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Case No. 2017-0381-AGB

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

KENNETH CARR, individually and on behalf of all others similarly situated, and derivatively and on behalf of nominal defendant ADVANCED CARDIAC THERAPEUTICS, INC., Plaintiff, v. NEW ENTERPRISE ASSOCIATES, INC., PETER JUSTIN KLEIN, ROY T. TANAKA, DUKE S. ROHLEN, ARIS CONSTANTINIDES, WILLIAM OLSON, MICHAEL J. PEDERSON, NEW ENTERPRISE ASSOCIATES 14, L.P., NEA PARTNERS 14, LIMITED PARTNERSHIP, NEA 14 GP, LIMITED PARTNERSHIP, NEA VENTURES 2014, LIMITED PARTNERSHIP, and DUKE ROHLEN AND KENDALL SIMPSON ROHLEN, AS TRUSTEES OR SUCCESSOR TRUSTEE, OF THE ROHLEN REVOCABLE TRUST DATED U/A/D 6/12/98, Defendants, and ADVANCED CARDIAC THERAPEUTICS, INC., Nominal Defendant.	C.A. No. _____ PUBLIC REDACTED VERSION E-filed: May 23, 2017

VERIFIED CLASS ACTION AND DERIVATIVE COMPLAINT FOR BREACHES OF FIDUCIARY DUTY AND AIDING AND ABETTING

Plaintiff Kenneth Carr, by and through his undersigned counsel, on behalf of himself and all other similarly situated stockholders of Advanced Cardiac Therapeutics, Inc. ("ACT" or the "Company") and derivatively on behalf of ACT as a nominal defendant, brings the following complaint against New Enterprise Associates, Inc., Peter Justin Klein, Roy T. Tanaka, Duke Rohlen, Aris Constantides, William Olson, Michael J. Pederson, New Enterprise Associates 14, L.P., NEA Partners 14, Limited Partnership, NEA 14 GP, Limited Partnership, NEA Ventures 2014, Limited Partnership, and Duke S. Rohlen and Kendall Simpson Rohlen, as Trustees or Successor Trustee, of the Rohlen Revocable Trust Dated U/A/D 6/12/98. These Defendants consist of ACT's controlling stockholder and affiliates during certain events, and pertinent members of ACT's board of directors, all of whom conspired with each other between April 2, 2014 and October 29, 2014. Plaintiff makes the following allegations upon knowledge as to himself and upon information and belief (including the ongoing investigation of counsel) as to all other matters, as well as information provided to him by ACT pursuant to his demand to inspect books and records of ACT pursuant to 8 *Del. C.* § 220,[1] and alleges as follows:

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[1] ACT's Section 220 production was inadequate. The limited and selective responses to requests under 8 *Del. C.* §220 did not include any collection or production of emails, nor meaningful support for the fairness of Defendants' structure and completion of the April 2014 financing, which used for their benefit a small fraction of the valuation imputed by the hasty Abbott warrant.

SUMMARY OF THE ACTION

1. This action challenges how a venture capital firm, Defendant New Enterprise Associates, Inc. and certain of its affiliates ("NEA"), through control and influence over appointed and related directors and certain officers, diluted certain classes of stock in Advanced Cardiac Therapeutics, Inc. ("ACT"), while extracting value for NEA from simultaneous transactions involving ACT and other NEA portfolio companies.

2. In or about January 2014, NEA gained effective control over ACT's board of directors through a financing in which ACT issued Series A-1 preferred stock.

3. Shortly thereafter, in or about March 2014, NEA caused ACT to undergo management changes at the board and CEO levels. NEA caused Defendant Duke Rohlen to become CEO of ACT as he entered into a voting agreement at NEA's request.

4. [redacted]. NEA and its related directors caused ACT to price the Series A-2 financing at a valuation

that allowed NEA and NBGI to dilute certain other stockholders at a small fraction of the valuation applied to potential ACT warrants shortly thereafter.

5. [redacted] Olson had recently served as the CEO of ACT, but was removed in March 201 [redacted]. Tanaka served in other capacities at another NEA portfolio company, VytronUS, thereby making Tanaka also economically dependent on NEA.

6. On or about April 3, 2014, NEA caused the execution by certain stockholders, not including Plaintiff, of an Amended and Restated Voting Agreemen [redacted]. Through the April 2014 financing, NEA enhanced its control over the management of ACT.

7. As a result of the April 2014 financing, NEA and its affiliates solidified their position as the controlling stockholders of ACT. Upon doing so, between on or about April 2, 2014 and October 29, 2014, the Defendants proceeded to make

ACT available for a transaction that obtained benefits for NEA's other investments, which resulted in a triad of simultaneous deals between Abbott and three NEA portfolio companies.

8. [redacted]

9. [redacted]

10. [redacted]

11. [redacted]

12. The sale of a warrant to Abbott accompanied simultaneous transactions between two other NEA portfolio companies and Abbott and an affiliate. The largest financial component of the three-headed deal involved Abbott's payment for Topera, Inc., another NEA portfolio company, in an amount of at least $250 million, plus other compensation upon certain milestones. Upon information and belief, NEA and Abbott had co-invested in Topera since in or about April 2013.

13. Also as part of the three-headed deal with Abbott, another NEA portfolio company, VytronUS, receive [redacted] in funding from Abbott's investment arm, Abbott Ventures. Defendant Tanaka, whom the Company claimed was a disinterested director at relevant times, served as a director for VytronUS. Tanaka's status as a dual fiduciary created divided loyalties because of VytronUS's separate interests in the three-headed Abbott transaction and Tanaka's multi-faceted relationship with NEA.

14. [redacted] As a result, the warrant transaction with Abbott has provided no return for common stockholder [redacted]

15. The warrant transaction effectively locked up ACT for approximately two-and-a-half crucial years in which major medical device companies had been in acquisition mode seeking companies involved in ACT's area of business, ablation catheter technology. When engaging in three simultaneous transactions with three different NEA portfolio companies, Abbott described its foray into the catheter-based electrophysiology market as involving an approximately $3 billion global market that had been growing annually at double-digit rates. Yet the commitment to the Abbott warrant foreclosed ACT from enjoying the benefits of other transaction [redacted].

16. The October 2014 transaction also allowed Abbott access to ACT's trade secrets and personnel without an exclusivity commitment and in a manner that defeated, as a practical matter, confidentiality needs, naturally making ACT less valuable to Abbott by the end of the warrant period. Instead of exercising its warrant

rights, in 2016, Abbott acquired a competing product line from St. Jude Medical, Inc. as part of a $25 billion transaction.

17. While locking ACT up from July 2014 through March 2017, the Defendants allowed Abbott to obtain the services of Defendant Pederson and to learn essentially everything about ACT's products and technologies. So eager to benefit themselves in the 2014 financing and the October 2014 transaction, including the sale of Topera, the Defendants took no meaningful steps to prevent Abbott from working with and acquiring a competitor of ACT after obtaining full access to ACT's technology.

18. In 2016, Abbott agreed to acquire St. Jude Medical for $25 billion, including an ablation catheter product line competitive with ACT's business. In connection with seeking FTC approval of that transaction, Abbott agreed to divest several unrelated product lines, but not the ablation catheter products of St. Jude Medical.

19. By December 27, 2016, to complete its $25 billion acquisition of ACT's competitor, Abbott agreed in substance with the FTC not to exercise its warrant rights in ACT or otherwise acquire ACT's business or product lines without giving further notice to the FTC.

20. Since that time, [redacted], thereby making the warrant completely worthless to

ACT's stockholders who did not benefit from the Topera sale or the VytronUS investment.

JURISDICTION

21. This Court has jurisdiction over this action pursuant to 10 *Del. C.* § 341.

22. As directors of a Delaware corporation, the Individual Defendants have consented to the jurisdiction of this Court pursuant to 10 *Del. C.* § 3114.

23. This Court has jurisdiction over NEA and its affiliates pursuant to 10 *Del. C.* § 3111.

PARTIES

24. Plaintiff Kenneth Carr is an 85-year old, world-renowned inventor in the area of microwave radiometry technology and ablation catheter devices. He holds a doctorate degree in engineering. He has owned shares of ACT common stock continuously since prior to April 2014 through the present. At times prior to the Series A-1 and A-2 financings, Dr. Carr had been considered a key investor and the largest holder of ACT's common stock, in the amount of approximately 960,000 shares. Dr. Carr was a co-founder of ACT whose stock originally gave him an approximately 30% interest in the Company. Dr. Carr is one of, upon information and belief, more than 30 investors who purchased equity in ACT before the Series A-2 financing who did not participate in the Series A-2 financing.

25. Defendant New Enterprise Associates, Inc. is a corporation formed under the laws of Delaware. NEA holds itself out as the world's largest venture capital fund with more than $17 billion in committed capital across 15 funds. At relevant times NEA acted with its affiliates as the controlling stockholder of ACT, which itself is a corporation formed under the laws of Delaware.

26. Defendant Klein has been a member of ACT's board of directors since prior to the April 2014 financing through the present. NEA has held Klein out as follows:

> Partner on the healthcare team. He focuses on medical device, healthcare technology, and biopharmaceutical company investments. He serves as a director of **Advanced Cardiac Therapeutics**, Cartiva, FIRE1, Intact Vascular, Personal Genome Diagnostics, PhaseBio Pharmaceuticals, Relievant Medsystems, Senseonics (NYSE: SENS), VertiFlex, Vesper Medical, and **VytronUS**. Justin's past board memberships and investments include CV Ingenuity (acquired by Covidien), Nevro (NYSE: NVRO), **Topera** (acquired by Abbott), TriVascular (NASDAQ: TRIV), and Ulthera (acquired by Merz). He is also a member of the advisory boards for the National Venture Capital Association's Medical Industry Group and its Medical Innovation and Competitiveness Coalition (MedIC), as well as a member of AdvaMed's Business Development Committee.

(Emphases added). [redacted].

27. Defendant Tanaka has been a member of ACT's board of directors since prior to the April 2014 financing through the present. Tanaka has also served at relevant times on the board of directors of VytronUS, another NEA portfolio

company, thereby creating divided loyalties for Tanaka based on VytronUS's participation in the October 2014 transactions with Abbott and his multi-faceted relationship and economic interdependence with NEA.

28. Defendant Duke Rohlen has been a member of ACT's board of directors since prior to the April 2014 financing through the presen [redacted] At the time, Rohlen also served as CEO of Ajax Vascular, another NEA portfolio company. Rohlen had previously served as CEO of CV Ingenuity and the President of FoxHollow Technologies, yet two other NEA portfolio companies. [redacted] Upon information and belief, in or about early May 2017, fully aware that Dr. Carr had already accused him of breaching fiduciary duties and without prior notice to Dr. Carr, Rohlen led a new round of financing for ACT through a newly-established fund known as Ajax Health, for which he has been held out as CEO. NEA has held Rohlen out as a "serial entrepreneur within the NEA family. [redacted]

29. Defendant Aris Constantinides has been a member of ACT's board of directors since prior to the April 2014 financing through the present. Constantinides

has been at relevant times a venture capital fund partner at an entity known at the time as NBGI, which NEA allowed to purchase preferred stock with NEA affiliates in the April 2014 Series A-2 financing. Constantinides is connected to Defendants NEA and Klein through various venture capital investments in the medical device industry. NBGI and NEA share co-investors and have, at times similar to each other and the events in this action, sold different companies to the same acquirer. At relevant times, upon information and belief, Constantinides and NBGI viewed NEA as an important potential co-investor in future transactions in the medical technology space. [redacted]

30. Defendant William Olson has been a member of ACT's board of directors since prior to the April 2014 financing through the present. He had served as CEO of ACT [redacted]

[redacted] As a result, at the time of the April 2014 financing, Olson suffered from divided loyaltie [redacted] Also, Olson had previously served as a Vice President for FoxHollow Technologies, another NEA portfolio company.

31. Defendant Michael J. Pederson had been a member of ACT's board of directors since prior to the April 2014 financing through the October 29, 2014 warrant transaction. [redacted] He also served at the time as the President and CEO of VytronUS, another NEA portfolio company and part of the three-headed deal with Abbott in October 2014, at which time Pederson went to work for Abbot [redacted]

32. Defendants New Enterprise Associates 14, L.P., NEA Partners 14, Limited Partnership, and NEA 14 GP, Limited Partnership, NEA Ventures 2014, Limited Partnership, are limited partnerships controlled by Defendant New Enterprise Associates, Inc., all of which collectively, along with Defendants Duke S. Rohlen and Kendall Simpson Rohlen, as Trustees or Successor Trustee, of the Rohlen Revocable Trust Dated U/A/D 6/12/98, constituted the controlling stockholder of ACT between and including April 2014 and October 2014. At relevant times, all of these stockholder Defendants were connected in a legally significant way, by contract, overlapping ownership, agreement or other arrangement to work toward a shared goal.

33. Douglas Koo has served as the Chief Financial Officer of ACT since prior to April 2014 through the present. Koo co-founded and served as Chief Financial Officer of Ajax Capital, another NEA portfolio company. Koo also served as a Chief Financial Officer of CV Ingenuity, yet another NEA portfolio company.

34. James Huie has been the Secretary of ACT since prior to the April 2014 financing through the present.

Background of ACT

35. Plaintiff Carr co-founded ACT in or about 2007. He brought to ACT his experience as a prominent scientist and inventor in the field of microwave radiometry and medical devices, credited with more than 30 United States patents

and additional foreign filings as well. Dr. Carr is regarded as a pioneer in applying the inherent characteristics of electromagnetic energy to provide solutions for medical applications that have eluded more conventional approaches. Dr. Carr has received awards for innovation from government and industry.

36. Since the 1980s and into 2013, Dr. Carr developed microwave medical technology used in medical devices such as ablation catheters, most recently at his company, Meridian Medical Systems ("MMS"). After its founding, MMS engaged in projects with ACT and licensed certain of its technology to ACT.

37. ACT has described itself as a developer of cardiac ablation systems. NEA has held ACT out as one of its portfolio companies and "an early state medical device company developing a novel cardiac catheter ablation technology." ACT is a licensee of certain intellectual property rights related to patents issued for inventions by Dr. Carr.

38. ACT has also held itself out as follows:

> Advanced Cardiac Therapeutics, Inc. is a pre-commercial, medical device company that designs and manufactures a catheter-based system for the treatment of patients with AFIB. AFIB is characterized by an irregular, often rapid heart rate that commonly causes poor systemic blood flow. The Company's mission is to dramatically improve the treatment of AFIB through the introduction of products based on its proprietary catheter and generator system. ACT's technology is the only system in the world to leverage feedback from four unique capabilities: temperature sensing, low irrigation flow rates, high resolution EGM attenuation and contact sensing. The ACT system is not currently approved for commercial use.

39. By May 2011, ACT was the licensee in an agreement with MMS of "rights in certain patents, technology, rights and know-how related to the minimally invasive use of microwave energy to warm (ablate) and/or detect temperature and other physiologic differences in animal or human heart tissue, as related to the use of microwave radiometry alone, or in association with the delivery of RF or microwave energy for the treatment of cardiac arrhythmias."

40. The ablation catheter technology exploited by ACT results from decades of work and innovation by Dr. Carr. During the Cold War, Dr. Carr and his colleagues invented techniques for measuring electromagnetic energy considered as thermal radiation. Initially used for measuring the thermal activity of the earth from space, Dr. Carr has developed ways to use microwave radiometry to detect and measure microwave energy emanating from heat sources.

41. More than one-million people have been diagnosed with cardiac arrhythmia, a statistic that omits the likely many more who have the condition but do not know it. The condition generally consists of the heart beating too fast, too slow, or irregularly, and can include a wide range of other symptoms ranging from a loss of consciousness to seizures, cardiomyopathy and even death. Treatments can include ablation, which involves the destruction of tissue, defibrillator implants or drugs. Cardiac ablation often carries a risk of error based on an inability to measure

precisely the temperature of targeted tissue, leading to the wrong amount of treated tissue. Dr. Carr's work has helped improve the precision of cardiac ablation through the use of, among other things, microwave technology.

Medical Venture Capital Firm NEA

42. NEA is a venture capital firm that participates in, among other areas, the medical device industry. NEA holds itself out as the world's largest venture capital fund with more than $17 billion in committed capital across approximately 15 funds. ACT's regular outside counsel also regularly represents and advises NEA.

43. Upon information and belief, in or about April 2013, NEA and an Abbott affiliate co-invested together in a company known as Topera that has held itself out as a cardiac arrhythmia mapping company for targeting catheter ablation that specializes in mapping electrical signals of the heart.

March 2014 Management Changes

44. Following a January 2014 Series A-1 financing, which facilitated NEA's pursuit of control over ACT, NEA began causing changes in the Company's management to further increase its power over the Company.

45. First, Olson was removed as CEO and replaced with Rohlen, a member of the "NEA family." [redacted]

[redacted]

46. [redacted]

47. [redacted]

48. As a result of the concerted actions of the Defendants taken in March 2014, NEA dominated and controlled ACT's board of directors.

April 2014 Financing (Series A-2 Preferred)[2]

49. Almost immediately after the March 2014 actions, the Defendants turned to a Series A-2 financing that they used to dilute even further the interests of more than 30 stockholders who had invested prior to the Series A-2 financing and did not participate in that financing.

50. [redacted]

51. NEA used the Series A-2 financing to solidify its control over ACT [redacted]

[2] The parties have executed a Tolling Agreement, pursuant to which all claims "related to or arising out of certain events, actions, omissions or conduct of one or more of the [Defendants] in connection with or relating to the initiation, development, discussion, proposal, negotiation, review, terms or approval of the Series A-2 financing in or about April 2014 and other events, actions, omissions o[r] conducted related to ACT thereafter" were tolled until the earlier of May 21, 2017 or the filing of a complaint asserting such claims.

[redacted]

52. [redacted]

[redacted]

a. [redacted]

b. [redacted]

c. [redacted]

d [redacted]

e.

f.

53.

54.

In fact, among other things, Defendant Olson's substantial stock compensation as a consultant depended on the board's and therefore NEA's contro

[redacted] and he had then-recently served as an officer of another NEA-portfolio company, Fox Hollow Technologies, along with Defendant Rohlen. Tanaka had also served and continued to serve as a director of multiple NEA-portfolio companies, including VytronUS. As a result, Olson and Tanaka were economically dependent on NEA.

55. [redacted]

56. [redacted]

57. [redacted]

58. Upon information and belief, all of the Defendants participated, directly or indirectly [redacted] as the start of a plan to dilute certain other stockholders, including Dr. Carr, who held interests in ACT prior to the April 2014 financing.

Summer 2014 Warrant Proposals

59. [redacted]

60. [redacted]

61. [redacted]

62. On or about July 12, 2014, ACT conducted a meeting of its board of directors via teleconference [redacted]

63. [redacted]

64. [redacted] none of the ACT board members was disinterested for the reasons set forth above.

October 2014 Warrant

65. The timing of the April 2014 dilution of non-participating stockholders demonstrates that NEA exploited ACT to gain benefits in connection with its other investments as part of a three-headed deal that came to completion in October 2014.

66. [redacted] NEA stood to profit through the $250 million purchase by Abbott of Topera as the largest and only institutional investor alongside Abbott in Topera [redacted]

[redacted]

67. [redacted]

68. [redacted] values were determined for each portion of the three-headed October 2014 transaction with Abbott and how it came about that the ACT warrant was contingent on the closing of the Topera portion of the transaction. [redacted]

69. Notwithstanding the obvious conflicts and glaring deficiencies in disclosures [redacted] The Abbott warrant was not placed before stockholders for a vote.

70. NEA announced publicly at the time: "With NEA as the largest institutional investor in each of these companies—and the only investor to be involved in all three—we are proud to share some insight into this seemingly

unprecedented suite of transactions that, for the first time in the medical device sector's history, feature a large corporate acquirer partnering with multiple portfolio companies in a single VC's portfolio to establish a path to building a market leader in a major diagnostic and therapeutic category." In addition, NEA took credit in writing for the completion of the transactions, lauding "NEA's internal legal and accounting teams and the outside firms who advised each company involved in these transactions."

71. [redacted]

72. ACT's board of directors met again on October 22, 2014. [redacted]

[redacted]

73. [redacted]

74. Notwithstanding the conflicts and deficiencies in disclosures and information [redacted]

75. [redacted]

76. In response to requests for records under 8 *Del. C.* § 220, ACT refused to produce many of the requested categories of materials related to the April 2014

financing that diluted Dr. Carr and more than 30 other stockholders, as well as documents that Dr. Carr requested concerning valuations. ACT refused for months to engage in meaningful electronic discovery in response to Dr. Carr's request under 8 *Del. C.* §220, and never gathered and produced emails.

77. Lacking a disinterested director, and without adequate disclosures of material facts concerning conflicts of interest suffered by board members and by the controlling stockholder, NEA and its affiliates, along with the other Defendants, breached their fiduciary duties of loyalty and care owed to Dr. Carr and other similarly situated stockholders of ACT by diluting their interests and exploiting ACT as part of NEA's three-headed deal with Abbott in October 2014. Tellingly, NEA and ACT's board of directors did not submit the Abbott warrant transaction to a full stockholder vote.

Abbott's Right to (Anti-)Competitive Activity

78. In 2016, after looking under ACT's proverbial hood for more than two years, Abbott went in a different competitive direction. Abbott acquired St. Jude Medical, which also had an ablation catheter business. [redacted]

79. The FTC took issue with Abbott's plan to purchase St. Jude Medical, finding that, in light of Abbott's right to purchase ACT's business, the acquisition of St. Jude Medical would substantially lessen competition.

80. While Abbott agreed to divest other product lines, Abbott refused to divest St. Jude Medical's ablation catheter products.

81. [redacted]

82. On or about December 27, 2016, Abbott reached an agreement with the FTC that allowed the acquisition of St. Jude Medical to proceed, with Abbott agreeing not to purchase any product line from ACT without giving prior notice to the FTC.

83. As a result of NEA's three-headed deal with Abbott, which lacked restrictions on Abbott's ability to compete, Dr. Carr and similarly situated stockholders received absolutely nothing. Indeed, while withholding substantive details [redacted]

[redacted]

84. As a result of NEA's three-headed deal with Abbott, NEA and its affiliates enjoyed a $250 million payment from Abbott for Topera, and a sizeable investment in VytronUS, without providing any information to ACT stockholders justifying the fairness of the Topera price, the VytronUS valuation, and the ACT warrant price.

85. All of the Defendants knowingly and intentionally conspired and combined to cause the dilution of the shares of Dr. Carr and those similarly situated through the April 2014 financing and the exploitation of ACT in the warrant portion of the three-headed transaction with Abbott, in order to obtain the improper objective of generating profits for the controlling stockholder, NEA and its affiliates, at the expense of other stockholders.

86. All of the Defendants signed a tolling agreement effective March 27, 2017 that tolled time to file certain of Plaintiff's claims through and including May 21, 2017.

CLASS ACTION ALLEGATIONS

87. Plaintiff brings this action on his own behalf and as a class action on behalf of all stockholders of ACT who acquired their interests prior to the Series A-2 financing but did not participate in the Series A-2 financing (the "Class"). Upon

information and belief, all such stockholders held their interests between April 2014 and October 2014 when the Defendants breached their fiduciary duties.

88. Excluded from the Class are Defendants herein and any person, firm, trust, corporation, or other entity related to or affiliated with any of the Defendants.

89. This action is properly maintainable as a class action.

90. The Class is sufficiently numerous that joinder of all members is impracticable. There were over 100,000,000 shares of ACT common stock outstanding as of April 2, 2014. At relevant times, ACT had at least several dozen stockholders other than the NEA affiliates.

91. There are questions of law and fact that are common to the Class and which predominate over questions affecting any individual Class member. The common questions include, among other things, the following:

(a) Whether the controlling stockholder NEA and its affiliates and the directors on the board and officers it controlled breached their fiduciary duties in connection with the board's consideration and approval of the April 2014 financing;

(b) Whether the controlling stockholder NEA and its affiliates and the directors on the board and officers it controlled breached their fiduciary duties in connection with the board's consideration and approval of the October 2014

warrant rather tha [redacted] pursuit of another option;

(c) Whether the controlling stockholder NEA and its affiliates aided and abetted the directors' breaches of their fiduciary duties in connection with the board's consideration and approval of the April 2014 financing and October 2014 warrant; and

(d) Whether the defendants can show the fairness of the totality of the transactions, or the extent to which they need not return to plaintiff and similarly situated stockholders the proceeds they received from the $250 million sale to Abbott of Topera.

92. 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.

93. Plaintiff is an adequate representative of the Class, has been involved with ACT sufficiently to know its business, has retained competent counsel experienced in litigation of this nature, and will fairly and adequately protect the interests of the Class.

94. 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.

95. Plaintiff anticipates that there will be no difficulty in the management of this litigation. A class action is superior to other available methods for the fair and efficient adjudication of this controversy.

96. 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.

DERIVATIVE ALLEGATIONS

97. A portion of the claims and damages in this matter may be deemed to arise, in the alternative, from rights of ACT rather than from the Plaintiff and other stockholders. Plaintiff therefore brings this action in part derivatively to redress injuries suffered by ACT as a direct result of the breaches of fiduciary duties by the individual defendants.

98. Plaintiff has owned ACT stock continuously during the wrongful course of conduct by Defendants alleged herein and through the present.

99. Plaintiff will adequately and fairly represent the interests of ACT and its stockholders in enforcing and prosecuting their rights and has retained counsel competent and experienced in such matters.

DEMAND ON THE BOARD IS EXCUSED AS FUTILE

100. Plaintiff has not made a demand on the ACT board of directors to bring suit asserting the claims set forth herein because pre-suit demand would be futile and

is excused as a matter of law. Upon information and belief, when Dr. Carr first made his demand for inspection of books and records raising mismanagement issues, the then-present board of directors for ACT consisted of a subset of the directors who approved the April 2014 financing and the October 2014 warrant, namely Defendants Klein, Rohlen, Constantides and Tanaka. In or about early May 2017, ACT conducted another round of financing led by Ajax Health, for which Defendant Rohlen serves as a CEO, and Aisling Capital, which holds out Ajax Health as one of its portfolio companies. Upon information and belief, the ACT board of directors now includes an individual, Ryan Drant, who recently left a partner position at NEA and has a long-term history with Rohlen. Any further change in board composition will remain subject to control of the Defendants.

101. The April 2014 financing and the October 2014 warrant transactions were plainly interested transactions on terms that were unfair to ACT. Because those related transactions were interested transactions, the Defendants will bear the burden of proving the entire fairness of them.

102. Further, because the April 2014 financing and October 2014 warrant transaction were unfair to ACT and their approval and continuance has been inexplicable except on grounds of bad faith or a lack of independence, it cannot be deemed a product of the valid exercise of business judgment and demand is excused as a matter of law.

103. The April 2014 financing and October 2014 warrant provided a substantial benefit to NEA and its affiliates, with which the other Defendants have economic interdependence.

104. Also, a majority of ACT directors suffers from conflicts of interest and divided loyalties which preclude it from exercising independent business judgment. As of the date of ACT providing its board composition in response to the demand for books and records, the Act board of directors consisted of: Klein, Tanaka, Rohlen, Constantinides, Olson, and Pederson. Each of these directors suffered from the above-described incapacitating conflicts, including economic interdependence with NEA.

105. Demand is also excused by the fact that at least three Defendants remain on the ACT board of directors (Klein, Tanaka, Rohlen) and would be required to determine whether to sue themselves, potentially subjecting themselves to personal liability. A fourth present board member, Ryan Drant, has a long history with Rohlen and served as a partner of NEA until recently. Here, where the April 2014 financing and October 2014 warrant so diluted unrelated stockholders while providing NEA with control of ACT and facilitating the sale of another one of NEA's portfolio companies, Topera, for $250 million, and the approval of the April 2014 financing and October 2014 warrant could not be defended by the test of

business judgment, a substantial likelihood of director liability exists. This high likelihood alone establishes demand futility.

106. Additionally, the individual defendants failed to investigate efforts, legitimately and thoroughly on behalf of ACT, into the April 2014 financing and the October 2014 warrant when prompted by Plaintiff. ACT's attempts to fend off even a demand for inspection of books and records, and ACT's unwillingness to comply promptly and adequately with the demand are indicative of the individual defendants' inability to exercise their informed business judgment in handling the matter.

107. Upon information and belief, ACT and its board of directors are incapable or unwilling to take the actions required to seek the relief requested in this complaint.

COUNT I

(Direct Claim for Breach of Fiduciary Duty Against NEA Entities as Controlling Stockholder)

108. Plaintiff repeats and realleges each of the preceding allegations as if set forth fully herein.

109. By virtue of their control over the Company, New Enterprise Associates, Inc., New Enterprise Associates 14, L.P., NEA Partners 14, Limited Partnership, NEA 14 GP, Limited Partnership, and Duke S. Rohlen and Kendall

Simpson Rohlen, as Trustees or Successor Trustee, of the Rohlen Revocable Trust Dated U/A/D 6/12/98 (the "NEA Group") constituted the controlling stockholder of ACT and had the fiduciary duty not to abuse their power and accrue benefits to themselves at the expense of other stockholders.

110. By the acts alleged herein, the NEA Group defendants have breached their fiduciary duties and thereby generated profits for themselves and their affiliates at the expense of the members of the Class, while also depriving them of the fair value of their shares, for which the NEA Group is liable to Dr. Carr and the Class.

111. Plaintiff and the Class have no adequate remedy at law.

COUNT II

(Direct Claim for Breach of Fiduciary Duty Against the Directors)

112. Plaintiff repeats and realleges each of the preceding allegations as if set forth fully herein.

113. By the acts alleged herein, the individual directors Peter Justin Klein, Roy T. Tanaka, Duke Rohlen, Aris Constantidies, William Olson, and Michael J. Pederson breached their fiduciary duties and thereby generated profits for themselves and their principals and affiliates, including NEA and its affiliates, at the expense of the members of the Class, while also depriving them of the fair value of their shares, for which each of the directors is liable to Dr. Carr and the Class.

114. Plaintiff and the Class have no adequate remedy at law.

COUNT III

(Direct Claim for Aiding and Abetting Breach of Fiduciary Duty Against the NEA Group)

115. Plaintiff repeats and realleges each of the preceding allegations as if set forth fully herein.

116. The individual directors and officers named above owed fiduciary duties to ACT and its stockholders.

117. By the acts alleged herein, the NEA Group defendants knowingly participated in breaches of fiduciary duty to Plaintiff and the Class by the individual directors and officers.

118. The breaches of fiduciary duty aided and abetted by the NEA Group proximately caused damage to the Class by generating profits for the NEA Group and their principals and affiliates, at the expense of the members of the Class, while also depriving them of the fair value of their shares, for which the NEA Group is liable to Dr. Carr and the Class.

119. Plaintiff and the Class have no adequate remedy at law.

COUNT IV

(Derivative Claim Against NEA Entities as Controlling Stockholder for Breach of Fiduciary Duty)

120. Plaintiff repeats and realleges each of the preceding allegations as if set forth fully herein.

121. By virtue of their control over the Company, New Enterprise Associates, Inc., New Enterprise Associates 14, L.P., NEA Partners 14, Limited Partnership, NEA 14 GP, Limited Partnership, and Duke S. Rohlen and Kendall Simpson Rohlen, as Trustees or Successor Trustee, of the Rohlen Revocable Trust Dated U/A/D 6/12/98 (the "NEA Group") constituted the controlling stockholder of ACT and had the fiduciary duty not to abuse their power and accrue benefits to themselves at the expense of ACT.

122. By the acts alleged herein, the NEA Group defendants have breached their fiduciary duties and thereby generated profits for themselves and their affiliates at the expense of ACT, for which the NEA Group is liable to ACT.

123. Plaintiff has no adequate remedy at law.

COUNT V

(Derivative Claim for Breach of Fiduciary Duty Against the Directors)

124. Plaintiff repeats and realleges each of the preceding allegations as if set forth fully herein.

125. By the acts alleged herein, the individual directors Peter Justin Klein, Roy T. Tanaka, Duke Rohlen, Aris Constantidies, William Olson, and Michael J. Pederson breached their fiduciary duties to ACT and thereby generated profits for themselves and their principals and affiliates, including NEA and its affiliates, at the expense of ACT for which each of the directors is liable to ACT.

126. Plaintiff has no adequate remedy at law.

COUNT VI

(Derivative Claim for Aiding and Abetting Breach of Fiduciary Duty Against the NEA Group)

127. Plaintiff repeats and realleges each of the preceding allegations as if set forth fully herein.

128. The individual directors and officers named above owed fiduciary duties to ACT and its stockholders.

129. By the acts alleged herein, the NEA Group defendants knowingly participated in breaches of fiduciary duty by the individual directors and officers.

130. The breaches of fiduciary duty aided and abetted by the NEA Group proximately caused damage to ACT by generating profits for the NEA Group and their principals and affiliates, at the expense of ACT for which the NEA Group is liable to ACT.

131. Plaintiff has no adequate remedy at law.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff demands relief in his favor and in favor of the Class, and against defendants, as follows:

A. Declaring that this action is properly maintainable as a class and/or derivative action;

B. Awarding Plaintiff and the Class, as well as ACT, damages against all defendants, jointly and severally, including the profits generated by the fiduciaries, aiders and abettors, and their affiliates as a result of the breaches of fiduciary duty and the lost opportunities to obtain value of their shares, plus interest;

C. Awarding Plaintiff the costs and disbursements of this action, including attorneys' and experts' fees and expenses; and

D. Granting such other and further relief as this Court deems just and proper.

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