IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

MELVYN KLEIN, Individually and On Behalf of All Others Similarly Situated, Plaintiff, vs. NUTRISYSTEM, INC., MICHAEL J. HAGAN, ROBERT F. BERNSTOCK, JAY HERRATTI, BRIAN P. TIERNEY, PATRICIA HAN, DAWN M. ZIER, PAUL GUYARDO, MICHAEL D. MANGAN, ANDREA WEISS, BENJAMIN A. KIRSHNER, TIVITY HEALTH, INC., and SWEET ACQUISITION, INC. Defendants.	**Civil Action No:** **CLASS ACTION** **JURY TRIAL DEMANDED**

COMPLAINT

Plaintiff Melvyn Klein ("Plaintiff"), on behalf of himself, by his undersigned attorneys, for his complaint against Defendants (defined below), alleges upon personal knowledge with respect to himself, and upon information and belief based upon, *inter alia*, the investigation of counsel as to all other allegations herein, as follows:

NATURE OF THE ACTION

1. This is a class action brought by Plaintiff on behalf of himself and all other similarly situated public stockholders of Nutrisystem, Inc. ("Nutrisystem" or the "Company") against the above-captioned Defendants, including Nutrisystem and the members of the Company's Board of Directors (referred to as the "Board" or the "Individual Defendants," and, together with Nutrisystem, the "Defendants") for violations of Sections 14(a) and 20(a) of the Securities Exchange Act of 1934 ("Exchange Act"), 15 U.S.C. §§ 78n(a), 78t(a) respectively,

and United States Securities and Exchange Commission ("SEC") Rule 14a-9, 17 C.F.R. § 240.14a-9, in connection with the acquisition of Nutrisystem by Tivity Health, Inc.

2. On December 9, 2018, Nutrisystem, Tivity Health, Inc. ("PARENT"), and Sweet Acquisition, Inc., a direct wholly-owned Subsidiary of PARENT ("Merger Sub") entered into an Agreement and Plan of Merger (the "Merger Agreement").

3. Pursuant to the Merger Agreement, Merger Sub will merge with and into Nutrisystem, with Nutrisystem surviving the merger and becoming a direct, wholly-owned Subsidiary of PARENT (the "Proposed Transaction").

4. On January 7, 2019, in order to convince Nutrisystem's public common stockholders to vote in favor of the Proposed Transaction, PARENT filed a materially incomplete and misleading Form S-4 Registration Statement (the "Proxy") with the SEC, in violation of Sections 14(a) and 20(a) of the Exchange Act.

5. As stated in the Proxy, upon completion of the Proposed Transaction, each share of Nutrisystem common stock will be converted into the right to receive $38.75 in cash, without interest, and 0.2141 of a share of Tivity Health common stock (the "Merger Consideration").

6. The Proxy contains materially incomplete and misleading information concerning: (i) the valuation analyses prepared by the Company's financial advisor, Evercore Group L.L.C. ("Evercore"), in support of their fairness opinion and (ii) the absence of an analysis of PARENT.

7. Additionally, although the Proxy does not yet set the date for the special meeting of Nutrisystem's stockholders to vote on the Proposed Transaction (the "Stockholder Vote"), the Proxy does state the merger parties' intention to conclude this merger during the first quarter of 2019. It is therefore imperative that the material information that has been omitted from the

Proxy is disclosed prior to the Stockholder Vote so Nutrisystem stockholders can properly exercise their corporate suffrage rights.

JURISDICTION AND VENUE

8. This Court has subject matter jurisdiction pursuant to Section 27 of the Exchange Act (15 U.S.C. § 78aa) and 28 U.S.C. § 1331 as Plaintiff alleges violations of Sections 14(a) and 20(a) of the Exchange Act.

9. Personal jurisdiction exists over each Defendant either because each Defendant conducts business in or maintains operations in this District or is an individual who is either present in this District for jurisdictional purposes or has sufficient minimum contacts with this District as to render the exercise of jurisdiction over each Defendant by this Court permissible under traditional notions of fair play and substantial justice.

10. Venue is proper in this District under Section 27 of the Exchange Act, 15 U.S.C. § 78aa, as well as under 28 U.S.C. § 1391, because, among other things: (i) the conduct at issue will have an effect in this District; (ii) a substantial portion of the transactions and wrongs complained of herein, occurred in this District; and (iii) certain Defendants have received substantial compensation in this District by doing business here and engaging in numerous activities that had an effect in this District.

THE PARTIES

Plaintiff

11. ***Plaintiff Melvyn Klein*** is, and at all relevant times, has been a Nutrisystem stockholder.

Defendants

12. ***Defendant Nutrisystem, Inc.*** ("Nutrisystem") is a Delaware corporation with its

principal executive offices located at 600 Office Center Drive, Fort Washington, Pennsylvania, 19034. Nutrisystem is a provider of weight management products and services sold primarily online and over the telephone and multi-day kits and single items available at select retail locations. Nutrisystem common stock is traded under the ticker symbol "NTRI".

13. ***Defendant Michael J. Hagan*** ("Hagan") is, and has been at all relevant times, a director of the Company, and currently serves as the Company's Chairman.

14. ***Defendant Dawn M. Zier*** ("Zier) is, and has been at all relevant times, a director of the Company, and currently serves as the Company's President and Chief Executive Officer ("CEO")

15. ***Defendant Robert F. Bernstock*** ("Bernstock") is, and has been at all relevant times, a director of the Company.

16. ***Defendant Jay Herratti*** ("Herratti") is, and has been at all relevant times, a director of the Company.

17. ***Defendant Brian P. Tierney*** ("Tierney") is, and has been at all relevant times, a director of the Company.

18. ***Defendant Patricia Han*** ("Han") is, and has been at all relevant times, a director of the Company.

19. ***Defendant Paul Guyardo*** ("Guyardo") is, and has been at all relevant times, a director of the Company.

20. ***Defendant Michael D. Mangan*** ("Mangan") is, and has been at all relevant times, a director of the Company.

21. ***Defendant Andrea Weiss*** ("Weiss") is, and has been at all relevant times, a director of the Company.

22. ***Defendant Benjamin A. Kirshner*** ("Kirshner") is, and has been at all relevant times, a director of the Company.

23. The parties in paragraphs 13 through 22 are collectively referred to herein as the "Board" or the "Individual Defendants," and together with the Company, the "Defendants".

24. ***Defendant Tivity Health, Inc.*** ("PARENT") is a Delaware corporation with its principal executive offices located at 701 Cool Springs Boulevard, Franklin, Tennessee 37067, and is a party to the Merger Agreement.

25. ***Defendant Sweet Acquisition, Inc.*** ("Merger Sub") is a Delaware corporation and a direct wholly-owned subsidiary of PARENT, and a party to the Merger Agreement.

CLASS ACTION ALLEGATIONS

26. Plaintiff brings this class action pursuant to Fed. R. Civ. P. 23 on behalf of themselves and the other public stockholders of Nutrisystem (the "Class"). Excluded from the Class are Defendants herein and any person, firm, trust, corporation, or other entity related to or affiliated with any Defendant.

27. This action is properly maintainable as a class action because:

(a) the Class is so numerous that joinder of all members is impracticable. As of December 17, 2018, there were 34,077,624 shares of Nutrisystem common stock outstanding and restricted stock units that will immediately vest upon closing, held by hundreds to thousands of individuals and entities scattered throughout the country. The actual number of public stockholders of the Company will be ascertained through discovery;

(b) there are questions of law and fact that are common to the Class that predominate over any questions affecting only individual members, including the following: (i) whether Defendants have misrepresented or omitted material information concerning the

Proposed Transaction in the Proxy, in violation of Section 14(a) of the Exchange Act; (ii) whether the Individual Defendants have violated Section 20(a) of the Exchange Act; and (iii) whether Plaintiff and other members of the Class will suffer irreparable harm if compelled to vote their shares regarding the Proposed Transaction based on the materially incomplete and misleading Proxy.

(c) Plaintiff is an adequate representative of the Class, has retained competent counsel experienced in litigation of this nature, and will fairly and adequately protect the interests of the Class;

(d) Plaintiff's claims are typical of the claims of the other members of the Class and Plaintiff does not have any interests adverse to the Class;

(e) the prosecution of separate actions by individual members of the Class would create a risk of inconsistent or varying adjudications with respect to individual members of the Class, which would establish incompatible standards of conduct for the party opposing the Class;

(f) Defendants have acted on grounds generally applicable to the Class with respect to the matters complained of herein, thereby making appropriate the relief sought herein with respect to the Class as a whole; and

(g) a class action is superior to other available methods for fairly and efficiently adjudicating the controversy.

SUBSTANTIVE ALLEGATIONS

The Proposed Transaction

28. On December 17, 2018, the Company and PARENT issued a joint press release announcing the Proposed Transaction. The press release stated, in relevant part:

Tivity Health to Acquire Nutrisystem for $1.3 Billion in Cash and Stock

* * *

The combined company will be unique in offering, at scale, an integrated portfolio of fitness, nutrition and social engagement solutions to support overall health and wellness. Through this expanded portfolio, Tivity Health will be better positioned to address weight management – a major factor contributing to many chronic diseases. The diversification of Tivity Health's portfolio and increased scale will benefit all the company's stakeholders – including health plans, fitness partners, members and consumers – as these offerings support healthier lifestyles and can lower medical costs. Tens of millions of Americans are currently eligible for Tivity Health's SilverSneakers®, Prime® Fitness, WholeHealth Living™and flip50™ programs, and millions of people have lost weight with Nutrisystem's products, including Nutrisystem®, South Beach Diet® and DNA BodyBlueprint™.

This transaction will also create meaningful value for Tivity Health's shareholders through the addition of a new independent revenue stream, cost and revenue synergies, and significant potential growth opportunities. The combination of Tivity Health's and Nutrisystem's highly trusted brands and strong marketing and data analytics expertise will allow the combined company to increase awareness and member enrollment and engagement across all consumer audiences. The acquisition of Nutrisystem will further elevate Tivity Health as a leading health and wellness company offering comprehensive fitness, nutrition and social engagement solutions. Based on the financial results for both companies for the 12 months ended September 30, 2018, pro forma revenue would have been approximately $1.3 billion, net income would have been approximately $135 million and adjusted EBITDA would have been approximately $223 million. See the table appended to this release for a reconciliation of non-GAAP financial measures.

"The acquisition of Nutrisystem is an exciting and transformational event for Tivity Health as we expand our portfolio of healthy lifestyle brands," said Donato Tramuto, Tivity Health's Chief Executive Officer. "Tivity Health and Nutrisystem share the same mission-driven culture and have highly talented, motivated colleagues. Tivity Health has the opportunity to accelerate its already impressive growth with the addition of Nutrisystem. Our combined platform has the potential to attract new users, increase enrollment, and enhance engagement among the loyal customers and members of both companies. Many of the most common chronic conditions afflicting Americans today are associated with weight management, nutrition and physical fitness, and addressing both calories in and calories out is an important part of alleviating those conditions. Today, Tivity Health manages calories out with our SilverSneakers®, Prime® Fitness and flip50™ programs; and Nutrisystem manages calories in with its weight loss solutions. We believe combining our two companies will create entirely new value propositions for our health plans, fitness partners, members and

consumers."

"Today marks an important milestone in Nutrisystem's 45-year history, as through this transaction, we will become part of a leading health and wellness company that will offer a broad range of nutrition, fitness and social engagement solutions to our customers. This transaction will provide our shareholders with significant value and the opportunity to participate in the upside potential of the combined company through ownership of Tivity Health stock," said Dawn Zier, President and Chief Executive Officer of Nutrisystem. "Tivity Health and Nutrisystem share a common strategic vision, mission and culture, and we look forward to working with the Tivity Health team to take the combined organization to the next level."

Upon closing of the acquisition, Tivity Health expects to maintain all existing Nutrisystem brands, as well as Nutrisystem's Fort Washington, PA location. Additionally, Dawn Zier will become President and Chief Operating Officer of Tivity Health reporting to Tivity Health CEO Donato Tramuto. She will be responsible for Tivity Health's nutrition and fitness divisions and will join the company's Board of Directors.

Transaction Details

Under the terms of the merger agreement, each outstanding share of Nutrisystem stock will be exchanged for $38.75 in cash and 0.2141 shares of Tivity Health common stock. Upon closing, Tivity Health shareholders are expected to own approximately 87% of the pro forma company on a fully diluted basis.

Tivity Health will finance the cash portion of the acquisition with fully committed term loan financing from Credit Suisse and existing cash on hand. At the closing of the transaction, Tivity Health's pro forma net leverage is expected to be approximately 4.4x, including the benefit of identified cost synergies. Tivity Health expects to reduce net leverage to less than 3.5x by the end of 2020, and less than 2.5x by the end of 2021.

The transaction is expected to close in the first quarter of 2019, subject to the approval of Nutrisystem shareholders, the receipt of regulatory approval and other customary closing conditions.

Advisors

Credit Suisse acted as exclusive financial advisor to Tivity Health and Bass, Berry & Sims PLC served as legal counsel. Evercore acted as exclusive financial advisor to Nutrisystem and Davis Polk & Wardwell LLP served as legal counsel.

29. The Merger Consideration is unfair because, among other things, the intrinsic value of the Company is in excess of the amount the Company’s stockholders will receive in

connection with the Proposed Transaction.

30. It is therefore imperative that the Company common stockholders receive the material information that Defendants have omitted from the Proxy so that they can meaningfully assess whether the Proposed Transaction is in their best interests prior to the vote.

THE MERGER AGREEMENT

31. Section 6.3 of the Merger Agreement provides for a "no solicitation" clause that prevents Nutrisystem from soliciting alternative proposals and constrains its ability to negotiate with potential buyers:

> Section 6.3 No Solicitation
>
> (a) Except as otherwise permitted by the other clauses of this Section 6.3, from and after the date hereof until the Effective Time or, if earlier, the termination of this Agreement in accordance with Article VIII, none of the Company or any of its Subsidiaries shall, and the Company shall instruct its Representatives not to, directly or indirectly, (i) whether publicly or otherwise, initiate or solicit the submission of any offer, inquiry, proposal or indication of interest that constitutes, or would reasonably be expected to lead to, an Acquisition Proposal, (ii) furnish to any third party any non-public information relating to the Company or any of its Subsidiaries, or afford to any third party access to the business, books, records or other non-public information, or to any personnel, of the Company or any of the Subsidiaries of the Company, in any such case with the intent to encourage or induce the making, submission or announcement of any offer, inquiry, proposal or indication of interest that constitutes, or would reasonably be expected to lead to, an Acquisition Proposal, (iii) enter into, conduct, participate, maintain or engage in any discussions or negotiations with any third party with respect to any offer, inquiry, proposal or indication of interest that constitutes, or would reasonably be expected to lead to, an Acquisition Proposal (other than solely to (x) inform any third party of the existence of the provisions contained in this Section 6.3 or (y) seek clarification regarding the terms or conditions of any offer, inquiry, proposal or indication of interest), (iv) approve, adopt, declare advisable or recommend an Acquisition Proposal, (v) withdraw (or qualify, amend or modify in any manner adverse to PARENT or Merger Sub) the Company Board Recommendation, (vi) fail to include the Company Board

Recommendation in the Proxy Statement/Prospectus, (vii) if a tender offer or exchange offer that constitutes an Acquisition Proposal is commenced, fail to publicly recommend against acceptance of such tender offer or exchange offer by the Company's stockholders (including, for these purposes, by disclosing that it is taking no position with respect to the acceptance of such tender offer or exchange offer by the Company's stockholders, which shall constitute a failure to recommend against acceptance of such tender offer or exchange offer) by the close of business on the 10th business day after the commencement thereof pursuant to Rule 14d-2 under the Exchange Act (it being understood and agreed that the Company's Board of Directors may take no position with respect to such tender offer or exchange offer during the period referred to in this clause), (viii) other than with respect to any tender offer or exchange offer, fail to publicly reaffirm the Company Board Recommendation within 10 Business Days following PARENT's reasonable written request for the same, (ix) enter into any letter of intent, memorandum of understanding, agreement in principle or other similar document, or any Contract providing for any Acquisition Proposal or requiring the Company to abandon, terminate or fail to consummate, the Merger, or (x) resolve, publicly propose or agree to do any of the foregoing (any action set forth in the foregoing clauses (iv), (v), (vi), (vii), (viii) or (x) (to the extent related to the foregoing clauses (iv), (v), (vi), (vii), or (viii)), a "Change of Board Recommendation"). The Company shall immediately cease and cause to be terminated any and all existing activities, discussions or negotiations with any Persons (other than PARENT) conducted prior to or as of the date hereof by the Company or any of its Subsidiaries, and will instruct its Representatives to cease and cause to be terminated any and all existing activities, discussions or negotiations, that would reasonably be expected to lead to any Acquisition Proposal, and shall, as promptly as practicable, terminate access by each such Person and its Representatives to any online or other data rooms containing any non-public information in respect of the Company or any of its Subsidiaries for the purpose of permitting such Persons to evaluate a potential Acquisition Proposal. The Company shall, as soon as practicable following the date hereof, request of each Person that has, during the 12 months prior to the date hereof, executed a confidentiality agreement in connection with its consideration of an Acquisition Proposal, to promptly return or destroy all confidential information furnished prior to the execution of this Agreement to or for the benefit of such Person by or on behalf of the Company or any of its Subsidiaries

32. In addition, Section 8.3 of the Merger Agreement requires Nutrisystem to pay $45 million as a "termination fee" to PARENT in the event this agreement is terminated by Nutrisystem and improperly constrains Nutrisystem from obtaining a superior offer.

THE MATERIALLY INCOMPLETE AND MISLEADING PROXY

33. On January 7, 2019, Defendants filed an incomplete and misleading Proxy with the SEC and disseminated it to the Company's stockholders. The Proxy solicits the Company's stockholders to vote in favor of the Proposed Transaction.

34. Defendants were obligated to carefully review the Proxy before it was filed with the SEC and disseminated to the Company's stockholders to ensure that it did not contain any material misrepresentations or omissions.

35. First, the Proxy describes the fairness opinion of the Company's financial advisor, Evercore, and the various valuation analyses it performed in support of its opinion. However, the description of Evercore's fairness opinion and analyses fails to include key inputs and assumptions underlying these analyses. Without this information, the Company's stockholders are unable to fully understand these analyses and, thus, are unable to determine what weight, if any, to place on Evercore's fairness opinion in determining whether to vote their shares in favor of the Proposed Transaction. This omitted information, if disclosed, would significantly alter the total mix of information available to the Company's common stockholders.

36. For example, in completing its analysis Evercore compared Nutrisystem to eight comparable public companies on the basis of total enterprise value based on 2019 estimated EBITDA and 2019 estimated price-to-earning ("P/E") multiples. The median and average multiples for the group of comparable companies are 11.8x (EBITDA) and 19.3x (P/E). Evercore then "applied a reference range" of 8.5x and 11.5x EBITDA, and 15.0x to 20.0x for

P/E to Nutrisystem's projections. At the lower end this reflects approximately a 30% discount to the median multiples. Evercore provided no explanation for this 30% discount. This information must be disclosed to make the Proxy not materially misleading to Nutrisystem stockholders.

37. Evercore's analysis relies on management's projections of EBITDA and earnings per share for Nutrisystem. However, the Proxy discloses only projected revenue, EBITDA and free cash flow. The earnings per share projections are not included in the Proxy. This information must be disclosed to make the Proxy not materially misleading to Nutrisystem stockholders.

38. Evercore calculated the present value of Nutrisystem stock based on: (a) a next twelve months ("NTM") EBITDA multiple range of 8.5x – 11.5x; plus (b) expected quarterly dividends of $0.25 per share. Evercore discounted this by 10.5%, the cost of equity for Nutrisystem to arrive at implied value of $38 - $49 per share. The dividend component is based on management's estimates for future dividends and equals the company's current quarterly dividend. However, Nutrisystem increased its dividend last March by approximately 40%. Management's projections reflect free cash flow ("FCF") growth of about 8% over the forecast period. More information must be provided to make the Proxy not materially misleading to Nutrisystem stockholders.

39. Evercore's analysis fails to include any analysis of PARENT. The Proposed Transaction includes a PARENT stock component of approximately 18% of the total purchase price (as of the announcement date). This information must be disclosed to make the Proxy not materially misleading to Nutrisystem stockholders.

40. In sum, the omission of the above-referenced information renders the Proxy

materially incomplete and misleading, in contravention of the Exchange Act. Absent disclosure of the foregoing material information prior to the upcoming stockholder vote, Plaintiff and the other members of the Class will be unable to make an informed decision regarding whether to vote their shares in favor of the Proposed Transaction, and they are thus threatened with irreparable harm, warranting the injunctive relief sought herein.

COUNT I

AGAINST ALL DEFENDANTS FOR VIOLATIONS OF SECTION 14(A) OF THE EXCHANGE ACT AND RULE 14A-9 PROMULGATED THEREUNDER

41. Plaintiff incorporates each and every allegation set forth above as if fully set forth herein.

42. Section 14(a)(1) of the Exchange Act makes it "unlawful for any person, by the use of the mails or by any means or instrumentality of interstate commerce or of any facility of a national securities exchange or otherwise, in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors, to solicit or to permit the use of his name to solicit any proxy or consent or authorization in respect of any security (other than an exempted security) registered pursuant to section 78l of this title." 15 U.S.C. § 78n(a)(1).

43. Rule 14a-9, promulgated by the SEC pursuant to Section 14(a) of the Exchange Act, provides that communications with stockholders in a recommendation statement shall not contain "any statement which, at the time and in the light of the circumstances under which it is made, is false or misleading with respect to any material fact, or which omits to state any material fact necessary in order to make the statements therein not false or misleading." 17 C.F.R. § 240.14a-9.

44. Defendants have issued the Proxy with the intention of soliciting the support of stockholders for the Proposed Transaction. Upon information and belief, each Defendant reviewed and authorized the dissemination of the Proxy, which fails to provide critical information detailed above.

45. In so doing, Defendants made untrue statements of material fact and/or omitted material facts necessary to make the statements made not misleading. Each Defendant, by virtue of their roles in the Proposed Transaction, was aware of the omitted material information but failed to disclose such information, in violation of Section 14(a). Defendants therefore had reasonable grounds to believe material facts existed that were misstated or omitted from the Proxy, but nonetheless failed to obtain and disclose such information to stockholders although they could have done so without extraordinary effort.

46. The Proxy is materially misleading and omits material facts that are necessary to render it not misleading. Defendants undoubtedly reviewed and relied upon the omitted information identified above in connection with their decision to approve and recommend the Proposed Merger.

47. Defendants knew or should have known that the material information identified above has been omitted from the Proxy, rendering the sections of the Proxy identified above to be materially incomplete and misleading. Indeed, Defendants were required to be particularly attentive to the procedures followed in preparing the Proxy and review it carefully before it was disseminated, to corroborate that there are no material misstatements or omissions.

48. Defendants violated the securities laws in preparing and reviewing the Proxy. The preparation of a registration statement by corporate insiders containing materially false or misleading statements or omitting a material fact violates securities laws. Defendants and the

Individual Defendants chose to omit material information from the Proxy or failed to notice the material omissions in the Proxy upon reviewing it, which the Individual Defendants were required to do in their roles as officers and directors of the Company.

49. The misrepresentations and omissions in the Proxy are material to Plaintiff and the Company's other stockholders, each of whom will be deprived of their right to cast an informed vote if such misrepresentations and omissions are not corrected prior to the vote on the Proposed Transaction.

50. Plaintiff and the Company's other stockholders have no adequate remedy at law. Only through the exercise of this Court's equitable powers can Plaintiff and the Company's other stockholders be fully protected from the immediate and irreparable injury that Defendants' actions threaten to inflict.

COUNT II

AGAINST THE INDIVIDUAL DEFENDANTS FOR VIOLATIONS OF SECTION 20(A) OF THE EXCHANGE ACT

51. Plaintiff incorporates each and every allegation set forth above as if fully set forth herein.

52. The Individual Defendants acted as controlling persons of the Company within the meaning of Section 20(a) of the Exchange Act as alleged herein. By virtue of their positions as officers and/or directors of the Company, and participation in and/or awareness of the Company's operations and/or intimate knowledge of the incomplete and misleading statements contained in the Proxy filed with the SEC, they had the power to influence and control and did influence and control, directly or indirectly, the decision making of the Company, including the content and dissemination of the various statements that Plaintiff contends are materially incomplete and misleading.

53. Each of the Individual Defendants was provided with, or had unlimited access to, copies of the Proxy and other statements alleged by Plaintiff to be misleading prior to and/or shortly after these statements were issued and had the ability to prevent the issuance of the statements or cause the statements to be corrected.

54. In particular, each of the Individual Defendants had direct and supervisory involvement in the day-to-day operations of the Company, and, therefore, is presumed to have had the power to control or influence the particular transactions giving rise to the Exchange Act violations alleged herein and exercised the same. The Proxy at issue contains the unanimous recommendation of each of the Individual Defendants to approve the Proposed Transaction. They were thus directly involved in preparing this document.

55. In addition, as set forth in the Proxy sets forth at length and described herein, the Individual Defendants were involved in negotiating, reviewing, and approving the Merger Agreement. The Proxy purports to describe the various issues and information that the Individual Defendants reviewed and considered. The Individual Defendants participated in drafting and/or gave their input on the content of those descriptions.

56. By virtue of the foregoing, the Individual Defendants have violated Section 20(a) of the Exchange Act.

57. As set forth above, the Individual Defendants had the ability to exercise control over and did control a person or persons who have each violated Section 14(a) and Rule 14a-9 by their acts and omissions as alleged herein. By virtue of their positions as controlling persons, these Defendants are liable pursuant to Section 20(a) of the Exchange Act. As a direct and proximate result of Individual Defendants' conduct, Plaintiff will be irreparably harmed.

58. Plaintiff has no adequate remedy at law. Only through the exercise of this Court's

equitable powers can Plaintiff and the Company's other stockholders be fully protected from the immediate and irreparable injury that Defendants' actions threaten to inflict.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff prays for judgment and relief as follows:

(A) declaring that the Proxy is materially false and/or misleading;

(B) enjoining, preliminarily and permanently, the Proposed Transaction until the Proxy is cured;

(C) in the event that the transaction is consummated before the entry of this Court's final judgment, rescinding it or awarding Plaintiff rescissory damages;

(D) directing that Defendants account to Plaintiff for all damages caused by them and account for all profits and any special benefits obtained as a result of their breaches of their fiduciary duties.

(E) awarding Plaintiff the costs of this action, including a reasonable allowance for the fees and expenses of Plaintiff's attorneys and experts; and

(F) granting Plaintiff such further relief as the Court deems just and proper.

JURY DEMAND

Plaintiff demands a trial by jury on all issues so triable.

Dated: January 9, 2019

O'KELLY ERNST & JOYCE, LLC

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