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Case No. 2018-0804-KSJM

**IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE**

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| THOMAS S. HOWLAND, JR., derivatively on behalf of ANIXA BIOSCIENCES, INC. (f/k/a ITUS CORPORATION),<br><br>Plaintiff,<br><br>v.<br><br>AMIT KUMAR, LEWIS H. TITTERTON, JR., ARNOLD M. BASKIES, JOHN MONAHAN, MICHAEL J. CATELANI, JOHN A. ROOP, ANTHONY CAMPISI, and DALE FOX,<br><br>Defendants,<br><br>and<br><br>ANIXA BIOSCIENCES, INC. (f/k/a ITUS CORPORATION),<br><br>Nominal Defendant. | C.A. No. _____ |

**VERIFIED SHAREHOLDER DERIVATIVE COMPLAINT**

Plaintiff Thomas S. Howland, Jr., by and through his undersigned counsel, brings this action derivatively in the right of, and for the benefit of, nominal defendant Anixa Biosciences, Inc. (formerly known as ITUS Corporation) ("Anixa" or the "Company") against certain of the Company's officers and directors

(collectively, the "Defendants" as individually defined below), to remedy Defendants' breaches of fiduciary duties which have caused and will continue to cause, damage to the Company. Plaintiff alleges herein upon the review of books and records produced by the Company pursuant to a demand made by Plaintiff under 8 *Del. C.* §220, the Company's public filings, personal knowledge as to his own acts, and information and belief as to all other matters, as follows:

## PRELIMINARY STATEMENT

1. This case arises from Defendants' complete disregard for the Company's financial well-being and Defendants' disregard for fiduciary duties owed to the Company and the Company's shareholders. Defendants, especially Kumar and Titterton, grossly abused their corporate roles, ignored their fiduciary duties and other legal prohibitions against using inside information, and treated (and continues to treat) the Company as if it is a private company not subject to any rules or oversight by, among other things but for purposes of the present action, improperly engaging in self-dealing transactions for the purpose of enriching themselves. In 2017, Defendants were involved in a grossly improper re-pricing of certain Company stock options (the "2017 Re-pricing"), based entirely upon inside information.

2. Through the 2017 Re-pricing, Defendants have shown a complete disregard for their fiduciary duties to the Company and the Company's

shareholders. This conduct, along with a prior questionable re-pricing in 2015 (the "2015 Re-pricing") exposed (and continues to expose) the Company to potential Securities and Exchange Commission ("SEC") investigations into regulations violations and violations of federal or state law.

3. In addition to damages on behalf of the Company, Plaintiff seeks various corporate reforms to prevent future re-pricings designed to garner personal benefit for directors and officers without any basis or other corporate stunts under the cover of compensation.

## PARTIES

4. Plaintiff Thomas S. Howland, Jr. ("Howland" or "Plaintiff"), is a shareholder of the Company and has been a shareholder of the Company during all relevant times of the allegations in this Complaint.

5. Defendant Amit Kumar ("Kumar") is Chairman of the Company's Board of Directors (the "Board"), and the Company's President and Chief Executive Officer. Kumar, who is sued in his capacity as an officer and as a director, personally benefitted from the 2017 Re-pricing and attended the Company's Compensation Committee meeting at which the 2017 Re-pricing was authorized.

6. Defendant Lewis H. Titterton, Jr. ("Titterton") is a member of the Board and was a member of the Compensation Committee at the time of the 2017 Re-pricing. Titterton personally benefitted from the 2017 Re-pricing.

7. Defendant Arnold M. Baskies ("Baskies") is a member of the Board and was a member of the Compensation Committee at the time of the 2017 Re-pricing. Baskies personally benefited from the 2017 Re-pricing.

8. Defendant John Monahan ("Monahan") is a member of the Board. Monahan personally benefitted from the 2017 Re-pricing.

9. As of the filing of this Verified Complaint, the board was comprised of Kumar, Titterton, Baskies, Monahan, and David Cavalier ("Cavalier"). At the present time, Cavalier is not named as a defendant.

10. Defendant Michael J. Catelani ("Catelani") is the Company's Chief Operating Officer and Chief Financial Officer. Catelani personally benefited from the 2017 Re-pricing and attended the Compensation Committee meeting where the 2017 Re-pricing was authorized. Catelani is listed on the Company's website as a member of the Company's management team.

11. Defendant John A. Roop ("Roop") is the Senior Vice President of Engineering, and personally benefitted from the 2017 Re-pricing. Roop is listed on the Company's website as a member of the Company's management team.

12. Defendant Anthony Campisi ("Campisi") is the Vice President of Engineering. Campisi personally benefitted from the 2017 Re-pricing. Campisi is listed on the Company's website as a member of the Company's management team.

13. Defendant Dale Fox ("Fox") was a director at the time of the 2017 Re-pricing and personally benefitted from the 2017 Re-pricing. Fox resigned from the Board on or about September 22, 2017.

14. Nominal Defendant Anixa Biosciences, Inc. is a Delaware corporation with principal executive offices located at 3150 Almaden Expressway, Suite 250 San Jose, California 95118. Anixa is a biotechnology company focused on using the body's immune system to fight cancer. The Company was formerly known as ITUS Corporation, but announced a name change to Anixa effective October 1, 2018. Anixa's stock trades on NASDAQ under the stock symbol "ANIX." Anixa's registered agent for service of process within the State of Delaware is The Corporation Trust Company, Corporation Trust Center, 1209 Orange Street, Wilmington, Delaware, 19801.

## JURISDICTION AND VENUE

15. The Court of Chancery has jurisdiction over actions brought against Delaware corporations, such as Anixa, pursuant to 10 *Del. C.* § 3111.

16. The Court of Chancery has personal jurisdiction over the individual defendants pursuant to 10 *Del. C.* § 3114.

17. Venue lies before the Court of Chancery inasmuch as Plaintiff's claims invoke the Court's equitable jurisdiction and seek, in whole or in part, relief of an equitable nature.

## FACTUAL BACKGROUND

### A. The Prelude: The 2015 Re-pricing

18. On January 28, 2015, the then-Board of Directors of the Company authorized the re-pricing of certain stock options outstanding for all officers, directors, and employees at any time prior to February 16, 2015 (the "2015 Authorization").

19. The 2015 Authorization occurred just one day before the Company issued a press release, on January 29, 2015, showing that the Company experienced an 840% increase in revenue over the previous fiscal year (2013).

20. Then, in accordance with the 2015 Authorization, on February 5, 2015, 54.6 million common stock shares, including 6 million of Titterton's options, 17 million of Kumar's options, and 450,000 of Fox's options were re-priced (the "2015 Re-pricing").

21. The 2015 Re-pricing, from which Titterton, Kumar, and Fox personally benefitted and which violated the Stock Option Plan, first alerted Plaintiff to the Board's deceptive practices.

### B. The Breach of Fiduciary Duties Begins: The Patent

22. By press release on May 10, 2017 (the "May Press Release"), the Company merely notified the public that the United States Patent and Trademark Office (the "USPTO") issued a "Notice of Allowance" for a patent for the

Company's Cchek early-detection cancer test technology. *See* May 10, 2017 press release, attached hereto as Exhibit "A." The May Press Release included a statement that the Company's Cchek technology's success was predicated on "what we hope will be several patents that we expect to receive to protect our cancer detection technology." *Id.*

23. As would be expected due to the immateriality of the information, the May Press Release had little effect on the price of the Company's common stock. On May 9, 2017, the common stock price closed at $1.15 and only rose $0.55 by the close of markets on May 10, 2017, after the May Press Release. Moreover, the Company's stock prices steadily declined, closing out the month of May at $0.84. *Id.*

24. On August 3, 2017, Kumar and Roop were notified that the USPTO would issue a patent to Anixa Diagnostics Corporation, a subsidiary of Anixa on August 22, 2017 for the Ccheck cancer diagnostic test (Patent No. 9,739,783) (the "Patent"). *See* e-mail to Kumar and Roop from Heather Glasson, attached hereto as Exhibit "B" (the Patent "will issue on August 22, 2017 and was assigned U.S. Patent Number 9,739,783") (emphasis added).

25. The Patent was issued on August 22, 2017. *See* letter to Kumar and Roop from Heather Glasson, attached hereto as Exhibit "C". The Company chose to not publicly disclose any of this information at the time.

## C. The 2017 Re-pricing

26. Understanding the impact on the Company's common stock value that news of the Patent's issuance would have, Defendants scrambled to call a special meeting of the Company's Compensation Committee (the "Special Meeting") in order to spring-load Defendants' options before news of the Patent's issuance went public and the Company's common stock price exploded.

27. On September 6, 2017, a mere 28 business days from receiving news that the Patent would definitely issue shortly, and with that material, non-public insider knowledge of the issuance of the Patent, Compensation Committee members Titterton and Baskies, in Kumar's and Catelani's presence, voted on and approved the re-pricing of 2,029,600 stock options held, in part, by the Defendants (the "2017 Authorization"). *See* Minutes of a Special Meeting of the Compensation Committee of ITUS Corporation, attached hereto as Exhibit "D." In yet another example of Defendants' willingness to disregard corporate formalities and Company policy if doing so generated a financial windfall, Defendants directly violated the Compensation Committee Charter (attached hereto as Exhibit "E") by discussing Kumar's compensation in Kumar's presence. Exhibit "D" at 1.

28. The 2017 Authorization was approved by the then-Board of Directors.[1]

[1] At the time of the 2017 Re-pricing, Defendants Kumar, Monahan, Titterton, Baskies, and Fox were members of the Board of Directors.

29. Indeed, on September 6, 2017, the then-Board of Directors re-priced the stock options of certain Company insiders to $0.67 – the common stock value at the close of trade on that date – from various original strike prices, ranging between $0.82 and $5.30 (the "2017 Re-Pricing"). *Id*. at 2. The then-Board repriced stock options to purchase 2,029,600 shares, including 880,000 shares belonging to Kumar, 262,400 shares belonging to Titterton, 250,000 shares belonging to Catelani, 42,000 shares belonging to Fox, 18,000 shares belonging to Baskies and 18,000 shares belonging to Monahan.

30. The 2017 Re-pricing was done a mere twelve days before the Company finally decided to publicly disclose the Patent's issuance.

31. This conduct, along with a prior questionable re-pricing in 2015 (the "2015 Re-pricing") exposed the Company to potential Securities and Exchange Commission ("SEC") investigations into regulations violations and violations of federal and/or state law.

**D. <u>The Eventual Public Disclosure</u>**

32. Although Defendants had many opportunities to disclose the Patent's issuance to the Company's shareholders and the public, the Defendants failed to do so for a month and a half after becoming aware the Patent's issuance. Rather, the Defendants kept the information secret and used it to improperly re-price their own

stock options and to extort personal financial windfalls at the Company's and shareholders' expense.

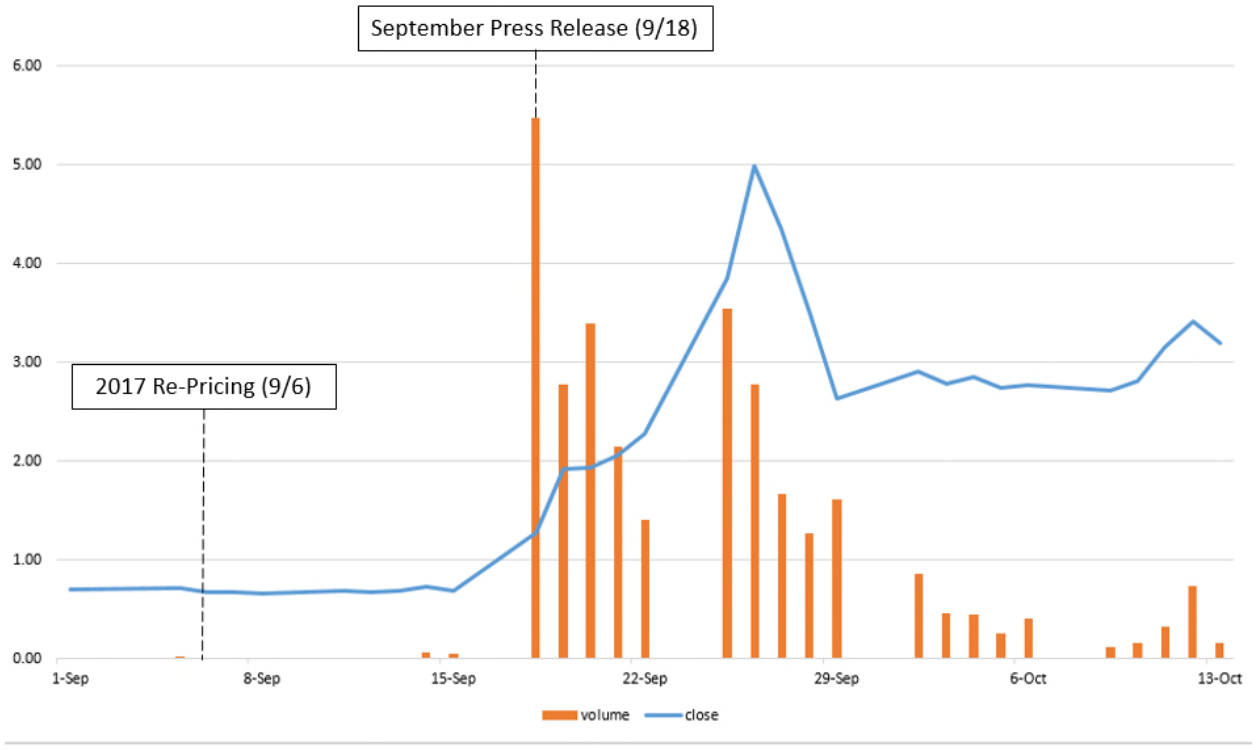
33. On September 8, 2017, after receiving notice of the Patent's issuance and after the 2017 Re-pricing, the Company filed a Form 10-Q with the SEC. The Form 10-Q disclosed the 2017 Re-pricing, and even discussed the Cchek technology at length; however, the Directors simply refused to publicly disclose the Patent's issuance, all while knowing the likely impact the public disclosure would have on the stock price.

34. The Company, after passing on a multitude of opportunities to publicly disclose the Patent's issuance (opportunities ncluding by disclosing in the Form 10-Q, by filing a Form 8-K, by making an earlier press release – none of which Defendants availed themselves), finally publicly announced the issuance of the Patent via press release on September 18, 2017 (the "September Press Release").

35. The September Press Release, as one would reasonably expect, affected the Company's common stock trading price significantly. On Friday, September 15, 2017, the Company's common stock closed the day trading at $0.69, with a trading volume of 209,959. The day after the September Press Release, the Company common stock closed trading at $1.28, with a trading volume of 22,764,730. News of the Patent significantly affected the Company common stock trading price in the

following days. Ultimately, the Company's common stock peaked on September 26, 2017, when it closed trading at $4.99.

36. The following chart, reflecting the trading volume and closing prices from September 1 to October 14, 2017, clearly demonstrates the effect of the September 18, 2017 public disclosure on the Company's stock and the financial windfall the Directors sought to obtain through the improper 2017 Re-pricing.




37. The very belated public disclosure was inadequate to prevent harm to the Company and its shareholders. In the time between becoming aware of the Patent's issuance and the dissemination of the September Press Release, the

Defendants' re-priced over 2 million options, including over 1.4 million of their own – all while possessing material, non-public information.

**E. Defendants' Exercise of Options**

38. Defendants used their insider knowledge of the Patent to secure a financial windfall in the wake of the September Press Release. In fact, Defendants Titterton and Fox each exercised options after the 2017 Re-pricing.

39. On October 16, 2017, Fox exercised at least 42,000 re-priced options. *Id.*

40. On October 19, Titterton exercised at least 2,400 re-priced options. *Id.*

41. Furthermore, in the Rejection Letter, the Company states that the Board is unware of whether certain directors sold shares of ITUS stock. *Id.*

**F. Plaintiff's Demand for Books and Records Pursuant to Section 220**

42. After having his suspicion raised by the Board's highly questionable actions in connection with the 2015 Re-pricing, Plaintiff learned of the 2017 Re-pricing and the timing of the 2017 Re-pricing with regard to the news the Company had issued days later causing a substantial increase in the price of the stock. The suspicion, it turns out, was well-grounded.

43. Plaintiff retained Delaware counsel to prepare a 220 demand for books and records. In preparation of the 220 demand, an extensive investigation on behalf of Plaintiff of publicly available documents and SEC filings revealed potentially

serious acts of mismanagement and various breaches of fiduciary duty by Defendants in connection with Defendants' advanced, insider knowledge of the Patent's issuance and the timing of the 2017 Re-pricing. This mismanagement includes the then-Board's misuse of non-public information, material misrepresentations relating to officer and director compensation, and the misuse of Company intellectual property to generate a personal windfall for Defendants.

44. On November 8, 2017, Plaintiff sent a 220 demand letter to the Company's then-Board of Directors requesting various documents relating to the 2017 Re-pricing (the "220 Demand"). The stated purpose of the 220 Demand was to ascertain whether there had been mismanagement, waste, wrongdoing, or any breach of fiduciary duty by any Company officer, director, agent or representative in connection with the 2017 Re-pricing. In addition, the 220 Demand sought "recovery of the Company's damages and [to] formulat[e] proposals to improve [the Company's] corporate governance compliance practices so as to prevent a recurrence of the wrongdoing."

45. Without regard to the serious allegations of insider trading and associated breaches of fiduciary duty in the 220 Demand, the Company, by letter from its outside counsel dated November 15, 2017, rejected Plaintiff's 220 Demand (the "Rejection Letter"). In the Rejection Letter, the Company admitted that Defendants Titterton and Fox exercised options after the 2017 Re-pricing when they

stood to substantially benefit from Defendants' insider knowledge of the Patent. Despite the then-Board's knowledge of this wrongdoing, the then-Board refused to take any action to protect the Company's and shareholders' interests. The Rejection Letter tried to cover up the timing of the re-pricing while Defendants were in possession of material, non-public information.

46. Despite the Rejection Letter, Plaintiff persisted in his efforts to secure the books and records sought in the 220 Demand. During those efforts and in light of the Company's refusal to produce documents, Plaintiff suggested that the Company solicit the advice of Delaware counsel in order to avoid burdening the Court with a complaint to enforce Plaintiff's rights in connection with his 220 Demand.

47. The Company eventually retained Delaware counsel with whom the discussions concerning the 220 Demand continued. After several rounds of discussions, the Company changed its position and agreed to, and did, produce many of the books and records sought by Plaintiff in the 220 Demand. This Verified Shareholder Derivative Complaint is based, in part, on the information gleaned directly from those books and records.

## G. Defendants' Breaches of Fiduciary Duties and Related Misconduct

48. Defendants, as officers and directors of the Company, owed fiduciary duties to the Company and the Company's shareholders, including the duties of

loyalty, good faith and candor, and were and are required to use their utmost ability to control and manage the Company in fair, just, honest, and equitable manner in furtherance of the best interests of the Company. Defendants were, and are, required to act so as to benefit all shareholders equally and not in furtherance of Defendants' personal interests or benefit.

49. In addition, Defendants have a duty to act in the Company's best interest without abusing Defendants' position to engage in self-dealing and potentially criminal activities through the use of insider information.

50. Because of Defendants' position of control and authority, Defendants were able to, and did, directly and/or indirectly, exercise control over the wrongful acts complained of herein.

51. While the 2015 Re-pricing was of questionable propriety, Defendants certainly took advantage of the next opportunity presented to them to use inside, material, non-public information to their personal advantage in connection with the 2017 Re-pricing of options.

52. By calling the Special Meeting after Company insiders knew of the Patent but before such news was publicly disclosed, Defendants either participated in, or assented to the use of insider knowledge, without investing any time into assessing what impact the 2017 Re-pricing would have on the Company's financials,

director and officer compensation, or the legal ramification for the Company and shareholders alike.

53. The 2017 Re-pricing affected approximately 2 million stock options. A significant portion of the affected options belonged to Company directors and officers possessing material, non-public knowledge of the Patent's issuance and the impending associated Public Disclosure.

54. Through the 2017 Re-pricing, Defendants have shown a complete disregard for their fiduciary duties to the Company and the Company's shareholders in an attempt to personally benefit from the Company's intellectual property by abusing Defendants' position within the Company.

55. In addition to damages on behalf of the Company, Plaintiff seeks various corporate governance reforms to prevent future issuances of options or re-pricing of options under improper circumstances, including while having material, non-public information, designed solely to enrich the Company's favored officers and directors.

56. Until Plaintiff became involved in an investigation into the 2017 Re-pricing, the Company had made no efforts to rectify the issues created by the Defendants' breaches and misconduct and the resulting re-priced options.

## DERIVATIVE AND DEMAND EXCUSED ALLEGATIONS

57. Plaintiff has not made a demand on the Company's Board of Directors to bring suit asserting the claims set forth herein because pre-suit demand was excused as a matter of law.

58. Plaintiff brings this action derivatively in the right, and for the benefit, of the Company to redress injuries suffered, and to be suffered by the Company as a direct result of the breaches of fiduciary duty, abuse of control, gross mismanagement, waste of corporate assets and unjust enrichment. The Company is named as a nominal defendant solely in a derivative capacity. This is not a collusive action to confer jurisdiction in this Court that it would not otherwise have.

59. Plaintiff will adequately and fairly represent the interests of the Company and its shareholders in enforcing and prosecuting his rights.

60. Plaintiff is an owner of the Company's common stock and was an owner of the Company's common stock at all times relevant to the wrongful course of conduct alleged herein.

61. At the time that this action was commenced, the Company's Board consisted of Kumar, Monahan, Titterton, Baskies and Cavalier.

62. As a result of the facts set forth herein, Plaintiff has not made any demand on the Company's Board to institute this action. Such demand would be a futile and useless act because, a majority of the Board (four of the five members:

Kumar, Monahan, Titterton and Baskies) are direct beneficiaries of the 2017 Re-pricing and are liable for breaching their fiduciary duties to the Company and its shareholders. Thus, the Board is incapable of making an independent and disinterested decision to institute and vigorously prosecute this action against themselves.

63. Moreover, despite the Board having knowledge of the potential claims and causes of action raised by Plaintiff, the Board has failed and refused to seek to recover for the Company for any of the wrongdoing alleged by Plaintiff herein.

64. The transactions and actions complained of herein are not the product of a valid exercise of business judgment.

65. Furthermore, the conduct alleged herein could not have been the product of good faith business judgment, and the Board faces a substantial likelihood of liability for breaching the Board's fiduciary duties because, through the Board's intentional misconduct, the Board has subjected the Company to substantial damages.

## COUNT I
## DERIVATIVELY, AGAINST THE DEFENDANTS
## BREACH OF FIDUCIARY DUTY

66. Plaintiff incorporates by reference each of the preceding paragraphs as though they were set forth in full herein.

67. As officers and/or directors of the Company, each of the Defendants owed the Company and its shareholders the fiduciary obligations of loyalty, good faith, and due care. Defendants were and are required to act in furtherance of the best interests of the Company and the Company's shareholders so as to benefit all shareholders equally and not in furtherance of their personal interest or benefit.

68. In approving (or by abdication of duty permitting and/or accepting) the challenged 2017 Re-pricing discussed herein, the Defendants breached their fiduciary duties of loyalty and good faith. These actions were not a good faith exercise of prudent business judgment to protect and promote the Company's corporate interest, but rather lined the pockets of Defendants at the expense of the Company and the Company's shareholders.

69. In addition, Defendants breached their fiduciary duties by failing to disclose adequate financial and material information respecting the Company, withholding from shareholders certain insider information relating to the Patent in an effort to generate significant personal financial windfall.

70. Moreover, since the Compensation Committee and Re-Pricing Defendants stood on both sides of the challenged 2017 Re-pricing, the Re-pricing will be subject to the entire fairness standard of review.

71. The challenged 2017 Re-pricing discussed herein does not satisfy the entire fairness criteria. As described above, the challenged 2017 Re-pricing was the

product of unfair dealing initiated by self-interested Board members. The timing, structure, and disclosure of the 2017 Re-pricing were unfair. In addition, the new exercise price was artificially low, as it was based upon an ITUS common stock trading price dictated by outsiders who lacked the material insider knowledge of the Patent possessed by the Defendants who set in motion, approved, and/or benefitted from the 2017 Re-pricing.

72. Based on the foregoing conduct, Defendants were not acting in good faith toward the Company and breached Defendants' fiduciary duties.

73. As a direct and proximate result of Defendants' conscious failure to perform Defendants' fiduciary obligations, the Company has been and will continue to sustain significant damages as a result of the 2017 Re-pricing. The Company's reputation and corporate image in the business community, courts, and financial markets, as well as any goodwill it may have left, have been placed in jeopardy at a crucial time in the Company’s evolution when other patents pending relating to the Company's cancer detection technology must be obtained and maintained. The Company has sustained significant damages monetarily and remains exposed to potential SEC and other agency investigations.

74. As a result of the misconduct alleged herein, Defendants are liable to the Company.

75. Plaintiff, on behalf of the Company, has no adequate remedy at law.

## COUNT II
## DERIVATIVELY, AGAINST THE DEFENDANTS
## UNJUST ENRICHMENT

76. Plaintiff incorporates by reference each of the preceding paragraphs as though they were set forth in full herein.

77. Defendants have received and will receive excessive and unwarranted personal financial benefits as a result of the 2017 Re-pricing.

78. As alleged herein, the 2017 Re-pricing was based upon Defendants' insider knowledge of the Patent, which knowledge led to Defendants' obtaining spring-loaded options capable of generating Defendants a substantial financial windfall upon public disclosure of the Patent. It would be unconscionable and against fundamental principles of justice, equity, and good conscience for the Defendants to retain the benefits of the 2017 Re-pricing.

79. Defendants have been unjustly enriched at the expense of and to the detriment of the Company.

80. Accordingly, this Court should order Defendants to disgorge all profits and benefits obtained by Defendants, and each of them, from their wrongful conduct and fiduciary breaches described herein and should order that the options affected by the 2017 Re-pricing be rescinded or re-priced to the last exercise price before the 2017 Re-pricing.

81. Plaintiff has no adequate remedy at law.

## PRAYER FOR RELIEF

WHEREFORE, Plaintiff prays for judgment as follows:

(a) Declaring that Defendants breached their fiduciary duties to the Company and its shareholders;

(b) Declaring that Plaintiff may maintain this action on behalf of the Company and that Plaintiff is an adequate representative of the Company;

(c) Determining that this action is a proper derivative action maintainable under law and demand is excused;

(d) Determining and awarding to the Company the damages sustained by it as a result of the violations set forth above from Defendants, with interest thereon;

(e) Directing the Company to take all necessary actions to reform and improve its corporate governance and internal procedures to comply with the Delaware General Corporations Law and the Company's written shareholders' agreement;

(f) Awarding the Company damages, together with pre- and post-judgment interest to the Company;

(g) Awarding to Plaintiff the costs and disbursements of the action, including reasonable attorneys' fees, accountants' and experts' fees, costs, and expenses; and

(h) Granting such other and further relief as this Court deems just and equitable.

Dated: November 5, 2018

**FOX ROTHSCHILD LLP**

*/s/ Sidney S. Liebesman*

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