

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE**

In re:

MVK FARMCO LLC, *et al.*,¹

Debtors.

Chapter 11

Case No. 23-11721 (LSS)

(Jointly Administered)

Ref. Docket Nos. 271, 273 & 391

Hearing Date: Dec. 27, 2023 at 10:00 a.m. (ET)

Objection Deadline: Dec. 19, 2023 at 4:00 p.m. (ET)

**PRELIMINARY OBJECTION OF NEGOCIOS LIBERTAD LLC TO MOTION OF
DEBTORS FOR ENTRY OF AN ORDER (I) APPROVING THE ADEQUACY OF THE
DISCLOSURE STATEMENT; (II) APPROVING THE SOLICITATION AND NOTICE
PROCEDURES WITH RESPECT TO CONFIRMATION OF THE DEBTORS' JOINT
CHAPTER 11 PLAN; (III) APPROVING THE FORM OF BALLOTS AND NOTICES IN
CONNECTION THEREWITH; (IV) SCHEDULING CERTAIN DATES WITH
RESPECT THERETO; AND (V) GRANTING RELATED RELIEF**

Negocios Libertad LLC ("Negocios"), through its undersigned counsel, hereby files this preliminary² objection (the "Objection") to the *Motion of Debtors for Entry of an Order (i) Approving the Adequacy of the Disclosure Statement; (ii) Approving the Solicitation and Notice Procedures with Respect to Confirmation of the Debtors' Joint Chapter 11 Plan; (iii) Approving the Form of Ballots and Notices in Connection Therewith; (iv) Scheduling Certain Dates With Respect Thereto; and (v) Granting Related Relief* [Docket No. 273] (the "Motion") filed by the above-captioned debtors and debtors in possession (collectively, the "Debtors") in connection with the *Joint Chapter 11 Plan of MVK FarmCo LLC and Its Debtor Affiliates* [D.I. 270] (as modified

¹ The Debtors in these chapter 11 cases, along with the last four digits of each Debtor's federal tax identification number, are: MVK FarmCo LLC (5947); MVK Intermediate Holdings LLC (6016); Gerawan Farming LLC (1975); Gerawan Supply, Inc. (6866); Gerawan Farming Partners LLC (0072); Gerawan Farming Services LLC (7361); Wawona Farm Co. LLC (1628); Wawona Packing Co. LLC (7637); and GFP LLC (9201). The location of the Debtors' service address is: 7700 N. Palm Ave., Suite 206, Fresno, CA 93711.

² This Objection is styled as preliminary due to the Debtors filing a newly revised Plan and Disclosure Statement less than 24 hours before the Disclosure Statement objection deadline. Negocios continues to review the newly filed documents and will supplement the Objection as needed in advance of any hearing on this matter.

on December 18, 2023, the “Plan”) and the *Disclosure Statement for the Joint Chapter 11 Plan of MVK FarmCo LLC and its Debtor Affiliates* [D.I. 271] (as modified on December 18, 2023, the “Disclosure Statement”).³ In support of this Objection, Negocios respectfully states as follows:

PRELIMINARY STATEMENT

1. MVK FarmCo LLC (“MVK”) was formed by a 2019 merger of the two largest stone fruit companies in the United States, Wawona Packing Company (“Wawona”) and Gerawan Farming Inc., both of which companies were farms that had been run by their founding families for many decades. The merger was spearheaded by private equity firm Paine Schwartz Partners, LLC (“PSP”), which had acquired Wawona in 2017. The equity value of the combination was \$560 million at the closing in September of 2019. Four short years later, the company was bankrupt. According to the lenders, no buyers have offered acceptable bids for the company, and they plan to liquidate.

2. The Debtors are majority owned by a PSP-controlled entity, and PSP has run the Debtors’ operations since December of 2020. The Disclosure Statement blames the companies’ demise on a 2020 fruit recall (but omits the material fact that the cost of the recall was paid by insurance coverage), forest fires and the weather. *See* Disclosure Statement, pp. 25-26. These are the types of problems that, before PSP took over, Wawona and Gerawan Farming navigated successfully for decades. The more plausible explanation for the financial failure is documented in the derivative action that Negocios filed against PSP and others prior to the Petition Date. The derivative action seeks, on behalf of MVK, damages in the hundreds of millions of dollars. The derivative action details massive overspending, an utter lack of business judgment, self-interested transactions, and ultra vires decision-making.

³ Capitalized terms used but not defined herein shall be ascribed the definitions given to them in the Plan.

3. The Disclosure Statement omits any reference to this derivative action against PSP (and others) or the claims alleged therein. Not only are these estate assets undisclosed, but the Debtors' Plan would release them without, it appears, any investigation or consideration.

4. As set forth below, the Disclosure Statement should not be approved without appropriate disclosure of the derivative action, the status and results of any investigation of claims that are estate assets, and disclosure of the consideration that the Debtors will receive in exchange for the release of these estate assets (if the Court permits the release).

BACKGROUND

5. On October 13, 2023 (the "Petition Date"), the Debtors filed chapter 11 petitions in this Court. The Debtors continue to operate their businesses and manage their properties as debtors and debtors in possession pursuant to Bankruptcy Code sections 1107(a) and 1108. On October 23, 2023, the United States Trustee appointed an official committee of unsecured creditors [Docket No. 123]. No trustee or examiner has been appointed in the Debtors' chapter 11 cases (collectively, these "Cases").

6. Daniel Gerawan is the former Chief Executive Officer of the Debtors and is the single largest individual investor through his entity, Negocios. Mr. Gerawan was a lifelong employee of Gerawan Farming, a third-generation family business with best-in-class farming operations, packing practices, and proprietary varieties of stone fruit marketed under the Prima brand. Mr. Gerawan was replaced as CEO by PSP in December of 2020; his successor, hired by PSP, resigned after a year and a half and was never replaced (except by a series of interim CEOs). Negocios also holds a general unsecured claim against the Debtors.

7. Wawona was a portfolio company that PSP acquired in 2017. At the time of the merger of Gerawan Farming and Wawona in 2019, PSP valued the equity of the combined entity, MVK, at \$560 million.

8. PSP controls the Debtors through its affiliate, Wawona Delaware Holdings LLC (“Holdings”). PSP controls the Board of Managers of MVK through Holdings’ contractual right to appoint the majority of the Board’s members. PSP also agreed to provide management, consulting and advisory services to MVK in a Services Agreement executed at the time of the merger. Before and after bankruptcy, PSP operated the Debtors through its appointed managers and officers. Notwithstanding Mr. Gerawan’s experience and deep knowledge of the business, PSP withheld information from him and excluded him from decision-making. Ultimately, after discovering that PSP and the company had made certain representations without the knowledge or authorization of the independent managers, Mr. Gerawan resigned from the board in the middle of January 2023.

9. On July 25, 2023, Negocios filed a Verified Derivative Complaint (the “Derivative Complaint”), commencing a derivative action against PSP, Eric Beringause and Lutz Goedde as defendants (collectively, the “Derivative Defendants”), and MVK, as a nominal defendant, in the Court of Chancery of the State of Delaware, Civil Action No. 2023-0621-PAF (the “Derivative Action”). A true and correct copy of the public version Derivative Complaint is attached hereto as **Exhibit A**. Through the Derivative Action, Negocios seeks to recover hundreds of millions of dollars from the Derivative Defendants on behalf of Debtor MVK, for the harm that the Derivative Defendants caused by breaching their contractual and fiduciary duties.

10. The Derivative Complaint documents in detail more than \$50 million of improvident expenditures directed by the Derivative Defendants—cash that would have remained

in the company had the Derivative Defendants not entered into self-serving (and in some instances, undisclosed) agreements with executives, outside advisors and related entities. The Derivative Complaint alleges that, with the Derivative Defendants at the helm, the company paid for services that it did not need, were duplicative and redundant, were never requested or agreed to, and in some instances were never performed. These actions were taken by the Derivative Defendants in disregard of the company's governing documents and in secret, by concealing material information from the independent members of the Board of Managers (including Mr. Gerawan).⁴

11. The Derivative Complaint documents other actionable business decisions that contributed to the company's demise. For example, PSP caused the expenditure of tens of millions of dollars in 2021 on an ill-fated "replanting initiative." They tore down more than 2,000 acres of producing almond trees (including the crop of unharvested almonds still on the branches), even though the company lacked the capital and personnel needed to properly re-plant, graft and maintain the hundreds of thousands of new stone trees that were the goal of the initiative. The botched project resulted in thousands of acres of half-dead trees with stunted growth. PSP undertook this disastrous initiative by usurping the authority of the Board of Managers and disregarding core principals of corporate governance, burning through tens of millions of dollars of new expenses and lost revenue from almonds in the process. The Derivative Complaint alleges that the Derivative Defendants caused additional harm to the company, creditors and interest holders by failing to heed Houlihan Lokey's (the company's investment banker) recommendation, in November of 2021, that the company recapitalize its balance sheet by raising new equity.

⁴ Indeed, Mr. Gerawan was forced to file a books and records action to obtain information regarding the Company's activities despite his seat on the Board of Managers. *See Gerawan v. MVK FarmCo LLC*, C.A. No. 2021-0314-PAF (Del. Ch. Apr. 12, 2021).

12. All told, the Derivative Complaint alleges claims in the hundreds of millions of dollars, all of which are assets of the Debtors and their estates.

13. And yet, the Disclosure Statements does not mention the Derivative Action or the claims asserted in the Derivative Complaint. In the section of the Disclosure Statement describing litigation matters, the Debtors refer only generally to litigation arising in the ordinary course out of business operations. *See* Disclosure Statement, p. 33-34.

14. The Debtors allude that a Special Committee has been charged with investigating, with the assistance of various counsel, claims and causes of action that the companies might have against insiders and others, which presumably includes the claims set forth in the Derivative Complaint. According to the Disclosure Statement, the Special Committee is comprised of an allegedly Independent Director (Aron Schwartz appointed by PSP) and “disinterested managers” who are not identified. Disclosure Statement, p. 28. In reality, there may be no truly disinterested managers. As set forth in the Derivative Complaint, four of the five remaining members of the Board of Managers are partners and/or directors of PSP, and the fifth, Theodore Kruttschnitt, has received a portion of the fees paid by the Debtors to PSP.⁵

15. Nor is it clear which law firms are conducting which investigations. The Disclosure Statement states that Young Conaway Stargatt & Taylor, LLP (“Young Conaway”) is assisting the Special Committee with “investigating any claims or causes of action that the Company may have against certain specified insiders (the “Independent Investigation”)", while Kirkland (for whom PSP is a firm client) is charged with assisting the Special Committee with investigating “any other

⁵ Lutz Goedde, who is also a Derivative Defendant, is a PSP partner and member of PSP’s leadership team. Edward Haft is a PSP Operating Director and director of multiple PSP portfolio companies. Steven Bierschenk is a PSP Managing Director and director of multiple PSP portfolio companies. Mark Rodriguez is a PSP Operating Director. Theodore Kruttschnitt has been paid a portion of the fees that PSP received from the Debtors.

claims and causes of action against other insiders and/or others that the Company might hold (the “Claims Investigation”).” Disclosure Statement, p. 28.

16. According to the *First Supplemental Declaration of Ryan Blaine Bennett in Support of the Debtors’ Application for Entry of an Order Authorizing the Retention and Employment of Kirkland & Ellis LLP and Kirkland & Ellis International LLP as Attorneys for the Debtors and Debtors in Possession Effective As of October 13, 2023* [D.I. 319] (“First Supplemental Kirkland Declaration”), Young Conaway “will be responsible for investigating any claims the Debtors may or may not have against PSP.” First Supplemental Kirkland Declaration, ¶13. This language suggests that the Independent Investigation being conducted by Young Conaway is limited to PSP, and that Kirkland is conducting the investigation of everyone else, including the four individuals who are PSP partners and/or directors (Steven Bierschenk, Lutz Goedde, Edward Haft and Mark Rodriguez).

17. In any event, the Disclosure Statement contains no real information about these estate claims and causes of action. The Disclosure Statement does not divulge the status of the investigations or inform the Court or creditors about the results or existence of any reports.

18. Worse, the Debtors’ Plan *releases and settles* all of the estates’ claims against PSP, and any other claims that are part of the Claims and Independent Investigations.⁶ This release is accomplished by including in the Plan’s definition of “Released Parties” each “Related Party” of the Debtors. *See* Plan, Art. I(A)(154). “Related Parties” casts a wide net that encompasses, among others, an entity’s current and former directors, managers, officers, investment company members, special or other committee members, equity holders (regardless of whether equity interests are

⁶ In the First Supplemental Kirkland Declaration, counsel avers that Young Conaway, and not Kirkland, “will be responsible for negotiations over any release of claims against PSP in these chapter 11 cases.” First Supplemental Kirkland Declaration, ¶ 13. This statement is curious, given that negotiations will be superseded by a Plan that summarily releases the claims.

held directly or indirectly), affiliated investment funds or investment vehicles, managed accounts or funds, predecessors, participants, successors, assigns, subsidiaries, Affiliates, partners, limited partners, general partners, principals, members, management companies, fund advisors or managers, employees, agents, trustees, advisory board members, financial advisors, attorneys (including any attorney or professional retained by any current or former director or manager in his or her capacity as director or manager of an Entity), accountants, investment bankers, consultants, representatives, and other professionals and advisors and any such Person's or Entity's respective heirs, executors, estates and nominees. *See* Plan, Art. I(A)(153). The Derivative Defendants occupy several of the aforementioned roles.

19. To make matters worse, the Plan provides that general unsecured creditors—who will receive nothing under the Plan—will be deemed to have granted third party releases to the Released Parties unless they return a form opting out of the release. *See* Plan, Art. I(A)(153) (Definition of Releasing Party).

20. The Disclosure Statement states that the Plan shall be deemed to be a motion to approve compromises and settlements, and that the entry of the Confirmation Order shall constitute the Court's findings that the settlements and compromises are fair, equitable, reasonable, and in the best interests of the Debtors, their estates, and the holders of claims and interests. *See* Disclosure Statement, p. 60. The Disclosure Statement further provides that the entry of the Confirmation Order shall constitute the Court's findings that the releases are “in exchange for good and valuable consideration” and given and made “after reasonable investigation by the Debtors.” *Id.* There is nothing in the Disclosure Statement to support the foregoing findings.

21. The Disclosure Statement does not specify any consideration being provided by the Released Parties for the release of the Derivative Claims, other than to baldly claim that “[a]ll of

the Released Parties and the Exculpated Parties have made substantial and valuable contributions to the Debtors' restructuring through efforts to negotiate and implement the Plan, which will maximize and preserve the going concern value of the Debtors for the benefit of all parties in interest." Disclosure Statement, p. 13. At various points the Disclosure Statement identifies the sources of consideration for Plan distributions, but none of those sources include proceeds of the Derivative Claims. *See* Disclosure Statement, pp. 8 (noting that the sources of funds include the revenues and proceeds of any asset sale(s), proceeds from all Causes of Action that are not settled, released, discharged, enjoined or exculpated under the Plan); 36 (Sources of Consideration for Plan Distributions Under the Equitization Restructuring), and 39 (Sources of Consideration for Plan Distributions Under the Wind-Down).

OBJECTION

A. THE DISCLOSURE STATEMENT LACKS ADEQUATE INFORMATION AND FAILS TO MEET THE REQUIREMENTS OF 11 U.S.C. §1125

22. Section 1125(b) of the Bankruptcy Code prohibits the solicitation of votes in respect of a plan of reorganization "unless, at the time of or before such solicitation, there is transmitted . . . a written disclosure statement . . . containing adequate information." 11 U.S.C. § 1125(b). Adequate information is defined in section 1125(a) of the Bankruptcy Code as "information of a kind, and in sufficient detail . . . that would enable [] a hypothetical reasonable investor . . . to make an informed judgment about the plan." 11 U.S.C. § 1125(a)(1).

23. The determination of whether the disclosure statement has adequate information is made on a case-by-case basis and is largely within the discretion of the bankruptcy court. *See In re Am. Capital Equip., LLC*, 688 F.3d 145, 154-55 (3d Cir. 2012). At a minimum, however, it is clear that a disclosure statement should contain sufficient information for a creditor to determine

“what it is going to get, when it is going to get it, and what contingencies there are to getting its distribution.” *In re Ferretti*, 128 B.R. 16, 19 (Bankr. D.N.H. 1991).

24. In order to consider the settlement of estate claims and causes of action and vote on whether to accept the Plan, stakeholders must, at a minimum, have an understanding of the claims, their strengths and weaknesses and the potential recoveries. Courts in the Third Circuit recognize that debtors have an “express obligation of candid disclosure.” *See Oneida Motor Freight, Inc. v. United Jersey Bank*, 848 F.2d 414, 417 (3d Cir. 1988), *cert. den.* 488 U.S. 967 (1988) (“The importance of full disclosure is underlaid by the reliance placed upon the disclosure statement by the creditors and the court. Given this reliance, we cannot overemphasize the debtor’s obligation to provide sufficient data to satisfy the Code standard of ‘adequate information.’”); *In re Lower Bucks Hosp.*, 488 B.R. 303, 321 (Bankr. E.D. Pa. 2013), *aff’d* 571 Fed. App’x 139 (3d Cir. 2014) (denying approval of disclosure statement because it “did not provide . . . information about the merits or value of the potential claims . . . or the class action that they would be relinquishing.”).

25. The Disclosure Statement falls short of the required “adequate information.” It fails to disclose the connections between PSP and the Debtors and the Board of Managers. The Disclosure Statement fails to disclose the existence of the Derivative Action and the Derivative Claims, identify the members of the Special Committee and firms investigating specific claims, report on the status or results of any investigations, or disclose the consideration or value being contributed by the Released Parties (which include PSP, the Derivative Defendants and all other insiders) in exchange for their releases.

26. The Disclosure Statement also contains inadequate information about how the Debtors propose to meet the difficult standard for obtaining the controversial non-consensual third-party releases. In order to make an informed decision about voting and potentially opting out of

the third-party release, stakeholders need to understand the standard applied under the Third Circuit and how the Debtors plan to meet their burden. Currently the Disclosure Statement is not clear about who specifically is receiving a release and how much each Released Party is contributing to the estates. There is no description of the consideration being provided by any Released Party. Nor is there any explanation why such releases are necessary to what is now a liquidation of the Debtors or who made the decision to authorize the releases. Without more information, stakeholders cannot be expected to decide whether to support or oppose the Plan or to opt out.

27. Further, there is no indication that the releases of the claims alleged in the Derivative Action, and similar claims, are integral to the restructuring of the debtor-creditor relationship, as required by *In re Millenium Lab Holdings, II, LLC*, 945 F.3d 126, 135 (3d Cir. 2019). The Plan has converted into a plan of liquidation, extinguishes equity interests, including those of Holdings and, indirectly, PSP. The Plan provides that, as of the Effective Date, the Post-Effective Date PropCo will adopt new organizational documents, the terms of the existing boards of directors or managers will expire or the boards will dissolve, and either the Required Lenders will appoint new directors and officers, or a Plan Administrator will be appointed. *See* Plan, Articles IV(B)(4), IV(C)(3)(d) and IV(C)(3)(f). Neither PSP nor any of the other named or future defendants in the Derivative Action will be contributing anything to the reorganized or wind-down entities. There is nothing in the Disclosure Statement to indicate how the releases are integral to the restructuring of to the debtor-creditor relationship as required by *Millenium*.

28. The Disclosure Statement lacks other critical pieces of information. On the one hand, the Plan suggests that general unsecured creditors may receive a distribution. *See* Plan, Art. I(87) (“*General Unsecured Claim Distribution*” means any proceeds of the wind-Down Debtors’

Assets and/or Liquidating Trust Assets, as applicable, in excess of the amounts necessary to satisfy in full: (i) the Exit Bridge Facility; (ii) if applicable, the Exit Termed Out DIP Facility; (iii) the Wind-Down Debtors' Expenses; (iv) the Bridge OpCo Roll-Up Term Loan Claims; and (v) the OpCo Secured Claims, if any, after giving effect to each of the foregoing.”). However, the Debtors have apparently concluded that the likelihood of a distribution to general unsecured creditors is so remote that their class is deemed to reject the Plan.

29. In any event, the Disclosure Statement lacks necessary information that would allow general unsecured creditors and the Court to evaluate the Plan for themselves. The Disclosure Statement contains no liquidation analysis, other than a conclusory narrative that touts the benefits of a chapter 11 liquidation over chapter 7. The Disclosure Statement does not disclose necessary information about the *res* or framework of the Liquidating Trust (or that it may never come into existence because that is at the discretion of the Plan Administrator).

30. The Disclosure Statement fails to adequately disclose the treatment of Professionals under the Plan. As drafted, the Plan provides for a Professional Fee Escrow Account to be funded no later than the Effective Date, in the amount of fees and expenses that the Professionals estimate have been incurred through the Effective Date (*i.e.*, prior to the filing of any application and allowance of their fees). The Professional Fee Escrow Account will be held in trust for the benefit of the Professionals and will not be property of the estates or of the Debtors. *See* Plan, Art. II(B)(2). In the event that, after allowed Professional claims are paid in full, there are amounts remaining in the Professional Fee Escrow Account, those funds “shall be addressed pursuant to Article IV.C.3(c) without any further action or order of the Bankruptcy Court.” *Id.* Article IV(C)(3)(c) provides that any amounts remaining in the Professional Fee Escrow Account after payment of the allowed claims of professionals “shall be payable in Cash in accordance with Article III.” Art.

IV(C)(3)(c). Article III does not provide for payment of these amounts. Therefore, as drafted, it appears that the Professionals would retain the excess amounts in the Professional Fee Escrow Account—without regard to the allowed amounts of their claims. Further, if the Professional Fee Escrow Account is funded prior to the Effective Date, but the Effective Date never occurs or the Cases convert to Chapter 7, the funds in the account will have been spirited from creditors.

31. These omissions are particularly troubling given that the Plan seems to provide nothing for unsecured creditors.

B. THE DISCLOSURE STATEMENT CONTAINS INACCURATE INFORMATION THAT SHOULD BE CORRECTED

32. The Disclosure Statement contains information that is inaccurate or incorrect. In addition to expanding the disclosures as set forth above, the following corrections should be made:

- a. The reference on page 18 to Wawona Frozen Foods should be stricken, as that is a company unrelated to the Debtors.
- b. In “The Recall” section on pages 25-26, the following sentence should be added: “The Company’s recall insurance carriers paid the Company over \$21 million to cover the cost of the recall.”
- c. In “The Company’s Prepetition Efforts to Address its Liquidity Issues” section on page 27, the following should be added as an initial paragraph: “After a November 1, 2021 presentation from Houlihan, the Company formally retained Houlihan as of November 10, 2021 to address the Company’s liquidity issues. The Board was notified of the retention and approved it on December 2, 2021. In February and April 2022, Houlihan made presentations to the Company on strategic alternatives.”

C. OBJECTION TO THE OPT OUT PROCEDURES

33. The Plan provides that those holders of claims and interests who do not affirmatively opt-out of the third-party releases are “Releasing Parties”—including those holders of claims and interests that are receiving nothing under the Plan. *See* Plan, Art. I(A)(155). The first page of the proposed notice to such holders (Motion, Exhibit 5) is devoted to informing the recipient that they are not entitled to vote on the Plan. The information concerning the third-party release does not appear until the second page, which is less likely to be read by the recipient. In addition, the “Release Opt-Out Form” attached to the notice in the first instance characterizes itself as “optional.”

34. The proposed notice is designed to be thrown in the trash, not to call the recipients’ attention to the opt-out release. *Compare In re Boy Scouts of Am. and Delaware BSA, LLC*, 642 B.R. 504, 675 (Bankr. D. Del. 2022) (opt-out requirement was prominently displayed on first page of notice). In these circumstances, the failure to return an opt-out notice should not be deemed “consent” to a third-party release.

35. Further, “Releasing Parties” includes “Related Parties” that are neither creditors nor holders of equity interests, and who will not receive an opt-out notice. *See* Plan, Art. I(A)(153) and (155). Parties who do not receive an opt-out notice will not receive adequate notice and cannot be deemed to have consented to any release. *See Boy Scouts* at 678 (request for opt-out consent requires adequate notice).

D. RESERVATION OF RIGHTS

36. As stated previously, *Negocios*, as well as a majority of the Debtors’ creditors, learned for the first time at a hearing on Friday, December 15th, that the Debtors intended to fully revise the Plan and Disclosure Statement and liquidate the Debtors. The revised documents were

filed in the evening of December 18th, less than 24 hours before the Disclosure Statement objection deadline. Accordingly, Negocios reserves its rights to supplement or amend this Objection to further address or object to the Motion and all revised Plan and Disclosure Statement documents that the Debtors have filed or may file in the future, and any related matter, and to respond to any response or objection either by further submissions to this Court, at oral argument, or by testimony to be presented at any hearing. Negocios further reserves all of its rights with respect to confirmation of the Plan, including the right to assert any and all objections to confirmation at the appropriate time, whether or not such objections are set forth herein, and the right to seek appropriate relief in connection with any Plan confirmation proceedings or otherwise.

CONCLUSION

WHEREFORE, based on the foregoing, Negocios respectfully asks that the Court require the Debtors to make the modifications requested herein as a condition to approval the adequacy of the Disclosure Statement.

Dated: December 19, 2023
Wilmington, Delaware

WOMBLE BOND DICKINSON (US) LLP

/s/ Morgan L. Patterson

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EXHIBIT A

Derivative Action Complaint

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

NEGOCIOS LIBERTAD LLC,	)	
	)	
Plaintiff,	)	
	)	
v.	)	C.A. No. 2023-0621-PAF
	)	
PAINE SCHWARTZ PARTNERS,	)	PUBLIC VERSION FILED
LLC, ERIC BERINGAUSE, and	)	JULY 25, 2023
LUTZ GOEDDE,	)	
	)	
Defendants,	)	
	)	
and	)	
	)	
MVK FARMCO LLC,	)	
	)	
Nominal Defendant.	)	

VERIFIED DERIVATIVE COMPLAINT

Plaintiff Negocios Libertad LLC brings this derivative Complaint on behalf of Nominal Defendant MVK FarmCo LLC against Defendants Paine Schwartz Partners, LLC, Eric Beringause, and Lutz Goedde, as follows:

INTRODUCTION

1. In September 2019, Paine Schwartz Partners, LLC (“Paine”) merged its portfolio company, Wawona Packing, with Gerawan Farming (the “Merger”). Gerawan Farming was the largest stone fruit producer in the United States; Wawona Packing was the second largest. The Merger valued the equity of the combined entity, MVK FarmCo LLC (the “Company”), at \$560 million.

2. In a press release announcing the closing of the Merger, Kevin Schwartz, Paine's CEO, described Paine's vision for the combined entity:

This merger represents a tremendous milestone and the type of growth opportunity that we can achieve by leveraging Paine's agribusiness sector expertise and close collaboration with two family-owned businesses. We look forward to this new chapter for two companies that have been incredibly successful on their own, and we believe they can achieve even greater success through this merger.

3. Paine voluntarily undertook fiduciary duties and made binding contractual commitments to achieve that vision. Paine breached those obligations.

4. Less than four years later, the Company is insolvent. Paine has written down its investment in the Company to zero. The Company's investors have lost hundreds of millions of dollars.

5. Paine, on the other hand, profited handsomely from its destructive mismanagement of the Company, draining over \$24 million in cash from the Company in less than four years.

6. Paine also used its control over the Company to enrich others, causing the Company to pay millions in consulting fees to other firms for work that Paine had agreed to perform. Paine continued to cause the Company to pay millions in fees to those advisors despite obvious signs that they were either performing poorly or doing nothing at all.

7. Paine controls the Company through its affiliate, Wawona Delaware Holdings LLC (“Holdings”), which owns approximately 75% of the Company’s outstanding Class A Common Units. Paine also controls the Company’s Board of Managers (the “Board”) through Holdings’ contractual right to appoint a majority of the members of the Board. As the controller of the Company, Paine owes fiduciary duties to the Company for the benefit of its Unitholders, including Plaintiff.

8. Paine also agreed to provide management services to the Company in a Services Agreement executed at the time of the Merger. In the Services Agreement, Paine agreed to “devote reasonable time and efforts to the performance of” management services, including “identifying and assembling a highly capable board of managers . . . with significant industry and operational knowledge,” providing “advisory and consulting services in relation to the selection, retention, and supervision of other advisors,” and providing “advisory and consulting services on executive management personnel decisions [and] executive recruitment.”

9. Paine breached its fiduciary and contractual obligations. Paine staffed the Company with Managers and officers who made disastrous business decisions. Through its appointees, Paine willfully operated the Company to benefit itself at the expense of the Unitholders. Despite controlling the Board, Paine repeatedly ignored the Company’s governing documents by acting unilaterally on the Company’s behalf and concealing material information from the independent members of the Board.

Paine also permitted McKinsey & Company, a consulting firm, to collect millions in fees from the Company despite McKinsey's failure to deliver promised reports and improvements to the Company's bottom line. Paine acted intentionally to benefit McKinsey because the two entities have a longstanding, troubling relationship—many Paine employees are former McKinsey employees, Paine believes that its brand benefits from its association with McKinsey, and McKinsey has co-invested in Paine's funds, including by agreeing to invest in Paine's new investment fund as a limited partner.

10. Paine also breached multiple provisions of the Services Agreement. Paine failed to cooperate with the Company's senior executives or devote reasonable time and efforts to the services it agreed to perform under the Services Agreement. Paine also breached the Services Agreement by causing the Company to reimburse Paine for additional services the Company never requested or agreed to and whose amounts were not reasonable.

11. Paine also breached the implied covenant of good faith and fair dealing that inheres in the Services Agreement. Paine pervasively exercised its discretion under the Services Agreement to benefit Paine at the expense of the Company. Paine failed to pursue the legitimate objectives of the Services Agreement in good faith by selecting and retaining executives and outside advisors for self-serving ends and by refusing to allow the Company to pursue financing that the Company's financial

advisor repeatedly warned was desperately needed in late 2021 and early 2022. Paine further breached the implied covenant of good faith and fair dealing by using its ostensible authority under the Services Agreement to circumvent the governance structure in the Company's constitutive documents. Instead of respecting that governance structure, Paine directed the Company's operations and strategy unilaterally, hiring and firing executives to benefit Paine's interests, isolating the independent members of the Board from critical decisions, and unilaterally causing the Board to approve Paine's improper actions, often retroactively.

12. Paine accomplished its disloyal objectives through its control of the Board and two loyalist CEOs that Paine unilaterally installed in 2020 and 2022: Defendant Eric Beringause and Mark Rodriguez. Beringause breached his fiduciary duties by failing to act on an informed basis to benefit the Company. Instead, Beringause acted with gross negligence and to benefit Paine and his former employer, Edgewood Consulting.

13. Paine aided and abetted Beringause's breaches of fiduciary duty by directing, participating in, and concealing the breaches.

14. Defendant Lutz Goedde, a McKinsey insider hired by Paine after the Merger, aided and abetted Paine's breach of fiduciary duty by signing an agreement that purported to create new obligations of the Company to McKinsey without authorization from the Company (and before Goedde even joined the Board).

15. Plaintiff brings this derivative action to recover damages caused by the Defendants' breaches of their contractual and fiduciary duties.

PARTIES AND RELEVANT NON-PARTIES

16. Nominal Defendant MVK FarmCo LLC is a Delaware limited liability company with its principal place of business in Fresno, California. The Company is in the stone fruit farming business.

17. Plaintiff Negocios Libertad LLC is a Nevada limited liability company. Plaintiff owns approximately 25% of the Company's outstanding Class A Common Units.

18. Non-party Daniel Gerawan controls Plaintiff. At the time of the Merger, Mr. Gerawan¹ was a lifelong employee of Gerawan Farming who served as its President. Mr. Gerawan served as the Company's CEO from the date of the Merger until December 2020. Through Plaintiff, Mr. Gerawan invested \$140 million in the Company, becoming its largest individual investor. Through Plaintiff, Mr. Gerawan has a contractual right to sit on the Board and designate a second member of the Board. During certain of the events at issue in this litigation, non-party Denver Schutz was Mr. Gerawan's other Board designee.

¹ This Complaint refers to Daniel Gerawan as "Mr. Gerawan" to distinguish him from the eponymous Gerawan Farming. It refers to other natural persons by their last names without intending to suggest familiarity or disrespect.

19. Defendant Paine Schwartz Partners, LLC is a Delaware limited liability company. Paine is a private equity firm. Through Holdings, Paine controls a majority of the Company's outstanding Class A Common Units and has the right to designate six of the eight members of the Board.

20. Defendant Eric Beringause served as the Company's CEO from December 2020 until August 2022.

21. Defendant Lutz Goedde is a member of the Board. Goedde is a Paine partner and a member of Paine's leadership team. Paine appointed Goedde to the Board in April 2022 to replace Cate Hardy, who was not a Paine insider. Before joining Paine in 2021, Goedde was a senior partner at McKinsey. On behalf of McKinsey, in 2015 Goedde had signed McKinsey's "Strategic Partnership and Consulting Agreement" with Paine.

22. Non-party Edward Haft is the Chairman of the Board. Haft is a Paine Operating Director and a director of multiple Paine portfolio companies.

23. Non-party Steven Bierschenk is a member of the Board. Bierschenk is a Paine Managing Director and a director of multiple Paine portfolio companies.

24. Non-party Mark Rodriguez is a member of the Board. Rodriguez is a Paine Operating Director. Rodriguez also served as the Company's interim CEO from August 2022 to January 31, 2023.

25. Non-party Theodore Kruttschnitt is a member of the Board. Paine remitted to Kruttschnitt a portion of at least some of the fees the Company paid to Paine under the Services Agreement.

JURISDICTION AND VENUE

26. The Court has subject matter jurisdiction over this derivative action under 6 *Del. C.* § 18-1001.

27. The Court has personal jurisdiction over Defendant Paine, a Delaware limited liability company. 6 *Del. C.* § 18-105.

28. The Court has personal jurisdiction over Defendants Beringause and Goedde because they participated materially in the management of the Company. 6 *Del. C.* § 18-109.

BACKGROUND AND SUBSTANTIVE ALLEGATIONS

A. The Company

29. Gerawan Farming was a third-generation family business and an industry pioneer with best-in-class farming operations, packing practices, and proprietary varieties of stone fruit marketed under the Prima brand. Gerawan Farming also grew almonds and mandarins sold by other marketers.

30. In 2017, Paine acquired a controlling interest in Wawona Packing, a stone fruit company.

31. In 2019, Paine oversaw the Merger of Wawona Packing with Gerawan Farming to create MVK FarmCo LLC, the largest stone fruit company in the United States. The Company does business under the name Prima Wawona.

32. In connection with the Merger, Holdings invested cash and assets valued at \$420 million, Mr. Gerawan invested \$140 million, and Mr. Gerawan was named CEO of the Company.

33. Immediately after the Merger, the Company hired Category Partners, an industry-leading consulting firm that advises produce businesses on sales and marketing strategy. Category Partners developed a comprehensive go-to-market strategy for the new Company.

B. The LLC Agreement

34. The Company's internal affairs are governed by the MVK FarmCo LLC Amended and Restated Limited Liability Company Agreement, dated September 13, 2019 (the "LLC Agreement" or "LLCA"). A true and correct copy of the LLC Agreement is attached as **Exhibit A**.

35. The LLC Agreement gives the Board plenary authority over the business and affairs of the Company:

Except for situations in which the approval of the Unitholders is expressly and specifically required by the express terms of this Agreement or by non-waivable provisions of the Delaware Act, (i) the powers of the Company shall be exercised by or under the authority of, and the business and affairs of the Company shall be managed, operated

and controlled by or under the direction of, the Board, . . . and (ii) the Board shall have, and is hereby granted, the full and complete power, authority and discretion for, on behalf of and in the name of the Company, to take such actions as it may in its sole discretion deem necessary or advisable to carry out any and all objectives and purposes of the Company, subject only to the terms of this Agreement.

LLCA § 5.1(a). The Board is authorized to act only through written “resolutions adopted at a meeting,” through “written consents,” “by delegating power and authority to committees,” and “by delegating power and authority” to officers of the Company in accordance with Section 5.6(a) of the LLC Agreement. *Id.* § 5.1(b).

36. The LLC Agreement provides that the Board consists of “up to eight” Managers. *Id.* § 5.2(a)(i). Under the LLC Agreement, Mr. Gerawan is entitled to designate two Managers, and Holdings designates the remaining Managers. *Id.* § 5.2(a)(i)–(ii). Paine controls Holdings and therefore controls a majority of the voting power of the Board through its six designated Managers.

37. Section 5.4(b) of the LLC Agreement guarantees Mr. Gerawan a seat on each Board committee other than the Audit Committee and the Compensation Committee. *Id.* § 5.4(b).

C. The Company’s Governance Policies

38. At the time of the Merger, the parties established a set of governance policies for the Company (the “Governance Policies”). A true and correct copy of the Governance Policies is attached as **Exhibit B**.

39. The Governance Policies begin with a bold, underlined heading identifying “Powers Reserved for Full Board of Managers and the Executive Committee.” Ex. B at 1. The text beneath the heading provides in part: “Neither MVK FarmCo, LLC, nor any of its subsidiaries, officers or employees (nor any of its subsidiaries’ officers or employees) shall take any of the actions referred to below without the authorization of the Board of Managers of the Company.” *Id.* (defined terms omitted). With limited exceptions, the Company cannot take any of the following actions without the approval of the full Board:

1. implement, approve or amend any annual or long-term business or strategic plans or any annual or interim budget (the ***Budget***) or related business policies, or take any actions materially inconsistent with duly approved annual business plans, Budgets or strategic plans;
2. enter into any new line of business or otherwise change the nature of the business by stopping, carrying on, or materially altering the scale of operations;
3. make, modify or approve plans, practices or policies material to governance outside the ordinary course of business;
4. enter into transactions or contracts involving payment in excess of \$250,000 annually or any other material contract of the Company or any of its subsidiaries, except to the extent provided for in the Budget;
5. amend or waive any material term of any agreement or transaction that required, or would have required had such agreement or transaction been entered into after the adoption hereof, approval of the Board hereunder;

6. make any capital expenditure in excess of \$250,000 except to the extent provided for in the Budget; *provided*, that approval by the Board shall be required for the acquisition of real property if (i) such real property acquisition involves payment in excess of [\$4,000,000] in any single transaction or (ii) all real property acquisitions in the applicable fiscal year exceed or, upon the completion of the contemplated acquisition, will exceed [\$8,000,000];
7. cast any votes with respect to any investments or subsidiaries, or grant any proxy with respect to the voting of any units directly or indirectly held as to an action or transaction that would require approval of the Board hereunder if such action were to be taken by the Company;
8. make any material changes to existing Company policies on accounts receivable, accounts payable, deferred revenue recognition or disposal of inventory; or
9. authorize, commit or agree to take any action covered hereby, except in accordance with the provisions hereof[.]

Id. at 1–2 (first and second brackets in original).

40. The Governance Policies give the Board the exclusive power to “hire, renew, promote, elect, enter into, or terminate an employment with any employee with a gross annual base salary of \$250,000 or more.” *Id.* at 3.

41. The Governance Policies provide limited exceptions to the enumerated actions for which Board approval is required: The Executive Committee of the Board can (i) “enter into transactions or contracts involving payment in excess of \$250,000 annually,” including the hiring of executives, (ii) authorize capital expenditures, and (iii) make changes to the Company’s accounting policies. *Id.* at

1. In each case, the authority of the Executive Committee is subject to the same requirements that would have applied to the Board had the Board made the decision; any transaction, contract, or capital expenditure in excess of \$250,000 other than an employment agreement for a Company executive must otherwise be “provided for in the Budget.” *Id.*

D. The Services Agreement

42. Simultaneously with the execution of the LLC Agreement, Paine and the Company executed a Services Agreement dated September 13, 2019 (the “Services Agreement” or “SA”). A true and correct copy of the Services Agreement is attached as **Exhibit C**.

43. The Services Agreement recited the Company’s belief that Paine had “significant value . . . to offer in a variety of strategic areas” including “corporate management, business strategy, acquisitions and divestitures, private and public debt and equity financing, capital structure and other matters relating to the strategic and financial (as opposed to operational) management of businesses.” SA at 1. The agreement explained that the “Company believes this Agreement is a cost-effective way to obtain the valuable services [] herein.” *Id.*

44. Paine advertises its Portfolio Excellence Platform (the “PEP”) as a provider of consulting support to Paine’s portfolio companies. In reality during the relevant time frame, the PEP was a small group of mostly junior Paine employees

who lacked experience managing large enterprises like the Company. The weaknesses of Paine’s consulting capabilities would become apparent as Paine systematically dismantled longstanding Company management (including terminating Mr. Gerawan in December 2020) and then failed to adequately supervise the consultants and new executives it brought in to manage the Company.

45. The Services Agreement provided that “Paine shall render to the Company and its subsidiaries, in cooperation with the Company’s senior management, from time to time, advisory, consulting and other services,” including the following:

- i. assist in identifying and assembling a highly capable board of managers of the Company with significant industry and operational knowledge; . . .
- v. provide advisory and consulting services in relation to the selection, retention and supervision of other advisors, including, without limitation, outside legal counsel, investment bankers or other financial advisors or consultants, in respect of proposed material transactions or engagements;
- vi. provide advisory and consulting services on executive management personnel decisions, executive recruitment and executive compensation issues

Id. § 2(a). Paine further agreed to “devote reasonable time and efforts to the performance of the Services contemplated by this Agreement.” *Id.* § 2(c).

46. In exchange for Paine’s services, the Company agreed “to pay to Paine an annual fee equal to the greater of (i) \$2,000,000 and (ii) 2% of the projected annual EBITDA of the Company for the next fiscal year.” *Id.* § 3(b). The Company also agreed to, “at the direction of Paine, reimburse Paine for its reasonable Ordinary Out-of-Pocket Expenses and Additional Out-of-Pocket Expenses.” *Id.* § 4. The Services Agreement defined “Additional Out-of-Pocket Expenses” to mean

the amounts payable by Paine in connection with its performance of the Services, including, without limitation, reasonable (i) fees and disbursements of any independent auditors, outside legal counsel, consultants, investment bankers, financial advisors and other independent professionals and organizations and (ii) costs of any outside services or independent contractors such as financial printers, couriers, business publications or similar services.

Id.

47. The parties to the Services Agreement also “agreed that, from time to time, Paine may be requested to perform services in addition to the Consulting Services, for which Paine shall be entitled to additional compensation” (the “Additional Services”). *Id.* § 2(b). The Services Agreement provided that any compensation for any Additional Services performed by Paine would be “agreed upon by the parties.” *Id.* § 3(j).

48. The Services Agreement further provided that in the event of “any future merger, acquisition, disposition, recapitalization, issuance of securities, financing or any similar transaction,” Paine would “be hired as an investment

adviser” and would receive a “Future Transaction Fee” that would “be agreed upon by the parties hereto.” *Id.* § 2(b).

49. The Services Agreement created perverse incentives for Paine. It enabled Paine to cause the Company to execute any transaction that could be characterized as a “merger, acquisition, disposition, recapitalization, issuance of securities, financing or any similar transaction,” then force the Company to “hire” Paine as an investment advisor and demand a Future Transaction Fee as a tax on the transaction. *Id.* Through its control of the Company, Paine could determine the amount of the Future Transaction Fee. Worse still, Paine could force the Company to pay for *someone else* to do the actual work of advising on the transaction, then pay the advisor out of the Company’s funds as an Additional Out-of-Pocket Expense.

50. The Services Agreement included limited safeguards to prevent Paine from abusing its control over the Company.

- Section 2(a) obligated Paine to provide consulting services to the Company “in cooperation with the Company’s senior management” (the “Cooperation Requirement”).
- Section 2(c) required Paine to devote reasonable time and efforts to performing the services contemplated by the Services Agreement (the “Time and Efforts Requirement”).
- Section 2(b) required that any Additional Services performed by Paine be “requested” by the Company (the “Request Condition”).

- Section 2(b) also required that the amount of any Future Transaction Fee be “agreed upon” Paine and the Company (the “Agreement Condition”).
- Section 4 provided that Paine only was entitled to be reimbursed for “*reasonable*” Ordinary and Additional Out-of-Pocket Expenses. *Id.* § 4 (emphasis added) (the “Reasonability Condition”).

51. Paine succumbed to the perverse incentives created by its control of the Company and the lax provisions of the Services Agreement. Paine reaped millions of dollars in fees by causing the Company to enter transactions, then imposing and collecting a 2% Future Transaction Fee without any negotiation. Paine repeatedly hired consultants and outside advisors to do work that Paine itself should have performed under the Services Agreement. Those consultants frequently were firms with troubling links to Paine and its insiders at the Company. Further, when asked to certify that the amounts received from the Company as Ordinary and Additional Out-of-Pocket Expenses complied with the Services Agreement, Paine refused.

52. In flouting the purposes of the Services Agreement (and breaching its fiduciary duties in the process), Paine ignored even the weak procedural safeguards in the agreement.

- Paine pervasively failed to cooperate with senior Company management, including during multiple searches for replacement CEOs, breaching the Cooperation Requirement.
- Paine persistently failed to devote reasonable efforts to the performance of the services it promised to deliver, breaching the Time and Efforts Requirement.

- Paine repeatedly caused the Company to pay for Additional Services that the Company did not request. Because the Request Condition was not met as to those payments, the payments breached the Services Agreement.
- There never has been a negotiation or agreement between the Company and Paine about a Future Transaction Fee. Because the Agreement Condition was not met as to the Future Transaction Fees, those transactions breached the Services Agreement.
- Finally, Paine caused the Company to reimburse Paine for expenses to consultants like McKinsey that were not reasonable. Because the Reasonability Condition was not met, those payments breached the Services Agreement.

E. Paine's Relationship with McKinsey

53. Paine has a longstanding relationship with McKinsey. Multiple principals and employees of Paine (including Goedde) are former McKinsey consultants, engagement managers, and partners. Paine's relationship with McKinsey is, in Paine's own words, unique.

54. Goedde's career is instructive. Goedde worked at McKinsey before joining Paine. In 2015, while he was a McKinsey principal, Goedde signed a five-year "Strategic Partnership and Consulting Agreement" between McKinsey and Paine.

55. Goedde later would be identified in a 2020 McKinsey pitch to Paine for a restructuring engagement with the Company, which Paine then awarded to McKinsey. Less than a year later, Goedde joined Paine as a partner. At Paine, Goedde purported to amend the Company's multimillion-dollar agreement with

McKinsey despite lacking any authorization to act on the Company's behalf. After that, Paine placed him on the Board, where he and Paine failed to disclose to the Board that, without authorization, he had amended the Company's agreement with McKinsey. The Company only learned of the amendment when McKinsey disclosed it to the Company's interim CEO, who then shared it with the Board.

56. Paine also favors McKinsey for reputational reasons, as Paine has associated its brand with McKinsey to attract investors.

57. In its marketing materials, Paine has promoted its "strong connection to McKinsey," which "generates extensive knowledge to appropriately source, diligence and execute M&A opportunities."

58. In a 2018 interview, Schwartz described Paine's unique "partnership with McKinsey," explaining, "They take risks on our investments and are aligned with us economically – they don't [do] that with other private equity firms."

59. The relationship between Paine and McKinsey deepened after the Merger. McKinsey has since committed to invest in Paine funds as a limited partner.

60. The high value that Paine attributes to its association with McKinsey created a conflict of interest for Paine. The significant financial and business ties between Paine and McKinsey suggest an understanding that Paine will direct its portfolio companies to retain McKinsey as a consultant, even when McKinsey is not the best option.

61. Paine has rewarded McKinsey through fees paid by the Company and promises of more fees. Even as the Company became insolvent in 2023, Paine's designees on the Board demanded that the Company schedule an additional \$10 million payment to McKinsey that was not owed under any written agreement between the Company and McKinsey. Paine used its control over the Board to put the interests of McKinsey over the interests of the Company.

F. Paine Secretly and Unilaterally Engages McKinsey Without Consulting Mr. Gerawan or the Board.

62. In late 2020, Paine initiated a strategy to drain cash from the Company to enrich itself and McKinsey. Part of that strategy was to remove Mr. Gerawan as CEO, because he would have objected to the planned 2021 transfer from the Company to Paine and McKinsey.

63. In November 2020, Paine secretly solicited bids from consulting firms to restructure the Company. Paine never involved the full Board in a discussion of whether a restructuring was necessary, even though Board involvement was required by the Company's Governance Policies. The Board never discussed whether a restructuring of the Company was necessary—and, if so, what its goals should be, when it should start, and who should do it. Despite having agreed to the Cooperation Requirement, Paine completely excluded Mr. Gerawan, the Company's CEO, from its plans.

64. Paine’s internal November 2020 “Update on 3rd Party Restructuring (Bid Summaries),” a document that was never shown to the Board, listed proposals from four consulting firms, including McKinsey and AlixPartners, LLP. Paine identified AlixPartners’ proposal as clearly superior, noting its “[l]ogical planning of resources” and “best in class procurement/cost reduction programs.” The AlixPartners proposal would cost “\$2.9-3.4M.”

65. By contrast, Paine concluded that McKinsey’s proposal was flawed and overpriced. Paine’s analysis observed that “[g]iven” McKinsey’s “experience with the asset,” its “proposal lacks specificity.” Paine noted that McKinsey “overstated opportunities” in the due diligence McKinsey had performed for Paine before the Merger. And the proposal was “[a]n expensive \$7M”—\$7.36 million, to be precise—“for 6 months of work.”

66. The only strengths that Paine identified in McKinsey’s proposal were McKinsey’s “[h]istory with” the Company, McKinsey’s “commercial expertise,” a “[s]trong Farming Manager,” and, disturbingly, McKinsey’s “PSP [i.e., Paine Schwartz Partners] partnership and Fund IV arrangement.”

67. Paine rated AlixPartners’ proposal as superior to the McKinsey proposal. An objective comparison of the two proposals confirms that Paine’s ranking was correct. AlixPartners was more qualified for the assignment.

68. Paine nevertheless retained McKinsey. Paine did not tell the Board about the AlixPartners presentation or about Paine's conclusion that AlixPartners was better suited to the assignment.

69. The award of the restructuring contract to McKinsey violated the requirement in the Governance Policies that any contract for more than \$250,000 be approved by the full Board.

70. The award of the restructuring contract to McKinsey also violated the duty of loyalty that Paine owed to the Company as its controller. Paine should have secured Board approval before beginning the process, should have involved the Board in the decision, and should have disclosed all conflicts of interest. Paine did none of those things.

71. The hiring of McKinsey was a willful breach of the Governance Policies and Paine's fiduciary duties.

72. Had Mr. Gerawan been involved in the process, he would have questioned the need for this massive and expensive consulting project. He also would have pointed out that, if a consulting firm were needed at all, then AlixPartners' proposal was obviously superior.

73. In late 2022, after two years of McKinsey's restructuring engagement, the Company hired AlixPartners to prepare for a financial restructuring or possible bankruptcy and made an AlixPartners executive the Company's interim CEO.

G. Paine Terminates Mr. Gerawan Without Notice and Fails to Oversee the Transition to New Management.

74. In December 2020, Paine terminated Mr. Gerawan without notice and replaced him with a CEO chosen by Paine. Mr. Gerawan's employment agreement included a thirty-day notice period in the event of his termination. Paine ignored that provision, so there was no transition period between the outgoing and incoming CEOs.

75. After terminating Mr. Gerawan, Paine immediately locked him out of his Company email account. From the moment of his firing until he left the Board earlier this year, Paine failed to listen to Mr. Gerawan or seek his advice on Company operations or decisions.

76. Also during December 2020, the most senior member of the PEP team, Adam Fless, resigned and joined AlixPartners. Paine did not replace Fless until months later. As a result, there was a void in Paine's consulting unit just when Paine and the Company needed seasoned leadership to oversee McKinsey and the CEO transition—a violation of the Time and Efforts Requirement in the Services Agreement.

77. The LLC Agreement provides that "[a]ny vacancy occurring in any office of the Company may be filled by the Board and shall remain vacant until filled

by the Board.” LLCA § 5.6(b). Paine ignored that requirement, excluding the Board (or at least Mr. Gerawan’s two Board designees) from the search for a new CEO.

78. The Services Agreement obligated Paine to “provide advisory and consulting services on executive management personnel decisions [and] executive recruitment.” SA § 2(a)(vi). Paine began its process by ignoring that requirement, instead hiring an outside consulting firm, Spencer Stuart, to assemble a menu of candidates. From the list of candidates from Spencer Stuart, Paine chose Eric Beringause, a former CEO of Dean Foods. Beringause was recruited, interviewed, and hired by Paine. From the start, Beringause understood that he reported to Paine.

79. Beringause hired two of his Dean Foods former colleagues to serve as senior executives at the Company: Kevin Kollock, who became the Company’s Chief Commercial Officer, and Bassey Ekpo, who became the Company’s Executive Vice President for Food Safety and Quality Assurance.

80. Beringause then reduced the number of CEO direct reports by half, demoting nine longtime Company employees, including the top sales employee. Many of those demoted resigned and joined competitors of the Company.

81. The new senior management team—Beringause, Kollock, and Bassey—had no relevant farming experience. The exodus of senior personnel concerned Beringause, who created a Board presentation titled “Retention Strategy

Based on Flight Risk.” By the time he presented it to the Board on February 10, 2021, four of the employees he had targeted for retention already had resigned.

82. The botched CEO transition was the predictable result of Paine’s disregard for the governance structure in the LLC Agreement and Paine’s obligations under the Services Agreement. As the controller of the Company, Paine should have acted to ensure an orderly transition. As the obligor under the Services Agreement, Paine should have “provide[d] advisory consulting services” to the *Board*, “in cooperation with the Company’s senior management,” in the search for a new CEO. *Id.* §§ 2(a), (a)(vi). Paine did neither.

83. The botched CEO transition shattered the Company’s culture. Whatever Paine may have thought of Mr. Gerawan, he was highly regarded in the industry and among the Company’s many stakeholders, including its employees. Many of the Company’s employees had worked for Gerawan Farming for decades. In a matter of weeks, their longtime CEO, who had been with the Company and its predecessor for four decades, had abruptly disappeared. In his place was Beringause with his own hand-picked senior executives, and a gaggle of outside consultants from McKinsey. Those abrupt changes understandably damaged morale at the Company.

H. Beringause Hires His Former Employer to Perform Redundant Consulting Work.

84. Beringause arrived at the Company at roughly the same time as McKinsey and disclaimed any role in the hiring of McKinsey. A prudent executive would have informed himself about the scope of McKinsey's engagement. Beringause did not. Even though McKinsey was set to work on the Company's commercial operations, on January 1, 2021, Beringause hired yet another expensive consulting firm—Edgewood Consulting, his former employer—to take over marketing at the Company.

85. The contract with Edgewood obligated the Company to pay monthly fees of \$43,650 to Edgewood, billed quarterly in advance with immediate payment of \$139,950 due upon receipt of the invoice. In violation of the Governance Policies, Beringause did not secure Board approval before signing the contract with Edgewood. The Company made five quarterly payments to Edgewood totaling \$523,800.

86. By contrast, Beringause did recognize that Edgewood's engagement was redundant with Category Partners' work. Further, although Category Partners had proven expertise in the produce industry and Edgewood did not, Category Partners' ongoing engagement with the Company was a fraction of the cost of Edgewood's. Beringause nonetheless summarily terminated Category Partners'

engagement shortly after he arrived. Consequently, the Company lost vital insights from an industry-leading advisor that had been with the Company since the Merger. In its place was Edgewood, which lacked Category Partners' produce industry expertise.

87. Edgewood billed the Company approximately \$500,000 in additional fees for tasks as considering "alternative product names," performing a "peach experience survey," and pursuing "a retail discovery assessment" to discern "in-store presence" of stone fruit. In total, Edgewood charged the Company \$1,054,825.

88. The Board knew none of this. Beringause did not disclose Edgewood's engagement to the Board, and Edgewood never made a presentation to the Board.

89. It also is unclear whether McKinsey knew that Beringause had hired another consulting firm to perform redundant work. For its part, Paine either knew about Edgewood's retention in violation of the Governance Policies or did not know because it failed to oversee the Company's consultants as required under the Services Agreement.

90. It made no sense to hire McKinsey and Edgewood at the same time. In 2020, when Mr. Gerawan was still CEO, Haft had engaged McKinsey to prepare a 100-page report on "Category and Commercial Strategy." One of four key work streams McKinsey had focused on was "target consumer insights . . . and marketing." When Beringause hired Edgewood to advise the Company on

marketing, the Company already had been using McKinsey's report to improve its marketing strategy in working with Category Partners.

91. The Company paid over \$1 million to Edgewood. As the CEO of the Company, Beringause had a duty to act on an informed basis and involve the Board in transactions that cost more than \$250,000. By failing to adequately inform himself before hiring Edgewood, Beringause breached that duty. Beringause also had a duty to act only in the best interest of the Company. By delivering a \$1 million contract to his former employer, then failing to oversee Edgewood's work, Beringause breached that duty.

I. Paine Develops Plans to Destroy Millions of Almond Trees in a Cash-Burning Replanting Initiative.

92. In early 2021, Haft, Bierschenk, and other Paine employees privately decided that the Company should pursue a costly initiative to replace 2,600 acres of almond trees with stone fruit trees (the "Replanting Initiative"). The project would cost approximately \$22 million, plus \$4 million in foregone revenue from ripping out almond trees midseason—a negative \$26 million hit to the Company's bottom line versus the status quo alternative of continuing to harvest the almonds.

93. The Board had not analyzed the Replanting Initiative—and the independent members of the Board had not discussed it at all—when it was presented "[f]or decision" at the Board's February 10, 2021 meeting.

94. The slide deck for the February 10 Board meeting (the “February 2021 Board Deck”) acknowledged that the Replanting Initiative would cause the Company to “lose any potential almond profits” and incur significant capital expenditures but claimed that the Company “possesses the liquidity to invest in growth.” The initiative would not produce revenue-generating fruit until 2026.

95. Mr. Gerawan warned that this was a weighty decision for the Company and deserved careful consideration of the risks. He was not convinced that the Company had the need or financial ability to embark on this project. His suspicion would prove prescient.

96. After Mr. Gerawan voiced his opposition, Haft stated that the Board would defer the decision on the Replanting Initiative. Haft, the Chairman of the Board (and a Paine insider), assured Mr. Gerawan that the Board or the Executive Committee would discuss further before deciding.

J. Management Reveals the Transformation Agreement with McKinsey, and McKinsey Fails to Deliver Promised Work Product.

97. Paine failed to supervise McKinsey and failed to objectively assess McKinsey’s performance. Instead, Paine consistently acted as McKinsey’s cheerleader. Paine never told the Board that McKinsey had failed to deliver the “Bankable Plan”—which was supposed to be the foundation of the promised transformation of the Company—on its due date in February 2021, or ever. With

Paine's backing, McKinsey nonetheless collected millions in fees from the Company. In 2021 and 2022, Paine, McKinsey, and Beringause transformed the Company from a respected and admired brand into a worthless shell with no market value other than its landholdings.

98. The February 2021 Board Deck referenced an "RTS Agreement" with McKinsey (the "Transformation Agreement").²

99. The February 2021 Board Deck stated that McKinsey had been retained in November 2020. Although he was the CEO of the Company in November 2020, Mr. Gerawan was unaware that McKinsey had been retained or even interviewed. The Board had never discussed the Transformation Agreement at any meeting (and the Executive Committee has never met). Paine had imposed the Transformation Agreement on the Company unilaterally and in secret, breaching the Cooperation Requirement and ignoring the LLC Agreement and the Governance Policies.

100. The February 2021 Board Deck explained that a McKinsey team had been "on the ground since January 4." It projected that the Transformation Agreement would cost the Company \$5.5 million in 2021.

101. In a December 2020 kickoff meeting, McKinsey had promised to deliver a "Bankable Plan" to improve the Company by February 23, 2021, and that

² "RTS" is an initialization of "Recovery and Transformation Services," a division of McKinsey that specializes in restructuring.

there would be a “celebration” on February 25, 2021. McKinsey did not deliver the plan. Paine did not hold McKinsey accountable.

102. Instead, McKinsey claimed to have found twenty-one “Quick Wins” that would instantaneously improve the Company’s bottom line in 2021. Just as McKinsey failed to deliver the bankable plan, it failed to deliver the promised quick wins. The Company’s financial performance deteriorated significantly in 2021.

103. On February 20, 2021, Mr. Gerawan emailed Beringause, copying Haft, to express his concern about the “Quick Wins” McKinsey had identified in the February 2021 Board Deck. Mr. Gerawan pointed out that several of the initiatives included in the “Quick Wins” were the Company’s initiatives from before McKinsey arrived. Mr. Gerawan therefore requested a copy of the Transformation Agreement and information about the competing proposals that Paine had solicited on the Company’s behalf.

104. Haft blocked the request, replying to Mr. Gerawan, copying Beringause: “Just want to point out that Eric does not report directly to you. He has a list of priorities . . . he will try to fit in your requests as feasible.”

105. On March 4, 2021, having received nothing, Mr. Gerawan again asked Beringause for a copy of the Transformation Agreement. Beringause explained that he had *never seen* the Transformation Agreement, confirmed that he had not been

involved in the hiring of McKinsey, and said he would inquire with the Company's CFO.

106. On March 10, 2021, Bierschenk, a Paine Managing Director and member of the Board, wrote to Mr. Gerawan about his request: "I am not sure I understand your objective in this area at this state since the '*horse has left the barn.*' Perhaps you can explain to me what you're asking for so not to distract Eric and the team."

107. Bierschenk was now working in tandem with Haft to withhold information about McKinsey from Mr. Gerawan.

108. Bierschenk did not explain why he, a Paine insider, believed that willfully withholding material information from a fellow Manager was appropriate.

109. Instead, Bierschenk said the quiet part aloud: The "horse had left the barn" because Paine had made the decision months ago, unilaterally, in secret, and for its own reasons. Paine was intent on preventing Mr. Gerawan from discovering the origins of the Transformation Agreement or assessing McKinsey's performance.

110. In any event, the "Quick Wins" that McKinsey promised to deliver never materialized in a manner that improved the Company. Because Paine disloyally prioritized its relationship with McKinsey over the best interests of the Company, McKinsey's failures did not cause Paine to reevaluate the relationship.

K. The Board Approves the Company's 2021 Budget, and Paine Secretly Implements the Replanting Initiative over Mr. Gerawan's Objections.

111. On March 11, 2021, the Board met again. At the meeting, management gave a detailed "Budget Presentation for Board Approval" for the Company's fiscal year 2021.

112. The presentation vaguely explained that the budget had been "developed looking [sic] at the company with headwinds and tailwinds and then layering in the quick win initiatives with work done by McKinsey." It also stated that McKinsey had assisted in an "account by account planning review" of the Company's pricing strategy. The fact that McKinsey was working on pricing despite Beringause having hired Edgewood to work on "marketing" demonstrates wasteful consultant spending and an inexcusable lack of coordination.

113. In another frank assessment of the Company's deterioration following the termination of Mr. Gerawan, the February 2021 Board Deck acknowledged that the CEO transition had caused "multiple key employees" to "exit[] the business[,] taking with them key knowledge." It noted that "[m]any areas in the organization are understaffed and don't have the appropriate bench strength to tackle more complex projects and analysis."

114. The Company accounts for consulting services as a component of Selling, General and Administrative ("SG&A") expense, a category that includes

employee salaries, “consulting, legal and professional services,” and “insurance.” While the presentation contained numerous pro forma financial statements that included SG&A, none of them broke out the cost of retaining McKinsey.

115. Despite the Company’s deteriorating condition and lack of internal capacity “to tackle . . . complex projects and analysis,” the presentation again advocated pursuing the Replanting Initiative. In one slide, the presentation claimed that “[r]edeveloping all acreage immediately has the highest NPV,” but acknowledged that it also had “the highest immediate cash cost,” at a three-year net cash impact of negative *\$19.7 million*. The presentation also noted that maintaining status-quo almond farming would “provide stable cash flow.” The choice was between a risky, expensive project that would destroy existing productive assets and, according to management’s valuation model, would not begin to generate positive cash flow until the end of 2024; and doing nothing, which would cost nothing and preserve a reliable, stable generator of cash flow.

116. Mr. Gerawan again expressed his opposition, warning that the Replanting Initiative would be costly at a challenging time for the Company. Planting, grafting, and growing new trees is difficult. The model presented at the March 11 Board meeting naively assumed that the Company had the skill and bandwidth to successfully plant one million trees in a matter of months. It is impossible to square that heroic assumption with management’s simultaneous

assessment that the Company was “understaffed” and lacked “appropriate bench strength to tackle more complex projects and analysis.” The Company’s new management was not prepared for the challenge.

117. No decision was made at the March 11 Board meeting. Haft again assured Mr. Gerawan that the Board would discuss the initiative again before reaching a decision. This time, Haft claimed that the Executive Committee would meet to consider the Replanting Initiative.

118. Haft lied. Later that day, at Paine’s direction, the Company began ripping out the almond trees, senselessly sacrificing a valuable unharvested crop still sitting on the trees.

119. The Replanting Initiative was a significant decision involving the expenditure of millions of dollars at a time when the Company was struggling operationally. By forcing through the Replanting Initiative, Paine usurped the authority of the Board and disregarded core principles of corporate governance. The result was a material degradation of the Company’s financial position.

L. The Company Refuses to Produce Books and Records and Retaliates Against Mr. Gerawan.

120. After the Company repeatedly had stonewalled his requests for information, on March 22, 2021, Mr. Gerawan sent a formal demand to inspect the Company’s books and records under Section 18-305(b) of the Delaware Limited

Liability Company Act (the “Demand”). The Demand sought information about the Company’s 2021 budget, its relationship with McKinsey, a companywide program called the “CPQ Initiative,” the Company’s payments to Paine, transactions involving real estate assets owned by the Company, Executive Committee activity, and the independence of the Board.

121. On March 25, 2021, Beringause acknowledged receipt of the Demand and promptly canceled all future weekly update meetings with Mr. Gerawan. Beringause thus willfully acted to isolate Mr. Gerawan and conceal material information that was relevant to Mr. Gerawan’s role as a member of the Board, breaching his duty of candor to Mr. Gerawan.

122. On March 26, 2021, the Company responded to the Demand. The Company characterized the Demand as “obviously an improper attempt to harass [the Company] and its other shareholders,” “disruptive,” and “inappropriate.”

123. The Company refused to produce (i) “all communications’ related to the 2021 budget,” (ii) “all communications’ between McKinsey and [the Company and/or the Board,” (iii) any documents and communications about transactions other than the sale of almond acreage, and (iv) any documents and communications related to the independence of the Board.

124. The Company confirmed that the Executive Committee had never met and that no Executive Committee minutes existed.

125. The Company refused to produce additional information unless Mr. Gerawan signed a nondisclosure agreement. The Company had never before conditioned a Manager's access to information on the execution of a nondisclosure agreement.

126. On March 31, 2021, Mr. Gerawan responded to the Company's March 26 letter and added color to certain of his requests. In its reply, the Company confirmed that McKinsey's "work" under the Transformation Agreement in the form of a "Bankable Plan" was nonexistent, claiming that it had "been delayed due to the lack of manpower at [the Company] to gather data and assist with McKinsey's diligence" and stating that the Company did not "know when it will be delivered." Despite having promised to "provide advisory services in relation to the . . . supervision of other advisors, including . . . consultants," Paine was nowhere to be found. SA § 2(a)(v).

127. The Company refused to provide more information unless Mr. Gerawan executed a nondisclosure agreement.

M. Paine Attempts to Retroactively Paper Over Its Unilateral Actions.

128. On April 1, 2021, a Paine employee named Hywel Robinson circulated a proposed written consent of the Board that would approve multiple past transactions including the Transformation Agreement, three real estate transactions, and Future Transaction Fees to Paine for the real estate transactions (the "April

Board Consent”). Robinson’s message attached an email chain that confirmed that governance rules had not been followed and the Board never had approved the Transformation Agreement with McKinsey. Nearly five months later, Paine had realized that it had ignored division of authority in the LLC Agreement when it retained McKinsey. Paine also had ignored the requirement under the Services Agreement that the Company formally agree to the amount of any Future Transaction Fee. The April Board Consent was Paine’s attempt to retroactively cleanse those actions.

129. The email chain began with an email to from Robinson to Freshfields, Paine’s outside law firm, on March 18, 2021: [REDACTED]

[REDACTED] Robinson’s email confirmed that, in violation of the LLC Agreement and the Governance Policies, Paine had purported to execute the Transformation Agreement on the Company’s behalf. The April Board Consent was intended to retroactively ratify the agreement.

130. Further demonstrating the impropriety of Paine’s unilateral actions, Robinson continued:

- [REDACTED]

- [REDACTED]
- [REDACTED]
- [REDACTED]

Robinson's email thus confirmed that Paine had ignored the basic formalities required by the LLC Agreement and Services Agreement that Paine had written. Even Robinson's attempt to bring the Company into "compliance with corporate governance" ignored the Agreement Condition, which required that any fees paid to Paine be "agreed upon by the parties hereto." SA § 2(b).

131. The April Board Consent also approved a \$37.9 million sale of real estate assets (a separate piece of land with almond trees) owned by the Company. In the attached email chain, Robinson also asked of Freshfields,

[REDACTED]

132. The Services Agreement did not contemplate a 2% fee for a real estate transaction. It contemplated that Paine would receive a fee that was "agreed upon by the parties" to the Services Agreement. *Id.* § 2(b). Such a fee would include an assessment of other fees paid in connection with a transaction so that the Company did not pay twice.

133. Renata Lombardia Malavazzi, Paine's General Counsel, added another question for Freshfields: [REDACTED]

[REDACTED]

[REDACTED]

134. In a second email, Malavazzi added, [REDACTED]

[REDACTED]

[REDACTED]

135. Paine's employees thus faced two dilemmas. First, they had hired McKinsey without Board approval. They needed to retroactively ratify that decision. Second, Paine needed to charge the Company fees that the Company never had agreed to pay.

136. Robinson had an idea. In another email to Freshfields, he wrote, [REDACTED]

[REDACTED]

[REDACTED]

137. Freshfields responded: [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

138. Robinson knew that the Company's budget had not included the McKinsey contract. He responded: [REDACTED]

[REDACTED]

[REDACTED]

139. Freshfields responded, asking whether [REDACTED]

[REDACTED] and suggesting that

[REDACTED]

140. Robinson responded: [REDACTED]

[REDACTED] That statement was not correct. To solve Paine's dilemma, Robinson sought a retroactive ratification of the Transformation Agreement, the sale of almond acreage, and the 2% fee that Paine unilaterally imposed on the Company for a sale of almond acreage, a sale of citrus acreage, and the execution of a sale-leaseback transaction. Those fees netted Paine \$759,569, \$1,258,000, and \$1,500,000, respectively.

141. Robinson's email was addressed to the entire Board but inadvertently excluded Mr. Gerawan. When Mr. Gerawan eventually received the April Board Consent, he noticed that it did not disclose the roles of the Company's third-party advisors, the amount of their fees, or why, as it claimed, the Company was "required

to hire” Paine despite never having agreed to Paine’s fees as required by the Services Agreement.

142. The April Board Consent also omitted copies of the Transformation Agreement and the Purchase and Sale Agreement for the real estate transaction. Both of those documents were identified as exhibits to the April Board Consent and apparently had been attached to an email between Paine and Freshfields lower in the email thread that Robinson forwarded to Mr. Gerawan.

143. On April 5, 2021, Mr. Gerawan asked Robinson for the two missing documents, copying the entire Board:

Hi Hywel: Unless I missed it, the written consent circulated with the below email did not include Exhibit A, the Purchase and Sale Agreement, or Exhibit B, the Transformation Agreement. It looks like Exhibit C was attached. Are you planning on sending Exhibits A and B to the Board? Thank you. -- Dan

144. Robinson never responded. The Board nonetheless approved the April Board Consent.

145. The terms of the Transformation Agreement and the Purchase and Sale Agreement were material. Paine failed to disclose them to the Board.

146. The fact that Paine had caused the Company to agree to the Transformation Agreement without proper Board approval was material. Paine failed to disclose that information to the Board.

147. Paine thus willfully violated its duty of candor to Mr. Gerawan and the other Managers by omitting information whose absence was materially misleading.

148. Paine further breached its duty of loyalty to the Company by causing the Board to operate in an informational vacuum with respect to the April Board Consent. The members of the Board were entitled to receive all material information about the transactions they were approving and why they had been executed without Board approval to begin with.

149. Paine further violated its duty of loyalty to the Company by charging a 2% fee on transactions without even attempting to justify the fairness of the process or the price or negotiating with the Company.

150. By imposing its 2% fee on the transactions referenced in the April Board Consent, Paine caused the Company to pay fees that the Company had not agreed to pay. Those transactions therefore breached the Agreement Condition in the Services Agreement.

151. Beringause breached his duties by remaining silent while all this happened, letting Paine do whatever it wanted, even if it involved transferring millions of dollars from the Company to Paine.

152. On the same day Robinson circulated the April Board Consent, the Company publicly announced the Replanting Initiative as a “major stone fruit expansion” of 2,600 acres adding “1 million additional trees.” Kollock commented

that the initiative would “provide new selling opportunities with new customers.” True to form, Beringause and Paine’s insiders had barreled forward with the \$20 million Replanting Initiative without Board approval.

N. Mr. Gerawan Obtains Books and Records.

153. Paine’s stonewalling prevented Mr. Gerawan from obtaining material information vital to the performance of his duties as a member of the Board. On April 12, 2021, after repeated attempts to obtain the information he sought, Mr. Gerawan brought an action for books and records under Section 18-305(b) of the Delaware Limited Liability Company Act. Verified Compl. For Inspection of Books & Records Pursuant to 6 *Del. C.* § 18-305(b), *Gerawan v. MVK FarmCo LLC*, C.A. No. 2021-0314-PAF (Del. Ch. Apr. 12, 2021) (the “Books and Records Complaint”). A true and correct copy of the Books and Records Complaint is attached as **Exhibit D**.

154. The Books and Records Complaint explained that Paine had “excluded Plaintiff and the rest of the Board from governance of the Company” and detailed how Paine had “retained a management consultant, made related-party payments, replaced the CEO, began marketing the Company’s real-estate and launched other key initiatives,” all “without securing prior Board approval.” Ex. D ¶ 2.

155. As of the filing of the Books and Records Complaint, Paine had been on notice of the impropriety of its unilateral actions at the Company for months. The Books and Records Complaint removed any doubt.

156. In response, Paine caused the Company to agree to produce information that Mr. Gerawan had requested. Mr. Gerawan then dismissed the Books and Records Complaint on May 26, 2021. Stipulation of Dismissal with Prejudice, *Gerawan v. MVK FarmCo LLC*, C.A. No. 2021-0314-PAF (Del. Ch. May 26, 2021). This Complaint relies upon and incorporates by reference the books and records the Company produced in response to the Books and Records Complaint.

157. Unfortunately, Paine and its insiders at the Company continued to isolate, mislead, and ignore Mr. Gerawan in his attempts to participate in the prudent management of the Company. Indeed, Paine held a grudge against Mr. Gerawan for having filed the Books and Records Complaint, something that Mr. Gerawan authorized only after Paine repeatedly refused to provide him with information to which he was entitled.

O. Without Explanation, Paine Improperly Causes the Company to Reimburse An Unearned Invoice from McKinsey.

158. In a May 7, 2021 invoice, Paine sought reimbursement from the Company for what it called “costs related to Prima Wawona.” In that invoice, Paine

demanded \$131,578.94, referencing a bill for consulting services from McKinsey dated March 31, 2021. The Company obliged.

159. When the Company reimbursed Paine for the McKinsey invoice, Paine already had caused the Company to enter into a fixed-price contract with McKinsey. There was no reason for the Company to pay additional fees to McKinsey on top of the fixed-price agreement.

160. When Mr. Gerawan pointed out the apparent mistake, Paine refused to explain the reimbursement request and refused to return the money.

161. Any reimbursement of expenses under the Services Agreement is subject to the Reasonability Condition. Because Paine refused to justify the reimbursement of the McKinsey invoice, the Reasonability Condition was not met. The payment therefore breached the Services Agreement. McKinsey and Paine apparently had an arrangement under which McKinsey could bill the Company directly but also bill Paine, who would pay and get reimbursement from the Company. Paine put McKinsey's interests ahead of the Company's interests, breaching its duty of loyalty to the Company.

P. Beringause Signs the Transformation Agreement.

162. In May 2021, Beringause signed the Transformation Agreement. The agreement was backdated to December 14, 2020, before Beringause was employed by the Company. It committed the Company to pay millions to McKinsey—\$5.67

million in 2021 alone; \$225,000 per week for “high-intensity” weeks, and \$65,000 per week for times when McKinsey may well not have been working at all.

163. The Transformation Agreement nonsensically included deadlines for McKinsey to deliver work that already had passed when Beringause signed the agreement. For example, the Agreement contemplated that McKinsey’s “diligence” would “commence on December 14, 2020,” then set out a “Phase 1A” that would end on March 14, 2021. When Beringause signed the Transformation Agreement, these deadlines had passed. The agreement did not include statements of the work McKinsey had performed to date.

164. Beringause signed the Transformation Agreement because Paine told him to. He did not tell the Board that he had signed the agreement.

165. When Mr. Gerawan settled the books-and-records action, the Company agreed that it would provide copies of any agreements with McKinsey to the Board. Beringause did not provide the Board with a copy of the Transformation Agreement.

166. As an officer of the Company, Beringause had a duty to act on an informed basis. He breached that duty when he signed the Transformation Agreement without informing himself.

167. As an officer of the Company, Beringause had a duty to act for the benefit of the Company. He breached that duty when he signed the Transformation Agreement out of loyalty to Paine.

Q. 2021 Closes on a Disastrous Note with Liquidity Issues, Another Restructuring Engagement, and a Ratings Downgrade.

168. The actions of Paine’s insiders on the Board and in the C-suite, together with the excessive fees the Company paid to Edgewood and McKinsey and the expense of the Replanting Initiative, severely harmed the Company’s financial and operational performance.

169. Recognizing the Company’s deterioration, Paine recommended that the Board hire Houlihan Lokey, a financial advisor that specializes in restructurings. In a presentation on November 1, 2021, Houlihan Lokey confirmed that the Company had suffered “deteriorating performance” in 2021 and consequently had a “minimal cash balance” and was “expected to deplete existing liquidity” by the second quarter of 2022.

170. On November 10, 2021, Beringause signed Houlihan Lokey’s engagement letter.

171. Houlihan Lokey recommended that the Company “recapitalize [its] balance sheet.” The Company could have pursued that path by raising new equity from the Company’s current owners or outside investors.

172. Paine was unwilling to allow the Company to raise new equity. Paine planned to raise a new fund in 2022. To market the new fund to potential investors (including limited partners who had invested in the Company), Paine needed to

avoid marking its investment in the Company to its true market value or diluting its investment in the Company.

173. On November 30, 2021, Moody's Investors Service downgraded the Company's debt to junk, citing "weaker than expected financial results" and "concerns regarding potential liquidity needs in Fiscal 2022."

174. The Moody's report flatly contradicted the assessment in the February 2021 Board Deck that the Company had adequate "liquidity to invest" in the Replanting Initiative. Moody's highlighted the Replanting Initiative as a key driver of the Company's lack of liquidity, stating that "[f]ree cash flow will be negative in 2021," noting that the Company had funded its operations "through asset sales which lead to higher debt and a smaller asset base."

175. Moody's further warned that the Company's "governance risk" was "high given its private equity ownership by Paine Schwartz Partners and its aggressive financial strategies."

176. Moody's reiterated its concerns in a December update, assigning the Company a "highly negative" governance score: "The company's lack of an independent board is a highly negative risk because concentrated decision making creates potential for event risk."

177. On December 2, 2021, Beringause admitted in a year-end report to the Board that the Company's performance was a "disappointment." Adjusted EBITDA

was \$18 million, shockingly below the budget of \$53 million. Beringause gave many explanations for the deficient performance—small fruit, a weak pricing environment, labor shortages, supply chain issues, high costs, high yields in other parts of the country, and a lack of confidence in the Company by outside growers.

178. The truth was far simpler: Paine placed unqualified executives and consultants in charge of the Company, then failed to supervise them. Their failures were the direct and predictable result of Paine’s failure to devote reasonable time and effort to the services it agreed to provide under the Management Agreement. Paine also ignored the governance structure contemplated by the LLC Agreement and caused the Company to pay millions in fees to Paine and McKinsey, breaching its duty of loyalty to the Company. Schutz and Mr. Gerawan were experienced and knowledgeable about the Company and its business. Paine ignored them and withheld critical information from them, breaching its duty of candor.

179. Beringause also highlighted the Company’s urgent need for liquidity. He stated that “lower than expected operational performance for [the] 2021 season has put significant pressure on liquidity through 2022.” As a stopgap, Beringause suggested deferring payments to vendors.

180. Throughout 2021, Paine and Company management repeatedly misrepresented to the independent members of the Board that the Replanting Initiative was proceeding according to plan, never disclosing that it was not. Under

Beringause's management, the botched \$20 million project had produced thousands of acres of half-dead trees with stunted growth. The Company ultimately forfeited an \$800,000 deposit on replacement trees because it did not have the money to make full payment.

181. In the Replanting Initiative, the Company spent tens of millions of dollars that it desperately needed for working capital. In a rare show of candor, Haft admitted at a December 2022 Board meeting that the Replanting Initiative was a mistake and a leading cause of the Company's demise.

182. Given the ratings downgrade, the hiring of Houlihan Lokey, and the urgent liquidity issues at the Company, Paine should have stopped collecting its fees under the Services Agreement. Paine opted to take the cash instead. Within weeks of the downgrade, Paine collected its \$2 million annual fee—just when Beringause began asking the Company's suppliers to allow the Company to defer payments the Company owed them, risking the loss of critical inputs at a time when the Company could not afford further operational and reputational harm.

183. Beringause should have instructed Houlihan Lokey to go out and look for new money to restore the Company's balance sheet. Beringause failed to do so because Paine did not want to dilute or write down its investment in the Company. Beringause thus placed Paine's interests before those of the Company, breaching his duty of loyalty.

R. The LeHenaff Amendment

184. On December 7, 2021, Serge LeHenaff, the Company's CFO, signed an Amendment and Addendum to the Transformation Agreement, effective November 1, 2021 (the "LeHenaff Amendment"). A true and correct copy of the LeHenaff Amendment is attached as **Exhibit E**.

185. The LeHenaff Amendment reflected a renegotiation of both McKinsey's obligations and "the economic arrangements" under the Transformation Agreement. Ex. E at 1. The amendment reflected the fact that the Company had paid McKinsey approximately \$3.67 million in 2021 under the Transformation Agreement, and that McKinsey either had not earned the remaining \$2 million in fees or had permitted the Company to defer payment. Accordingly, the parties agreed that the Company would not be obligated to pay the deferred fees unless (i) McKinsey had earned a \$2,020,000 "Soft Cap" and (ii) "unless and until McKinsey also delivers an assessment of the operational performance of Prima Wawona during the 2022 season (the "Assessment")." *Id.* § 1. The "target delivery date for the delivery of the Assessment" was November 1, 2022. *Id.* The LeHenaff Amendment did not require the Company to pay interest on any earned but unpaid fees.

S. Goedde Commits the Company to Pay Additional Fees to McKinsey, His Former Employer, Before Even Joining the Board.

186. On January 24, 2022, mere weeks after LeHenaff had executed the LeHenaff Amendment, Goedde, the former McKinsey executive, secretly executed a radically different “Second Amendment and Addendum to Transformation Agreement” (the “Goedde Amendment”). A true and correct copy of the Goedde Amendment is attached as **Exhibit F**.

187. The Goedde Amendment contained an identical recitation of purpose to that of the LeHenaff Amendment. The Goedde Amendment did not create any new obligations for McKinsey. Yet, inexplicably, the Goedde Amendment radically altered the economic terms that LeHenaff had negotiated during the previous month.

188. First, the Goedde Amendment changed the “Soft Cap” from \$2,020,000 to \$9,000,000. Ex. F. § 1. Second, the Goedde Amendment obligated the Company to pay interest at an onerous rate on McKinsey’s fees, beginning on October 31, 2022: “nine percent (9.0%) or 3-Month SOFR plus eight percent (8.0%), whichever is greater.” *Id.*

189. The Goedde Amendment thus authorized McKinsey to charge the Company almost *four-and-a-half times* the amount contemplated by the LeHenaff Amendment, then collect interest at a rate at least *thirty-two times higher* than the then-prevailing Federal Funds rate.

190. Goedde, who had joined Paine from McKinsey less than six months earlier, has never explained why it was appropriate for him to personally deliver a windfall to his former employer. Goedde has never given any explanation at all. Instead, Goedde kept the existence of the Goedde Amendment secret; the Company only discovered its existence when McKinsey sent the Company a copy of the agreement in January 2023. Even when he attended Board meetings in early 2023 when the topic of the Goedde Amendment was discussed, Goedde never acknowledged or attempted to justify his actions.

191. It is easy to see why Goedde hid the Goedde Amendment: Setting aside the lack of justification for executing a second amendment weeks after the LeHenaff Amendment, the onerous economic terms in the Goedde Amendment, and the troubling conflict of interest, Goedde *lacked any authorization* to sign the agreement on behalf of the Company.

192. Only “the Board” or an “Officer authorized by the Board” may execute an “agreement, instrument or document for and on behalf of the Company.” LLCA § 5.2(g). As noted, the Board is empowered to act only through written “resolutions adopted at a meeting,” through “written consents,” “by delegating power and authority to committees,” and “by delegating power and authority” to officers of the Company. *Id.* § 5.1(b); *see also id.* § 5.3(f) (“The Chairman shall not, except in his or her capacity as an Officer, have the authority or power to act for or on behalf of

the Company, to do any act that would be binding on the Company or to make any expenditure or incur any obligation on behalf of the Company or authorize any of the foregoing.”).

193. When he signed the Goedde Amendment, Goedde was not a member of the Board. Goedde has never been an officer of the Company. He purported to sign in his capacity as a “partner.” Goedde was not a “partner” in the Company. He was a partner in Paine. The Goedde Amendment was void.

194. Paine and Goedde hid this fact from the Company for a year. The Company only discovered it in January 2023 when it requested that McKinsey send copies of all agreements between McKinsey and the Company.

195. In February 2022, Kruttschnitt pressed Paine to provide information on McKinsey’s fees. Paine’s employees on the Board provided a copy of a McKinsey presentation to the Board. The presentation confirmed that the Company had paid McKinsey \$3.67 million in 2021 and listed the remaining \$2 million under the Transformation Agreement as “deferred to after the 2022 season, with potential for further deferral.” That information was consistent with the LeHenaff Amendment. It contradicted the Goedde Amendment.

196. The presentation also did not indicate that the Company would owe any interest on any deferred fees. It did not indicate that Paine and Goedde had purported

to give McKinsey leeway to seek an additional \$7 million in fees during 2022. Nor did it mention the \$131,578.94 payment McKinsey had funneled through Paine.

197. At a February 2022 meeting, the Board discussed the possibility of a new arrangement with McKinsey. None of Paine's insiders disclosed the existence of the Goedde Amendment.

198. Goedde has never explained why he thought he was authorized to sign the Goedde Amendment. The most rational inference is that Paine told him to. By causing Goedde to sign the agreement, then concealing it from the Board, Paine circumvented the authority of the Board to benefit McKinsey at the expense of the Company. Paine therefore breached its fiduciary duties to the Company. By signing the Goedde Amendment and then concealing it, Goedde aided and abetted Paine's breach.

T. Paine Again Refuses to Allow the Company to Raise New Funds.

199. The Company's operations continued to flounder, and on April 7, 2022, Beringause informed the Board that LeHenaff was leaving the Company. Beringause stated that an internal hire would replace LeHenaff.

200. On April 12, 2022, Houlihan Lokey gave a presentation to the Board. Houlihan Lokey indicated that investors were interested in providing junior debt. Noting that "market conditions" were "[f]avorable," Houlihan Lokey explained that

“multiple lenders have already reached out” and “expressed interest in providing new money.”

201. Houlihan Lokey warned that the situation at the Company was dire: “Without a cash infusion, operations remain cash-poor . . . and lender scrutiny will increase.”

202. These developments should have resulted in the Company immediately pursuing outside funding to save the Company, even if it required renegotiating the Company’s existing debt arrangements or diluting existing equity holders. But Paine still was marketing its new fund. Mindful of Paine’s position, Beringause did not instruct Houlihan Lokey to seek new capital, delaying the inevitable reckoning until after Paine could raise billions of dollars in commitments from state and local government pension funds and other investors.

U. Paine Consolidates Its Control of the Board.

203. Paine should have responded to the Company’s deteriorating financial position by allowing Houlihan Lokey to pursue new money. Instead, Paine consolidated its control over the Board, systematically reducing the number of purportedly independent Managers among Paine’s appointees from three to one.

204. In 2021, Paine had hired Spencer Stuart to find “independent” Managers to create the illusion of a majority-independent Board. At Spencer

Stuart's recommendation, Paine had designated Cate Hardy and Mark Rodriguez as "independent" Managers.

205. By 2022, Paine needed to consolidate its control over the Board. To accomplish that goal, Paine discarded the veneer of independence it had created among its Board designees.

206. The first step was to replace Hardy, who did not work at Paine, with Goedde, who did. Paine never explained why Hardy left the Board and was replaced by Goedde.

207. Hardy had been selected to chair the Strategy Committee in April 2021. However, coincident with Hardy's appointment, Haft instructed her to delay the first meeting of the Strategy Committee until the end of the season. Hardy told Rodriguez and Mr. Gerawan, who also sat on the Strategy Committee, that she looked forward to working with them "when the time comes." The Strategy Committee never met, and within a year Hardy was gone.

208. Paine's second step was to hire Rodriguez as a Paine Operating Director, making him a Paine insider. By converting Rodriguez from an "independent" Manager to a full-time Paine employee, Paine secured Rodriguez's loyalty and acquired full voting control over the Board.

V. Beringause Resigns, and Paine Appoints a Rodriguez as Interim CEO.

209. In July 2022, Beringause resigned as CEO after serving for approximately eighteen months. Kollock and Ekpo resigned with Beringause. As a result, the Company needed to replace its CEO, Chief Commercial Officer, and head of Food Safety and Quality Assurance.

210. Later that month, Rodriguez became a full-time Operating Director of Paine. Paine then appointed Rodriguez interim CEO of the Company. Paine did not involve the Board in that decision and never disclosed to the Board the specifics of the arrangement.

211. The LLC Agreement required that “[a]ny vacancy occurring in any office of the Company . . . be filled by the Board and shall remain vacant until filled by the Board.” LLCA § 5.6(b). For the second time, Paine had ignored that requirement, freezing the Board out of its search for a replacement CEO.

212. During his entire tenure as interim CEO, Rodriguez continued to serve as an Operating Director of Paine. As CEO, Rodriguez acted as a Paine insider.

W. McKinsey Fails to Deliver Another Promised Report, and Paine Claims the Company Owes McKinsey \$10 Million.

213. In the LeHenaff Amendment, McKinsey had promised to deliver its Assessment of the 2022 season with a “target delivery date” of November 1, 2022. Ex. E § 1. The LeHenaff Amendment conditioned the Company’s obligation to pay

any fees to McKinsey on delivery of the Assessment. *Id.* The Assessment was intended to summarize McKinsey's two years of work at the Company and what, if anything, it had achieved. The Time and Efforts Requirement obligated Paine to spend reasonable time and efforts to ensure that McKinsey, the consulting firm Paine had selected, *at least* delivered the report as promised.

214. McKinsey never delivered the Assessment, perhaps because by November 2022 the Company was in severe financial distress and the promised McKinsey-inspired improvements to the Company's bottom line had not materialized. If honest, the Assessment would have indicated that the Company was in far worse shape than when McKinsey arrived.

215. Despite this failure, and despite McKinsey's failures to deliver any meaningful operational improvements throughout its entire engagement, Paine claimed in late 2022 that the Company owed McKinsey *\$10 million*. There was no written agreement with McKinsey requiring that this payment be made. Unaware of the existence of the Goedde Amendment, Mr. Gerawan requested copies of all written agreements with McKinsey from the Company. The Company, its outside counsel, and Paine's insiders on the Board all insisted that the Transformation Agreement was the only written agreement between the Company and McKinsey.

216. A properly functioning and loyal Board could have resolved McKinsey's fee dispute easily and saved the Company millions of dollars: First, the

Goedde Amendment was void because Goedde signed it without authorization from the Company. Second, the LeHenaff Amendment conditioned any payment to McKinsey on delivery of the Assessment. McKinsey never delivered the Assessment, so the Company did not owe McKinsey anything.

217. Even if the void Goedde Amendment had been validly executed (and it was not), there was no evidence that McKinsey had earned any fees in excess of the \$2,020,000 “Soft Cap” in the LeHenaff Amendment. Mr. Gerawan requested copies of any invoices that could justify the \$10 million figure. The Company and Paine’s insiders on the Board produced none. Yet every Paine-affiliated Board member who commented on the matter supported making the \$10 million payment to McKinsey. Every non-Paine affiliated Board member disagreed. Paine’s Board designees ignored them.

X. Without Notice to the Board, Paine Creates a Secret Search Committee that Fails to Find a New CEO.

218. After Beringause quit, when the independent members of the Board inquired about the search for a new permanent CEO, they were only told that Spencer Stuart had been hired and was working on it. In reality, Paine secretly had created its own search committee comprised of Goedde, Bierschenk, Rodriguez, and two human resources employees from Paine. The Board was not informed about the

search committee until January 2023, after the committee had failed to find a new CEO after searching for five months.

219. The LLC Agreement required that “[a]ny vacancy occurring in any office of the Company . . . be filled by the Board and shall remain vacant until filled by the Board.” LLCA § 5.6(b). For the third time, Paine ignored that requirement, freezing the Board out of its search for a replacement CEO.

220. At a December 2022 meeting of the Board, Rodriguez reported on the CEO search, claiming that Paine had identified multiple candidates for the position without providing additional information. After the meeting, Mr. Gerawan asked Haft when the Board would meet them. Haft replied that he “had not seen or met with any of the candidates that [Spencer Stuart] had surfaced.” Haft did not disclose that he was the only Paine insider who was not on the secret search committee and that others at Paine had “seen” and “met with” the candidates.

221. Paine refused to disclose the identities of the CEO candidates its secret search committee had identified. Instead, Haft informed Mr. Gerawan that “it will be determined [by Paine] who from the company and board should meet with the finalist(s).” Haft’s message further demonstrates Paine’s total disregard for the governance structure its Board designees were required to respect under the LLC Agreement. The independent members of the Board only learned the identities of the candidates when Paine sought reimbursement for the expensive dinners Paine’s

principals enjoyed with the candidates while failing to convince them to head the Company.

222. The secret Paine search process was a disaster, as all of Paine's searches for replacement CEOs had been. Every candidate Spencer Stuart identified and Paine interviewed withdrew from consideration.

223. As the former CEO and 25% owner of the Company with a long and venerated career in the stone fruit business, Mr. Gerawan could have provided invaluable input into the search process. True to form, Paine excluded Mr. Gerawan and the other two independent Managers from the process.

224. By ignoring the LLC Agreement and usurping the search process from the Board, Paine again breached its duty of loyalty to the Company.

Y. Paine Belatedly Instructs Houlihan Lokey to Seek New Money for the Company, then Extracts Another \$2 Million from the Company.

225. In December 2022, Paine finally directed Houlihan Lokey to look for new funds for the Company. It was too late.

226. In contrast to November 2021, when Houlihan Lokey had recommended a capital raise, and April 2022, when Houlihan Lokey had recognized "[f]avorable market conditions" and interest from multiple potential investors, the environment in December 2022 was not conducive to raising new money. Interest

rates had risen and concerns about an economic slowdown were widespread. Meanwhile, the Company's operations had deteriorated further.

227. Consequently, despite a massive canvass of the market, Houlihan Lokey could not find anyone willing to invest junior capital or debt in the Company.

228. As the Company drew nearer to insolvency, Paine and Houlihan Lokey recommended that the Company hire AlixPartners. In the three years since Paine had first caused the Company to hire McKinsey instead of AlixPartners, the Company's equity value had evaporated.

229. After the Company hired AlixPartners, Paine further isolated the independent members of the Board from the management of the Company, again disregarding the governance structure in the LLC Agreement. Instead of acting through the Board, Paine managed AlixPartners' engagement.

230. Despite the lack of justification for McKinsey's claim that the Company owed it \$10 million, Paine instructed AlixPartners to record a \$10 million debt to McKinsey on a schedule of the Company's debts. AlixPartners obliged. Paine thus caused AlixPartners to overstate the Company's liabilities, reducing the residual value available for the Company's creditors and Unitholders.

231. Paine also caused the Board to hire outside counsel for the anticipated bankruptcy proceedings. In its engagement letter, bankruptcy counsel explained that it "currently represents or has represented Paine Schwartz Partners, LLC and will

continue to do so.” Bankruptcy counsel then sought and received a waiver of present and future conflicts.

232. In January 2023, despite the Company’s insolvency, Paine nonetheless took advance payment of its \$2 million annual fee from the Company despite the Company’s increasingly precarious cash position. The \$2 million was unearned when Paine took it; the Services Agreement requires the provision of services over the full year. Indeed, the Company’s advisors projected that the Company would enter restructuring by April 2023, making it unlikely that Paine’s services would be needed for the full year. As a fiduciary of the Company, Paine was obligated to act in the best interest of the Company. Instead, Paine acted to benefit itself, breaching that duty and further eroding the residual value of the Company that would be available for the Company’s creditors and Unitholders.

233. On January 16, 2023, Mr. Gerawan pointed out the lack of any signed agreement between the Company and McKinsey that could justify the \$10 million debt that Paine had caused AlixPartners to record on the schedule of the Company’s debts in December.

234. On January 17, 2023, Rodriguez sent Mr. Gerawan the Goedde Amendment. Mr. Gerawan, Schutz, and Kruttschnitt had never seen it before. As noted, Goedde had purported to sign the Goedde Amendment on the Company’s behalf without authorization under the LLC Agreement. Mr. Gerawan pointed out

this fact and the obvious conflict Goedde had faced when he purported to bind the Company to pay unearned fees to McKinsey, his recent former employer.

235. Paine's insiders refused to challenge the void Goedde Amendment. They preferred to preserve Paine's close relationship with McKinsey, which by then had expanded to include McKinsey's commitment to invest as a limited partner in Paine's new fund. Paine's insiders did not care that failing to challenge the void debt to McKinsey would worsen the Company's cash position in any restructuring, make it more likely that the Company would face liquidation, and further deplete any residual value available for the Company's Unitholders.

236. If Paine recognized that the Goedde Amendment was void, then Paine breached its duty of loyalty by knowingly causing AlixPartners to record a void \$10 million debt to McKinsey on the schedule of the Company's debts.

237. If Paine somehow failed to recognize that the Goedde Amendment was void, then the next question is whether Paine possessed documentation for the amount the Company supposedly owed McKinsey under the (void) Goedde Amendment. If so, then Paine breached its duty of candor by causing the Company and Paine's Board designees to withhold that information from Mr. Gerawan. If not, then Paine breached its duty of loyalty by causing AlixPartners to record the debt as a fixed, concrete obligation in the maximum possible amount, when the (void) debt really was an unknown, contingent liability.

238. On January 24, 2023, the Board held a meeting. At the meeting, the Company's bankruptcy counsel proposed that the Board appoint Aron Schwartz as an "independent" member of the Board. Schwartz specializes in corporate bankruptcies and restructurings.

239. On January 31, 2023, having failed to identify a replacement CEO, Rodriguez resigned, leaving the Company without a CEO.

240. Paine informed the Board that an AlixPartners director had agreed to temporarily serve as interim CEO but could not start until February 6, 2023. Rodriguez, a Paine Operating Director and (still) a member of the Board, never explained why he could not stay on until that date.

241. In or around late January 2023, the Board approved the appointment of Schwartz to the Board. The Company pays Schwartz \$25,000 per month to serve on the Board.

242. On February 22, 2023, Mr. Gerawan and Schutz resigned from the Board.

Z. Paine's Investment Scorecard as of 2023

243. The Company did not become insolvent due to any deterioration in its core markets. Indeed, in its report downgrading the Company's debt to junk, Moody's noted the Company's "strong position in the US conventional and organic stone fruit market" and "positive secular trends in organic and healthy living."

Consumers still demand the Company's products; the Company's downfall coincided with a period of robust demand when other growers thrived. The Company became insolvent due to Paine's gross mismanagement, self-dealing, and disregard for its fiduciary and contractual duties. Paine, Beringause, and the consultants they enabled systematically siphoned cash out of the Company, sat idly while the Company's operations deteriorated, and squandered the remainder of the Company's cash on fruitless initiatives.

244. In total, Paine unilaterally imposed 2% Future Transaction Fees on five transactions, for a total of \$3,851,275.

- Paine charged the Company \$678,000 for a sale of citrus tree real estate in January 2021.
- Paine charged the Company \$1.5 million for a sale and leaseback transaction in February 2021.
- Paine charged the Company \$560,000 for a sale of citrus tree real estate in March 2021.
- Paine charged the Company \$763,275 for a sale of almond tree real estate in June 2021.
- Paine charged the Company \$330,000 for a real estate sale in June 2022.

245. These fees include two transactions in which the Company did nearly all the work (the two citrus transactions), and another in which Houlihan Lokey was involved and received a fee (the June 2022 real estate sale). These fees were in

addition to Paine's \$2 million annual fee and the \$12.5 million fee Paine took on the closing date of the Merger.

246. Paine also caused the Company to agree to pay McKinsey \$5.67 million in the Transformation Agreement, despite knowing that McKinsey's proposal was inferior to AlixPartners' proposal. Even after McKinsey failed to deliver a Bankable Plan on time, Paine unilaterally caused the Company to approve the Transformation Agreement. McKinsey never delivered a Bankable Plan. Paine then permitted (or instructed) Goedde to sign the Goedde Amendment on the Company's behalf. Paine even supported McKinsey when McKinsey claimed the Company owed it \$10 million, causing AlixPartners to radically overstate the Company's obligations. Thanks to Paine's disloyal actions, McKinsey collected millions in fees while failing to improve the Company's operations. Ultimately, McKinsey was paid approximately \$3.8 million.

247. Goedde has never explained why he purported to execute the void Goedde Amendment. Paine has never justified its claim that the Company owes McKinsey \$10 million. The Company's schedule of liabilities still reflects the void, unsupported \$10 million liability to McKinsey.

248. Along the way, Paine allowed Beringause to pursue value-destroying initiatives, cause the Company to pay over \$1 million to Beringause's former employer to pursue redundant consulting work, and conceal the negative effects of

the Replanting Initiative from the independent members of the Board. The Replanting Initiative cost the Company at least \$20 million in increased expenses and lost revenue.

249. The Company's insolvency is the predictable result of the Defendants' brazen disregard for their duties. The Company is entitled to recover damages. The amounts identified above total over \$50 million in cash the Company would have had on its balance sheet if the funds had not been squandered at Paine's direction. These excess expenditures mortally wounded the Company, causing its demise. Other breaches of duty—such as the failure to heed Houlihan Lokey's warning in November 2021—caused additional harm in the tens or hundreds of millions of dollars.

COUNT I: BREACH OF FIDUCIARY DUTY

Against Defendant Paine

250. Through its affiliate, Holdings, Paine exercised majority voting power over the Company and designated the majority of the members of the Board. Paine therefore owed a duty of loyalty to the Company. That duty included an unremitting obligation to deal candidly with the members of the Board, including Mr. Gerawan.

251. Paine breached its duty of loyalty by willfully causing the Company to operate for the benefit of Paine at the expense of the unaffiliated Unitholders.

252. Paine further breached its duty of loyalty by causing the Company to hire McKinsey without Board authorization, despite the existence of a superior proposal from AlixPartners. Paine caused the Company to hire McKinsey because Paine benefited from its association with McKinsey. By using funds that belonged to the Company to benefit itself by rewarding McKinsey, Paine willfully breached its duty of loyalty to the Company.

253. Paine further breached its duty of loyalty by willfully failing to deal candidly with Mr. Gerawan. Paine and its insiders repeatedly withheld material information from Mr. Gerawan, creating an informational vacuum. As just one example, Paine deliberately omitted the Transformation Agreement from the April Board Consent, which sought retroactive approval of that agreement. Paine and its insiders at the Company also willfully misled Mr. Gerawan about the actions Paine

was causing the Company to take. As just one example, Paine and its insiders at the Company willfully misled Mr. Gerawan about the status of the Replanting Initiative: While Haft claimed in April 2021 that the initiative would not be approved unless the Executive Committee approved it, the Company already had begun ripping out the almond trees.

254. Paine further breached its duty of loyalty by willfully usurping the authority of the Board in connection with the selection and hiring of Beringause and Rodriguez as CEO of the Company.

255. Paine further breached its duty of loyalty by causing the Company to reimburse a six-figure bill from McKinsey in May 2021 despite the existence of a fixed-price contract between the Company and McKinsey.

256. Paine further breached its duty of loyalty by unilaterally causing the Company to pay Future Transactions Fees for services that the Company had not requested and that the Board did not approve.

257. Paine further breached its duty of loyalty by refusing to allow the Company to raise desperately needed financing so that Paine could raise money for a new fund without acknowledging the destruction of the Company Paine had caused.

258. Paine further breached its duty of loyalty by instructing Goedde to sign the Goedde Amendment without Board authorization and before Goedde even was

a member of the Board, then concealing the existence of the Goedde Amendment from the Company and the Board.

259. Paine further breached its duty of loyalty by causing AlixPartners to record a void \$10 million liability to McKinsey in a schedule of the Company's liabilities, reducing the residual value of the Company and creating further obstacles for any restructuring of the Company.

260. Paine further breached its duty of loyalty by not waiving or deferring collection of its \$2 million fee in January 2023 despite knowing that the Company was approaching insolvency due to Paine's destructive mismanagement.

261. Paine's breaches of the duty of loyalty damaged the Company in an amount to be proven at trial.

COUNT II: BREACH OF FIDUCIARY DUTY

Against Defendant Beringause

262. Plaintiff repeats and re-alleges all allegations in Paragraphs 1 through the Paragraph immediately preceding this one.

263. As an officer of the Company, Beringause owed duties of loyalty and care to the Company. The duty of care obligated Beringause to act on an informed basis in the performance of his executive duties. The duty of loyalty obligated him to act for the benefit of the Company and no one else. Beringause also had an

unremitting duty to deal candidly with the members of the Board, including Mr. Gerawan.

264. Beringause breached his duties of care and loyalty by approving the contract with Edgewood. If Beringause had acted on an informed basis, then he would have known that the Edgewood consulting contract called for Edgewood to perform services that McKinsey and Category Partners already had agreed to perform. By failing to adequately inform himself before hiring Edgewood, Beringause breached his duty of care. By delivering a \$1 million contract to Edgewood, his former employer (and without Board approval), terminating the Company's relationship with Category Partners (a more effective and less costly advisor), then failing to oversee Edgewood's work, Beringause breached his duty of loyalty.

265. Beringause breached his duty of loyalty by failing to instruct Houlihan Lokey to seek new financing for the Company in late 2021 and spring 2022. Beringause ignored Houlihan Lokey's reports that market conditions were favorable and potential investors were interested because he knew that Paine was uninterested in shoring up the Company's balance sheet. By acting to benefit Paine instead of the Company, Beringause breached his duty of loyalty.

266. Beringause further breached his fiduciary duties by signing the Transformation Agreement. Beringause breached his duty of care by signing the

agreement without inquiring into what work McKinsey already had done, why the agreement was backdated to December 2020, and why the Board never had approved McKinsey's engagement to begin with. Further, by signing the agreement at the urging of Paine, Beringause willfully acted to benefit Paine at the expense of the Company, breaching his duty of loyalty to the Company.

267. Beringause further breached his fiduciary duties by approving and then concealing the disastrous results of the Replanting Initiative. Beringause breached his duty of care by approving the costly, wasteful destruction of the Company's almond trees—depleting the Company's cash and eliminating a reliable revenue stream despite existing liquidity struggles. Beringause breached his duty of candor to the Board and Mr. Gerawan by concealing the initiative's disastrous results.

268. Beringause's breaches of his fiduciary duties damaged the Company in an amount to be proven at trial.

COUNT III: AIDING AND ABETTING BREACH OF FIDUCIARY DUTY

Against Defendant Paine

269. Plaintiff repeats and re-alleges all allegations in Paragraphs 1 through the Paragraph immediately preceding this one.

270. As an officer of the Company, Beringause owed duties of care and loyalty to the Company.

271. Beringause breached his duties of care and loyalty to the Company.

272. Paine knowingly and willfully participated in Beringause's breaches of his fiduciary duties. Paine knew or had constructive knowledge that it was facilitating the breaches because (i) Paine caused Beringause to operate the Company for its own benefit at the expense of the Company, and (ii) Paine's insiders approved, participated in, and failed to remediate the breaches.

273. The breaches of fiduciary duty that Paine aided and abetted have damaged the Company in an amount to be proven at trial.

COUNT IV: AIDING AND ABETTING BREACH OF FIDUCIARY DUTY

Against Defendant Goedde

274. Plaintiff repeats and re-alleges all allegations in Paragraphs 1 through the Paragraph immediately preceding this one.

275. As the controller of the Company, Paine owed a duty of loyalty to the Company.

276. Paine breached its duty of loyalty to the Company by willfully causing Goedde to sign the Goedde Amendment without Board authorization and when Goedde was not a member of the Board.

277. Goedde knowingly participated in Paine's breach by signing the Goedde Amendment, purportedly on behalf of the Company, without Board authorization and without even being a member of the Board, then concealing the Goedde Amendment from the Company and the Board.

278. The breach of fiduciary duty that Goedde aided and abetted damaged the Company in an amount to be proven at trial.

COUNT V: BREACH OF CONTRACT

Against Defendant Paine

279. Plaintiff repeats and re-alleges all allegations in Paragraphs 1 through the Paragraph immediately preceding this one.

280. The Services Agreement contained the Cooperation Requirement, which obligated Paine to perform its services “in cooperation with the Company’s senior management.” SA § 2(a).

281. Paine failed to cooperate with the Company’s senior management when it secretly planned to replace Mr. Gerawan as CEO, breaching the Cooperation Requirement. Paine also failed to cooperate with the Company’s senior management when it secretly engaged McKinsey in November 2020, breaching the Cooperation Requirement.

282. The Services Agreement contained the Time and Efforts Requirement, which obligated Paine to “devote reasonable time and efforts to the performance of the Services contemplated by this Agreement.” *Id.* § 2(c).

283. Paine failed to devote reasonable time and effort to the performance of the services contemplated by the Services Agreement. Instead, Paine collected fees under the Services Agreement while delegating management tasks to junior

employees who lacked expertise and experience and to outsiders whom Paine both failed to oversee and allowed to drain the Company of cash. Paine also failed to devote reasonable time and efforts to the supervision of outside advisors like McKinsey. The time and efforts that Paine did “devote” to the Company were almost entirely directed at extracting money from the Company. Those actions breached the Time and Efforts Requirement.

284. The Services Agreement provided for the payment of Future Transaction Fees to Paine only for transactions that satisfied the Request Condition, which provided that Paine was “entitled to additional compensation” only for services “requested” by the Company, and the Agreement Condition, which required that the amount of any Future Transaction Fee “be agreed upon” by Paine and the Company. *Id.* § 2(b).

285. Paine repeatedly caused the Company to pay for Additional Services that the Company did not request. Because the Request Condition was not met as to those payments, the payments breached the Services Agreement.

286. There never has been a negotiation or agreement between the Company and Paine about a Future Transaction Fee. Because the Agreement Condition was not met as to the Future Transaction Fees, those transactions breached the Services Agreement.

287. The Services Agreement included the Reasonability Condition, which provided that the Company only was obligated to reimburse Paine for “reasonable” Ordinary and Additional Out-of-Pocket Expenses. *Id.* § 4.

288. Paine caused the Company to reimburse McKinsey’s unexplained May 7, 2021, invoice despite the existence of a fixed-price contract between McKinsey and the Company. Paine then refused to justify the payment or return the funds to the Company. Because the Reasonability Condition was not met, that payment breached the Services Agreement.

289. Paine’s breaches of the Services Agreement damaged the Company in an amount to be proven at trial.

**COUNT VI: BREACH OF THE IMPLIED COVENANT OF GOOD FAITH
AND FAIR DEALING**

Against Defendant Paine

290. Plaintiff repeats and re-alleges all allegations in Paragraphs 1 through the Paragraph immediately preceding this one.

291. The Services Agreement contained an implied covenant of good faith and fair dealing that inheres in all contracts under Delaware law.

292. The Services Agreement contained an implied term requiring Paine to pursue in good faith the legitimate purposes of the Services Agreement: Providing “valuable,” “cost effective” management services in critical areas such as the

selection and retention of executives and the pursuit of financing. That implied term required that Paine exercise its discretion under the Services Agreement in good faith to serve those purposes.

293. Paine breached that implied term by selecting and retaining executives for self-serving ends—i.e., to increase Paine’s control over decision-making at the Company—and refusing to allow the Company to obtain new financing that its outside advisors reported was desperately needed. Paine further breached that implied term by using its discretion under the Services Agreement to delegate management tasks to consultants like McKinsey with the understanding that they could reap millions of dollars from the Company to perform (or fail to perform) redundant work that failed to produce the “valuable,” “cost effective” results contemplated by the parties to the Services Agreement.

294. The Services Agreement also contained an implied term requiring Paine to respect the governance structure in the Company’s LLC Agreement and not use its ostensible authority as the Company’s advisor to circumvent the Board and the Company’s officers.

295. Paine breached that implied term by, among other things, unilaterally hiring and firing executives and consultants, isolating the Board from critical decisions Paine was making for the Company, and causing the Board to retroactively approve its improper actions.

296. Paine's breaches of the implied covenant of good faith and fair dealing deprived the Company of the benefit of the bargain the Company agreed to when it executed the Services Agreement.

297. Paine's breaches of the implied covenant of good faith and fair dealing damaged the Company in an amount to be proven at trial.

DEMAND FUTILITY ALLEGATIONS

298. Edward Haft, Steven Bierschenk, Mark Rodriguez, Lutz Goedde, Theodore Kruttschnitt, and Aron Schwartz currently serve on the Board of Managers and constitute the "Demand Board."

299. The Demand Board cannot impartially consider a litigation demand against Paine or the other defendants because a majority of the members of the Demand Board have deep and compromising ties to Paine, face a substantial likelihood of liability as a defendant in this action, or both.

300. Haft cannot impartially consider a litigation demand because he is a Paine Operating Director and his livelihood depends on his employment by Paine. Paine also caused Haft to receive \$125,000 per year as compensation for his Board service. The compensation Haft receives from Paine and the Company is material to Haft and negates his ability to impartially consider a litigation demand.

301. Bierschenk cannot impartially consider a litigation demand because he is a Paine Managing Director and his livelihood depends on his employment by

Paine. The compensation Bierschenk receives from Paine is material to Bierschenk and negates his ability to impartially consider a litigation demand.

302. Rodriguez cannot impartially consider a litigation demand because he is a Paine Operating Director and his livelihood depends on his employment by Paine. The compensation Rodriguez receives from Paine is material to Rodriguez and negates his ability to impartially consider a litigation demand.

303. Goedde cannot impartially consider a litigation demand because he is a Paine Operating Director and his livelihood depends on his employment by Paine. The compensation Goedde receives from Paine is material to Goedde and negates his ability to impartially consider a litigation demand. Goedde also cannot impartially consider a litigation demand because he faces a substantial likelihood of liability as a defendant in this action.

304. Schwartz cannot impartially consider a litigation demand because his livelihood depends on the compensation he receives for his Board service—\$25,000 per month. The compensation Schwartz receives from the Company is material to Schwartz. Paine controls whether Schwartz will continue to serve on the Board and receive that compensation. Schwartz therefore cannot impartially consider a litigation demand.

305. Because a majority of the Demand Board is conflicted, a litigation demand would have been futile in this case.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully request that the Court enter an Order:

- (a) Declaring that Paine and Beringause breached their fiduciary duties;
- (b) Declaring that Paine aided and abetted Beringause's breaches of fiduciary duty;
- (c) Declaring that Goedde aided and abetted Paine's breach of fiduciary duty;
- (d) Declaring that Paine breached the Services Agreement;
- (e) Declaring that Paine breached the implied covenant of good faith and fair dealing that inheres in the Services Agreement;
- (f) Awarding the Company damages, including compensatory and rescissory damages, in an amount to be proven at trial;
- (g) Awarding the Company pre-judgment and post-judgment interest;
- (h) Awarding Plaintiff its reasonable attorneys' fees, expert fees, and other expenses; and
- (i) Awarding Plaintiff and the Company such other relief as this Court deems just, equitable, and proper.

/s/ A. Thompson Bayliss
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Attorney for Plaintiff

Dated: June 14, 2023

CERTIFICATE OF SERVICE

I hereby certify that on July 25, 2023, my firm served true and correct copies of *Updated Public Version of Verified Derivative Complaint* upon the counsel listed below via File & ServeXpress:

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