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Case No. 2017-0059-TMR

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

SOUTHPAW CREDIT OPPORTUNITY MASTER FUND L.P. and CLOUDYBLUFF & CO., in its capacity as the nominee of NORTHEAST INVESTORS TRUST, Plaintiffs, -against- ROMA RESTAURANT HOLDINGS, INC., a Delaware corporation, SCOTT WILSON, and KENNETH J. REIMER, PH.D, Defendants.	Civil Action No. 2017-0059-VCMR PUBLIC VERSION - FILED JAN. 30, 2017

VERIFIED COMPLAINT FOR RELIEF PURSUANT TO 8 DEL. C. §225(a)

Plaintiffs Southpaw Credit Opportunity Master Fund L.P. ("Southpaw") and Cloudybluff & Co., in its capacity as the nominee of Northeast Investors Trust ("Northeast"), by and through their undersigned counsel, upon knowledge as to themselves and otherwise upon information and belief, hereby allege against Defendants Roma Restaurant Holdings, Inc., Scott Wilson, and Kenneth J. Reimer, Ph.D as follows:

INTRODUCTION

1. On December 30, 2016, based on their collective holdings of approximately 51.4% of the issued and outstanding common stock, par value $0.01 per share (the "Common Stock") issued by Defendant Roma Restaurant Holdings,

Inc. (the "Company"), Plaintiffs delivered to the Company a written consent (the "December Consent"), resolving that the two non-executive directors on the three member Board of Directors of the Company (the "Board") – Scott Wilson, a Managing Director of Highland Capital Management LP, and Kenneth J. Reimer, Ph.D (together, the "Removed Directors") – be removed from the Board and replaced with two other Board members, Howard Golden and Bradley Scher (together, the "New Directors").

2. The Removed Directors were appointed by Highland Capital Management LP and two funds managed by Highland Capital Management LP, Highland Loan Funding V Ltd. and Pamco Cayman Ltd. (collectively, "Highland"), acting through their nominee, Hare & Co.

3. Under the influence of Highland, the Company refused to act upon the December Consent, and the Removed Directors have continued to act as Board members in spite of their removal and the substitution of the New Directors as Board members.

4. The Company has taken the position that Plaintiffs did not own more than 50% of the Common Stock at the time of the December Consent. The Company does not dispute that Southpaw completed a purchase of Common Stock that resulted in Plaintiffs collectively owning approximately 51.4% of the Common Stock. However, the Company purports that it subsequently issued, with Board

authorization, enough additional Common Stock to officers of the Company to dilute Plaintiffs' holdings to below 50%.

5. This purported issuance of Common Stock was implemented by an unauthorized Board and without a vote of holders of the Company's Common Stock ("Stockholders") in violation of the fiduciary duties of the Board and multiple provisions of the Company's Stockholders' Agreement among the Company and the Stockholders named therein dated March 27, 2006 (together, with all amendments thereto, the "Stockholders' Agreement"). The purported issuance is therefore voidable or void, and Plaintiffs owned on December 30 and continue to own more than 50% of the Common Stock. A copy of the Stockholders' Agreement is annexed hereto as Exhibit 1.

6. On January 25, 2017, in an abundance of caution, Plaintiffs delivered to the Company a further written consent directing that Wilson and Reimer be removed from the Board and any committee thereof and replaced with the New Directors (the "January Consent"). The January Consent was delivered in strict compliance with certain notice provisions of the Company's bylaws that have historically not been complied with by the Company. Copies of the December Consent and the January Consent are annexed hereto as Exhibit 2.

7. Plaintiffs bring this proceeding pursuant to Section 225(a) of the Delaware General Corporation Law ("Section 225(a)") seeking an order enforcing

their rights under the Stockholders' Agreement and Delaware law to use their majority ownership of the Common Stock to control the Company's Board.

THE PARTIES

8. Plaintiff Southpaw Credit Opportunity Master Fund L.P., is an exempted limited partnership organized under the laws of the Cayman Islands, and holds 181,212 shares of Common Stock.

9. Plaintiff Cloudybluff & Co., in its capacity as the nominee of Northeast Investors Trust, a trust organized under the laws of Massachusetts, holds 82,220 shares of Common Stock.

10. Defendant Roma Restaurant Holdings, Inc. is a corporation organized under the laws of Delaware. The Company is the owner of Romacorp, Inc. ("Romacorp"), which is the parent company of the Tony Roma's and TR Fire Grill chains of restaurants. Tony Roma's, which was founded in 1972, is the world's largest casual dining restaurant specializing in ribs, with more than 150 restaurants located in more than 30 countries. TR Fire Grill, which was launched in 2015, is a chef-inspired American bistro with two restaurants located in Florida and Hawaii.

11. In November 2005, the Company and Romacorp filed voluntary petitions for reorganization under Chapter 11 of the Bankruptcy Code. At that time, Plaintiffs were holders of Senior Notes due 2008 issued by Romacorp pursuant to that certain indenture dated October 30, 2003 (the "Senior Notes").

Pursuant to the Modified Joint Plan of Reorganization confirmed by the United States Bankruptcy Court for the Northern District of Texas on March 8, 2006, the Senior Notes were cancelled and exchanged for pro rata shares of the Company's Common Stock. From the exchange date to the present, Plaintiffs have been holders of substantial positions in Common Stock.

12. Defendant Scott Wilson purports to be a member of the Board of the Company.

13. Defendant Kenneth J. Reimer, Ph.D purports to be a member of the Board of the Company.

BACKGROUND

14. While Southpaw and Northeast have no representation on the Board, Highland controls the Board and purports to have appointed both Removed Directors. Notwithstanding the fact that Southpaw and Northeast collectively own significantly more shares than Highland, Highland has dominated the management of the Company, while the views of Southpaw and Northeast on corporate governance and related issues have been routinely ignored or rejected by the Board.

15. As Highland and the Company are aware, Southpaw and Northeast have worked together to protect their rights as Stockholders since 2015. In July 2015, Southpaw, on behalf of itself and Northeast, raised a number of concerns to

Reimer, who was the interim Chief Executive Officer ("CEO") of the Company, in addition to being a member of the Board, regarding a proposed stock repurchase that was structured in order to enable Highland to launch a potential tender offer that would have resulted in Highland's shares being repurchased by the Company.

16. In their July 2015 correspondence, Southpaw, on behalf of itself and Northeast, also raised other issues with Reimer and the Company, including whether the Company was in compliance with the requirements under its bylaws requiring the appointment of at least three members to the Board (at the time, it only had two members of the Board, both appointed by Highland).

17. Highland realized the threat that the alliance of Southpaw and Northeast posed to its *de facto* control of the Company and reacted to Southpaw's correspondence by seeking to acquire additional Common Stock in order to strengthen Highland's control over the Company. In this effort, Highland had a logistical difficulty. Under Sections 2.1 and 3.1 of the Stockholders' Agreement, no "Stockholder" (as defined in the Stockholders' Agreement) could, in one or more transactions, sell, give or otherwise "Transfer" (as defined in the Stockholders' Agreement), to anyone other than a "Permitted Transferee" (as defined in the Stockholders' Agreement), 5,000 or more shares of Common Stock "***or any right, title or interest therein or thereto***" (emphasis added) without first offering the Company the opportunity to purchase at the same price and on the

same conditions, and, to the extent that the Company does not fully exercise such a right, offering each current Stockholder the right to purchase at the same price and on the same conditions (the "Right of First Refusal").

18. Whether a potential transferee qualifies as a "Permitted Transferee" under the Stockholders' Agreement depends on the relationship of the Stockholder seeking to "Transfer" Common Stock to the proposed transferee. When a Stockholder seeks to Transfer Common Stock to an unaffiliated and unrelated transferee, only "Original Stockholders" under the Stockholders' Agreement are Permitted Transferees. "Original Stockholder" is defined to mean "each Stockholder a party to this Agreement as such agreement has been deemed effective by the Court on March 27, 2006." Southpaw was party to the Stockholders' Agreement on March 27, 2006, and qualifies as an Original Stockholder and thus a Permitted Transferee. Highland was not a party to the Stockholders' Agreement on March 27, 2006, and does not qualify as an Original Stockholder or a Permitted Transferee. Accordingly, Highland, unlike Southpaw, had to comply with the Right of First Refusal with respect to any purchases of Common Stock from unaffiliated and unrelated persons.

19. During the period between July 1, 2016 and October 7, 2016, Highland attempted to increase its ownership of Common Stock without triggering the Right of First Refusal in two ways: (1) by purchasing less than 5,000 shares of

Common Stock from three different Company officers in three separate purchases (the "Individual Purchases"); and (2) by purchasing from an entity or entities affiliated with JPMorgan Chase & Co. (the "JPM Entities") the beneficial interest in and the right to control the voting of 66,009 shares of Common Stock pledged to and held by US Bank N.A. ("US Bank") in its capacity as the trustee for the controlling class of notes (the "CBO Notes") issued by BEA CBO 1998-2 Ltd., a collateralized bond obligation vehicle (the "JPM Involuntary Transfer").

20. On July 1, 2016, holdings of Common Stock were as follows:

Roma Restaurant Holdings Ownership List as of July 1, 2016

Name	**Shares**	**%**
Cloudybluff & Co. [Northeast]	**82,220**	**16.2%**
Southpaw Credit Opportunity Master Fund LP	**168,211**	**33.2%**
Hare & Co.		
1) Highland	**170,200**	**33.6%**
2) Other	1,164	0.2%
American Knights Security, Inc.	26	0.0%
Myres, Kenneth L.	18,000	3.5%
Short, David G.	1,334	0.3%
US Bank [JPM Entities]	66,009	13.0%
Total Outstanding Common Stock	**507,164**	

21. In addition to the Common Stock holdings listed above, certain officers of the Company possessed stock options issued pursuant to the Long-Term Incentive Plan entered into by the Company upon its emergence from bankruptcy in 2006 (the "2006 Incentive Plan"). David G. Short (who owned 1,334 shares of

Common Stock as of July 1, 2016) owned options granting him the right to purchase 3,333 additional shares. Bob Gallagher (who did not own any Common Stock as of July 1, 2016) owned options granting him the right to purchase 2,222 shares.

22. On or after July 1, 2016, Short and Gallagher exercised their options and sold their entire holdings of Common Stock to Highland. These Individual Purchases – of the 4,667 shares owned by Short and the 2,222 shares owned by Gallagher – were below the 5,000 share threshold for triggering the Right of First Refusal.

23. Highland also purchased Common Stock from Kenneth Myres, the former President and CEO of the Company. However, Myres owned 18,000 shares. Thus, purchasing Myres's entire holdings would have triggered the Right of First Refusal. In order to avoid triggering the Right of First Refusal, Highland purchased only 4,999 of Myres's shares.

24. Also during the period from July 1, 2016 to October 7, 2016, Highland entered into the JPM Involuntary Transfer, purchasing the CBO Notes, and the beneficial interest in the 66,009 shares of Common Stock pledged to and held by US Bank in its capacity as the trustee for the Senior Notes, from the JPM Entities.

25. Section 3.1(d) of the Stockholders' Agreement defines an "Involuntary Transfer" to include "any Transfer of . . . beneficial ownership of Shares . . . otherwise than by a voluntary decision on the part of a Stockholder[.]"

26. The JPM Involuntary Transfer was such an "Involuntary Transfer" as it constituted a "Transfer" (as defined in the Stockholders' Agreement) of beneficial ownership in "Shares" (defined in the Stockholders' Agreement to mean Common Stock) owned by US Bank otherwise than by a voluntary decision of US Bank, which is a "Stockholder" (as defined in the Stockholders' Agreement). In fact, US Bank was not a party to and had no consent right with respect to the JPM Involuntary Transfer, which was entered into between the JPM Entities and Highland.

27. Under Section 3.1(d) of the Stockholders' Agreement, upon the occurrence of an "Involuntary Transfer", the Stockholder (here US Bank) is obligated to "promptly (but in no event less than two (2) Business Days after such purported Involuntary Transfer) furnish written notice to the Company indicating that the purported Involuntary Transfer is pending, specifying the name of the Person to whom such Shares are expected to be transferred, giving a detailed description of the circumstances giving rise to, and stating the legal basis for, the purported Involuntary Transfer."

28. US Bank did not timely provide and has never provided the written notice required by Section 3.1(d) of the Stockholders' Agreement with respect to the Involuntary Transfer of the beneficial interest in the 66,009 shares of Common Stock it holds.

29. Section 2.1 of the Stockholders' Agreement provides that no Stockholder, including US Bank, may "give, . . . any Shares or any right, . . . therein . . . , except in accordance with the provisions of this Agreement."

30. US Bank violated Section 2.1 of the Stockholders' Agreement as a result of the JPM Involuntary Transfer. After the Involuntary Transfer was consummated, US Bank *gave* Highland the *right* to control the voting of the 66,009 shares of Common Stock held by US Bank. The JPM Involuntary Transfer was not in accordance with the provisions of the Stockholders' Agreement, because the notice required by Section 3.1(d) was not provided by US Bank.

31. Pursuant to the terms of Section 2.1 of the Stockholders' Agreement, the US Bank transfer of the right to vote the 66,009 shares of Common Stock held by US Bank is therefore void *ab initio*. Accordingly, Highland was not and is not entitled to vote the 66,009 shares subject to the JPM Involuntary Transfer.

32. Separately, Section 3.1(d) of the Stockholders' Agreement provides that Article III, including the Right of First Refusal set forth in Section 3.1(a), "shall apply to Involuntary Transfers."

33. As set forth above, the Right of First Refusal prohibits any "Stockholder" from selling or otherwise "Transferring" 5,000 or more shares of Common Stock "***or any right, title or interest therein or thereto***" (emphasis added) without first offering the Company the opportunity to purchase at the same price and on the same conditions, and, to the extent that the Company does not fully exercise such a right, offering each current Stockholder the right to purchase at the same price and on the same conditions.

34. The JPM Involuntary Transfer triggered the Right of First Refusal. US Bank is a "Stockholder" as defined in the Stockholders' Agreement. Pursuant to the JPM Involuntary Transfer, the "right" to vote the 66,009 shares of Common Stock held by US Bank was "Transferred" by US Bank to Highland, which is not a Permitted Transferee, without the JPM Entities first offering the Company/the Stockholders the opportunity to purchase at the same price and on the same conditions.

35. Because the JPM Involuntary Transfer triggered the Right of First Refusal, and the parties did not comply with the Right of First Refusal, the JPM Involuntary Transfer is void *ab initio* pursuant to Section 2.1 of the Stockholders' Agreement. Therefore, Highland was not and is not entitled to vote the 66,009 shares subject to the JPM Involuntary Transfer.

36. On October 7, 2016, after Highland had consummated the Individual Purchases and the JPM Involuntary Transfer, holdings of Common Stock were as follows:

Roma Restaurant Holdings Ownership List as of October 7, 2016

Name	Shares	%
Cloudybluff & Co. [Northeast]	**82,220**	**16.0%**
Southpaw Credit Opportunity Master Fund LP	**168,211**	**32.8%**
Hare & Co.		
1) Highland	**182,088**	**35.5%**
2) Other	1,164	0.2%
American Knights Security, Inc.	26	0.0%
Myres, Kenneth L.	13,001	2.5%
US Bank [JPM Entities]	66,009	12.9%
Total Outstanding Common Stock	**512,719**	

37. On October 27, 2016, Southpaw and Northeast together sent a letter to Wilson, in his capacity as a Managing Director of Highland, asking for details regarding Highland's Individual Purchases and the JPM Involuntary Transfer. In its November 1, 2016 response to this letter, Highland took the position that the JPM Involuntary Transfer did not trigger the Right of First Refusal because it "did not constitute a Transfer as defined in the Stockholders' Agreement, and therefore, is not subject to the Stockholders' Agreement."

38. Southpaw and Northeast then sent a letter regarding the same issues to the Board and senior officers of the Company on November 10, 2016. In a response letter dated November 23, 2016, the Board and the Company also took

the position that the JPM Involuntary Transfer was not a "Transfer" within the meaning of the Stockholders' Agreement. The basis for this position was unclear.

39. In reaction to Highland's actions described above, Southpaw and Northeast decided to seek to replace the Removed Directors with new members of the Board who agreed with their vision for the Company. Southpaw's and Northeast's collective holdings of Common Stock were 5,929 shares short of the majority required to achieve this objective. Accordingly, Southpaw sought to buy at least 5,929 in additional Common Stock. There was only one obvious source left for that much Common Stock – the 13,001 shares of Common Stock still held by Myres that Myres could not sell to Highland without triggering the Right of First Refusal.

40. On November 30, 2016, Myres informed the Company that he had agreed to sell his 13,001 shares of Common Stock to Southpaw. This transaction was not subject to the Right of First Refusal, because Southpaw (unlike Highland) qualifies as an Original Stockholder and thus a Permitted Transferee.

41. With the purchase of the Myres shares, Southpaw and Northeast collectively held approximately 51.4% of the Common Stock (263,432 shares), and the holdings of Common Stock at that point were as follows:

Roma Restaurant Holdings Ownership List
Upon the Closing of the Myres Sale to Southpaw

Name	Shares	%
Cloudybluff & Co. [Northeast]	**82,220**	**16.0%**
Southpaw Credit Opportunity Master Fund LP	**181,212**	**35.3%**
Hare & Co.		
1) Highland	**182,088**	**35.5%**
2) Other	1,164	0.2%
American Knights Security, Inc.	26	0.0%
US Bank [JPM Entities]	66,009	12.9%
Total Outstanding Common Stock	**512,719**	

42. After Wilson learned that Myres sold his remaining Common Stock to Southpaw, Wilson called Myres to complain that his sale of Common Stock to Southpaw would give control over the Company to Southpaw and Northeast (and thus take control away from Highland and likely result in the removal of Wilson from the Board).

43. Also on November 30, 2016, the Company provided Stockholders with notice of a written consent electing the Removed Directors to new terms on the Board.[1] To be valid under the bylaws of the Company, this written consent needed the approval of a majority of Stockholders. Since neither Southpaw nor Northeast consented to the written consent or the reelection of the Removed Directors, the only way the Removed Directors could have gotten the votes they

[1] The Removed Directors already purported to be members of the Board prior to November 30, 2016, and this written consent did not purport to change the composition of the Board.

required was if Highland caused the JPM Entities to direct US Bank to vote its Common Stock in favor of new terms for the Removed Directors. Because Highland is not entitled to vote those shares, such action was invalid and in violation of the Stockholders' Agreement. Accordingly, all actions by the Board after November 30, 2016 are void.

44. Actions of the Board prior to November 30, 2016 may also be void, as the Board appears not to have complied with various provisions of the bylaws, in particular the requirement for annual meetings (Art. II, Sec. 2) and the requirement for annual election of directors (Art. III, Sec. 3). A copy of the Company's bylaws is annexed hereto as Exhibit 3.

45. On December 9, 2016, the Company (not the Board) issued a stock certificate (the "Stock Certificate") to Southpaw reflecting that Southpaw was now both the record and beneficial holder of the 13,001 shares of Common Stock previously held by Myres.

46. In spite of the December 9 issuance, Southpaw did not receive the Stock Certificate from the Company until December 21, 2016, when the Company forwarded the Stock Certificate by email together with a cover letter, signed by Daniel T. Cronk in his capacity as Secretary and General Counsel of the Company, stating that the Board "plans to issue an update memo to all stockholders shortly;

likely on Thursday, December 22, 2016.[2] The requested updated Stock Ownership Chart/Ledger will be included with that communication to all stockholders, so that all stockholders receive the same information." A copy of the cover letter and the stock certificate are annexed hereto as Exhibit 4.

47. On December 22, 2016, the Company issued a memorandum (the "December 22 Memorandum") to Stockholders explaining that the 2006 Incentive Plan, under which the Company had, for the previous ten years, issued only stock options as incentive compensation, had expired in March 2016. The December 22 Memorandum further announced that the Board had approved a new 2016 Long-Term Incentive Plan (the "2016 Incentive Plan"), pursuant to which 48,500 shares of restricted Common Stock were issued to the Company's officers. The Company and its officers also cancelled the outstanding stock option awards under the 2006 Incentive Plan. A copy of the December 22 Memorandum, with attachments, is annexed hereto as Exhibit 5.

48. The December 22 Memorandum attached a copy of the Company's ownership ledger purporting to show that 48,500 shares of recently issued restricted Common Stock (the "Purported New Common Stock") could be voted by their respective holders, which had the effect of reducing the Common Stock

[2] In connection with arranging for the transfer of Myres's Common Stock to Southpaw, Southpaw requested an updated stock ownership chart.

holdings of Southpaw and Northeast to less than the majority required to replace the Removed Directors. According to the ownership ledger, Stephen K. Judge, the President, CEO and third member of the Board of the Company, received 32,000 of the 48,500 shares of Purported New Common Stock.

49. If the issuance of the Purported New Common Stock was valid, and it is not, holdings of Common Stock would be as follows:

Roma Restaurant Holdings Ownership List as of December 1, 2016*
**Includes Purported New Common Stock, for illustrative purposes only (given that Purported New Common Stock was not authorized or properly issued and is void)*

Name	Shares	%
Cloudybluff & Co. [Northeast]	**82,220**	**14.7%**
Southpaw Credit Opportunity Master Fund LP	**181,212**	**32.3%**
Hare & Co.		
1) Highland	**182,088**	**32.4%**
2) Other	1,164	0.2%
American Knights Security, Inc.	26	0.0%
US Bank [JPM Entities]	66,009	11.8%
Purported New Common Stock		
1) Stephen K. Judge	[redacted]	[redacted]
2) Other Officers	[redacted]	[redacted]
	561,219	

50. As set forth below, both the 2016 Incentive Plan and the issuance of the Purported New Common Stock thereunder were unauthorized and invalid, and thus did not affect Southpaw and Northeast's aggregate percentage holdings of

Common Stock, such that, from December 9, 2016 at the latest to the present, Southpaw and Northeast have continuously held a majority of the Common Stock.

51. On December 23, 2016, "[a]t the request of a Stockholder," the Company provided a copy of the 2016 Incentive Plan to Southpaw. A copy of the 2016 Incentive Plan is annexed hereto as Exhibit 6.

52. The 2016 Incentive Plan purports to have been adopted by the Board "effective as of December 1, 2016." It is unclear how the Board justified its approval of the 2016 Incentive Plan and the award of the Purported New Common Stock thereunder, given that none of the directors were disinterested: two of the directors were appointed by Highland, and Highland was using the award to attempt to preserve its control over the Company; the other director was Judge, who received an unduly generous grant of Purported New Common Stock.

53. On December 30, 2016, based upon their collective holdings of approximately 51.4% of the Company's Common Stock, Southpaw and Northeast delivered the December Consent to Daniel T. Cronk, in his capacity as the Secretary of the Company, removing the Removed Directors from the Board and electing the New Directors to the Board.

54. The December Consent removing the Removed Directors and appointing the New Directors was duly and validly executed by Plaintiffs and

delivered in accordance with the Stockholders' Agreement, the Company's certificate of incorporation and bylaws, and Delaware law.

55. The Company has wrongly refused to acknowledge the validity of the December Consent. The Company acknowledged its receipt of the December Consent, but failed to act on it, and the Removed Directors purport to remain on the Board (while the New Directors have not been seated). On Saturday, December 31, 2016, the Company's Secretary, Mr. Cronk, replied to Southpaw as follows:

> The Company acknowledges receipt of your email below and attached Written Consent of Stockholders. However, based upon the most recent Company stockholder/ownership ledger distributed to all stockholders on December 22, 2016 (copy attached for your convenience), the combined ownership of Southpaw and Cloudybluff is insufficient to take the actions described in the Written Consent.

56. On January 5, 2017, Southpaw requested that the Company provide it with "copies of the award agreements and all other documentation related to the approval of, and issuances under, the 2016 Long-Term Incentive Plan."

57. On January 6, 2017, in response to that request, the Company provided Southpaw with a form of restricted stock award and a copy of Board resolutions purporting to adopt the 2016 Incentive Plan (the "Board Resolutions"). The Board Resolutions are dated December 1, 2016, only one day after Highland and the Company were made aware of Southpaw's acquisition of the shares held

by Myres, and Wilson had complained to Myres that the sale would shift control of the Company away from Highland and to Southpaw and Northeast. A copy of the Board Resolutions attaching the form of restricted stock award is annexed as Exhibit 7.

58. On January 25, 2017, in an abundance of caution, Plaintiffs delivered the January Consent to the Company again directing that Wilson and Reimer be removed from the Board and any committee thereof and replaced with the New Directors. The January Consent was delivered in strict compliance with certain notice provisions of the Company's bylaws and Stockholders' Agreement that have historically not been complied with by the Company.

59. The January Consent removing the Removed Directors and appointing the New Directors was duly and validly executed by Plaintiffs and delivered in accordance with the Stockholders' Agreement, the Company's certificate of incorporation and bylaws, and Delaware law.

60. The Company has wrongly refused to acknowledge the effectiveness of the January Consent.

THE REMOVED DIRECTORS WERE NOT PROPERLY APPOINTED TO THE BOARD, AND THEIR APPROVAL OF THE 2016 INCENTIVE PLAN AND THE AWARD OF THE PURPORTED NEW COMMON STOCK IS VOID

Non-Compliance With Section 3.1(d) Notice

61. The JPM Involuntary Transfer was an Involuntary Transfer.

62. US Bank did not comply with its notice obligations with respect to the JPM Involuntary Transfer pursuant to Section 3.1(d) of the Stockholders' Agreement.

63. The JPM Involuntary Transfer is therefore void *ab initio* under Section 2.1 of the Stockholders' Agreement.

64. Accordingly, Highland is not entitled to control the voting of the 66,009 shares subject to the JPM Involuntary Transfer.

65. On November 30, 2016, the Removed Directors were elected to the Board by means of a written consent allegedly supported by a majority of existing Stockholders.

66. Highland caused US Bank to vote the 66,009 shares subject to the JPM Involuntary Transfer in support of such written consent, which otherwise would not have had the requisite majority approval.

67. The written consent that appointed two of the three members of the Board on November 30, 2016 was therefore invalid.

68. All actions taken by the Board after November 30, 2016, including the approval of the 2016 Incentive Plan and the award of the Purported New Common Stock, are unauthorized and therefore null, void and of no further force and effect.

Non-Compliance With Right of First Refusal

69. The JPM Involuntary Transfer triggered the Right of First Refusal.

70. US Bank and the parties to the JPM Involuntary Transfer did not comply with their obligations under the Right of First Refusal.

71. The JPM Involuntary Transfer is therefore void *ab initio* under Section 2.1 of the Stockholders' Agreement.

72. Accordingly, Highland is not entitled to control the voting of the 66,009 shares subject to the JPM Involuntary Transfer.

73. On November 30, 2016, the Removed Directors were elected to the Board by means of a written consent allegedly supported by a majority of existing Stockholders.

74. Highland caused US Bank to vote the 66,009 shares subject to the JPM Involuntary Transfer in support of such written consent, which otherwise would not have had the requisite majority approval.

75. The written consent that appointed two of the three members of the Board on November 30, 2016 was therefore invalid.

76. All actions taken by the Board after November 30, 2016, including the approval of the 2016 Incentive Plan and the award of the Purported New Common Stock, are unauthorized and therefore null, void and of no further force and effect.

THE REMOVED DIRECTORS BREACHED THEIR FIDUCIARY DUTIES WHEN THEY AWARDED THE PURPORTED NEW COMMON STOCK, AND THAT AWARD IS THEREFORE VOID

77. The Removed Directors have fiduciary duties to the Company and its Stockholders.

78. The primary purpose of the award of the Purported New Common Stock was to perpetuate Highland's control over the Company, and to prevent Plaintiffs from gaining control over the Company and removing the Removed Directors from the Board. *See WNH Invs., LLC v. Batzel*, 1995 Del. Ch. LEXIS 47, at *17-19 (Del. Ch. Apr. 28, 1995) (Balick, V.C.) (setting aside dilutive stock issuance that purportedly served to incentivize management where timing, effect and other facts indicated that primary purpose was defeating a challenge to control).

79. The Removed Directors were interested in awarding the Purported New Common Stock.

80. The Removed Directors approved the award of the Purported New Common Stock without the support of any disinterested member of the Board.

81. The Removed Directors breached their fiduciary duties to the Company and its Stockholders by approving the award of the Purported New Common Stock.

82. The award of the Purported New Common Stock is therefore voidable or void.

83. The Company has wrongly treated the Purported New Common Stock as valid.

THE 2016 INCENTIVE PLAN WAS NOT AUTHORIZED, AND THE AWARD OF THE PURPORTED NEW COMMON STOCK THEREUNDER IS VOID

84. Section 6.4(xii) of the Stockholders' Agreement provides as follows: "*The Board of Directors shall not, without the affirmative vote of at least a majority of the Stockholders represented,* either in person or by proxy, at a duly convened Stockholders Meeting, ***authorize*** *the Company to*: . . . (xii) *issue options,* warrants or other securities convertible into or exchangeable for shares of capital stock, or otherwise amend the exercise or conversion price of such securities." (Emphasis added).

85. Sections 6.1 and 6.2 of the 2016 Incentive Plan would authorize the Company, acting through a committee of the Board, to issue stock options.

86. Thus, to be valid, the 2016 Incentive Plan required Stockholder approval pursuant to Section 6.4(xii) of the Stockholder's Agreement.

87. The Board purported to approve the 2016 Incentive Plan by means of the Board Resolutions, without the approval of Stockholders.

88. The 2016 Incentive Plan was therefore not validly authorized, and the issuance of the Purported New Common Stock thereunder is therefore null, void and of no further force and effect.

89. The Company has wrongly treated the Purported New Common Stock as valid.

THE AWARD OF THE PURPORTED NEW COMMON STOCK WAS NOT AUTHORIZED AND IS VOID

90. Section 6.4(vii) of the Stockholders' Agreement provides as follows: "*The Board of Directors shall not, without the affirmative vote of at least a majority of the Stockholders represented,* either in person or by proxy, at a duly convened Stockholders Meeting, *authorize the Company to*: . . . (vii) *enter into any transaction or business arrangement (other than* ***customary employment arrangements*** *approved by the Board of Directors . . .) with* (A) *any . . . officer* or director . . . ." (Emphasis added).

91. The Purported New Common Stock was purportedly issued to officers of the Company, and therefore was a "transaction or business arrangement" with such officers.

92. The Board purported to approve the 2016 Incentive Plan that authorized and caused the issuance of the Purported New Common Stock by means of the Board Resolutions, without the approval of Stockholders.

93. The 2016 Incentive Plan, and the subsequent award of Purported New Common Stock thereunder, were clearly a response, engineered by Highland and supported by the Board, to thwart the attempts by Southpaw and Northeast to exercise their right to control the Company, and not a "customary employment arrangement." A stock option plan (like the Company had used in the past to incentivize officers) would not have resulted in the immediate dilution of Southpaw's and Northeast's Common Stock holdings. Highland, after running out of all other options to maintain control following the Southpaw purchase of 13,001 shares from Myres, had no other choice but to direct the Company to issue enough shares to dilute the holdings of Southpaw and Northeast below 50%. The 2016 Incentive Plan and award of Purported New Common Stock thereunder were the means by which Highland hoped to maintain control of the Company.

94. The Company had historically incentivized its officers only by means of stock options. Tying its officers' equity-based incentive compensation to stock options, rather than restricted Common Stock, had a number of favorable consequences for the Company. Stock options provide value to an officer who receives them only upon appreciation of the value of the equity tied to the stock option; by contrast, the grant of the Purported New Common Stock transfers, immediately upon vesting, the entire value of the Common Stock (and not just the value of appreciation that may be tied to the officer's service). This unnecessary

use of the Company's assets is particularly egregious in the case of the Purported New Common Stock, since [redacted] of the issuance vested [redacted] after the award, an extremely short vesting period that is far from customary. Based on the value offered by the Company in its most recent tender offer, $36.00 per share of Common Stock, the full value of the restricted Common Stock transferred to Judge was [redacted].

95. Stock options also have favorable tax consequences, because recipients of stock options do not face an immediate tax burden on either grant or vesting while recipients of restricted stock will be taxed on the full value of the restricted stock on vesting (or, if elected, at the time of the grant). The unnecessary tax burden associated with the Purported New Common Stock will necessarily be borne either by the Company or by the officers who received Purported New Common Stock. If paid by the Company, whether through a direct payment to the appropriate tax authorities or in the form of additional compensation to the officers, such payments would reduce the Company's available liquidity and possibly earnings.

96. Notably, for the Company to award stock options to its officers, it must comply with Section 6.4(xii) of the Stockholders' Agreement, which requires majority Stockholder approval prior to the issuance of stock options. Section 6.4(vii) is clearly intended to work in concert with Section 6.4(xii), with Section

6.4(vii) allowing for customary employment compensation without Stockholder approval (*e.g.*, salary, bonus, benefits and expense payments), while Section 6.4(xii) prohibits the issuance or grant of the type of equity-based incentive compensation historically provided by the Company (stock options) without majority Stockholder approval. Clearly, the Stockholders' Agreement was drafted with the compensation structures intended to be used by the Company in mind, and Section 6.4(xii) is clearly intended to prohibit potentially dilutive equity-based incentive compensation awards without Stockholder approval. The Purported New Common Stock significantly diluted the value of the Common Stock held by current Stockholders, and under the circumstances and given the history here, there was nothing "customary" about approving such a dilutive transaction without the approval of Stockholders.

97. Furthermore, the amount of the Purported New Common Stock granted to the officers was unduly generous. The Purported New Common Stock would represent approximately 8.6% of the outstanding Common Stock of the Company, of which approximately [redacted] would go to Judge, the President and CEO of the Company. Such an unduly generous grant cannot be considered "customary" in light of the facts that (1) all the officers who received the Purported New Common Stock were already employed by the Company, (2) not one of those officers was threatening to leave, and (3) [redacted] of the 48,500 shares of Purported

New Common Stock were issued to officers who already possessed stock options (which were not close to expiring) and had no need to receive new equity-based incentives.

98. While the Company asserted in the December 22 Memorandum that "many of the prior awards under the 2006 [Incentive] Plan that remained outstanding were comprised of out-of-the money stock option awards," which "no longer had the desired effect of incentivizing and retaining key employees[,]" the Company has not explained why it did not simply issue new options to such employees with lower exercise prices. The reason why is clear – while such new stock options would have provided the purportedly desired incentive at less cost to the Company, such new stock options would not have served the interest of Highland in diluting Plaintiffs from possessing a majority of the Common Stock of the Company. *See WNH Invs.*, 1995 Del. Ch. LEXIS 47, at *17-19 (holding that it is improper for a board to issue stock in order to defeat a challenge to control).

99. Because the Purported New Common Stock was not in any way a "customary employment arrangement," Stockholder approval was required to issue it.

100. Because such Stockholder approval was not obtained, the issuance of the Purported New Common Stock is null, void and of no further force and effect.

101. The Company has wrongly treated the Purported New Common Stock as valid.

THE PURPORTED NEW COMMON STOCK WAS NOT VALIDLY ISSUED AND IS VOID

102. Section 5.2 of the Stockholders' Agreement prohibits the Company from issuing Common Stock to any person not a party thereto, unless such person has agreed in writing to be bound by the terms and conditions of the Stockholders' Agreement "pursuant to an instrument substantially in the form attached hereto as Exhibit C-2" (such an instrument, a "Joinder").

103. The officers of the Company who received Purported New Common Stock did not execute Joinders.

104. Under Section 5.2 of the Stockholders' Agreement, any issuance of Common Stock without a Joinder in place "shall be null and void *ab initio* and neither the Company nor any transfer agent shall give effect in the Company's stock records to such attempted issuance."

105. The Purported New Common Stock was not validly issued, and the Purported New Common Stock is therefore void *ab initio*.

106. The Company has wrongly treated the Purported New Common Stock as valid.

COUNT I

(Declaratory Judgment)

107. Plaintiffs incorporate herein by reference all the foregoing paragraphs as though fully set forth herein.

108. The December Consent and/or the January Consent were duly and validly executed by Plaintiffs and delivered in accordance with the Stockholders' Agreement, the Company's certificate of incorporation and bylaws, and Delaware law.

109. Defendants have wrongly refused to acknowledge the effectiveness of the December Consent and/or the January Consent.

110. Plaintiffs lack an adequate remedy at law.

111. Plaintiffs are therefore entitled to a judicial declaration that, effective immediately upon delivery of the December Consent and/or the January Consent, (a) the Removed Directors, Scott Wilson and Kenneth J. Reimer, Ph.D, were removed from the Board, and (b) the New Directors, Howard Golden and Bradley Scher, became members of the Board.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully request, pursuant to Section 225(a), that this Court enter an order: (a) declaring that, effective immediately upon delivery of the December Consent and/or the January Consent, (i) the Removed Directors, Scott Wilson and Kenneth J. Reimer, Ph.D, were removed from the Board, and (ii) the New Directors, Howard Golden and Bradley Scher, became members of the Board; and (b) granting such other and further relief as this Court deems just and proper.

Dated: January 25, 2017

Respectfully submitted,

YOUNG CONAWAY STARGATT
& TAYLOR, LLP

/s/ Martin S. Lessner

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