by FSD or their counsel. We are bound not to disclose any information on that account except to say that any credit cards that were on file have been removed to make sure there are no issues or conflicts.

In terms of getting you set up with an account, our standard Core membership without a fund program is \$17,500 and we would provide you with a \$7500 flight credit all things considered and the history here. It would provide you with about 95% of the benefits that the former account provided from a Peak Day access standpoint.

If you wanted the full benefits the \$100k program would provide that. We would waive \$7500 of the membership initiation in conjunction with a fund program and the funding cost would be \$109,995.

To be honest, unless you plan on travelling over major holidays (which is what the funds programs are designed for), the pay as you fly option would provide all the same benefits and would be a lot less in startup costs.

Let me know if you have any questions – happy to go over any of it in more detail.

Best,

Doug

Doug Clarke, Senior Vice President, Wheels Up

From: Raza Bokhari (bbbric) <rbokhari@bbbricinvest.com>

Date: Friday, May 21, 2021 at 2:17 PM

To: Doug Clarke <dclarke@wheelsup.com>

Cc: Molly Manier <molly.manier@wheelsup.com>, Maryann L Eigner <madeso@parkwayclinical.com>

Subject: Raza Bokhari – wheels up account

Hi Doug

Thanks for the follow-up; and appreciate your consideration; I'm requesting Maryann adesso to coordinate getting the account set-up the pay as go account

It will be my name but u can use the business address

Please use Raza@razabokhari.com as the email address

Maryann will be the additional person, with full authorization on the account

Thanks again Doug and i wanted to take a moment Molly on her professional and excellent demeanor

Have a nice weekend

Best wishes

Raza Bokhari

From: Doug Clarke <dclarke@wheelsup.com>

Date: May 21, 2021 at 3:33:24 PM EDT

To: Raza Bokhari (bbbric) <rbokhari@bbbricinvest.com>

Cc: Molly Manier <molly.manier@wheelsup.com>, Maryann L Eigner <madeso@parkwayclinical.com>

Subject: Re: Raza Bokhari – wheels up account

Raza,

Sounds good and thank you for the kind words about Molly – she’s absolutely a pro. We’re both here to make this as smooth as we can.

I will send over the DocuSign to that email. Maryann – let me know if you have any questions with it. Happy to help in any way I can there. Once we have it filled out and back I will be in touch to confirm.

I’m glad we get to continue working together. We’re both very appreciative of your business and look forward to continuing the relationship.

Best,

Doug

Doug Clarke, Senior Vice President, Wheels Up

199. The Agreement which Wheels Up eventually sent to Bokhari on May 14th outlined an agreement between FSD and Bokhari transferring the Wheels Up membership account from FSD to Bokhari. By DocuSign, Bokhari signed as CEO of FSD and for himself as transferee. This Agreement reads:

May 14, 2021

FSD Pharma, Inc.

Attention: Dr. Raza Bokhari

Re: Wheels Up Partners LLC (“Wheels Up”) Membership Agreements

Dear Dr. Bokhari,

We hope you are enjoying the Wheels Up program. In connection therewith, you have previously executed and delivered a (i) Wheels Up Membership Agreement and (ii) Wheels Up Flight Services Agreement (together, the “Operative Agreements”).

The parties hereto hereby confirm and agree as follows:

1. FSD Pharma, Inc. (“Transferor”) hereby authorizes the transfer of the Core Membership account in Transferor’s name into a new account in the name of Raza Bokhari (“Transferee”)
2. The Transferee hereby accepts such account transfer and confirms its agreement to assume all of the obligations of the Transferor under the Operative Agreements.
3. Upon execution of this letter agreement, the Core Membership account in the name of Transferor shall officially be transferred into a Core Membership account in the name of Transferee. The membership date for the Transferee account shall be the original membership date of the Transferor account (i.e, the membership date shall not change).

If there is a conflict between the terms of this letter agreement and the terms of the Operative Agreements, the terms of this letter agreement shall control.

Please indicate your agreement to the terms set forth above by signing in the appropriate space below.

Very truly yours,
WHEELS UP PARTNERS LLC

Jason K. Horowitz
Chief Business Officer
Agreed and accepted as of the date first written above
TRANSFEROR:
FSD PHARMA, INC.
DocuSigned by:
Raza Bokhari, CEO
TRANSFEE:
DocuSigned by:
Raza Bokhari

200. As Bokhari stated in his evidence, his only intent in all of this was to ensure that the account remained under his control. Ultimately, Wheels Up, after hearing from counsel for FSD and Coyle, informed Bokhari that the account would remain in FSD's name but that he could open a new account in his own name if he so wished.

201. As already noted, after the May 14th shareholders' meeting, Bokhari took steps to isolate FSD from any access to PCL's premises as well as any records FSD held there. On June 30, 2021, a lawyer at Mr. Racowski's firm, Holland & Knight, now acting for PCL, forwarded a new set of invoices from PCL. According to Carroll, these invoices totalling USD \$1,412,951.50 were for expenses incurred by PCL and Bokhari for the period November 2018 to December 2019, and from April to May 2021. Carroll testified that the claim for the 2018 to 2019 period had already been invoiced for and paid.

202. Carroll, in his evidence pointed out that many of the charges that FSD had already paid for were unwarranted and FSD was seeking to be reimbursed. Bokhari on the other hand, maintained that all PCL charges to FSD were legitimate and that PCL provided services regularly to FSD after he became a part of the Company in 2018.

203. By agreement, all business Bokhari conducted on behalf of FSD was to be done out of his Philadelphia offices. As well, he stated, an internal process was developed whereby all PCL invoices would be reviewed and approved by officers and directors other than him. According to Bokhari, Durkacz and Saeed, along with Carroll, regularly reviewed and approved every payment FSD made to PCL. Moreover, he stated, the relationship between PCL and FSD as well as the relationship between Bokhari and PCL was not only known to the full Board but was also disclosed to FSD's auditors and referenced in FSD's public financial statements as a Related Party Transaction.

The Issues

204. The parties agree that the fundamental issue in this arbitration is whether FSD was legally justified in terminating the employment of Bokhari for cause. There are a number of sub-issues involved, which will be discussed and which deal with the Respondent's grounds for dismissal.

205. The Applicant, at the outset, raises the issue of constructive dismissal, asserting that he was constructively dismissed on May 14, 2021 and in any event before FSD purported to terminate him for cause.

206. On that date, Durkacz and Saeed, as newly appointed Executive Co-Chairs of FSD's Board wrote Bokhari a letter advising that the new

Board had significant concerns regarding his conduct and that a special committee would be set up to “oversee an investigation” concerning this conduct. Bokhari, the letter stated, would be placed on temporary paid leave and have his authority as CEO removed.

Positions of the Parties

207. As the onus rests with the Respondent to prove that the termination for cause was justified, I will first generally outline FSD’s position.

FSD Position

208. In its closing submissions, FSD pointed to a number of areas where the Tribunal could find Bokhari’s termination for cause was entirely justified.

209. As earlier noted, in its Report to the Special Committee, Dentons outlined five areas where, either individually or collectively, Bokhari breached his fiduciary duty to FSD, a duty, FSD argues, that was owed both at common law and under s. 134(1)(a) and (b) of the OBCA. As well, FSD maintains, this duty was reinforced and supplemented by the terms of his written Employment Agreement with FSD wherein at s. 2.1 it stated:

2.1 Capacity and Services. The Company shall employ the Executive [Dr. Bokhari] in the position of Executive Co-Chairman of the Board of Directors and Chief Executive Officer (“CEO”). The Executive shall perform such duties and have such authority

as are normally associated with the position and as may be assigned or delegated by the Board of Directors from time to time. The Executive shall perform all duties and responsibilities in a manner consistent with all applicable laws as well as the written policies of the Company that are in effect from time to time...the Executive acknowledges that he is a fiduciary and has fiduciary obligations to the Company that continue even after his employment ends.

210. Referencing *People's Department Store Ltd.* 2004 SCC 68, FSD argues that fiduciary duty is better described as a “duty of loyalty” requiring “officers and directors to act honestly and in good faith with a view to the best interests of the corporation.”

211. As the Court wrote:

The statutory fiduciary duty referring to s. 122 (1)(a) of the CBCA (which mirrors s. 134 (1)(a) of the OBCA) requires directors and officers to act honestly and in good faith vis-à-vis the corporation. They must respect the trust and confidence that have been reposed in them to manage the assets of the corporation in pursuit of the realization of the objects of the corporation. They must avoid conflicts of interest with the corporation. They must avoid abusing their position to gain personal benefit...Directors and officers must serve the corporation selflessly, honestly, and loyally.

212. In this case, FSD argues, those were the duties owed by Bokhari to FSD not only at common law and statutorily, but as well under his Employment Agreement, duties which it argues, he breached in a number of ways on the evidence before the Tribunal.

213. In his evidence in chief, Coyle described the written policies which FSD had, including the Controls Policy which included the

Delegation Matrix, the Employee Handbook containing the Anti-Bullying Policy, the Disclosure Policy, the Insider Trading Policy, the Whistleblower Policy and the Code of Conduct.

214. In cross-examination, these documents were put to Bokhari and while he testified he was familiar with the Code of Conduct, the Disclosure Policy and the Whistleblower Policy, he said he had never seen the Employee Handbook, was not familiar with the Anti-Bullying Policy and denied that the Disclosure Policy had been approved by the Board. He did not recognize the Delegation Matrix.

215. FSD argues that even if Bokhari was not familiar with these policies, he was obliged, under his Employment Agreement, to abide by them and he didn't. Bokhari, it argues, allowed his personal desire to win the proxy fight at all costs to prevail and in doing so breached his fiduciary duty.

216. FSD argues that upon receiving the Requisition, Bokhari and the then board of FSD had an obligation to fix the date for a shareholders' meeting within a reasonable period of time. It is a fundamental right of dissident shareholders holding at least five percent of the votes, as was the case here, to requisition such a meeting.

217. As Cumming J. stated in *Paulson & Co. v. Algoma Street Inc.* 79

OR (3rd) 191 at paragraph 41:

“This fundamental right in respect of corporate governance afforded by s. 105 (of the OBCA) provides an important and valuable remedy for minority shareholders.”

218. While the calling of such a meeting is within the discretion of the board using proper business judgment, it is unlikely a court will intervene regarding the date selected by the board unless the board has acted unreasonably (see *Marks v. Intrinsyc Software International Inc.* 2013 ONSC 727).

219. In the present case, because Bokhari and the Board did everything in their power to set the meeting date as far out as possible, the court was asked to intervene. In the decision of McEwen J. dated March 5, 2021, already referred to, the judge rejected the June 29, 2021 date set by the company and ordered the meeting to be held May 14th.

220. This, the Respondent argues, was an exceptional decision by a judge in circumstances where such intervention is rarely occasioned. The conclusion, FSD argues, can only be that the judge found the actions of Bokhari and the Board to have been unreasonable. The Requisition from Durkacz and Saeed dated January 4, 2021 required the Board to call a

meeting of shareholders no later than March 15, 2021 to remove Bokhari and the existing directors and to fix the new slate at five.

221. Bokhari knew, at that time, as he admitted in cross examination, that Durkacz and Saeed began the contest with a significant advantage, given the number of Class A Shares they held. It was Bokhari's desire to change that landscape, the Respondent argues, that led to his actions in advance of the shareholders meeting.

222. Despite the fact that FSD was now in the throes of a proxy fight, the Respondent argues that Bokhari and the Board were obliged to carry out their duties in the best interests of the corporation. Obviously, there is a conflict of interest in these circumstances. It cannot be helped. However, in spite of the temptation to protect one's own interests and to spend significant corporate funds in fighting off dissidents, it remains the Board's duty to always put the Corporation first and act in a way that will promote shareholder value.

223. Here, the Respondent argues, Bokhari, leading the Board, did anything but. In order to defeat Durkacz and Saeed, they argue, Bokhari had to somehow dilute the A shares held by them. Step one was to delay the meeting for as long as possible. The approach taken by Bokhari, they say, is well captured in a recorded conversation between Carroll and

Bokhari in which Sonshine and Gardner participated that has been reproduced at paragraph 58.

224. In order to make the proxy fight as expensive as possible for the Dissidents, Bokhari's comments have previously been reproduced at paragraph 60.

225. While Bokhari may have said he did not intend to break the law, the Respondent points to another portion of a recorded conversation with Carroll suggesting his utter contempt for Canadian law. In that conversation, Bokhari is heard stating:

“Fuck the Court. I'm sitting in the United States. Come over with the Canadian court order and do to me like, come tell me whatever, you know.”

226. Right from the moment he received the Requisition, Bokhari's sole interest was in winning the proxy fight no matter the cost to the corporation. He was going to make the fight as expensive as possible, the Respondents argue, using the corporation's funds. This led him to a strategy to delay the meeting and dilute down the A Shares held by Durkacz and Saeed. In carrying out this strategy, Bokhari, they argue, breached his fiduciary duty to FSD.

227. Moreover, the Respondent argues, he failed to ensure that the Board was properly advised regarding the requirement that a requisitioned

meeting be held within a reasonable time. Clearly, rejecting the date suggested in the Requisition, he proposed to the Board, and the Board accepted, his date of June 29, 2021.

228. Acting in the best interests of the corporation, the Respondent argues, Bokhari ought to have taken all steps necessary, and encouraged his Board to do so, to quickly resolve the dispute with the Dissidents. He did the opposite.

229. The Board meeting of January 21, 2021, they argue, was a clear indication of the strategy Bokhari sought to employ. The Board was never properly briefed on its obligations in the face of a Requisition. As well, the Respondent argues, Durkacz and Saeed did not receive complete Board Books for the January 21st meeting. Whole sections relating to a presentation by Brennan concerning the Phase 2 COVID-19 Study and possible future acquisitions were deleted from their Board material, as was the briefing by the CFO, Carroll.

230. Another subject discussed at this January 21st Board meeting was compensation for the corporation's "independent directors", that is, all but Bokhari, Durkacz and Saeed. Bokhari moved that for their services in 2021, these independent directors would be paid \$75,000 which was double what they had received in 2020 and an additional \$25,000 for any

director chairing a Board committee. If it were to be paid in cash, it would be paid quarterly. Should a director opt for shares, these would be issued immediately. By paying these friendly directors in February when the shares were to be issued, the Respondent argues, Bokhari was beginning his plan to put as many shares as possible in helpful hands.

231. But more than that, they argue, the Board should have been briefed on the law, in particular Section 23(3) of the OBCA which prohibits the issuance of shares for future consideration. By failing to inform himself or the other directors of this restriction, the Respondent argues, Bokhari breached his fiduciary duty to the Company.

232. Obviously angered by the challenge to his authority by Durkacz and Saeed, Bokhari, it is argued, first turned his attention to Saeed whom he needed to punish. On December 20, 2020, Bokhari alone created a Special Committee of the Board consisting of Buyer and Ciaruffoli to investigate Saeed's conduct related to issues that allegedly had occurred some considerable time ago.

233. After receiving advice from counsel and only accepting some of it, Bokhari sent a letter dated December 20, 2020 to Saeed placing him immediately on administrative leave, "pending completion of an investigation into escalating concerns that you have engaged in serious

misconduct inconsistent with your responsibilities as President and a director of FSD.”

234. This letter was drafted by Gardner, counsel to FSD and was, without doubt, the Respondent argues, meant as retaliation for Saeed questioning Bokhari’s decision not to pursue the Lucid opportunity. Indeed, after Bokhari changed his mind about considering the merits of the Lucid opportunity, Saeed on December 16th had emailed members of the Board suggesting that the Board should deal with the Lucid issue and asking them to suggest a suitable time for a meeting.

235. To Bokhari, this was pure insubordination and a challenge to his authority justifying suspension. As far as Bokhari was concerned, the discussion about Lucid was a closed matter.

236. As a result of being suspended, Saeed sought legal advice. His counsel was advised by Gardner that the work of the Special Committee would be carried out fairly and impartially. Not so, says the Respondent. The committee was a complete sham. In a recorded conversation of January 4, 2021 with Bokhari, Gardner stated:

“But if Steve (Buyer) and Bob’s (Ciaruffoli) work is going to serve its purpose, which is to get rid of Zeeshan (Saeed) and to do so to protect the company from a claim of constructive dismissal as best we can, then the best way for this complaint to come – I’m happy to ghostwrite it for you and have one of my associates work with

me to do that. But the best way is for either your lawyer – one of your lawyers to do it or for you; in your own capacity, to do it.”

237. Bokhari, earlier in this conversation, stated he was “going to disband this damn committee....” As well, during this conversation, it is clear that Bokhari sought to have Gardner, counsel to FSD, undertake personal work for him regarding money he believed was owed to him by First Republic, a company in which Durkacz had an interest. Clearly, it is argued, Gardner should not have been asked for advice in this personal matter.

238. After telling Gardner he was not shy about spending his own money, Bokhari stated:

“... I pay my bills. I do not want FSD Pharma to pay a dime of any of like the work which otherwise is related to me. Unless you find some reason that there is common ground. Yes of course. Fuck it. Bill it to FSD Pharma ... in the world of fighting with them on these proxy wars, that’s like the best part. I got the - I have the Treasury. They have their own personal money, you know, so good luck. For every dollar you’re going to spend, I’m going to outspend you by, who knows, \$25.00, \$50.00. You know you can’t win.”

239. All of this, FSD argues, demonstrated Bokhari’s utter contempt for anyone who might challenge his authority, his utter contempt for the law and his desire to defeat the Dissidents no matter the cost.

240. Notwithstanding that the Special Committee had barely begun its work looking into the allegations Bokhari was making against Saeed, on

January 25, 2021 Bokhari simply terminated Saeed's employment without any regard for the legal or reputational consequences for the corporation.

241. Again, as previously noted in paragraph 68, Bokhari's mindset was clearly captured in a recording of the January 25th telephone conversation between Bokhari, Carroll, Sonshine, Hogan and Robinson.

242. By terminating Saeed in this fashion, the Respondent argues, Bokhari exhibited bad faith all in an attempt to punish Saeed and to pressure him into giving up the proxy fight. This conduct, they argue, was completely contrary to the best interests of the company and a clear breach of his fiduciary duty.

243. To compound this bad behaviour, Bokhari, in early February 2021, having tired of the Special Committee and its counsel, Gardner, who had cautioned him about his aggressive approach towards Saeed, in an email to Robinson, complained about Gardner and his work as counsel to the Special Committee stating he wasn't "inclined" to pay Gardner. Later that evening, Bokhari emailed Gardner essentially firing him, advising that Sonshine would be terminating Gardner's access to FSD Pharma files. The email also advised that Sonshine would be securing a final bill from Gardner and that the company would not honour any bills from him after

10:00 pm ET February 3, 2021. The email concluded: “I thank you for your time and wish you much success.”

244. This was effectively the end of the Special Committee. In another email sent by Bokhari later on February 3rd to Buyer and Ciaruffoli, he thanked them for their “diligent work” on the Special Committee and asked if they had some time to discuss his suggestion that the Committee suspend its work.

245. FSD points out that in the creation of this Special Committee, Bokhari was to be “firewalled” from its activities because he was not a disinterested person. Accordingly, they argue, Bokhari had no authority to fire Gardner as the committee’s counsel. By taking this action, Bokhari abused his power as CEO for his own personal purposes, thereby breaching his fiduciary duty to the corporation.

246. Moreover, FSD argues, the response of the directors was astonishing. They did nothing to protest Bokhari’s unilateral actions. It was, they say, as though the Special Committee never existed. Another example of why this Board was anything but independent but rather a group totally controlled by Bokhari.

247. Another area where Bokhari allowed his personal interests to prevail over those of the corporation, FSD contends, was in his handling

of Zack Dutton for his apparent support of the Requisition. By improperly threatening Dutton and then by breaching his contract, Bokhari again placed his own interests ahead of those of FSD, thereby breaching his fiduciary duty to the corporation by permitting it to become vulnerable to unnecessary litigation.

248. Yet another area where the Respondent argues Bokhari breached his duty concerns the two ATM offerings. As earlier described, pursuant to these offerings, the corporation's Class B Shares were dramatically increased in, what the Respondent argues, was an improper defensive tactic contrary to Ontario securities law.

249. In the midst of a proxy fight, the corporation was not entitled to take steps to shift the balance between it and the Dissidents. Moreover, they argue, the Corporation did not need new money at that time. There was, according to Carroll, an excess of cash available.

250. As to the 2021 ATM offering, the Respondent argues that Bokhari entirely ignored the concerns registered by Durkacz's counsel that the issuance of these shares would be an improper defensive tactic. They point out Bokhari's evidence in cross-examination, which they say captures Bokhari's attitude when he stated: "His vote, as soon as he

became a dissident and he declared war against the current management and Board, in my calculus was really not relevant anymore.”

251. More to the point, FSD argues, Bokhari, at the March 15, 2021 Board meeting, made it abundantly clear he was doing this to water down the voting power of the Class A Shares. He stated in response to a query from Durkacz: “Well those are the facts you know, Anthony. We can’t change the timing. That’s why you know there are contested shareholders that are contesting the role of this board and management, so that’s an item that would come under a shareholder review and hopefully will be watered down, or from my perspective.”

252. During his cross-examination, FSD argues, Bokhari confirmed this intention when it was put to him that he had in seven weeks doubled the float. He responded that the issuance of these shares was “an intended or an unintended benefit that management also received.”

253. There was no need, it is argued, for this 2021 ATM offering, especially given the declining share price. By watering down the voting power of the Class A Shares by more than doubling the number of Class B Shares in a two-month period in the midst of a proxy fight, FSD says Bokhari once again breached his duty of care to the corporation, and that the Board simply complied after practically no discussion.

254. The next area the Respondent argues the Tribunal should be concerned about is Bokhari's involvement on the Perio Vance transaction. Again, in the middle of a proxy fight, they say, what possible justification could there be for such a transformational transaction? This deal, negotiated by Bokhari, made no sense. Not only would it fundamentally alter the business of the company, it was twice as expensive as the deal earlier proposed but only for 60%. And, as FSD points out, the company could have acquired Lucid for a meagre CAD \$5 million in shares.

255. As previously noted, Robinson advised Bokhari against pursuing Perio Vance as it would be viewed as a purely defensive tactic. This, of course, was borne out in the decision of Hailey J. enjoining FSD from pursuing any such transactions outside the ordinary course of business before the May 14th shareholders meeting.

256. As the Respondent points out, Robinson, for his efforts in warning Bokhari about Perio Vance, was replaced by Bieber who acted for the corporation in the matter before Hailey J. Clearly enraged by the decision, Bokhari insisted that Bieber's firm take steps to have Hailey J. dissolve the injunction which the judge refused to do.

257. McEwen J. had ordered that the status quo remain in place until the May 14th meeting. Hailey J. determined that the proposed Perio Vance

transaction was an “end run” around that decision “sprung” upon Durkacz. Justice Hainey’s comments in his decision on the request to dissolve the injunction, the Respondent notes, are telling.

258. By trying to push forward with this transaction in the midst of a proxy fight and then in taking Hainey J. to task for issuing an injunction, the Respondents say Bokhari breached his duties to the corporation by expending, unnecessarily, company funds to pursue his own personal interest. In doing so, he breached his fiduciary duties to the corporation.

259. Compounding this, they say, was Bokhari’s interaction with Cassel Salpeter, the firm he engaged to provide a fairness opinion of the Perioavance deal. At no time did Bokhari provide the Board with the Cassel Salpeter Report in which they concluded the price FSD had agreed to pay was unfair.

260. By arbitrarily and unilaterally appointing Santorum to preside over the May 14th shareholders’ meeting, the Respondent argues, Bokhari breached the Order of McEwen J. There is no way Bokhari could not have been aware of the court order requiring the parties to agree upon the Chair for the meeting, failing which the court would appoint the Chair. His argument that he had only ever seen the handwritten endorsement of McEwen J., they argue, makes no sense and is a lie. Sonshine, in a memo

dated March 10, 2021 advised Bokhari and the Board that McEwen J. ordered that the parties agree upon an independent chair.

261. As well, Sonshine told the directors at the April 20th Board meeting that the parties were required to agree on an independent chair. Indeed, the motion material which Durkacz served prior to the Hainey J. injunction hearing included the formal judgment of McEwen J. which ordered that the Chair of the May 14th meeting was to be a person agreed upon by the parties, failing which the court would make the appointment.

262. In his affidavit in response to the motion brought by Durkacz to have an independent chair (Carol Hansell) appointed, Bokhari affirmed he had reviewed the affidavit of Durkacz (which contained McEwen J.'s formal Judgment). As well, in his own affidavit, Bokhari swore that Santorum had agreed to serve as chair. That, the Respondent notes, was untrue. It wasn't until May 3rd that Santorum signed the heavily negotiated retainer agreement. In all of this, they argue, Bokhari again breached his fiduciary duties to the corporation by disobeying a court order.

263. As already noted, Carroll was concerned about this whole business involving Santorum and felt he would be breaching a court order if he were to pay a non-refundable fee of USD \$75,000 to Santorum. The Respondents argue that in attempting to bribe Carroll and ultimately firing

him for cause, on May 5, Bokhari abused his authority as CEO and again breached his duties to FSD by exposing the company to expensive and wholly unnecessary litigation. The company had a Whistleblower Policy that should have protected Carroll from such retaliation following his complaint about the activities of Bokhari.

264. Moreover, in engaging Stockwoods to assess a criminal complaint against Carroll and then, contrary to the advice of almost every advisor, issuing a damaging, and to Carroll, a devastating press release on May 13th, the day before the shareholders' meeting, Bokhari once again abused his power as CEO and in doing so breached his duties to the corporation. As was his pattern, he acted in his own personal interests by punishing employees whom he perceived to be challenging him, and in doing so, exposed the company to unnecessary litigation risks.

265. The final area of concern raised by the Respondent has to do with what it characterizes as misappropriation of assets of the Company by Bokhari. The first has to do with the Bryn Mawr account which Bokhari opened in December 2020. The Respondent argues there was never any business rationale for opening this account in the US in the first place with signing offices being two PCL employees and Bokhari. The benefit plan obligations of FSD, modest as they were, could easily have been set up at

the company's Canadian bank, Meridian, where there already was a US dollar account.

266. The opening of this account, quite apart from its needlessness, was done on Bokhari's instructions within days of the beginning of the shareholder dispute. Clearly Bokhari, angered by the actions of Saeed regarding the Lucid transaction, was determined to take action against Saeed and indeed, fired him for cause.

267. Bokhari knew, the Respondent asserts, the fight was on. Tellingly, in an email from Gardner to Bokhari on December 20th, when discussing the issues related to the possible firing of Saeed, he wrote:

“We have a letter to Anthony (Durkacz) fairly well advanced which we will send along this afternoon. We are not sure about a strategy that sends both sets of correspondence at once – we need to keep in mind how the record will look a few months from now if there is a proxy fight.”

268. The December 20th opening of this US account, the Respondent argue, was clearly in contemplation of such a fight.

269. Quite apart from the unnecessary opening of this account, Bokhari's use of it clearly points to an abuse of his authority and a failure to abide by his fiduciary duties. For example, the Respondents argue, he used it to pay the non-refundable USD \$75,000 to Santorum, knowing

he'd never get it through a Meridian account requiring other signatories, given Carroll's concern.

270. As well, Bokhari used the Bryn Mawr account to pay Toronto lawyers whom he engaged to pursue criminal complaints against Durkacz and Carroll. But perhaps more concerning, the Respondents assert, was Bokhari's attempt to transfer USD \$12 million from FSD's account with Meridian to the Bryn Mawr account.

271. On May 14th, while the shareholders' meeting was underway, Bokhari, obviously realizing he was losing the proxy fight, emailed Meridian directing them to immediately transfer the USD \$12 million to the US account. This followed a direction to Meridian, the day before, to have them transfer USD \$250,000 to the Bryn Mawr account to cover the retainer request of Mr. Racowski at Holland & Knight for his "expanded scope of representation."

272. The Respondent notes that when pressed about the direction to transfer these funds and the reasons for it, Bokhari stated it was required to pay bills and that Meridian wasn't functioning properly. As to Meridian not functioning properly, once notified of the Order of Hailey J., Meridian was being careful. Obviously, they didn't want to do anything that might be construed as a breach of that Order.

273. In his cross-examination on this subject, Bokhari did not think it was in the company's best interests to have funds remain at Meridian and that the company had to pay its lead clinical trial partner Syneos in excess of \$6 million or they would suspend the trial.

274. He also stated he was operating under the advice and guidance of his lawyers who were in the process of "preparing an injunction against the outcome of the shareholders' meeting based on irregularity that already had begun with respect to Ms. Hansel making a decision on May 10th or May 11th to insert Carroll onto the management slate." He further testified that an injunction was filed on May 14th to permit him to carry on as CEO of the company.

275. The Respondent argues that this defies credibility. No evidence was presented to indicate any urgency regarding the Syneos accounts. In fact, FSD was upset with Syneos and purposely hadn't paid them for months.

276. Why, they ask, would Bokhari suddenly be concerned about paying Syneos. Even if there were bills to pay, Coyle could very easily arrange to have them paid from the Meridian account.

277. This money, the Respondent urges, was never meant for the payment of bills. It was meant for Bokhari, as was the USD \$250,000 for

Mr. Racowski, Bokhari's lawyer in the US which they say was seed money for Mr. Racowski to act for Bokhari against FSD after May 14th. This, they argue, was a flagrant breach of Bokhari's duties to the Company.

278. The next area of misappropriation of funds being alleged has to do with the Wheels Up account. The evidence, which has been detailed earlier, the Respondent argues, clearly demonstrates an attempt by Bokhari to steal or otherwise get personal control of this account which by the time of the May 14th meeting, contained approximately USD \$430,000.

279. The email exchange between Bokhari and Wheels Up, they argue, clearly demonstrated that Bokhari was trying to steal this money and that his assertion he only was trying to de-link his credit card is nonsensical. Importantly, they say, Bokhari completed the Agreement transferring the membership into his name on May 14th when he clearly knew he had lost the proxy battle. All of this behaviour was completely contrary to his duties to the corporation and a breach of his fiduciary duty.

280. The next area of misappropriation alleged by the Respondent has to do with the Invoices from PCL, Bokhari's company in Pennsylvania. They take the position that all invoices from PCL having to do with PCL employee charges and PCL overhead charges are fake. In all, 10 PCL

employees are alleged to have performed work for FSD over the years 2018 to 2021. For this, FSD paid PCL the sum of USD \$626,746.53. As to the overhead charges, FSD paid USD \$327,760.35 which form part of their counterclaim against Bokhari.

281. The Respondent maintains no work product related to the 10 PCL employees nor any records of what they did has ever been produced. Accordingly, they say this Tribunal must draw an adverse inference that in fact no work was ever done by PCL for FSD.

282. Since taking control of FSD in May 2021, FSD points out that none of the PCL employees the company had paid for over many years has had to be replaced. As CEO of the corporation, Bokhari owed a duty to render not only complete but honest invoices regarding his PCL employees. By charging large portions of the salaries of PCL employees and overhead to FSD, Bokhari, the Respondents allege, breached his fiduciary duties to the company.

283. The Respondents therefore claim it was fully entitled to dismiss Bokhari for cause. His actions, certainly since December 2020, were not those of a CEO mindful of a duty to put the interests of the company ahead of personal interests.

284. The Tribunal, the Respondent asserts, should therefore dismiss Bokhari's claim and allow the Counterclaim in which FSD seeks to recover from Bokhari amounts charged to the company that ought not to have been charged. This includes, in addition to the amounts already noted that were charged by PCL, legal and professional fees paid to Bieber, Lenczner Slaght, Stockwoods, Holland & Knight and Cassel Salpeter. These legal and professional fees total USD \$216,939.00 and CAD \$555,031.35.

285. Additionally, in its Counterclaim FSD seeks the return of USD \$569,196.95 representing the sale of the 536,978.25 Class B Shares Koehnen J allowed Bokhari to retain, shares which he sold on or about March 15, 2022 at an average price of CAD \$1.06 per share. It is the position of FSD that Bokhari should never have received CAD \$2.5 million B Shares in February 2021 as compensation for his work in 2021 given his conduct.

286. Further, FSD in its Counterclaim, seeks damages of USD \$86,625.00 and CAD \$331,675.00 representing amounts Bokhari had FSD pay for the services of Santorum whom he should never have appointed let alone paid.

287. Finally, FSD seeks the return of USD \$69,833.00 representing the amounts FSD was charged in its Wheels Up account for Bokhari's personal travel, incurred costs which Bokhari in evidence said he always intended to repay but did not.

288. The total of the Counterclaim is USD \$1,327,903.88 and CAD \$1,155,903.30.

The Applicant's Position

289. The Tribunal now turns to the position of the Applicant, Raza Bokhari. At its essence, Bokhari's principal position is that he was constructively dismissed when he was summarily suspended on May 14, 2021 by letter from Durkacz and Saeed of the same date. This letter stated Bokhari was being placed on "temporary paid leave" pending the results of an investigation to be overseen by a special committee of the Board.

290. Almost immediately after suspending Bokhari, the new Board of FSD purported to cancel the shares he had received in February 2021 except for an amount representing his service prior to February 10, 2021. As the June 18, 2021 Board material confirms, the company purported to cancel 324/365th of these shares.

291. Bokhari alleges that in addition to cancelling shares to which he was entitled, FSD attempted to persuade his broker, Haywood Securities,

to return the purportedly cancelled shares without ever alerting him of this action. Thus, he argues, if he wasn't constructively dismissed by the May 14th letter from Durkacz and Saeed, he surely was when the company attempted to cut off his pay by trying to claw back his compensation shares.

292. As Bokhari argues, once an employer shows an intention to no longer be bound by the employment contract, an employee is deemed to have been constructively dismissed. The case law, he argues, is replete with examples of how reductions in pay will result in a finding of constructive dismissal because, as the court noted in *China Southern Airlines Ltd. V. Xi, a Labour Arbitration Case* (2020) L.L.A.D. 63 (quoting *Farquhar v. Butler Brothers Supplies Ltd* 1988 Carswell BC 46 (C.A.)): “the question of salary goes to the very root of the contract.” As a result, as already noted, Bokhari's counsel wrote FSD on June 21, 2021 alleging constructive dismissal.

293. The second issue raised by Bokhari is that having constructively dismissed him, either on May 14, 2021 or certainly on June 18th when the company tried to claw back his compensation shares, FSD was not entitled to then terminate him for cause.

294. Bokhari argues it is impermissible to constructively dismiss an employee by suspending his employment and then to use the suspension period retrospectively to uncover grounds for dismissal.

295. In that regard, reference is made to *Hookimawillile v. Payukotayno James and Hudson Bay Family Services*, 2019 Carswell Ont 11612 SCJ. Once there is a finding of constructive dismissal, an employer's attempt to retrospectively dismiss the employee for cause cannot be permitted. Simply put, if there has been a constructive dismissal, there cannot be termination for cause.

296. This position, Bokhari argues, is supported by *Ziten v. Sadie Moranis Realty Corp* (2015) OJ No. 6839 where Faieta J., after finding the plaintiff had been constructively dismissed, concluded that if the defendant had had concerns about the plaintiff's conduct justifying dismissal for cause, he would have expected them to have outlined those concerns to the plaintiff – put him on notice – before constructively dismissing him.

297. In fact, Bokhari, submits, were this Tribunal to find he had been constructively dismissed, that would be the end of the matter and he would be entitled to severance under the provisions of his Employment Agreement.

298. The third issue raised by the Applicant is that FSD could not terminate him for cause without complying with Section 4.1 of his Employment Agreement which reads:

4.1 Termination for Cause

The Company may terminate the employment of the Executive at any time for cause by written notice to the Executive. For the purposes of this Agreement, “cause” means

- (a) Material breach of the material provisions of this Agreement which has not been remedied by the Executive within thirty (3) business days after receipt of notice from the Board specifying such material breach, if capable of so being remedied.

299. It is undisputed, the Applicant argues, that the Board of FSD never gave Bokhari any such notice, nor the opportunity to explain or remedy the impugned conduct.

300. The fourth issue raised by the Applicant is that the Respondent has failed to meet the onus of establishing any of the grounds for cause as outlined in the termination letter dated July 27, 2021. As set out in that letter, which has already been referred to, a number of areas of misconduct were identified, including a flagrant breach of court orders, the improper issuance of shares, actions in respect of the potential purchase of Perioavance, and attempts to misappropriate Company Funds.

301. The Applicant argues that the Employment Agreement imposed a high bar upon FSD to establish cause when it spoke of a material breach

of material provisions of the Agreement. Moreover, the Applicant says, the high bar set out in the Employment Standards Act of Ontario should be the minimum standard for termination for cause in this case, a standard requiring willful misconduct or willful neglect of duty. This stringent legislative standard makes it clear that indifference, thoughtless or neglectful conduct is insufficient.

302. As Wein J noted in *Plester v. Polly One Canada Inc.* (2011) O.J. No. 6244, the test under the Employment Standards Act is higher than the test for just cause. The conduct must be intentional and deliberate. “It is, to put it colloquially, being bad on purpose...just cause involves a more objective test... willful conduct involves an assessment of subjective intent, almost akin to a special intent on criminal law.” The Respondent, they argue, has not met that onus.

303. In any event, the Applicant argues, the new Board of FSD was not entitled to terminate his employment for cause because the Board, during his tenure as CEO, condoned his conduct. Even if it could be found that Bokhari was guilty of serious misconduct, or acting in a way that breached his fiduciary duty to the Company, if such conduct was condoned by the Board, it would not constitute just cause.

304. In that regard, reference is made to *Pagliaroli v. Rite-Pak Produce Co.* where Grace J. upheld the decision of an arbitrator who concluded, even though the impugned conduct of the plaintiff breached his duty of good faith and his duty to act in the best interests of his employer, he could not be dismissed for cause because the company had condoned his activity.

305. In the present case, the Applicant argues the Board in respect of each identified area of alleged misconduct condoned every action he took. Moreover, he asserts, legal advice was relied upon. How could FSD now assert willful misconduct when he was literally surrounded by lawyers throughout the proxy battle, the context in which all of this should be viewed.

306. Turning to the specific allegations against Bokhari, the first has to do with the issuance of Compensation Shares to him and the Board for 2021 services in February 2021. First, Bokhari argues, s. 3.2 of the Employment Agreement expressly authorized the award of shares to the Executive and the Board, from time to time, for prior and anticipated performance.

307. Indeed, this was entirely consistent with past practice where in July 2020, the Board approved an award to Bokhari of CAD \$2.5 million worth of Class B Shares as his compensation for that year.

308. In any event, Section 3.5 of the Employment Agreement clearly contemplated the Board and the Executive completing negotiations regarding compensation for the Executive by March 31st.

309. As to the alleged breach of Section 23(3) of the OBCA, this was simply a technical breach later, they argue, remedied by the decision of Koehnen J of March 8, 2022 where he confirmed Bokhari's entitlement to 208/365th of the shares issued, representing his employment until termination July 27, 2021.

310. Moreover, the Applicant points to legal advice he received from Sonshine who in an email to Bokhari dated February 13, 2021, wrote in respect of the compensation shares:

Raza's comp is identical to what A (Durkacz) and Z (Saeed) approved for Raza in fiscal 2020. As in 2020, the board accepted the unanimous recommendation of the fully independent compensation committee in awarding Raza's comp. The issuance of share-based comp to other board members is entirely consistent with past practice.

As well, it is submitted, the issuance of the Compensation Shares was condoned by FSD's Board of Directors.

311. Turning to the Respondent's allegations concerning the proposed Perioavance transaction, an area of concern in the Dentons Report, the Applicant argues that none of his actions constituted a material breach of his duties to the Company giving rise to a termination for cause. Bokhari, it is argued, truly believed the Perioavance transaction would be in the best interests of FSD, was entirely consistent with the Company's diversification strategy and, importantly, was fully supported by the Board.

312. As evidence of Bokhari's belief in the deal, reference is made to a recorded conversation he had with Carroll and Robinson on March 19, 2021 where he stated the transaction would be in the best interests of the shareholders regardless of whether the Perioavance vendors could ever vote their shares.

313. Although Robinson may have expressed concerns about the Perioavance transaction in the midst of a proxy fight, his primary concern, the Applicant argues, was that the shares issued would not be permitted to be voted at the shareholders' meeting.

314. To counter the argument that the transaction was part of a strategy to put additional shares in friendly hands, Bokhari makes

reference to the vendor's request for a stock component even though Bokhari and his team had suggested an all-cash deal.

315. In any event, Bokhari maintains, at no time was he put on notice regarding Perio Vance. Indeed, the transaction was approved at a meeting of the Board on April 8, 2021, a meeting attended by all Independent Directors, FSD's counsel and members of the management team.

316. The deal was never "rushed" and both Sonshine and Mr. Cummings indicated at the April 8th meeting they were satisfied with the due diligence that had gone into the transaction. Even after the Hainey J. injunction, which Bokhari argues was most unusual, the Board never took any steps to castigate him or to put him on notice as required by Section 4.1 of his Employment Agreement. Indeed, both board members, Buyer and Ciaruffoli, expressly stated in evidence they did not think Bokhari's involvement in Perio Vance warranted termination.

317. Turning to the allegation that the appointment of Santorum was a breach of the Order of McEwen J., Bokhari argues that when viewed in the context of the legal advice he received, the engagement of Santorum could not amount to cause. His alleged deliberate breach of McEwen J.'s Order was nothing more than a misunderstanding of what had been ordered, given the two versions of McEwen J.'s Endorsement.

318. Bokhari states that as a result of legal advice he received from Bieber, he reached out to Santorum who eventually agreed to act as Independent Chair of the May 14th shareholders' meeting. None of FSD's counsel ever advised him that the proposed engagement of Santorum would be a breach of the court order. As Bokhari noted in his evidence in chief, had he ever been advised to withdraw Santorum's name, he would have done so.

319. Indeed, he says, from mid-April until the morning of May 3rd when Carroll raised the issue, no lawyer nor any board member expressed concern about having Santorum chair the meeting.

320. Turning to Bokhari's response to the allegations surrounding the Bryn Mawr bank account, part of a broader allegation regarding the misappropriation of funds, this account was opened on December 2020, before the Requisition was delivered in early January.

321. It is Bokhari's position there was nothing untoward about his opening of the Bryn Mawr account and that it had nothing to do with the developing dispute.

322. Bokhari and Carroll discussed the issue of whether the opening of this account offended the Company's internal controls. The account was opened at the direction of Bokhari and along with him, the signing officers

were Ms. Bonner and Ms. Adesso, neither of whom, it is alleged, under FSD's Delegation of Authority Matrix should have been signing authorities.

323. Bokhari argues he advised Carroll that this account was necessary to process US-based employees' 401K contributions. Moreover, it is Bokhari's position that both Ms. Bonner and Ms. Adesso had roles at FSD. A significant amount of their time was allocated to FSD for which FSD was charged accordingly.

324. Bokhari maintains Carroll lied to him when he said he would ensure that the opening of this account would be brought within the control policies of the Company. Any issue regarding the failure to bring the Bryn Mawr account into compliance with FSD's policies lies at the feet of Carroll, Bokhari maintains.

325. Moreover, Bokhari argues, not one of FSD's bank accounts ever met FSD's internal controls. Nothing he did, in respect of opening the Bryn Mawr account, Bokhari asserts, could come anywhere close to being a material breach of a material provision of his Employment Agreement.

326. As to FSD's assertion that Bokhari's direction to have Meridian transfer USD \$12 million from the Meridian account to the Bryn Mawr account, Bokhari argues this does not, in any way, amount to an attempted

misappropriation of Company funds. There were difficulties in accessing funds from Meridian, Bokhari explains, and given the urgent need to pay certain accounts, it was necessary for him to have access to these funds. For example, both the Union League's account and Ms. Hansell's account were due immediately. After the May 6th Board meeting which authorized the changing of signatures at the Meridian account giving Coyle, the Company's new CFO, signing authority (following Carroll's termination), Bokhari maintains that FSD met resistance by Meridian after the bank learned of the injunction granted by Hainey J.

327. In addition to its request for other measures, Meridian required an indemnification agreement for any claims arising out of banking transactions that might be found to have been in breach of the injunction.

328. Apart from the accounts from the Union League and Ms. Hansell, Bokhari argues that the Company owed a significant sum to Syneos, FSD's Phase 2 clinical trials service provider for the FSD-201 compound. The urgency to have these accounts paid made it necessary for the Company to have immediate access to funds, hence the request to transfer funds to the Bryn Mawr account. These were all, Bokhari asserts, legitimate expenses that needed to be paid.

329. Bokhari dismisses the concerns raised by Coyle, saying an intercompany transfer of money between two of the Company's accounts could not have been precluded by the Order of Hainey J. Furthermore, there was nothing within FSD's Internal Controls prohibiting such a transfer. In any event, he argues, the attempted transfer did not occur.

330. Dealing with the Respondent's further claim that Bokhari misappropriated Company funds, in the attempted transfer of funds from FSD's Wheels Up account to his own personal account, Bokhari maintains his only purpose in all of this was to have Wheels Up de-link his personal American Express card from the account, thereby removing any access to this card by the Company.

331. Bokhari always believed the Wheels Up account was opened in his name. His personal Amex card was used to establish the membership and was the only card even associated with the account. Moreover, he had negotiated the USD \$7,500 credit and all statements were addressed to Raza Bokhari as the account member. It was entirely reasonable for him to believe the account was his.

332. As to his use of Wheels Up, the costs for which FSD seeks recovery in its Counterclaim, Bokhari asserts this was entirely condoned by FSD and that he had always indicated his willingness to repay the

Company for personal use. He simply never received a demand for payment.

333. With respect to his exchanges with Wheels Up, Bokhari argues he was simply trying to ensure that by de-linking his credit card, FSD could not in any way interfere with an account he believed was his. It was never his intention, he maintains, to steal any of the funds in the account prepaid by the Company. The Respondent, he argues, has utterly failed to meet the onus of proving he attempted to defraud the Company

334. Bokhari maintains the Respondent cannot rely upon any of the purported grounds for dismissal for cause because it knew about them but did not rely upon them when he was dismissed on July 27, 2021. While the doctrine of after acquired cause is uncontroversial, it relates to grounds for cause not known to the employer at the time the employee was dismissed. It has been described as “evidence of misconduct that occurred during the currency of the employment relationship but was not discovered by the employer until after the employee was dismissed, and, as such, is not evidence that the employer relied on when initially deciding to terminate the employee.” (see *Re Director of Employment Standards*, (2017) BCWLD 5658).

335. This reasoning, it is argued, has been adopted by our Supreme Court in a number of cases including *McKinley v. BC Tel*, (2001) 2 SCR 161 and *Potter v. Newfoundland (Legal Aid Services Commission)*, (2015), SSCR 500.

336. However, as the Applicant argues, there are limits to the permissible use of after acquired cause evidence. It must relate to pre-dismissal conduct and, importantly, if it was known to the employer and either expressly or implicitly condoned, it will be defeated. Here, Bokhari asserts, the Respondent knew of the conduct it later complained about but did nothing about it. This was not after acquired cause, something discovered after Bokhari was terminated on July 27, 2021. All of this dredging up of conduct known to the Company before he was terminated was nothing more than an attempt to avoid having to pay him a severance. Only the breaches covered by Dentons in its Report to the Board dated July 22, 2021 may be relied upon. All of the alleged misconduct now being relied upon by the Respondent was known to FSD and condoned by FSD's Executive Committee, if not the entire Board.

337. As to the ATM offerings, it is Bokhari's position that both the 2020 and the 2021 ATMs were engaged in the best interests of the Company as part of its longstanding fundraising plans. FSD, he argues,

required significant funds to carry out its plans for 2021. As the witness, Buyer, testified in support of the ATM offerings: “(They) would allow FSD to pursue strategic acquisitions and continue advancing clinical trials of its FSD-201 compound which I considered to be in the Company’s best interests.”

338. Another Board member, Ciaruffoli, put it similarly: “... pharma companies are in perpetual fundraising mode. They do not stop fundraising.” Even Carroll acknowledged in evidence that there was an ongoing need for capital.

339. Quite apart from the Company’s requirement for additional funds, Bokhari points to the excellent timing of the ATM offerings given the market price at the time. Moreover, both offerings were supported by FSD’s Board as being in the best interests of the Company. In no way, Bokhari maintains, was this an attempt to dilute the dissidents’ shares in the midst of a proxy fight. Moreover, it could not be considered to be after acquired cause as the Board explicitly approved of Bokhari’s efforts in respect of the ATM offerings. Indeed, this subject was not mentioned in the Dentons Report nor in the termination letter.

340. With respect to the complaint by FSD regarding Bokhari’s involvement in the criminal complaint against Durkacz and Carroll,

Bokhari takes the position there was a good-faith basis for the complaint and that he was so advised by counsel at Stockwoods. Durkacz, Bokhari asserts, deliberately interfered with FSD's accounts at Meridian and BMO by alerting them of the Hainey J. injunction and advising them on May 13th to freeze FSD's accounts until after the shareholders' meeting the next day.

341. Believing Carroll was involved in this activity Bokhari, after consulting with counsel at Stockwoods, instructed counsel to lodge a criminal complaint against both Durkacz and Carroll. And, insofar as the Press Release issued May 13th is concerned, Bokhari maintains it was vetted by counsel and the Board. As well, it received IIROC's regulatory approval before being released.

342. One of the arguments Bokhari presents in his challenge to the dismissal for cause is that at all times, he acted upon legal advice. He, quite correctly, points out that Canadian jurisprudence emphasizes the significance of legal advice as an exonerating factor in wrongful dismissal cases.

343. In that regard, he refers to *Underhill v. Shell Canada Ltd*, (2020) A.J. 619 and *Manitoba Nurses' Union v. Winnipeg Regional Health Authority*, a grievance arbitration in 2016.

344. Having debunked all of the alleged grounds for dismissal, the Applicant submits he is entitled to a severance of USD \$30.2 million based upon Section 4.5 of his Employment Agreement. It is the Applicant's position he was employed since 2018 by FSD and that in that year, he was given stock options which, based upon the Black-Scholes valuation method, were worth USD \$15.1 million. In support of this position, the evidence of his expert Scott Davidson, he argues, should be accepted.

345. Much reliance, as well, is placed upon the Management Information Circular dated April 23, 2021. This Circular set out many reasons why shareholders should not support the Dissidents. Rather, it urged support for the current board plus two new nominees, Carroll and Lavelle. Importantly, Bokhari argues, the Circular disclosed his severance entitlement of USD \$30.2 million based upon the Black-Scholes option pricing model.

346. FSD, Bokhari testified, has never issued a public correction of this information, nor has it advised the market that it takes a different view of his severance entitlement. Contrary to the position being taken by the Respondent that Section 4.5 limits the meaning of Total Compensation to Compensation he received after February 5, 2019, Bokhari argues that

nothing in Section 4.5 of the Employment Agreement so limits his compensation and, moreover, that section captures any type of compensation he ever received from FSD.

347. As to the Argument that the 2018 Options have no value because they are not vested, Bokhari submits the evidence of Mr. Davidson, in that regard, should be accepted. There was no requirement for FSD to recognize the Stock Options as an expense in its financial statement until the commencement of the vesting period.

348. Even Professor Hull, FSD's expert, could not say the 2018 Options had no value. Indeed, Professor Hull testified there should be some value attributed to the 2018 Options, perhaps based upon an estimation of the probability of acquiring the NASDAQ listing.

349. Finally, in this section, the Tribunal turns to the Applicant's response to FSD's Counterclaim. The original Counterclaim for USD \$60 million, allegedly suffered by FSD in relation to the ATM offerings, was withdrawn and dealt with by the Tribunal in earlier reasons. That leaves the Respondent's Counterclaim in relation to the PCL Invoices, legal fees and other expenses incurred during the proxy battle, the Wheels Up charges, and the retained compensation shares.

350. As to the PCL expenses Bokhari, against whom the claim is made, points out PCL is a Pennsylvania corporation which he controls such that any claim should have been brought against PCL, not him personally. Even if FSD dressed up the claim as one of fraud or breach of fiduciary duty in order to pierce the corporate veil, Bokhari asserts the claim must fail on the facts.

351. FSD, he says, should be fully aware of the approval process in place whereby each PCL invoice, along with supporting documentation, was at all times reviewed and approved by officers and directors other than him.

352. Until January 2021 when it became Carroll's responsibility, every PCL invoice was approved by Durkacz and Saeed, after which the actual disbursement would be approved by the CFO, Carroll.

353. As an example of how well this process worked, the Applicant points to an occasion when, in March 2020, Durkacz requested details of certain PCL invoices. After reviewing them with Ms. Adesso, Durkacz approved them. Moreover, no one ever challenged any PCL invoices or raised issues with the Audit Committee of the Board. The relationship between Bokhari, PCL and FSD was common knowledge within FSD, a relationship fully disclosed in public filings.

354. FSD, Bokhari asserts, explicitly condoned his conduct in relation to the PCL Invoices. There could never have been a breach of fiduciary duty.

355. As already noted, FSD, in its Counterclaim, is also pursuing recovery of legal fees and expenses incurred during the proxy fight, expenses FSD argues that were entirely unnecessary and unwarranted. These involve fees paid to various lawyers during the proxy battle related to a number of court proceedings which FSD argues were wrongfully and unnecessarily undertaken. All of the court actions Bokhari took, he asserts, including the appeal of the decision of McEwen J. were taken on the advice of counsel.

356. The entire Counterclaim, the Applicant maintains, is absurd. It was perfectly reasonable for him to engage the various professionals he did. To find otherwise would lead to an untenable and unenviable state of affairs whereby officers and directors of a corporation would be wary of taking action in the interests of the corporation for fear of incurring personal liability.

Analysis

Was Bokhari constructively dismissed?

357. In *Potter v. New Brunswick Legal Aid Services Commission*

(2015) SCC 10, the test for constructive dismissal was articulated this way:

When an employer's conduct evinces an intention to no longer be bound by the employment contract, the employee has the choice of either accepting the conduct or changes made by the employer or treating the conduct or changes as a repudiation of the contract by the employer and suing for wrongful dismissal.

358. In the present case, the Tribunal has concluded Bokhari was not constructively dismissed either on May 14, 2021 or June 18, 2021.

Without question, the proxy battle had been hard fought as most of them are. Nevertheless, the new Board of FSD had legitimate concerns about Bokhari's conduct, the full details of which they believed would require an investigation by a Special Committee comprised of two independent directors.

359. Given the actions of Bokhari during the proxy battle, many of which the Tribunal is satisfied required further investigation, the new Board was perfectly entitled to place him on administrative leave. As the Respondent points out, and the Tribunal agrees, this was paid leave given that Bokhari had already been paid in full for his service to the company in 2021.

360. The letter to Bokhari dated May 14th stated he would “be placed on a temporary leave, effective immediately, pending the conclusion of the investigation.”

361. This was not a situation where the employee’s salary/remuneration was reduced or cut off. Here, as noted, Bokhari had been fully compensated for 2021. The Board resolution, as the Minutes of the May 14th meeting reveal, simply stated:

A special committee of the Board (the “Bokhari Special Committee”) is hereby appointed to evaluate the recent actions by Dr. Raza Bokhari, in his capacity as Chief Executive Officer of the Corporation, that may be inconsistent with his duties to the Corporation. Such committee shall have authority to retain independent advisors without consulting with the Board and it is anticipated that upon completion of its evaluation, the Bokhari Special Committee shall report its findings to the Board and make a recommendation with respect to Dr. Raza Bokhari’s future role with the Corporation.

362. In the Tribunal’s view, their pause was understandable and in no way showed an intention by FSD to no longer be bound by the employment contract. Every case is to be determined upon its own facts and upon the facts of this case, the Tribunal cannot conclude Bokhari was constructively dismissed.

363. Given the legal advice received by FSD’s new Board that the pre-payment to Bokhari in shares issued in early 2021 could well be a breach of Section 23 (3) of the OBCA, the later attempt to cancel shares in

respect of post-February 10, 2021 services (when the Executive Committee of the Board voted to issue the compensation shares) does not, as the Respondent points out, in any way alter the fact that as of May 14, 2021 when he was suspended, Bokhari had been fully paid for 2021 given the nature of his compensation as set out in Section 3 of the July 29, 2020 Employment Agreement.

364. Importantly, as FSD points out, it was Bokhari who, by commencing this arbitration during his suspension and before he was terminated, evinced an intention to not be bound by the terms of his Employment Agreement.

365. Indeed, when the issue of the share cancellation came before Koehnen J. on December 20, 2021, Bokhari took the position he was entitled to retain the proportion of the shares, issued to him, for his services up to July 27, 2021 when he says he was terminated by FSD.

366. As Koehnen J. wrote in his decision dated March 8, 2022:

[28] Bokhari continued to be employed by FSD until July 27, 2021. Although he was placed on leave on May 14, the letter advising him of this stated that he was being “placed on temporary paid leave” pending the conclusion of an investigation into his activities.

[29] His employment was not terminated until July 27, 2021, or 208 days into the calendar year. As a result, I would allow him to retain 208/365^{ths} of the shares and allow FSD to cancel 157/365^{ths} of the shares issued...”

367. At paragraph 34, Koehnen J. wrote:

[34] I am also mindful that the full year's allocation of shares on February 10 was made after a proxy contest to unseat Bokhari and the Board had already begun. It would not, in my view, be appropriate to allow Bokhari the potential windfall of being paid up front when his tenure at FSD was already under attack and was ultimately terminated.

368. The Tribunal concludes that Bokhari, having taken the position in a court proceeding that he was employed until July 27, 2021, is stuck with that date and cannot maintain he had been constructively dismissed earlier. Having concluded there was no constructive dismissal here, it is unnecessary for the Tribunal to deal with the argument that having been constructively dismissed, Bokhari could not later be dismissed for cause in order to justify an earlier constructive dismissal.

369. The Tribunal recognizes some courts have found it impermissible for an employer to constructively dismiss an employee by suspending their employment and then to use the suspension retrospectively to uncover grounds for dismissal. That is not our case.

Section 4.1 of the Employment Agreement

370. The Tribunal now turns to the Applicant's argument that FSD failed to comply with this provision of the Employment Agreement.

371. Bokhari takes the position that this notice requirement could not be more clear, a provision that essentially affirms an employer's duty to warn an employee his or her job is in jeopardy and give the employee an opportunity to rectify the impugned conduct.

372. In the present case, no notice was ever given to Bokhari as required by Section 4.1 of the Employment Agreement. Accordingly, Bokhari takes the position that FSD's entire case for "legal justification" fails for this reason alone. The Tribunal disagrees with his assertion.

373. It is important to consider the whole of s. 4.1 including the words "if capable of so being remedied." Here, as the Tribunal will explain, the breaches being alleged by FSD all had to do with past conduct which was incapable of being remedied. These have already been detailed and will be dealt with in subsequent portions of this Award.

374. Notice, in these circumstances, would have been pointless and clearly FSD relied upon the wording "if capable of so being remedied" in Section 4.1

375. In any event, even if it could be said FSD failed to comply with the notice provision, the Tribunal agrees with FSD that the remedy would be an independent claim by Bokhari for breach of contract which has not

been advanced. (see *Stolba v. Comware*, (2017) BCSC 2254 affirmed (2019) BCCA 120).

Has FSD met its onus of Establishing Termination for Cause

376. The law in this area is quite clear: an employer may discharge an employee for cause at any time if the employee's conduct amounts to a repudiation or breach of the employment contract. As the Supreme Court stated in *McKinley v. BC Tel* 2001 SCC 38:

In light of the foregoing analysis, I am of the view that whether an employer is justified in dismissing an employee on the grounds of dishonesty is a question that requires an assessment of the context of the alleged misconduct. More specifically, the test is whether the employee's dishonesty gave rise to a breakdown in the employment relationship. This test can be expressed in different ways. One could say, for example, that just cause for dismissal exists where the dishonesty violates an essential condition of the employment contract, breaches the faith inherent to the work relationship, or is fundamentally or directly inconsistent with the employee's obligations to his or her employer.

377. In *Dowling v. Ontario* (Workplace Safety and Insurance Board), the Court of Appeal for Ontario, citing *McKinley*, provided further guidance in respect of how termination for cause should be addressed. In paragraphs 46 to 53, the Court wrote:

[46] In *McKinley v. B.C. Tel*, [2001] 2 S.C.R. 161, the Supreme Court of established the standard to be applied when assessing whether an employee's dishonest conduct gives rise to just cause for dismissal.

[47] The Court says in paras. 48 and 49: [W]hether an employer is justified in dismissing an employee on the grounds of dishonesty is a question that requires an assessment of the context of the alleged misconduct. *More specifically, the test is whether the employee's dishonesty gave rise to a breakdown in the employment relationship.* This test can be expressed in different ways. One could say, for example, that just cause for dismissal exists where the dishonesty violates an essential condition of the employment contract, breaches the faith inherent to the work relationship, or is fundamentally or directly inconsistent with the employee's obligations to his or her employer.

In accordance with this test, a trial judge must instruct the jury to determine: (1) whether the evidence established the employee's deceitful conduct on a balance of probabilities; and (2) if so, whether the nature and degree of the dishonesty warranted dismissal. In my view, the second branch of this test does not blend questions of fact and law. Rather, assessing the seriousness of the misconduct requires the facts established at trial to be carefully considered and balanced. As such, it is a factual inquiry for the jury to undertake.

[48] And, at paras. 56 and 57, the Court explains the standard to be applied in these terms:

Absent an analysis of the surrounding circumstances of the alleged misconduct, its level of seriousness, and the extent to which it impacted upon the employment relationship, dismissal on a ground as morally disreputable as "dishonesty" might well have an overly harsh and far reaching impact for employees...

Based on the foregoing considerations, I favour an analytical framework that examines each case on its own particular facts and circumstances, and considers the nature and seriousness of the dishonesty in order to assess whether it is reconcilable with sustaining the employment relationship. Such an approach mitigates the possibility that an employee will be unduly punished by the strict application of an unequivocal rule that equates all forms of dishonest behaviour with just cause for dismissal. At the same time, it would properly emphasize that dishonesty going to the core of the employment relationship carries the potential to warrant dismissal for just cause.

[49] Following McKinley, it can be seen that the core question for determination is whether an employee has engaged in misconduct that is incompatible with the fundamental terms of the employment relationship. The rationale for the standard is that the sanction imposed for misconduct is to be proportional -- dismissal is warranted when the misconduct is sufficiently serious that it strikes at the heart of the employment relationship. This is a factual inquiry to be determined by a contextual examination of the nature and circumstances of the misconduct.

[50] Application of the standard consists of:

1. determining the nature and extent of the misconduct;
2. considering the surrounding circumstances; and,
3. deciding whether dismissal is warranted (i.e. whether dismissal is a proportional response).

[51] The first step is largely self-explanatory but it bears noting that an employer is entitled to rely on after discovered wrongdoing, so long as the later discovered acts occurred pre-termination. See *Lake Ontario Portland Cement Co. v. Groner*, 1961 CanLII 1 (SCC), [1961] S.C.R. 553.

[52] The second step, in my view, is intended to be a consideration of the employee within the employment relationship. Thus, the particular circumstances of both the employee and the employer must be considered. In relation to the employee, one would consider factors such as age, employment history, seniority, role and responsibilities. In relation to the employer, one would consider such things as the type of business or activity in which the employer is engaged, any relevant employer policies or practices, the employee's position within the organization, and the degree of trust reposed in the employee.

[53] The third step is an assessment of whether the misconduct is reconcilable with sustaining the employment relationship. This requires a consideration of the proved dishonest acts, within the employment context, to determine whether the misconduct is

sufficiently serious that it would give rise to a breakdown in the employment relationship.

378. Without doubt, any analysis by this Tribunal as to whether FSD has met the onus of establishing cause must, as earlier noted, be undertaken contextually with an eye to the surrounding circumstances.

379. As the Tribunal has already determined, the genesis of the present dispute was in Bokhari's refusal to support Durkacz's proposal that FSD purchase Lucid. There do not appear to have been any issues of significance between them before then. In fact, the evidence illustrates that both Durkacz and Saeed were fully supportive of Bokhari and the rest of the Board. As FSD has argued, during a six-month period from the middle of November 2020 until mid-May 2021, Bokhari engaged in a pattern of misconduct that breached his fiduciary duties of honesty, selflessness and loyalty to FSD, as well as his duty of care, in a way that was incompatible with the fundamental terms of the employment relationship.

380. In that period, FSD alleges, Bokhari failed to comply with both Ontario law and FSD's written policies, behaving in such a way that no reasonable person could be expected to overlook, having regard to the nature and circumstances of his employment.

381. Bokhari, on the other hand, argues that at all times, he had the full support of the Board and that he, the Independent Board and Carroll

were at all times advised by FSD counsel at Bennett Jones. At no time, he argues, did the Board ever chastise him or ever provide him with notice that he was in material breach of his Employment Agreement.

382. This, Bokhari asserts, raises the spectre of condonation.

Moreover, Bokhari says that everything he did was transparent and that he never concealed his activities.

383. While the Applicant asserts the Tribunal must confine itself to the issues raised by Dentons in their Report to the Special Committee, or to the issues raised in the termination letter, in order to apply a contextual approach, the Tribunal will look beyond those areas. Indeed, what is crucial is whether cause existed on the date of termination. Whether all grounds were listed in the termination letter is not determinative. After acquired cause may be considered as grounds for dismissal so long as the misconduct alleged was not either expressly or implicitly condoned.

384. As the Claimant points out, condonation can take many forms. In the case of a dismissed CEO, the question is whether the board of directors knew of the circumstances and acted in a manner that could be understood as condonation of the wrongful conduct (see *Cicalese v. Saipen Canada Inc.*, (2018) A.J. No. 1586.)

385. In the present case, Bokhari maintains the Board of FSD, during his tenure as CEO, at all times condoned his conduct before and during the proxy battle. Without doubt, the Executive Committee of the FSD Board was well aware of many of Bokhari's actions. However, the Respondent asserts, there are problems with the condonation argument.

386. First, it argues that this wasn't truly an independent board. All members of the Board except Durkacz and Saeed were handpicked by Bokhari and that essentially, they "rubber stamped" whatever initiative he brought before them. Moreover, FSD argues, because much of Bokhari's conduct was wrongful, as participants in it, their "condonation" is meaningless.

387. In that regard, the Respondent cites the decision of Myers J in *Dunsmuir v. Royal Group Inc.* (2017) ONSC 4391 as affirmed in (2018) ONCA 773. While this case may not be on all fours with *Dunsmuir*, the Tribunal, on the evidence before it, has little difficulty concluding that in respect of a number of Bokhari's actions, the Board was in a conflict of interest and, in reality, had little interest or motivation in monitoring, questioning or indeed challenging these actions.

388. To say this Board exercised oversight would be a stretch. For a fledgling company, these "independent" directors were paid handsomely

for actively supporting Bokhari at every turn. It really didn't matter that Bokhari withheld important information from them – and he did – because the Tribunal concludes they would have supported whatever he proposed. They were entirely complicit such that it could never be said true condonation ever existed.

389. Some of Bokhari's behaviour was known to the Board but some of it, as will be discussed, was not. Even in the context of a proxy fight, the Tribunal is unable to conclude there was condonation here and accordingly dismisses Bokhari's assertion that everything he did was known to the independent directors and accepted by them.

390. This is not a case of an employer continuing to employ someone who has repudiated an employment contract. Here, where the independent directors well knew of Bokhari's conduct, they cannot be said to have condoned it in the true sense of the word. Certainly in those circumstances where they were unaware of Bokhari's conduct, they cannot be said to have condoned it.

391. The case before the Tribunal in respect of termination for cause is not one of cumulative cause. This case, as the Respondent has framed it, is about a pattern of misconduct by the Applicant from mid-November

2020 until mid-May, 2021. It might more appropriately be described as collective cause.

392. Individually, some of Bokhari's actions might not reach the level of cause but, looked at as a whole, the inescapable conclusion is that the Respondent had every reason to terminate Bokhari's employment for cause. Indeed, some of his actions, when looked at alone, as will be discussed, were sufficient in and of themselves to warrant termination.

393. The Tribunal has little difficulty concluding that once Bokhari received the Requisition in early January 2021, his whole objective was to win the battle regardless of the cost to the company. In order to do so, one of the strategies he adopted was to dilute the voting shares of the dissidents, Durkacz and Saeed. In this regard, the Tribunal concludes the 2021 ATM Offering and the Perioavance transaction were both undertaken for that purpose.

394. Neither of these transactions were necessary or ever in the best interests of the corporation. Acquiring 60% of Perioavance for USD \$45 million in the midst of a proxy fight, or indeed at any time, made no sense. Moreover, it was in breach of a court order of which, the Tribunal finds, Bokhari was well aware.

395. As Hainey J. noted, there was no legitimate business reason for the Company to enter into the Perioavance transaction or the associated private placement, something, he wrote, that was “sprung” upon Durkacz as an “end run” around the Judgment of McEwen J. The Tribunal agrees completely.

396. The 2021 ATM offering, as well, the Tribunal concludes, was wholly unnecessary and was only undertaken, for strategic reasons, to water down the voting power of the Dissidents. The manner in which Bokhari dealt with Durkacz’s legitimate concerns was disgraceful and an abdication of his duties to the Company. Equally inexcusably, no independent director questioned Bokhari or FSD’s counsel about the issuance of shares during a proxy fight. Bokhari, himself, admitted in a recorded telephone call with Carroll, Durkacz and others on March 15, 2021, that the effect of creating the 2021 ATM offering would be to water down Durkacz’s shares.

397. The result was that the Class B Shares were increased from 26,461,698 to 43,291,924, an increase of 63.6% in the midst of a proxy battle, a clear breach of his duty to the Company.

398. FSD, at the time, had no need to raise cash. Only because the previously circulated 2021 budget was revised, at Bokhari’s request, did it

almost double to account for his capital raise intentions. The Board approval of this 2021 ATM offering at the February 10, 2021 meeting is a classic example of their “rubber stamping.” No diligence was exercised by the Board on this occasion.

399. The Tribunal need look no further than the decisions of McEwen J. and the Divisional Court for uncomplimentary commentary about Bokhari’s actions and those of his Board in relation to the two ATM offerings. Bokhari, after altering the 2021 budget, exhausted the 2020 ATM and then immediately created and exhausted the 2021 offering, none of which was for the benefit of the Company or its shareholders.

400. While the unilateral firing of Saeed, in a way that was contrary to legal advice he received, and the disgraceful behaviour he exhibited towards Dutton may not, in and of themselves, be sufficient to warrant termination for cause, they clearly demonstrate Bokhari’s mindset, particularly in circumstances where he believed his authority was being challenged. The same can be said about the manner in which Bokhari dealt with Carroll after Carroll questioned his engagement of Santorum. These were clear personal reprisals against people, certainly in the cases of Saeed and Carroll, whom Bokhari believed had crossed him. Without question, they were breaches of his duties to FSD and an utter abuse of power.

401. While the Independent Board may have known about his firing of Saeed, they were clearly unaware of his personal animus towards him. In the case of Dutton, the Board was completely unaware that Bokhari had sent Brennan to threaten him into reversing his support of the Requisition.

402. And as to his conduct in lodging a criminal complaint against Carroll and the issuance of a press release, no member of the Executive Committee was ever made aware of the contrary legal advice Bokhari had received.

403. In evidence before the Tribunal, Ciaruffoli stated he was unaware that legal counsel, Gryphon and Longview had all advised Bokhari not to issue the press release. Even Buyer stated that, as a CEO, he would never have done such a thing.

Breaches of Court Orders

404. As noted, on March 5, 2021, McEwen J. released his handwritten endorsement after hearing from the parties the day before on a number of issues including the setting of the date for the annual general meeting of shareholders. Rejecting the date of June 29, 2021 as proposed by the Board, McEwen J., believing it would not be in the Company's best interests to wait that long, ordered the meeting to be held on May 14th.

405. Against the advice of counsel, Robinson, not to appeal, Bokhari retained new counsel, Bieber, to appeal the decision of McEwen J. seeking to restore the June 29 meeting date and to remove any voting restrictions on shares held by directors.

406. The Tribunal has already spoken of the decision of the Divisional Court. Suffice to say, in dismissing the appeal, which in the Tribunal's view should never have been undertaken, the Divisional Court questioned how the actions taken by Bokhari and the Board could be in the best interests of the Company.

407. The Tribunal has concluded that the decision of McEwen J. requiring a mutually agreed upon Independent Chair be appointed for the May 14th meeting, failing which one would be appointed by the court was clearly known by Bokhari. Indeed, as noted, he was so advised by counsel. Any notion he was confused by the difference between Justice McEwen's handwritten endorsement and the final form of the Judgment is preposterous and not accepted by the Tribunal.

408. In early April 2021, within the context of an oppression action Durkacz and Saeed had brought against Bokhari and the other directors and FSD, they made a request for an interim and interlocutory injunction restraining the Perioavance transaction. McEwen J. was to hear the matter

of settling the terms of his order on April 9, 2021 when the Durkacz/Saeed injunction motion came before him. As noted, given his relationship with a member of Bieber's firm, he recused himself and Hailey J. heard the motion.

409. The Tribunal has already noted the decision of Hailey J. regarding the Perioavance transaction wherein he ordered that the status quo be maintained until the May 14th meeting, and that in addition to restraining Bokhari and his Board from pursuing the Perioavance transaction, he ordered that the Company be restrained from authorizing or undertaking any transaction outside the ordinary course of business before the scheduled shareholders' meeting.

410. In the face of the McEwen J. Judgment requiring the parties to agree upon an Independent Chair for the May 14th meeting of shareholders, Bokhari moved ahead and appointed Santorum as Chair, paying him a non-refundable USD \$75,000 fee.

411. Bokhari, the Tribunal concludes, knew this was wrong and a clear breach of the Judgment of McEwen J. He simply didn't care, thinking he could get away with it by forcing the other side to accept Santorum.

412. Once again, the parties were back in court, this time, on May 5, 2021 before Pattilo J., in part on a motion by Durkacz to have Carol Hansel appointed as Chair. Dealing with Bokhari's actions in appointing Santorum, Patillo J. concluded Bokhari had "deliberately breached the Judgment which clearly requires agreement between the parties, failing which appointment by the court."

413. Patillo J. further found Bokhari's actions "particularly galling given that he entered into the Agreement with Santorum after he and FSD were served with the motion."

414. The Tribunal has little difficulty finding that Bokhari, the CEO of a public company, deliberately breached a court order by appointing Santorum as Chair and paying him a USD \$75,000 non-refundable fee. This was done while on a break in his cross-examination regarding the matter about to come before Patillo J. In doing this, he breached his fiduciary duty to the Company. That conduct alone, something about which his Board had no knowledge, is sufficient cause for dismissal.

415. Bokhari's conduct throughout the entire Santorum matter was a reckless display of self-dealing at the expense of FSD. This clearly was being bad on purpose.

Misappropriation of Funds

416. The Tribunal turns now to the allegations by the Respondent that the Claimant attempted to divert Company funds to himself.

(a) Bryn Mawr

417. On or about December 27, 2020, Bokhari decided to open a new FSD account in the US with Bryn Mawr. While this account was opened prior to the Requisition, there can be little doubt it was opened following the difficulties that had erupted between Bokhari, Durkacz and Saeed over his rejection of the Lucid proposal.

418. On the evidence, the Tribunal concurs with the Respondent's assertion that Bokhari was anticipating a proxy fight and that by opening this account, over which only he and two PCL employees had control, he was seeking to establish a method by which he could control FSD's assets regardless of the outcome of any future proxy battle.

419. There was simply no legitimate reason for opening this account in the middle of the 2020 holiday season. Moreover, it offended Company policy by not involving the CFO and Controller in the account. Neither Ms. Adesso nor Ms. Bonner, the two other signatories on the account, were formally employed by FSD.

420. While the opening of this account is suspicious, it is what occurred immediately prior to and during the May 14th shareholders'

meeting that the Respondent's allege is, alone, sufficient cause for dismissal.

421. Following Bokhari's summary dismissal of Carroll on May 5, 2021, the Company account at Meridian was left with two signatories, Bokhari and Durkacz. Obviously, not wishing to work with Durkacz, Bokhari enlisted his now interim CFO, Coyle, to change the signing authorities such that Coyle became a signatory along with Bokhari.

422. On May 13, 2021, shortly after Coyle had become a signatory on the Company's account at Meridian, Bokhari instructed him to transfer USD \$12 million from the Meridian account to the Bryn Mawr account in the US. In his evidence in chief, Bokhari testified that this transfer request was made because there were significant accounts to be paid and that Meridian was making it difficult for FSD to access its accounts.

423. The expenses Bokhari said that needed immediate attention were those of Ms. Hansell who was to chair the May 14th meeting, the Union League of Philadelphia where the in-person portion of the meeting was to be held, and FSD service provider, Syneos, which was involved in FSD's Phase 2 clinical trials.

424. When it was put to him in cross-examination that he requested this transfer because he wanted to put the USD \$12 million into an account that only he would control, Bokhari responded:

A. That's not true, sir. The control would be of the, between two of the three people that are the signing signatories on the account. Two of those people were officers of the corporation. For you, Mr. Woods, it is one is to cast aspersions on me, but to go on to cast aspersions on Ms. Bonner or Mrs. Adesso, and for that matter on Nathan Coyle or anybody else, that were partaken with me to steal funds from FSD Pharma and steal wall (sic) and criminal enterprise is just not a very nice thing to say.

Q. What I put to you, sir, is that this is still part of that whole idea of trying to put funds outside of Canada so that you can draw on them later on in the event that you'd lose the proxy fight. That's true, isn't it?

A. Mr. Woods, I was operating under the advice and guidance of our lawyers who were preparing an injunction against the outcome of the shareholder meeting based on irregularity that already had begun on May 10th or May 11th to insert Mr. Carroll back onto the management slate.

I was advised, and there is also an application that was filed on May 14th morning, to see that injunction, that I would continue to function as the Chief Executive Officer, as a minimum in the company operations and to continue.

In addition, Meridian bank had conceded admitted itself that they had, were influenced by Mr. Durkacz and others. I did not think that the funds remaining with Meridian bank were in the best interests of the corporation, so an amount which, I believe, that I at least needed to pay our lead clinical trial partner, Syneos, which was in excess of 6 million dollars, or they had threatened to suspend the trial. Plus I thought that another 6 million would be reasonable to have in place until resolution of all of these disputes, and that is why I sought advice from our lawyers.

I also consulted a banking expert who was formerly the chairman of Booz Allen financial head of banking division, and Mr. McKean, and once I was informed that Bryn Mawr – that Meridian bank accounts were active, I sought to transfer 12 million dollars into Bryn Mawr trust. But nonetheless, that transfer never happened.

ARBITRATOR CUNNINGHAM: Dr. Bokhari, just for my assistance, what lawyers advised you to make, that you could make this transfer?

THE WITNESS: I spoke to Chris Cumming at Paul Weiss Rifkind on May 12th, sometime in the afternoon. I also had conversation with Bennett Jones with Aaron Sonshine before that also. And there was a, to some extent, I also believe Mr. Bieber was also involved because Meridian bank had put, frozen the accounts. So there was no, and they were making demands which were outside the normal functioning of the banking, but we proceeded and conceded to their demands so that the accounts can function. However, the accounts, we were given the impression, sometime on May 12th morning, that the accounts had become functional with new signatories, but, to the best of my understanding, Meridian never dispensed any funds out of that account until the shareholder meeting had not been completed, and I guess the funds are in their hands. So it was a very complicated situation, Your Honour, and the, it had come to this point that we may, could not hold a shareholder meeting and that was, that I also had thought, that I should suspend the shareholder meeting, but I would personally paid for the venue I think 79 or 80,000 dollars, for the shareholder meeting to go on as planned, and I was advised by company counsel that that was my personal problem that I should solve. They cannot advise me to suspend the meeting for lack of funds. And they will not back me if I took such a decision to suspend. So these were the circumstances and the advice that I thought that amount of money should be moved out of, the 16 plus million dollars that was that was sitting with Meridian, 12 million should at least move to FSD biosciences.

ARBITRATOR CUNNINGHAM: Thank you.

425. The Tribunal has carefully considered all of the evidence surrounding this attempted transfer, including that of Coyle who balked at making what he considered to be an unprecedented request. The Tribunal accepts the evidence of Coyle that he attempted, without success, to get reassurance from Ciaruffoli and company counsel, Sonshine.

426. It should be pointed out that the response from Sonshine was that his firm, Bennett Jones, was “unfortunately not in a position to opine or provide comfort or reassurance on this point.” As a result, the Tribunal finds that Coyle quite appropriately refused to authorize the transfer.

427. The suggestion by Bokhari in cross-examination that he had received legal advice about this attempted transfer is not accepted. Indeed, the email from Sonshine, company counsel, would seem to suggest otherwise.

428. The assertion that FSD was having difficulty accessing funds at Meridian also requires scrutiny. There can be no doubt Durkacz was concerned about what had occurred at a May 6th Board meeting where, over his objections, a resolution proposed by Bokhari to remove him, Saeed and Carroll as authorized signatories of FSD’s bank accounts, including Meridian, was passed. Realizing Bokhari might attempt to move

funds from FSD's Canadian accounts out of the country, he sent Meridian and FSD's other Canadian banker, BMO, a copy of the Order of Hainey J.

429. The Tribunal accepts this evidence. Clearly, Meridian was concerned about being in breach of this Order and accordingly asked FSD for further documentation including an indemnity. Perfectly normal in the circumstances.

430. While this may have been an inconvenience to Bokhari, there was no legitimate reason why USD \$12 million needed to be transferred. Even if the accounts of Ms. Hansell or the Union League were due, they were modest and would easily have been paid out of FSD's US account at Meridian.

431. As to the notion that the Syneos account was overdue and that Syneos was pressing for what Bokhari testified was USD \$6 million owing, the Tribunal completely rejects Bokhari's evidence in that regard. According to the evidence of Carroll, which is accepted, FSD and Syneos had been in a long-standing dispute regarding Syneos' bills. FSD hadn't been paying Syneos' bills due to this dispute and there was certainly no urgency that they be paid immediately.

432. This was a complete fabrication by Bokhari to justify this transfer request. Not only would it have been in breach of the Order of

Hainey J., the Tribunal concludes it was a clear attempt by Bokhari to direct USD \$12 million to a bank account in the US over which he had full control.

433. By this time, Bokhari had to have known he had no chance of winning the proxy fight. This attempted transfer was to provide him with funds in the likely event he lost the battle. And none of this was known to the Board.

434. Even more outrageous was Bokhari's attempt during the shareholders' meeting on May 14th to aggressively pressure Meridian into transferring the USD \$12 million to the Bryn Mawr account knowing full well he was about to lose the proxy contest and that a new Board would be installed imminently.

435. This, the Tribunal concludes, was not the behaviour of a CEO putting the interests of the Company first. This was not the conduct of a CEO mindful of his fiduciary duties. This was the action of a CEO, knowing he had lost a proxy battle, tending to his personal interest by attempting to squirrel away much of the Company's funds for his own later use, a clear and flagrant breach of his fiduciary duty to FSD and by itself sufficient grounds for dismissal for cause.

(b) Wheels Up

436. A second area where the Respondent alleges an attempt by Bokhari to misappropriate Company funds to himself has to do with the Wheels Up account. The interaction between Bokhari and representation of Wheels Up has already been detailed. The Tribunal, without hesitation, rejects Bokhari's evidence that because the Wheels Up account was in his name, through his American Express credit card, he was at risk.

437. Frankly, the Tribunal has difficulty believing anything Bokhari said in evidence about why he contacted Wheels Up following the May 14th shareholders' meeting. While he may have set up the account and taken advantage of a reduction in the initiation fee, for which he was reimbursed, this was an FSD account funded with FSD monies. Nothing had ever been charged to Bokhari's credit card except the reimbursed initiation fee.

438. Bokhari knew there were significant FSD funds in the Wheels Up account because he was responsible for depositing them. Regardless of the fact that his name may have been on the account, he knew the account wasn't his. He knew all the charges he'd incurred with Wheels Up had been paid by FSD, not by his credit card. He was at no risk whatsoever. All he had to do was have Coyle, or someone else at FSD, remove and replace his credit card. A very simple matter.

439. Without hesitation, the Tribunal concludes this was another attempt by Bokhari, while on administrative leave, and without anyone at FSD knowing about it, to transfer the core membership account from FSD's name to himself, thereby giving him sole access to approximately USD \$400,000. Once again, knowing full well what he was doing, Bokhari breached his fiduciary duty to FSD warranting dismissal.

Legal Advice

440. As the Tribunal noted at the outset, context is important, and most of the impugned actions occurred following the Requisition in early January 2021. In any consideration of the legal advice defence, it is critical to examine each situation carefully to determine whether the advice given was specific to the impugned action rather than just general advice about alternatives.

441. Moreover, as the Respondent points out, the process and purpose of seeking the legal advice must have been undertaken in good faith and not as cover. The advice must come from competent, fully informed practitioners and the person receiving the advice must act in full accordance with it.

442. As Mesbur J. wrote in *Unique Broadband Systems Inc (Re)* (2013) ONSC 2953 at paragraphs 159-161:

[159] The board sought an opinion from David McCarthy. He provided general advice, but was not asked to opine on the reasonableness of the changes to the SAR and bonus plans. Mr. McCarthy's letter described the board's duties fully and accurately. He provided the board with a complete description of what it is to exercise business judgment. He did not, however, provide any assistance on the question of whether the board was actually doing so in its deliberations.

[160] In my view it is not an answer to complaints about the board's actions to point simply to a letter outlining what the board's duties are, and how it should exercise its business judgment. The court must have evidence of how exactly the board went about its task. Having board members recognize their obligations to act in the best interests of the corporation and its shareholders is not the same as leading evidence to show that their actions were actually in those best interests, and taken only with a view to enhance those best interests.

[161] Put another way, it is not enough to say the board was given an appropriate roadmap, without showing that the board actually followed the map's directions.

443. In a subsequent decision, *Look Communications v. McGoey* (2017) ONSC 2165, Conway J again stressed the importance of specific legal advice.

444. The Tribunal agrees with the Respondent that the courts will carefully scrutinize the defence of reliance on legal advice and agrees there is a high threshold for demonstrating the requisite level of advice.

445. During the proxy fight, it could not be said that Bokhari lacked for lawyers. As one of the directors noted, Bokhari surrounded himself with lawyers. Of that, on the evidence, there can be no question. The issue

is: did they provide specific advice and was that advice followed to the letter.

446. As the Claimant points out, this proxy fight was new territory for Bokhari and his Board. All the more reason that there be specific advice provided. It is not sufficient that a group of lawyers may have been present at Board meetings called to deal with certain steps during the proxy battle. A lawyer's silence or failure to object does not constitute the requisite advice specific to the issue at hand.

447. The Tribunal has carefully reviewed the evidence surrounding the firings of Saeed, Dutton and Carroll, which the Tribunal has concluded were arbitrary, high handed and punitive.

448. Nowhere is it to be found that Bokhari took any of those actions following specific legal advice. While he may have received advice from Gardner in connection with the termination of Saeed, he rejected important parts of it because he wanted to "squeeze" Saeed into giving up the fight. Moreover, even though he established a Special Committee to investigate his allegations against Saeed on legal advice, he fired Saeed unilaterally before the committee had completed its work.

449. As to the termination of the Dutton agreement, while Hogan may have spoken with Bokhari on the subject, there is no evidence of him giving Bokhari any specific legal advice on the issue.

450. The Tribunal has reached the same conclusion in regards to the firing of Carroll. Criminal law advice was provided to Bokhari by Stockwoods after he had concluded Carroll was somehow interfering with FSD's banking. The Tribunal has carefully reviewed Stockwood's Memorandum to FSD dated May 9, 2021. It clearly states in part:

In short, if Mr. Carroll has intentionally interfered with FSD's banking in order to disrupt FSD's business, then there are grounds to believe that he has committed the criminal offence of fraud...as well as the criminal offence of breach of trust.

451. Based upon the information Stockwoods was provided by Bokhari, much of which was wrong, they concluded:

Based on the foregoing, we have a good faith basis to make a criminal complaint to the Financial Crimes Unit at the Toronto Police Service (TPS)

452. Then, of course, there is the matter of the issuance of the Press Release on May 13, 2021, the day before the shareholders' meeting. In fact, Stockwoods, along with a number of other advisors, told Bokhari not to issue it. He rejected that advice.

453. Given the conduct of Bokhari leading up to the firing of Carroll and reviewing his interaction with Stockwoods, the Tribunal concludes

Bokhari fully intended to punish Carroll and that his use of Stockwoods was simply cover.

454. In fact, Bokhari emailed Stockwoods on May 8th, before he received their Memorandum, directing them to immediately file a criminal complaint against Carroll, Durkacz and Saeed. So much for depending upon legal advice.

455. An email of May 13, 2021 from Bokhari to Stockwoods, after Stockwoods had raised concerns about not having actual evidence against Durkacz and Carroll is telling. He wrote:

From: Raza Bokhari [rbokhari@fsdpharma.com]

Sent: 5/13/2021 12:15:36 AM

To: NaderH@stockwoods.ca

CC: SBieber@agblp.com; SonshineA@bennettjones.com; madesso@fsdpharma.com; RyannA@stockwoods.ca; SonshineA@bennettjones.com; Kenneth.racowski@hklaw.com; ccummings@paulweiss.com

Subject: Re: Letter re Director Nominees – URGENT AND TIME SENSITIVE

Attachments: image001.png

Thank you Nader;

Perhaps you missed some of the emails but the bank has actually confirmed that Anthony Durkacz interfered with our banking relationship and what I understand threatened them with a lawsuit if they made any transfer of funds

If u need to retain and investigation branch to dig information to act please go ahead and do it or bow out.

The company has retained you on advise of litigation counsel to produce results if results are possible; not make opinions and pawn the company off to interns/associates.

I don't appreciate a bait and switch approach.
Please let me know if there are any next steps

Best, Raza Bokhari

456. Bokhari may well have created the appearance of seeking legal advice but it was just that – a fiction. When Robinson advised him against moving forward with the Perioavance transaction on March 19th because, in the midst of a proxy fight, it would be viewed as a defensive tactic, Bokhari ignored that advice. Robinson was quite clear when he cautioned that such a transaction would not be considered business as usual.

457. This proposed transaction had nothing to do with any strategy of FSD to diversify its portfolio. After Robinson advised him the other side would in all likelihood bring an emergency application, Bokhari's concern was not so much about Robinson's advice but about how long it would take the other side to bring such an application. When it suited his agenda, Bokhari accepted the advice he was given. If it didn't, he ignored it. Ergo, his termination of Robinson, who advised against an appeal of the McEwen J. Judgment, and his hiring of new counsel.

458. As noted, the Perioavance deal, quite apart from the fact that it would be, as Hailey J. later described it, an "end run" around the decision of McEwen J., made no sense. Yes, the Board approved it, but their unquestioning support of such a major investment in the middle of a proxy

fight is but another example of their rubber stamping any Bokhari initiative, a complete failure on their part to act with diligence.

459. As to the hiring of Santorum, nowhere can it be found that any lawyer advised Bokhari, specifically, that in the face of court orders, this would be acceptable. Likewise, no lawyer ever advised Bokhari that attempting to move USD \$12 million from FSD's Canadian bank to this US controlled account would pass muster. In fact, Sonshine's response was less than reassuring.

460. The same can be said about Bokhari's attempt to divert funds from the Wheels Up account to himself. Nowhere, in the evidence, is there any mention of Bokhari receiving confirmatory legal advice.

461. None of the impugned actions, the Tribunal concludes, were taken with the required level of specific legal advice. The notion that Bokhari acted and relied upon legal advice is rejected.

The ESA Issue

462. As the Tribunal has noted, in order for the Respondent to meet the required onus of proving cause for the dismissal of Bokhari, it must demonstrate, in order to satisfy Section 4.1 of his Employment Agreement, that he committed a "material breach" of a "material provision" of the contract.

463. Bokhari argues that this high bar must be at least as stringent as the minimum standard for termination in Ontario's Employment Standards Act, 2000 (the "ESA"). The ESA provides that an employee is entitled to notice or pay in lieu of notice unless the employee "has been guilty of willful misconduct, disobedience or willful neglect of duty that is not trivial and has not been condoned by the employer."

464. As noted, this legislative standard requires more than indifference, thoughtlessness, neglect or poor judgment. It requires willful misconduct and thus an assessment of subjective intent. (see *Cummings v. Quantum Automotive Group* 2017 ONSC 1785).

465. The Respondent argues, notwithstanding that the evidence demonstrates they have met that standard, that the ESA does not apply to Bokhari's employment at FSD because it only applies to employees who either work in Ontario or whose work outside Ontario is a continuation of work performed in the province (see s. 3(1) ESA). It matters not, as in the case here, that the parties intended to be governed by Ontario law, they assert.

466. While it may not, in the final analysis, matter, the Tribunal finds on the evidence that although Bokhari was an employee of FSD, the work he did for the Company was in Pennsylvania, not Ontario, and that

anything he did on his visits to Ontario were incidental to the work he did in the US. Indeed, they could only be described as a continuation of his work in the US. The question then is, what is the effect of the governing provision of the Employment Agreement whereby the parties agreed that Ontario law should apply?

467. The Tribunal has reviewed the authorities provided – *Karpowicz v. Valor Inc.*, (2016) OLRB Rep. 731 (“*Karpowicz*”) and *Zhang v. IBM Canada Ltd.* (2019) OLRB Rep. 394 provided by the Claimant, and by the Respondent, *McMichael v. The New Zealand & Australian Lamb Company* (2018) ONSC 5422 (“*McMichael*”).

468. Clearly, there is a divergence in opinion between the two OLRB decisions and the decision of the Superior Court in *McMichael*. Notably in both *Karpowitz* and *McMichael*, the employment contracts stated the parties were to be governed by the laws of Ontario.

469. In *Karpowitz*, the Board member, although mindful of the provisions of s. 3(1) of the ESA, concluded that because the substance of the work involved was outside Ontario and that some work incidental to that was occasionally performed in Ontario, the ESA did not apply.

470. In *McMichael*, the employee, a VP of Operations, resided and worked for the employer, a New Jersey-based company, exclusively in

California. The employment agreement, however, stated that it was to be governed by the laws of Ontario, Canada.

471. Diamond J. concluded the parties must have intended that the ESA would apply. In arriving at his conclusion, Diamond J. was guided by the reasoning of MacFarland J.A. writing for the court in *405341 Ontario Limited v. Midas Canada Inc.* (2010) ONCA 478 where at paragraph 43, she wrote, about dealing with a different statute:

I believe the most reasonable inference is that, by agreeing that the laws of Ontario are to govern the validity, construction, performance and enforcement of a franchise agreement applicable to franchises operating in another province, the intention of the parties was that their rights and obligations – including the reciprocal and inviolable rights and duties of fair dealing – are to be the same as if the business of the franchise was operated in Ontario. The territorial limitations in Section 2 of the AWA have, in my opinion, no more effect for this purpose than that of the general presumption that statutes are not “intended to apply extraterritorially to persons, things or events outside the boundaries of the enacting jurisdiction” (*Sullivan on the Construction of Statutes*, (5th edition), page 731).

472. The Tribunal agrees with the position taken by the Claimant, in the circumstances of this case, that the ESA does apply and that the bar for dismissal must be at least as stringent as that set out in the statute. The Tribunal accepts the reasoning of Diamond J. in *McMichael*.

473. As noted at the beginning of this passage, however, it really doesn't matter because in the Tribunal's view, the Respondent has met

that very stringent onus of establishing cause within the meaning of Section 4.1 of the Employment Agreement. In particular, by knowingly and flagrantly breaching the terms of the McEwen J. Judgment and the Hailey J. Injunction, in retaining and paying Santorum, by attempting to divert USD \$12 million from FSD's Canadian bank account to the Bryn Mawr account in the US over which he had control and by attempting to divert funds in the FSD Wheels Up account to his own use, Bokhari breached in a material way, material provisions of the Employment Agreement.

474. Throughout the proxy battle, he entirely failed to comply with his fiduciary obligations to the Company. Moreover, he was well aware that these duties continued even after his employment had ended. Nevertheless, on the day he realized he had lost the proxy battle, in a flagrant abuse of his fiduciary duties, he attempted to divert Company funds to his own use.

475. As already noted, the pursuit of Perio Vance, in the midst of a proxy fight, could never be described as an action taken in the best interests of the Company. Again, a disregard for his duties as a fiduciary knowing he was willfully breaching court orders. No CEO, acting in the

best interest of his company, would have attempted to do such a thing in the circumstances.

476. While individually the intemperate firings of Saeed and Carroll and the utter disregard for the Dutton agreement, all of which constituted an abuse of his powers as CEO, the exhausting of the 2020 ATM offering, the unnecessary creation of the 2021 ATM offering and the early dispensing of compensation shares in February 2021, in and of themselves may not meet the heavy onus, collectively they do. They demonstrate Bokhari's utter disregard for his fiduciary duties of honesty, loyalty and good faith. Not only are these common-law duties, statutorily, they are required by the OBCA.

477. As well, Section 2.1 of the Employment Agreement reinforced and supplemented his common law and statutory duties by requiring him to comply with all applicable laws and policies of the Company in the performance of his duties. All of these he breached with abandon throughout the proxy contest.

478. During the course of the arbitral hearing, the Tribunal paid close attention to Bokhari as he gave his evidence. The Tribunal found him to be arrogant, argumentative, and disrespectful. All in all, it perfectly

demonstrated the manner in which he conducted himself as a CEO and the Tribunal finds him to be entirely without credibility.

479. In late 2020, as soon as he felt his authority was being challenged, he began calculating what his severance would be as he girded himself for what he expected would become a proxy contest. At no time did he consider putting the interests of the Company ahead of his own as he went well beyond acceptable norms during the proxy battle.

Counterclaim

480. The next area to be discussed has to do with the Respondent's allegation in its Counterclaim that the charges billed by PCL to FSD were essentially fraudulent and that the monies paid by FSD ought to be recovered. Most of the charges had to do with work PCL employees performed for FSD.

481. As previously noted, the charges were from PCL and not Bokhari. While he owned and controlled PCL, the Company was a separate entity and is not a party to this arbitration. Moreover, FSD had an approval process in place under which the large majority, if not all, of the PCL invoices were approved by officers and directors other than Bokhari.

482. While the Tribunal may have suspicions about the legitimacy of the PCL charges, given its view of Bokhari's lack of credibility, it cannot allow the counterclaim regarding the PCL invoices.

483. As to the Counterclaim in respect of legal and professional fees totalling USD \$216,939.00 and CAD \$555,031.35, while the Tribunal is of the view that many of the legal actions taken during the proxy fight ought not to have been taken, they were taken by Bokhari and his Board with legal advice for the most part. It is not for the Tribunal to second guess the advice Bokhari was given. A good portion of the steps taken resulted in accounts from Bieber. The Tribunal recognizes there was conflicting advice regarding some of the steps taken. Nevertheless, they were taken with legal advice that they were appropriate steps.

484. As to the claim regarding the amounts charged by Cassell Salpeter for its fairness opinion, this, in the circumstances, was legitimate even though its advice was ignored by Bokhari. Accordingly, the Counterclaim in respect of legal and professional fees is dismissed.

485. The next item in the Counterclaim has to do with the non-cash compensation Bokhari received in February 2021 representing compensation for 2021. As has been discussed, Koehnen J. permitted Bokhari to retain 536,978.25 Class B Shares representing his

compensation up to the date of termination. The Tribunal appreciates the position of the Respondent that compensation for the full year 2021 ought not to have been set in February.

486. The Tribunal also understands the argument that the payment may well have breached Section 23 of the OBCA. While the timing is highly suspicious, the Board, albeit without a modicum of discussion, based to some extent on past practice, authorized the payment.

487. Koehnen J., however, had considerable material before him on the subject and ruled that Bokhari had “delivered 208 days of consideration and should be compensated for that as the parties had intended.”

488. After a full consideration of these issues, the Tribunal cannot conclude the clawing back of compensation already dealt with by the court would be permissible. The Tribunal recognizes Koehnen J. made his ruling without prejudice to FSD pursuing whatever claims it wished against Bokhari. Nevertheless, in all the circumstances, this portion of the Counterclaim cannot succeed and is dismissed.

489. The Tribunal next considers the Counterclaim in respect of the Santorum charges. As noted, the appointment of and non-refundable payment to Santorum was a flagrant breach of Bokhari’s duties to the

Company and a knowing rejection of the Judgment of McEwen J., if not the Order of Hainey J.

490. Bokhari, during the proxy fight, was looking for every angle, and in Santorum he believed he'd have an edge. Bokhari knew Santorum and had contributed to his political campaigns. As part of his effort to foreclose the Independent Chair issue in advance of his appearance before Pattillo J., he engaged Santorum. He did this entirely on his own and indeed caused a false press release to be issued announcing the appointment of Santorum as Chair of the May 14th meeting.

491. If that wasn't bad enough, in total disregard of Carroll's concerns, and after threatening to fire Carroll, Bokhari arranged for the nonrefundable payment to be made from the US Bryn Mawr account on a break during his cross-examination.

492. In all of these circumstances, Bokhari not only acted contrary to the Company's best interests but entirely by himself. He had no legal advice that might have permitted him to act as he did, nor did he have Board support.

493. Accordingly, this portion of the Counterclaim is allowed and Bokhari is ordered to pay the Respondent USD \$86,625 and CAD \$31,675

(representing the fees paid to Santorum's Canadian counsel and the Durkacz costs award.)

494. Finally, the Tribunal, within the context of the Counterclaim, deals with the Wheels Up charges allegedly incurred personally by Bokhari. There is no dispute that four of the six flights in issue were personal in nature. Bokhari says he had expressed his willingness to repay FSD for these flights on numerous occasions, but that FSD never made a formal demand. This is nonsense and he must know that. As the CEO of the company, it was his responsibility to take the initiative to repay personal expenses charged to the company.

495. Accordingly, Bokhari is ordered to pay the Respondent the sum of USD \$54,494 representing the cost of the four personal flights. The other two flight charges, the Tribunal accepts, were business related.

Conclusion

496. The Tribunal concludes FSD was entitled to dismiss Bokhari for cause and accordingly, his claim is dismissed. As to the Counterclaim, the Tribunal, having considered the Santorum expense, orders the Claimant to pay USD \$86,625 and CAD \$31,675 to the Respondent on account of those charges.

497. Further, in respect of the personal Wheels Up charges, the Tribunal orders the Claimant to pay USD \$59,494 to the Respondent. In all other respects, the Counterclaim is dismissed.

498. For completeness, had the Tribunal found that Bokhari had been wrongfully dismissed, it would have awarded him \$5,000,000 representing two times his best annual compensation. In arriving at this conclusion, the Tribunal has carefully reviewed Section 4.5 of the Employment Agreement which reads:

4.5 Severance. In the event of any termination of the Executive's employment by the Company pursuant to Section 4.3, or any termination of this Agreement by either party following a Change of Control except a termination of this Agreement by the Company pursuant to Section 4.1, the Company will, on the effective date of such termination, provide the Executive with a cash payment in an amount equal to the product of (a) two (2), multiplied by (b) the highest Total Compensation received by the Executive during any calendar year (or partial calendar year) or employment by the Company. As used herein, "Total Compensation" means the total of (v) the Executive's Cash Compensation, (w) the dollar amount of any bonuses paid by the Company to the Executive pursuant to Section 3.3 or otherwise, (x) the fair market value at the time of grant of any stock grants granted by the Company to the Executive, pursuant to Section 3.2 or otherwise, (y) the fair market value at the time of grant of all Options issued by the Company to the Executive, and (z) all other cash, and the fair market value of all non-cash, consideration paid or delivered by the Company to the Executive, during a calendar year (or partial calendar year); provided, however that Total Compensation shall in no case be less than Two Million Five Hundred Thousand Dollars (\$2,500,000). Upon a termination of the Executive's Employment by the Company at any time pursuant to Section 4.1, the Company may, by notice to the Executive delivered at the time that written

notice is delivered by the Company pursuant to Section 4.1, choose to pay to Executive the severance payment described in this Section 4.5, in which case, upon the delivery of such severance payment pursuant to the terms of this Section 4.5, the terms of Section 6.2, 6.4 and 6.5 shall be in effect during the Restricted Period. In the absence of the delivery of the severance payment by the Company as described in the immediately preceding sentence, the terms of Sections 6.2, 6.4 and 6.5 shall be null and void upon any termination of the Executive's employment by the Company at any time pursuant to Section 4.1

499. As well, the Tribunal has concluded Bokhari's employment with FSD, as set out in the first Recital to the Employment Agreement, commenced on February 5, 2019, the date he became CEO following the brief employment of Haynes.

500. In the face of that, the suggestion Bokhari was "employed" by FSD prior to that date cannot be accepted. Any severance to which he might otherwise be entitled is set out in Section 4.5 which expressly refers to the "executive's employment," the commencement of which, the Agreement plainly states, began February 5, 2019.

501. Moreover, Section 4.5 clearly outlines that in the event of termination without cause, the most Bokhari would be entitled to would be \$5,000,000, given that it provides his total annual compensation will not be less than \$2,500,000, exactly what he received in 2020 and 2021. As the Respondent correctly points out, if Bokhari's claim of USD \$30.2 million is correct, why would the parties have negotiated this term.

502. Any assertion he should be entitled to USD \$30.2 million is misplaced. It is based upon Bokhari having been granted options in 2018 which he values at USD \$15 million based upon a Black-Scholes valuation.

503. First, the Tribunal rejects the Claimant's interpretation that Section 4.5 is intended to capture any type of compensation ever received by Bokhari from FSD whether in his capacity as CEO or otherwise, at any time. Furthermore, the Tribunal concludes, in any event, that the 2018 Options had no value as they had not vested. While there might have been some nominal value associated with these options based upon some probability of obtaining the NASDAQ listing, the Tribunal, on the evidence, is unable to assign any accurate value.

504. Section 4.5 speaks of the "fair market value of all non-cash consideration paid or provided", clearly referencing any options the executive might receive. Here, the contemporaneous 2018 financial statements list a value for every option other than Bokhari's which are assigned no value as they had not vested.

505. Two other points must be made. First, pursuant to Section 9.1 (a) of the Employment Agreement, Bokhari released and forever discharged FSD from any and all charges, liabilities, damages or causes of action,

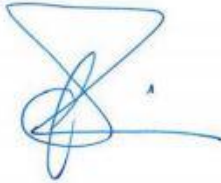
whether known or unknown, that he had against FSD as of July 29, 2020, the date of the Agreement. On that basis alone, the claim related to the 2018 options cannot stand.

506. Finally, as the Respondent notes, context here is important. It cannot be reasonable that the parties ever intended such an extraordinary severance. FSD is and was an early-stage company with no revenue during his tenure. Such a severance claim could never have been contemplated by the parties. It is entirely disproportionate to the reality of the situation.

507. Furthermore, the notion that this was, in effect, a “poison pill” within the Employment Agreement is rejected outright. Such an interpretation defies credibility given the fact that during discussions with Company counsel, prior to the final drafting of the Employment Agreement, Bokhari had proposed a “poison pill”, yet one was never incorporated into the Agreement. If the parties had intended there to be a “poison pill” in the Agreement, they would have included one. They cannot now rely upon some invisible poison pill.

508. The Respondent shall be entitled to its costs of the arbitration as well as the full Arbitrator’s account. In the event the parties are unable to agree upon costs, the Tribunal will entertain cost submissions in a manner to be determined at a further Case Conference.

Dated this 9th day of November, 2022.

A handwritten signature in blue ink, consisting of a stylized 'J' and 'C' with a horizontal line extending to the right.

The Honourable J. Douglas Cunningham, Q.C.