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Transaction ID 55067013
Case No. 8436-VCL

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

DURASEAL COATINGS COMPANY LLC,	)	
	)	
Plaintiff,	)	
v.	)	**C.A. No. 8436-VCL**
	)	
JOE JOHNSTON, DIETMAR ROSE, ROBERT OLSON, JAMES COLLINS, and AMY TARWATER,	)	
	)	
Defendants,	)	
	)	
-and-	)	
	)	
XUREX INC.,	)	
	)	
Nominal Defendant.	)	
	)	

THIRD SUPPLEMENTAL AMENDED VERIFIED COMPLAINT

DuraSeal Coatings Company, LLC ("DuraSeal"), by and through its undersigned attorneys, hereby submits this Third Supplemental Amended Verified Complaint (the "Complaint") both individually and derivatively for the benefit of nominal defendant Xurex Inc. ("Xurex") against Joe Johnston ("Johnston"), Dietmar Rose ("Rose"), Robert Olson ("Olson"), James Collins ("Collins"), and Amy Tarwater ("Tarwater") (collectively, "Defendants"), and alleges the following based upon personal knowledge as to its own actions and upon information and belief as to the actions of others. Allegations unchanged from the Verified Complaint, the Supplemental Amended Verified Complaint, or the Second Supplemental Amended Verified Complaint are asserted as of the date of filing of such complaint; allegations asserted for the first time in this Third Supplemental Amended Verified Complaint are true as of the filing of this Third Supplemental Amended Verified Complaint.

NATURE OF THE ACTION

1. This action seeks redress for the act of the board of directors of Xurex (the "Board" or the "Xurex Board") by which the directors issued themselves and affiliated officers ***10.2 million shares*** of Xurex common stock (the "Stock Issuance") (equal to approximately 22% of the company's outstanding stock prior to the Stock Issuance and 18% of the company's outstanding stock after the Stock Issuance), as well as other cash compensation, for only a few months of service. By any measure, the Stock Issuance and other cash payments are grossly unfair and constitute unjustified and unreasonable compensation. Plainly, the director defendants, who approved this self-dealing Stock Issuance, will be unable to sustain their burden of proving the entire fairness of their actions.

2. Since the Verified Complaint was filed, Olson and Rose (the "Defendant Directors"), aided by Collins and Tarwater (the "Defendant Employees"), have (i) caused Xurex to solicit proxies for the election of directors without corporate authority and (ii) disseminated materially false and misleading information to Xurex's stockholders – all in an effort by the Defendants to garner proxies to reelect themselves (and unidentified others) at Xurex's 2013 annual meeting (the "Annual Meeting").

3. Following the filing of the Supplemental Amended Verified Complaint, the Defendants took additional actions to (i) further cause Xurex to solicit proxies for the election of directors without corporate authority and (ii) further disseminate materially false and misleading information to Xurex's stockholders (the "Proxy Violations").

4. Since filing the Second Supplemental Amended Verified Complaint, through discovery in connection with this action and related actions stemming from the same misconduct, DuraSeal discovered that, while a fiduciary of both DuraSeal and Xurex, Johnston usurped from Xurex the opportunity to develop, position and market its product or a license for its product for

use in coating proppants, including ceramic vacuum microspheres and usurped from DuraSeal the corporate opportunity to sell proppants, including ceramic vacuum microspheres, potentially coated with the product that DuraSeal has exclusively licensed from Xurex, for himself and a newly formed entity, CVM Technology, LLC ("CVM").

5. Finally, Defendants misappropriated substantial corporate resources from both Xurex and DuraSeal for their personal use, both to further their efforts to retain control of Xurex in advance of Xurex's 2013 Annual Meeting and to develop the opportunity to sell proppants

THE PARTIES

6. Nominal Defendant Xurex is a Delaware corporation with its principal place of business in Kansas City, Missouri. Xurex offers innovative industrial protective coatings that create deep bonds by chemically altering substrates. In particular, Xurex's products provide for enhanced performance of equipment used in the oil and gas industry.

7. Plaintiff DuraSeal sells consumable products within, among other things, the oil and gas industry, which are used to enhance the performance of equipment used in the oil and gas industry. DuraSeal products have enhanced the service-life, improved environmental outcomes, and lowered operating expenses when used in oil and gas pipes.

8. DuraSeal is a record holder of shares of Xurex and has been at all pertinent times. Together with shares that DuraSeal had contracted to purchase and held proxies for, DuraSeal together with its affiliates was entitled to vote approximately 44.8% of Xurex's outstanding voting stock prior to the Stock Issuance. Xurex's other shares of common stock were held by numerous unaffiliated stockholders, thereby resulting in DuraSeal having substantial voting power through its 44.8% voting bloc – especially at an annual meeting to elect directors, at which only a plurality is needed to win an election contest.

9. At the time of the Stock Issuance challenged herein, the Xurex Board was comprised of Defendants Rose, Olson, and Johnston, with Johnston serving as the Chairman of the Board. Rose and Johnston had been elected to the Xurex Board by written consent of the stockholders (including DuraSeal), and Olson was appointed to the Xurex Board by Rose and Johnston. At the time of the Proxy Violations, the Xurex Board consisted of Rose, Olson, and non-party Giacomo Di Mase ("Di Mase"), whose family indirectly owns DuraSeal.

10. Defendant Johnston served as the President and CEO of DuraSeal from 2008 through 2011. After his replacement as DuraSeal's CEO, Johnston remained an officer of DuraSeal until February 4, 2013. Johnston served on DuraSeal's board of directors from 2008 to 2012. Johnston served as Xurex's President and CEO from 2011 to January 2012, without DuraSeal's permission. Johnston was a director of Xurex from 2011 through October 2012.

11. Defendant Collins is a long-time business partner of Johnston. Collins replaced Johnston as the President and CEO of Xurex on or about January 10, 2012. Collins was removed as Xurex's CEO on August 28, 2013.

12. Defendant Tarwater is another long-time business associate of Johnston, serving as his "personal assistant" for many years at DuraSeal and in connection with other businesses. On information and belief, Tarwater was appointed to serve as Xurex's Corporate Secretary in September 2011 or January 2012. Tarwater was removed as Xurex's Corporate Secretary on August 28, 2013.

FACTUAL ALLEGATIONS

Background

13. For several years, DuraSeal has been the principal customer of Xurex. DuraSeal purchases Xurex's products for use in coating equipment employed primarily in the oil and gas industry. DuraSeal has a license agreement with Xurex entitling it to the exclusive use of

Xurex's products in the oil and gas industry and a right of first refusal with respect to any future products developed by Xurex with applications in the oil and gas industry. At all pertinent times, DuraSeal has primarily purchased and resold a product called "HabraCoat" from Xurex. Johnston was the founder, President and CEO of DuraSeal.

14. In December 2010, a group of investors headed by the Di Mase family acquired all of the outstanding stock of DuraSeal. Johnston remained as the President and CEO of DuraSeal until early 2012, when he was shifted to the position of Founder/Technical Advisor. In October or November 2012, Johnston was reappointed Vice President of Specialty Automotive. He remained a Vice President of DuraSeal until February 4, 2013. Johnston also served as a director of DuraSeal during part of the relevant time period.

15. By April 2011, DuraSeal had become frustrated with Xurex's then managers and began soliciting consents to replace Xurex's directors (the "Old Board"). On June 14, 2011, DuraSeal delivered written consents to Xurex that removed the Old Board, fixed the size of Board at five directors and elected Johnston, Rose, William O'Brien ("O'Brien"), Nate Hutchings ("Hutchings"), and Carl McCutcheon ("McCutcheon") as Xurex's new directors.

16. The Old Board disputed the effectiveness of the written consents, and litigation ensued in this Court, styled *Johnston, et al. v. Pedersen, et al.*, C.A. No. 6567-VCL (the "Section 225 Litigation"). On September 23, 2011, this Court issued an opinion holding that the written consents were effective, and that the Old Board had been replaced by Johnston, Rose, O'Brien, Hutchings and McCutcheon. McCutcheon, however, thereafter declined to serve as a member of the Xurex Board. Additionally, both O'Brien and Hutchings resigned from the Xurex Board before the end of 2011. Upon information and belief, O'Brien and Hutchings resigned from the Board due to concerns with inappropriate governance on the part of Johnston. This left the

Xurex Board with only two members – namely, Johnston and Rose. On or about October 12, 2011, Johnston and Rose appointed Olson to fill one of the three vacancies on the Xurex Board.

17. Shortly after the Court's decision in the Section 225 Litigation, Johnston assumed the positions of Chairman, President, and CEO of Xurex. On account of opposition by DuraSeal, Johnston's tenure as Xurex's President and CEO was short lived, and he was replaced by Collins on or about January 10, 2012.

The Xurex Board Issues Itself Millions of Shares of Stock and Cash Compensation

18. On March 9, 2012, the three members of the Xurex Board (*i.e.*, Johnston, Rose and Olson) — purported to authorize the issuance of 10.2 million shares of Xurex common stock – the majority of which they issued to themselves. Specifically, the three members of the Xurex Board issued themselves a total of 6.6 million shares of Xurex common stock, including 3 million shares to Johnston and 1.8 million shares to each of Rose and Olson. These shares constitute approximately 18% of Xurex's total equity and voting power following the Stock Issuance. Moreover, unlike typical stock compensation paid directors, the stock that the members of the Xurex Board approved for themselves was not subject to any restrictions or vesting schedule. Rather, each director received an outright grant of unrestricted common stock, which he could retain even if he resigned the following day. At the time of the Stock Issuance, Johnston and Rose had been on the Xurex Board for less than six months, and Olson had been on the Xurex Board for even less time.

19. In addition to authorizing the issuance of millions of shares of stock to themselves, the three members of the Xurex Board also resolved to pay themselves $2,500 per month, retroactive to the date of their election or appointment. This compensation was "guaranteed" for a term of 36 months starting from the appointment of the director. It amounts

to a guaranteed payment of $90,000 per director. This arrangement would be unusual for a well-established business with a variety of established products and steady cash flow. For a struggling start up, such as Xurex, this was an outright abuse of the company's resources.

20. The Stock Issuance and related cash compensation awards were grossly unfair for directors who had only served a few months and were accomplished in an effort to entrench the defendants in office and make it unreasonably difficult and expensive to remove them.

21. In addition to granting themselves unreasonably large stock and cash compensation, the members of the Xurex Board also provided grossly unfair compensation to Xurex's two officers – Collins and Tarwater. As noted above, both Collins and Tarwater have a long professional and personal history with Johnston. The Xurex Board authorized the issuance of 1.8 million shares of Xurex common stock to each of Collins and Tarwater. As with the issuances to the directors, the shares issued to Collins and Tarwater were unrestricted and not contingent upon any further service to the company. The Xurex Board also approved paying Collins and Tarwater annual salaries of $100,000 and $65,000, respectively, as well as benefits. These cash compensation packages were also "guaranteed" for a term of 36 months. Although Johnston approved of the stock issuances to both the directors (including himself) and the officers, the minutes of the March 9, 2012 meeting show that Johnston abstained from the vote on the officers' cash compensation.

22. DuraSeal, which had sponsored the 2011 consent solicitation that resulted in the election of Johnston and Rose, and which was Xurex's largest stockholder, was not informed of the Stock Issuance and related cash compensation arrangement until after it was approved. Nor were Xurex's other independent stockholders so informed.

Johnston, Tarwater, and Contractor
Form a Company to Compete with Xurex and DuraSeal

23. Despite their lavish compensation by Xurex and DuraSeal, Johnston, Collins, and Tarwater did not faithfully serve the interests of Xurex or DuraSeal.

24. Upon information and belief, sometime after the 2011 consent solicitation, Johnson, a director and sometime CEO of Xurex, Cyrus Contractor ("Contractor"), a sales person for Xurex, and Tarwater, Xurex's corporate secretary, undertook to divert business from Xurex and DuraSeal to a new enterprise, called NanoCoat Solutions ("NanoCoat").

25. As of the spring of 2013, a website existed for NanoCoat, which identified Contractor and Scott Gulledge as Partners. (Ex. 1). The website identified Johnston and Tarwater as Managing Members of NanoCoat.

26. NanoCoat's website described its product as a "total corrosion abrasion solution" and described its use in the oil and gas industry. (Ex. 1). **NanoCoat's website copied DuraSeal's website word for word in many places, including when describing its product and tests performed using its product.** (*Compare* Ex. 1 with Ex. 2).

27. DuraSeal's product uses Xurex technology pursuant to a license agreement between Xurex and DuraSeal that grants DuraSeal the exclusive right to use that technology. NanoCoat's website claimed that NanoCoat was using the same product that DuraSeal sells in an industry for which DuraSeal has an exclusive license. NanoCoat's website misappropriated technical reports that DuraSeal had had prepared with respect to Xurex's product and published that information claiming that it applied to NanoCoat's product.

28. DuraSeal discovered the NanoCoat website during the spring of 2013. By January 2014, the NanoCoat website had disappeared.

29. Johnston, Tarwater, and Contractor breached their fiduciary duties to Xurex and DuraSeal by forming NanoCoat to divert business opportunities from Xurex and DuraSeal and by devoting time and resources to NanoCoat.

30. Any business that NanoCoat conducted was a usurped corporate opportunity of DuraSeal, Xurex, or both. Any such business also was the product of misappropriation of corporate assets belonging to DuraSeal and/or Xurex by Johnston and others.

Johnston Diverts the Corporate Opportunity to Sell Proppants from DuraSeal to Themselves

31. In addition to creating NanoCoat to directly divert sales from Xurex and DuraSeal's present product lines, Johnston, Tarwater, Contractor, and possibly other employees and fiduciaries of Xurex and DuraSeal also usurped DuraSeal and/or Xurex's corporate opportunity to develop and sell a line of proppants, both coated and uncoated, alongside Xurex and DuraSeal's current product lines.

32. Upon information and belief, in December 2011, Johnston formed CVM Technology, LLC ("CVM"), a Nevada company, for the purpose of selling proppants.

33. At that time, Johnston was a director and officer of DuraSeal and a director and officer of Xurex. And, DuraSeal's business consisted of selling products to oil and gas companies in the U.S., which those companies can use to increase their efficiency, production, and environmental safety.

34. At all pertinent times DuraSeal has been highly dependent upon one supplier, Xurex and one product, HabraCoat. It is and has always has been in DuraSeal's best interest to diversify its product lines. At various points in time, DuraSeal has actively sought out additional products for use in the oil and gas industry that it could sell alongside its coating products.

35. Selling proppants would be and would have been synergistic with DuraSeal's efforts to sell pipe coating in the oil and gas industry. Selling proppants consists of selling a consumable product to enhance the collection of oil and gas to companies within the oil and gas industry. HabraCoat, which DuraSeal sells, is a consumable product used in the oil and gas industry to enhance the collection of oil and gas. DuraSeal has fundamental knowledge and practical experience in selling consumable products, like proppants, to oil and gas companies which oil and gas companies can use to enhance their ability to extract oil and gas.

36. DuraSeal was financially capable of pursuing the corporate opportunity to sell coated or uncoated proppants in 2011 and could have pursued that opportunity at various points since 2011.

37. DuraSeal had an interest or expectancy in the opportunity to sell proppants. DuraSeal has sought for some time to expand its business into additional product lines. The expansion into the sale of proppants would have been complementary to the sale of pipe coating.

38. Moreover, upon information and belief, the experience and connections that Johnston used to develop the corporate opportunity to sell proppants were gained while an officer of DuraSeal. While Johnston was an officer of DuraSeal, DuraSeal had a reasonable expectation that those skills and connections would be used for the benefit of DuraSeal.

39. By pursuing the opportunity to sell proppants through a separate company, Johnston assumed a position inimical to the interests of DuraSeal. Among other things, the sale of proppants was a field that DuraSeal could have entered had Johnston presented the corporate opportunity to do so to DuraSeal. As an officer of DuraSeal, Johnston was obligated to devote substantially all of his professional efforts to the business of DuraSeal and failed to do so because he was acting as an officer for CVM.

40. Xurex's business consists of selling a particular coating to a single customer, DuraSeal. Xurex has tried at various points to find additional uses for its coating, which would allow it to either increase the volume of its sales to DuraSeal or to attract additional customers in different industries. For example, Xurex has investigated the possible use of its products in cosmetics and in concrete.

41. Proppants can be sold either uncoated or coated. HabraCoat, the solution which Xurex owns the intellectual property rights to and which it sells to DuraSeal, has shown promise as a possible coating for proppants. CVM has represented in communications with potential customers that it is selling coated proppants.

42. Xurex was financially capable of pursuing the corporate opportunity to sell coated proppant or to license its technology for the sale of coated proppants in 2011 and since.

43. The sale of either coated proppant or the license of Xurex's technology to a company selling proppant falls within Xurex's line of business. Xurex's business consists of licensing its coating products and selling its coating products.

44. Xurex had both an interest and an expectancy in licensing its product in any new markets that its officers or directors could identify for its products or in developing a new use for which it could sell its coating products.

45. By developing a business that used Xurex's technology in a field into which Xurex could have expanded its own business, Johnston placed himself in a position inimical to Xurex.

46. Upon information and belief, since forming CVM, Johnston has used resources belonging to DuraSeal, Xurex, or both to develop and to further CVM's business. For example,

Tarwater's employment contract with Xurex specified that she devote all of her professional efforts to Xurex, however Tarwater performed services for CVM while employed by Xurex.

47. Despite the fact that DuraSeal and Xurex each could have benefited from the opportunity to sell coated proppants and DuraSeal could have benefited from the opportunity to sell uncoated proppants, Johnston never presented this opportunity to the board of either DuraSeal or Xurex. Johnston did not use his role as an officer and director of DuraSeal and Xurex to develop the proppant opportunity for DuraSeal, Xurex, or both.

48. CVM has made many millions of dollars selling proppants. By extension, DuraSeal, Xurex, or both, have been deprived of many millions of dollars of revenue and associated profit.

Collins Provides Johnston with Confidential Information of Xurex

49. In addition to usurping corporate opportunities belonging to Xurex and DuraSeal, Johnston, with the assistance of Collins, Tarwater, and Contractor also misappropriated confidential and trade secret information belonging to Xurex and DuraSeal for his own use and for use in connection with CVM.

50. Although, Johnston was formally replaced by Collins as the CEO of Xurex on or about January 10, 2012, Collins continued to defer to Johnston with respect to business decisions concerning Xurex after that point in time.

51. Johnston's subsequent resignation from Xurex's Board on October 26, 2012, did not put a stop to Collins' reliance on Johnston. Despite Johnston's resignation from Xurex's Board, Collins continued to consult with and defer to Johnston with respect to the management of Xurex.

52. Among other things, Collins hired Contractor to act as a sales person for Xurex without performing any background check or otherwise investigating Contractor's competency at Johnston's request. Collins also caused Xurex to hire Johnston's son, Jared Johnston.

53. As of May 5, 2013, Collins and Johnston each signed a declaration of warranty in connection with obtaining insurance that identified Johnston as the Chairman of Xurex's Board. Johnston was not a member of Xurex's Board on May 5, 2013.

54. Johnston has used his continued unsanctioned control over Xurex to obtain confidential, highly confidential, and trade secret information belonging to Xurex or to Xurex and DuraSeal jointly from Collins, Contractor, Tarwater, and Jared Johnston following his departure.

55. Between Johnston's resignation as Xurex's CEO and August 2013, Collins sent or was copied on emails providing Johnston with confidential, highly confidential, or trade secret information belonging to Xurex or DuraSeal and Xurex jointly more than 100 times.

56. Contractor, Tarwater, and Jared Johnston sent confidential, highly confidential, or trade secret information belonging to Xurex or DuraSeal and Xurex jointly to Johnston on numerous occasions.

57. Although Xurex had entered into confidentiality agreements with potential business partners before providing them with confidential information in the past, Xurex did not enter into any confidentiality agreement with Johnston before Collins, Contractor, and Jared Johnston funneled Xurex's confidential, highly confidential, and trade secret information to him.

58. Johnston used the confidential, highly confidential, and trade secret information belonging to Xurex or DuraSeal and Xurex jointly to benefit CVM. For example, using samples of and the formula for HabraCoat, Johnston tested HabraCoat's use as a proppant coating. Upon

information and belief, those tests confirmed that using HabraCoat as a proppant coating would be a viable new business line for Xurex, DuraSeal, or Xurex and DuraSeal jointly. Johnston concealed the results of his testing of HabraCoat from Xurex and DuraSeal. DuraSeal only learned of Johnston's testing through discovery in connection with this action.

59. Thereafter, in August 2013, Johnston used the information that he improperly gained from Xurex in attempt to obtain a license for CVM to use HabraCoat at an unfair and inadequate price. When Di Mase asked counsel for Xurex to offer an opinion as to whether the license sought by Johnston would violate Xurex's pre-existing license agreements, Johnston withdrew CVM's offer to purchase the license.

DuraSeal Learns Of The Stock Issuances And Pursues Its Rights Under Section 220

60. Johnston resigned from the Xurex Board on or about October 26, 2012, and the remaining directors, Rose and Olson, appointed Di Mase to fill the vacancy.

61. In an effort to fulfill his duties as a Xurex director, Di Mase requested information concerning the company's compensation arrangements with its directors and officers, as well as other information concerning Xurex. Incredibly, Rose and Olson refused to provide Di Mase such information unless he first executed a non-disclosure agreement ("NDA"). Di Mase objected to the notion that a director would be required to sign an NDA to gain access to the company's information, but ultimately agreed to and did sign the NDA.

62. After signing the NDA, Di Mase received documents that revealed the Stock Issuance and associated cash compensation awards.

63. On January 25, 2013, pursuant to Section 220 of the Delaware General Corporation Law, DuraSeal made a demand for books and records related to the Stock Issuance. In response, Xurex produced the minutes from the March 9, 2012 meeting of the Xurex Board,

which reflect the Defendants' putative approval of the Stock Issuance and other compensation, and a handful of other documents. Xurex took the position that these are all of the documents responsive to the demand in its possession.

DuraSeal Forces Xurex to Hold an Annual Meeting of Stockholders Pursuant to Section 211

64. Of the directors who participated in the Stock Issuance, two remained on the Xurex Board in early 2013: Rose and Olson (the "Defendant Directors"). Because the Xurex Board also had two empty seats, the Defendant Directors comprised a majority of Xurex's sitting directors, but only a minority of the Xurex Board.

65. In the spring of 2013, Xurex had not held an annual meeting for the purpose of electing directors in years.

66. Thus, on March 28, 2013, DuraSeal brought an action pursuant to Section 211 captioned, *DuraSeal v. Xurex*, C.A. No. 8445-VCL (the "211 Action") to compel Xurex to hold an annual meeting for the election of directors.

67. On May 10, 2013, the Delaware Court of Chancery ordered Xurex to hold the Annual Meeting on June 14, 2013.

Defendants' First Two Unauthorized Proxy Solicitations

68. On May 2, 2013, Xurex filed a response in the 211 Action, admitting that Xurex was required to hold an annual meeting for the election of directors promptly.

69. Between May 2, 2013 and the Annual Meeting, there was no meeting of the Xurex Board, nor did the members of the Xurex Board take any action by unanimous written consent. The Xurex Board neither determined to nominate a slate of directors for election at the Annual Meeting nor did the Xurex Board determine that Xurex should solicit proxies in

connection with the Annual Meeting. Nor did the Xurex Board authorize any officer, employee or other person to solicit proxies for the Annual Meeting on Xurex's behalf.

70. Nonetheless, Johnston secretly organized a proxy contest to secure the re-election of directors beholden to Johnston to Xurex's Board. Initially, that proxy contest was conducted through Xurex.

71. Two letters (the "Proxy Solicitation Letters") were sent from Xurex to its stockholders – both on Xurex's letterhead – soliciting votes in favor of the Defendant Directors (along with three other unidentified persons) at the Annual Meeting.

72. The first Solicitation Letter (the "First Proxy Solicitation Letter"), sent on May 7, 2013, was signed by the Defendant Directors. It stated:

> We urge you in the strongest possible terms to resist any attempts by DuraSeal to buy your shares or obtain your proxy vote. The current Xurex management team asks you to give it your proxy vote so it can continue on its path towards a successful future for all Xurex stockholders.

(Ex. 3, p.4).

73. The second Proxy Solicitation Letter (the "Second Proxy Solicitation Letter"), sent on May 9, 2013, was signed by Collins. It stated that it was intended to "update everyone on certain potential business opportunities that could possibly impact your view of the Board of Director's control and stock valuation issues now under discussion." (Ex. 4, p. 1).

74. Upon information and belief, Johnston was involved in the decision to send the Proxy Solicitation Letters.

75. Not only were the Proxy Solicitation Letters written and disseminated to Xurex's stockholders without approval of the Xurex Board, but Di Mase, the third member of Xurex's five-member Board, was not even given the opportunity to review either of the two Proxy

Solicitation Letters. Nor was Di Mase informed that there was any plan for Xurex to engage in any proxy solicitation.

76. Neither Xurex's certificate of incorporation nor Xurex's bylaws authorize its management to nominate directors on the company's behalf, and the Xurex Board has not adopted any resolution delegating such authority to management.

77. Because the Xurex Board did not select or approve a slate in advance of Xurex's annual meeting, the solicitation that the Defendant Directors, Johnston, Collins, and Tarwater caused Xurex to make in connection with the 2013 Annual Meeting was unauthorized and improper.

The Proxy Solicitation Letters Omited Material Information

78. Separate and apart from being unauthorized, the Proxy Solicitation Letters omitted substantial information material to the stockholder action they encouraged.

79. In particular, neither of the two Proxy Solicitation Letters (nor any other disclosure made in recent past to Xurex's stockholders) included current financial information respecting Xurex. Nor did the Proxy Solicitation Letters (or any other stockholder communication) even disclose the identity (much less the qualifications and background) of the members of the slate for which the communications solicit stockholder support. Nor had the stockholders been provided with even the most basic summary of the compensation provided by Xurex to the Defendant Directors the stockholders have been asked to reelect.

80. Without appropriate supplemental disclosure, any proxies obtained by Xurex or the Defendants would be obtained based upon misleading disclosures, and any vote for the Defendants' slate would not be an informed stockholder vote.

The Proxy Solicitation Letters Include Materially False and Misleading Disclosures

81. Not only did the Defendants cause Xurex to solicit stockholder action without disclosing all material information, but the Defendants issued materially false and misleading disclosures through Xurex.

82. *First*, in attempting to persuade Xurex's stockholders to give their proxies to the Defendant Directors, the First Proxy Solicitation Letter states:

> DuraSeal has been trying to get control of Xurex starting with an offer to buy out all Xurex Stockholders using a totally inadequate valuation of Xurex. About a year ago DuraSeal made an offer to acquire all Xurex shares not already under their control by making a cash payment of about $400,000 or $0.01/share to be paid out over 4 years or 16 quarters to individual stockholders.

(Ex. 3, p.2 (emphasis in original)). This statement is materially false and misleading.

83. In truth, DuraSeal agreed in principal to a term sheet under which it would pay $4.1 million for the shares not owned by DuraSeal, as reflected in a contemporaneous letter from Xurex. (Ex. 5). Excluding the challenged Stock Issuance, which is invalid and which DuraSeal was unaware of, DuraSeal offered approximately $0.15 per share for the validly outstanding stock of Xurex. And, even if the unlawfully issued shares were counted, DuraSeal's offer still was for more than $0.10 per share. When the Defendants sought to convince Xurex's stockholders to leave the Defendant Directors in office by claiming that DuraSeal sought to acquire Xurex based on "a totally inadequate valuation," it was materially false and misleading to tell stockholders that DuraSeal offered to acquire the company for 1/10th of what DuraSeal actually proposed.

84. Moreover, when discussing DuraSeal's offer to acquire Xurex in 2012, the First Proxy Solicitation Letter failed to disclose that Xurex's management estimated the value of Xurex's common stock at $0.005 on March 9, 2012 when valuing the stock in connection with

issuing 10.2 million shares to Xurex's management and directors through the challenged Stock Issuance. Thus, even if it were assumed (*arguendo*) that Defendants mistakenly believed that Xurex's buyout offer had been for only $400,000 (which DuraSeal very much doubts to be the case), it still would not excuse Defendants' claim that Xurex's offer reflected "a totally inadequate valuation" – as even an offer of $.01 per share would be dramatically more than the $.005 per share that Defendants, themselves, valued the shares at the same time. Plainly, management's own contemporaneous $0.005 per share valuation of Xurex for the purpose of issuing itself shares was material to the stockholders' consideration of the adequacy of DuraSeal's approximately $0.15 per share offer for the company, which the Defendants disparaged as "totally inadequate."

85. In addition to misstating facts when accusing DuraSeal of attempting to acquire Xurex for an inadequate value, the First Proxy Solicitation Letter also falsely stated that DuraSeal was attempting to cancel its distribution agreement with Xurex. This statement was materially false and misleading. In fact (i) Xurex, (and not DuraSeal) twice proposed that the parties modify or terminate their contractual relationship and (ii) DuraSeal declined to agree to Xurex's proposals – hardly an effort to "cancel" the agreement. Additionally, neither Proxy Solicitation Letter mentioned that Johnston's, Tarwater's, and Contractor's organization of NanoCoat - in direct violation of Xurex's contractual obligations to DuraSeal – was a threat to Xurex's distribution agreement with DuraSeal. It was materially misleading to claim (falsely) that DuraSeal was threatening the contractual relationship between Xurex and DuraSeal, particularly without also mentioning these developments by Defendants, which pose a true threat to Xurex's valuable contract rights.

The Unexpected Board Meeting

86. On Saturday, May 18, 2013, in the evening, Tarwater sent an email (the "Saturday Email", Ex. 6) to Di Mase, the Defendant Directors, and two other individuals, announcing that "Rob has requested a BOD Meeting this Monday May 20, 2013 at 2 pm CST. The purpose of the meeting is to consider and review and vote on the Proxy statement and information that is to be sent out to Shareholders by May 21, 2013." The Saturday Email did not include copies of any of the materials proposed for consideration at the proposed meeting (the "Putative Meeting").

87. The Defendant Directors never informed Di Mase before the Saturday Email that they believed that Xurex could nominate a slate of directors given the divide of the Board.

88. The Saturday Email was particularly surprising in light of prior exchanges among the parties. On May 5, the Director Defendants had noticed a May 7 board meeting for the purpose of "Expanding the Board of Directors" and "Appoint new Board Member." (Ex. 7). After counsel for DuraSeal pointed out that this meeting would be wrongful and would lack quorum, counsel for the defendants, including Xurex, agreed to cancel the meeting. (Exs. 8, 9). In so agreeing, counsel for Xurex represented that it would "endeavor to provide DuraSeal with additional notice going forward in order to obviate any claimed "need" for emergency relief."

89. Upon receiving the Saturday Email, Di Mase responded promptly:

> I received Rob's request for a board meeting on Monday to consider whether Xurex should send proxy materials and information to its stockholders. The notice did not attach copies of the materials that you would like to send. I am happy to review the proposed materials. Please send me copies of the information, the proposed disclosure document, and any correspondence concerning the materials that you have had with each other, or Xurex's management, or counsel.
>
> If the information is accurate and appropriate for Xurex to disclose in connection with its annual meeting, I see no reason why we would not be able to agree on an information statement for Xurex to send through email, as we agreed to a form of notice through

email. Moreover, I strongly support Xurex providing its stockholders with information to correct the disclosure violations that you caused Xurex to make in the past. In particular, the information provided to Xurex's stockholders should include Xurex's most current financial statements, audited if possible, an MD&A discussion of the financials, a description of the business, a disclosure of all related party transactions and executive compensation, and things of that nature.

While I would like to review the draft disclosure materials, it is unclear to me why Xurex would be sending a "proxy" statement to its stockholders. Xurex itself will not be in a position to put forth a proposed slate or any other proposals to be voted on at the annual meeting. It does not have a position in a proxy contest among stockholders. As such, Xurex should send out only a neutral information statement.

Within the past month you have caused two communications to be sent to Xurex's stockholders on Xurex's letter head. I was not provided with copies of those communications and had no opportunity to review or comment on them. The communications contained false and misleading statements and omitted material information. The disclosure violations in those communications violate Delaware law. It would be reckless of me to allow you to authorize Xurex to commit further disclosure violations.

As I have reiterated twice in the past, I am not aware of any matter requiring a meeting of the board of Xurex in advance of the company's annual meeting on June 14. Thus, because of my continuing concern that you will take board action to entrench yourselves or authorize further disclosure violations in advance of an annual meeting if allowed to hold a board meeting, I will not attend the board meeting that you propose. As we have in the past, we can approve Xurex's provision of information to stockholders by unanimous written consent though email.

Because Xurex's board has five directorships, and Xurex has only three validly serving directors, in my absence you do not have a quorum of directors to hold a meeting. If you meet with each other and purport to take actions, those actions will be ineffective. Please do not cause further damage to Xurex by continuing down this path.

As soon as you send copies of the communications that you propose the board authorizing Xurex to send to its stockholders, I will review them and provide comments by email.

(Ex. 8). The Defendant Directors never replied to this email. Despite Di Mase's asserted willingness to review and provide comments on proposed materials, no drafts were sent in response to this email.

90. Then, when it was late on Sunday evening in Italy where Di Mase lives, Tarwater sent Di Mase an e-mail (the "Sunday Night Email") (Ex. 9), attaching seven documents for consideration at the putative board meeting the Director Defendants wished to have the next afternoon. The Sunday Night Email attached "(Xurex) Proxy Statement 2013_v10" (Ex. 10), "collins letter may 21 2013_v6" (Ex. 11), "Form for Xurex Inc stockholder letter_v5" (Ex. 12), "Memo to Xurex Shareholders from Dietmar Rose and Rob Olson_v1" (Ex. 13), "Notice for Xurex" (Ex. 14), "Proxy – Xurex Inc_v6" (Ex. 15), and "Xurex financials" (Ex. 16).

91. Sunday night was Di Mase's first opportunity to review any of these materials other than the Notice for Xurex. Yet, most of the attachments to the Sunday Night Email noted that they had gone through many prior revisions. Neither the Defendant Directors, nor the Defendant Employees provided Di Mase with any of the other information that he had requested the day before in order to consider the proxy materials. The issues the Board, including Di Mase, needed to consider before approving the exhibits to the Sunday Night Email were complex and required legal guidance.

92. Di Mase responded to the Sunday Night Email by noting his continued desire to provide comments on documents, but also his inability to do so within the compressed time frame permitted:

> Thank you for sending me the 7 documents to review.
>
> With the exception of the notice of Xurex's annual meeting, this is the first time that I am seeing any of these documents, although it is apparent that several of them have gone through many revisions. I have still not received any of the additional materials I requested

> to consider the context of these materials, including copies of all communications about these materials.
>
> I received these documents less than 24 hours before your proposed meeting on a Sunday afternoon; thus, I cannot properly review and consider the information to be sent to stockholders in advance of the meeting . Unless you have had access to these documents for longer than I have, I have similar doubts as to your ability to exercise due care in reviewing and commenting on the material. Furthermore, I have not had a chance to meet with the individuals that you propose to nominate other than yourselves.
>
> While I have not had a chance to review the material with care, a quick glance reveals that it is inadequate and contains further materially false and misleading statements, which I will address in greater detail once I have had a reasonable time to reflect on its content.
>
> I will not attend the board meeting noticed for tomorrow both because I cannot responsibly comment on the material that the agenda indicates the board meeting will address and also because I am concerned that you may take improper actions not on the agenda. Consequently, you will not have a quorum of directors to hold a board meeting tomorrow afternoon. I object to you holding any such invalid board meeting tomorrow. As I have written in the past, any action you claim to take at that meeting will be invalid.
>
> As I have written in the past and communicated through my counsel, I do not believe that Messrs. Bradley or DiGregorio were validly appointed to Xurex's board. None the less, I have included and continue to include them in my emails about this meeting as a courtesy to them, because the issues that I raise with respect to the meeting will have a direct impact on them if they choose to participate in the meeting. They should consult their own counsel about these issues before they proceed in order to understand their own potential liability.

(Ex. 17). The Defendant Directors never responded to this email. They made no effort to give Di Mase any opportunity to meet with or even speak to the individuals that they proposed to cause Xurex to nominate. They did not provide any copies of their communications or any communications from counsel on the exhibits to the Sunday Night Email, which presented a fully baked proxy solicitation.

93. The Defendant Directors wrongly impeded Di Mase's legitimate right to board materials and undermined the Board's collective decision-making process.

94. Here, the Defendant Directors had been working with counsel for Xurex and counsel for the Board in advance of the Sunday Night Email to prepare the materials that they intended to have the Board consider. At minimum, at some point, the Defendant Directors (a) authorized Xurex's counsel to prepare the material and (b) selected and approved the other members of the slate that is the subject of the material. Di Mase was not informed of either of those steps, let alone given an opportunity to comment on or voice an objection to the Board nominating a slate.

95. Di Mase was not allowed to meet the individuals presented for nomination, let alone to object or present any arguments against the candidates selected by the other directors, despite his very apparent interest in the subject.

96. Di Mase was given no access to any advice of the Board's counsel concerning the Board's power to nominate a slate or the propriety of it doing so. He had no access to any opinion given the Defendant Directors concerning the contents of the disclosures the Defendant Directors planned to cause Xurex to make.

97. The Defendant Directors neither informed Di Mase that they were taking action to cause Xurex to nominate directors for election at Xurex's annual meeting, nor did they inform him that he would not be included in any such discussions.

98. The Defendant Directors' course of conduct ensured that Di Mase would not be in a position to participate as an equal in the meeting noticed. They worked together and with counsel that should have been representing the entire Board in advance of the meeting, to prepare a fully baked set of documents. By excluding Di Mase from those communications and not

providing him with any copies in advance of the meeting, the Defendant Directors ensured that Di Mase could not have been on equal footing to debate or challenge the course of conduct that they were set on before the meeting. In short, the Defendant Directors prevented Di Mase's participation in the Putative Board Meeting before they even noticed the meeting.

The Defendants Engage in Further Unauthorized Solicitation

99. Di Mase did not attend the Putative Board Meeting. Following the Putative Board Meeting, Di Mase did not act by written consent to approve any solicitation by Xurex.

100. Following the Putative Meeting, on May 20, 2013, the Defendants distributed the Third Proxy Solicitation, (Ex. 18), a form of proxy (Ex. 19), a "Board of Directors Nomination" form (Ex. 20), and an event parking announcement, without making any effort to obtain comments from Di Mase, despite his statement that he would review and provide comments.

101. Xurex's Board has not validly approved a slate of nominees or authorized Xurex to solicit proxies for the election of directors. As such, the Third Proxy Solicitation was the Defendants' third unauthorized attempt to cause Xurex to solicit proxies on their behalf.

The Third Proxy Solicitation Includes Additional Disclosure Violations

102. Not only was the Third Proxy Solicitation Defendants' third unauthorized solicitation of proxies, but it failed to address the omissions of material information from the Defendants' first two unauthorized proxy solicitations, compounded earlier disclosure violations, and committed new ones.

103. *First*, the Third Proxy Solicitation continued the Defendants' failure to accurately disclose DuraSeal's prior offer for Xurex. In the First Proxy Solicitation Letter, Olson and Rose falsely misrepresented to the stockholders that "About a year ago, DuraSeal made an offer to acquire all Xurex shares not already under their control by making a cash payment of about

$400,000 or $0.01/share to be paid out over 4 years or 16 quarters to individual stockholders." (Ex. 3). In fact, the offer was for $4.1 million, or approximately $0.15 per share (or approximately $.10 per share after giving account to the dilutive and unlawful self-dealing stock issuance the Director Defendants and Collins gifted themselves unbeknownst to DuraSeal).

104. The Third Proxy Solicitation stated that DuraSeal's offer was "totally inadequate", "substantially below its fair market value", and "below what the Company believes to be its fair market value". (Ex. 18, pp. 2, 13). Collins' letter to stockholders stated that "Today we believe [Xurex] is worth $.15 to $.17 with more stockholder value to be realized." (*Id.* at p. 21). Yet, that is essentially what DuraSeal offered to pay in 2012. And, this stands in stark contrast to the ½ penny per share valuation Johnston, the Defendant Directors, and Collins used to give themselves and Tarwater nearly 20 percent of Xurex.

105. The Third Proxy Solicitation is blatantly wrong. In July of 2012, DuraSeal offered $4.1 million or approximately $0.15 for all of the validly outstanding shares of Xurex that it did not already own. (Ex. 21).

106. *Second*, the Third Proxy Solicitation carefully avoided disclosing the fact that in March of 2012 the Defendant Directors awarded themselves each 1,800,000 shares of common stock, which they valued for purposes of their self-gift at ½ penny per share – which was not only grossly inadequate, but not even the par value of the shares.

107. On page 9, the Third Proxy Solicitation listed the directors' compensation in a chart. This chart did not disclose that the Defendant Directors voted together with Johnston to authorize Xurex to issue each of them 1,800,000 shares of stock. This chart did not even give stockholders the information necessary to calculate the number of shares that the Defendant Directors awarded themselves. Where the Defendant Directors' stockholdings were disclosed,

there was no indication that they awarded themselves the vast majority of their stock as compensation for less than six months' service as directors, and with no strings attached. (Ex. 18, p. 7).

108. *Third*, what the Third Proxy Solicitation disclosed with respect to the Defendants' compensation or with respect to the Defendants' stockholdings was materially false and misleading. In 2012, the Defendant Directors and Johnston issued: (1) 3,000,000 shares of common stock to Johnston and (2) 1,800,000 shares of common stock to each of Rose, Olson, Collins, and Tarwater. The Third Proxy Solicitation indicated that the stock was valued at $0.005 when issued. Xurex's common stock has a par value of $0.01. (Ex. 18).

109. Under the Delaware General Corporations Law, a company cannot issue its stock in exchange for less than par value. The shares issued to the Defendants are void if they were not valued at a minimum of $0.01 when issued (in addition to all of the other basis upon which the shares may be void, or voidable). Thus, either the Third Proxy Solicitation inaccurately disclosed that the Defendants own approximately 18% of Xurex or the Third Proxy Solicitation understated the value of the stock award given to the Defendants by at least 100%. (Ex. 18, pp. 7, 9-10).

110. *Fourth*, the Third Proxy Solicitation's disclosure of the Defendants' compensation cannot be reconciled with the Third Proxy Solicitation's disclosure of DuraSeal's offer. When disclosing the value of their stock compensation, the Defendants valued the shares at $0.005 per share and asserted that "the value of the Company at that time was minimal." The Defendants issued themselves this compensation in March of 2012.

111. In July of 2012, relatively contemporaneously, DuraSeal offered $4.1 million, or approximately $0.15 per share for Xurex. The Defendants described this offer as "totally

inadequate". (Ex. 18, pp. 2, 13). Either the Defendants mislead Xurex's stockholders with respect to the amount of compensation that they gave themselves, they mislead stockholders with respect to DuraSeal's offer, or the Third Proxy Solicitation described a 3000% premium offer for a company with "minimal" value as "totally inadequate".

112. *Fifth*, the Defendants failed to disclose that Johnston was a beneficial 5% security holder of Xurex. (Ex. 18, pp. 7-8). The Third Proxy Solicitation included a chart that purported to list the name and address of each 5% security holders of Xurex. The chart fails to mention that BBD Development, LLC is owned by Johnston and that, by virtue of his 2012 compensation, Johnston was Xurex's second largest stockholder.

113. *Sixth*, the Third Proxy Solicitation identified Milt DiGregorio and Brad Duncan as directors, when neither individual had been validly elected or appointed by the Board. (Ex. 18, pp. 4-5, 14).

114. *Seventh*, the Third Proxy Solicitation claimed that "[T]he Board recommends that you vote as follows "FOR" the election of the Board's five (5) nominees for Director . . ." (Ex. 18, p. 3). As described in more detail above, the Board had not approved any nominees for director, nor had the Board authorized any recommendations to stockholders.

115. *Eighth*, the Third Proxy Solicitation incorrectly described the basic mechanics of Xurex's Annual Meeting. It falsely described the only methods of voting at the annual meeting as voting in person or sending a proxy to Xurex. (Ex. 18, p. 3).

116. The Third Proxy Solicitation included a form of proxy falsely stating that the proxies that Xurex received from stockholders would be "irrevocable for a period of one year thereafter". (Ex. 19).

117. The Third Proxy Solicitation also falsely stated that the "affirmative vote of a majority of the shares of our Common Stock, Preferred Stock, Preferred A Stock and Preferred B Stock voting together as one class present in person or represented by proxy and entitled to vote at the annual meeting will be required to approve this Proposal 1[,]" referring to the election of directors. (Ex. 18, p. 6). The vote of a plurality of shares was sufficient for the election of directors under Delaware law.

118. The Third Proxy Solicitation also falsely stated that the Annual Meeting may be adjourned, when that is not permitted with respect to a meeting called pursuant to Section 211. (Ex. 18, p. 1)

119. *Ninth*, the Third Proxy Solicitation misleadingly implied that DuraSeal's litigation against the Defendants was linked to DuraSeal's unsuccessful attempt to acquire Xurex: "As you might also be aware, following its unsuccessful attempt to acquire the Company's business, DuraSeal initiated litigation against the Company and certain of its Directors and officers in the Delaware Court of Chancery." (Ex. 18, p. 13). The Third Proxy Solicitation then offered no explanation of DuraSeal's claims or the nature of DuraSeal's claims. DuraSeal's litigation is unrelated to Xurex's rejection of its $4.1 million acquisition proposal (which the Director Defendants falsely claimed to have been a $400,000 proposal, and have never corrected their falsehood). Defendants' characterization of the claims made in this litigation and the Section 211 action were misleading. While Defendants were not obligated to admit wrongdoing, the failure to accurately identify the claims made was a misleading omission.

120. DuraSeal's litigation is unrelated to Xurex's rejection of its acquisition proposal. Defendants' characterization of the claims made in this litigation and the Section 211 action were misleading.

121. *Tenth*, the Third Proxy Solicitation claimed that P&G and Moeller distributing were customers of Xurex. (Ex. 18, p. 21). The Second Proxy Solicitation, issued on May 9, indicated that P&G and Moeller were only discussing doing business with Xurex. (Ex. 4, p. 1). To DuraSeal's knowledge, the Second Proxy Solicitation was accurate on this point, and the Third Proxy Solicitation was materially misleading in its reference to P&G and Moeller as actual customers.

122. *Eleventh*, the "financial statements" included in the Third Proxy Solicitation did not disclose Xurex's then-current financial situation. The "financial statements" provided did not include a balance sheet, which would be necessary to value Xurex's assets and was clearly material when considering the value of the Defendant Directors' stock compensation and the threats supposedly posed by DuraSeal's past offers for Xurex. (Ex. 18, pp. 15-20).

123. Additionally, the only statement provided, the income statement, was convoluted. (Ex. 20, pp. 15-20). For example, the 2012 statement included a "Year-to-Date" column at a time when 2012 had been over for five months. (*Id.* at p. 15). Moreover, the "financial statements" were not accompanied by any sort of explanation of the categories used.

124. Furthermore, despite the fact that the second quarter was almost over when the Third Proxy Solicitation was sent, the Third Proxy Solicitation failed to include any financial information for 2013. Defendants touted Xurex's upswing in the Third Proxy Solicitation, but failed to provide the financial statements showing that upswing. Defendants claimed to have gained two new customers for Xurex, but did not provide contemporaneous financial statements allowing stockholders to assess the volume of the new sales. In sum, the "financial statements" did not inform stockholders of Xurex's financial condition.

125. The misleading disclosures made by the Defendant Directors and Defendant Employees through Xurex interfered with Xurex's stockholders' ability to cast informed votes at Xurex's annual meeting. Any stockholder who gave a proxy to the Defendants or to Xurex did so based on incomplete or inaccurate information.

126. On May 24, 2013, DuraSeal filed a Second Supplemental Amended Verified Complaint asserting claims based upon the disclosure violations that Defendants caused Xurex to make and based upon the Defendants' use of Xurex to engage in unauthorized solicitation. DuraSeal also moved for a preliminary injunction to prevent Defendants from engaging in further wrongdoing and to require corrective disclosures.

127. Defendants avoided the imposition of a preliminary injunction by committing to refrain from using Xurex's resources any further in their efforts to retain control of Xurex following Xurex's Annual Meeting.

128. Despite their commitment to the Court, Defendants continued to use the resources of Xurex, including information, personnel, proxies, outside counsel, and funds for their own benefit in connection with Xurex's Annual Meeting.

DERIVATIVE ALLEGATIONS

129. DuraSeal brings this action derivatively to redress injuries suffered by Xurex as a direct result of breaches of fiduciary duties, usurpation of corporate opportunities, and misappropriation of corporate resources by Defendants.

130. DuraSeal has owned Xurex stock continuously during the time of the wrongful course of conduct by Defendants alleged herein and continues to hold Xurex stock.

131. DuraSeal will adequately and fairly represent the interests of Xurex and its stockholders in enforcing and prosecuting its rights and has retained counsel competent and experienced in stockholder derivative litigation.

DIRECT ALLEGATIONS

132. DuraSeal, together with its affiliates, was Xurex's largest stockholder prior to the unlawful Stock Issuance, with the right to vote 44.8% of Xurex's outstanding stock. DuraSeal's stockholdings gave it sufficient authority to marshal other independent stockholders to change the composition of the Xurex Board, as it did in 2011. At an actual stockholders meeting called to elect directors, DuraSeal's 44.8% provided a virtual guarantee that DuraSeal would elect whatever slate of directors it supports.

133. In unlawfully issuing themselves stock for inadequate compensation, the Defendants made themselves into Xurex's second largest voting bloc. The Defendant's self-dealing grant of stock to themselves diluted DuraSeal's and its affiliates' ownership of Xurex from approximately 44.8% voting power to approximately 36.3% – thereby (i) substantially diluting the economic value of DuraSeal's investment in Xurex, (ii) materially weakening, if not destroying, DuraSeal's ability to marshal other independent stockholders to determine the composition of the Xurex's Board, and (iii) destroying DuraSeal's virtually guaranteed ability to unilaterally elect a slate of directors of its choosing at an annual meeting called for that purpose.

134. Due to the Stock Issuance, DuraSeal had to bring the 211 Action to bring a stockholder vote to remove the Defendant Directors and a separate 225 Action to enforce the results of that stockholder vote, where previously DuraSeal was able to rally a sufficient number of stockholders to replace the Old Board by written consent.

135. Moreover, the Defendant Directors' and Defendant Employees' issuance of unauthorized, materially inadequate, and materially false and misleading disclosures through Xurex causes direct harm to DuraSeal and all of Xurex's stockholders by interfering with their ability to cast informed votes at Xurex's annual meeting, and by further eroding the value of DuraSeal's voting position.

136. Finally, the usurpation of DuraSeal's corporate opportunity to sell coated and uncoated proppants alongside its current product line in the oil and gas industry directly injured DuraSeal by depriving DuraSeal of a corporate opportunity and causing DuraSeal millions of dollars in damages.

DEMAND ON THE BOARD IS EXCUSED AS FUTILE

137. DuraSeal did not make demand on the Xurex Board to bring suit asserting the derivative claim set forth in this Verified Complaint because pre-suit demand was futile and excused as a matter of law when this action was commenced.

138. As described above, Defendants Rose and Olson comprised the majority of the Xurex Board. This action asserts claims that Rose and Olson breached their fiduciary duties – including their duty of loyalty – by issuing to themselves millions of shares of Xurex stock and other cash compensation and by causing Xurex to solicit proxies on their behalf without the authorization of Xurex's Board.

139. Defendants Rose and Olson suffer from a conflict between their personal interests and the interests of Xurex in connection with any demand to assert these claims, which precludes them from exercising independent business judgment and from objectively considering such a demand. These Defendants are further unable to consider objectively a demand because the action seeks to recover for harm to Xurex as a result of their breaches of fiduciary duties and they face a substantial likelihood of liability. Demand is therefore excused as futile.

CLAIMS FOR RELIEF

COUNT I

(Breach of Fiduciary Duty – Derivative Claim)

140. The allegations of paragraphs 1 through 139 of the complaint are incorporated by reference as if fully set forth herein.

141. As directors and officers of Xurex, Defendants owed the company fiduciary duties of care and loyalty.

142. As set forth above, Defendants Johnston, Rose and Olson determined to grant themselves unreasonable compensation, including millions of shares of Xurex common stock and cash. These defendants sought to line their own pockets with millions of shares and cash after only a few months of service. Because of the self-interest inherent in the decision to grant themselves sizeable compensation, Defendants must demonstrate that the compensation was entirely fair to the company, which they cannot do.

143. Defendants Johnston, Rose and Olson also approved unreasonable compensation for Collins and Tarwater, including 3.6 million shares of unrestricted Xurex common stock. Given his longtime association with Collins and Tarwater, Johnston was clearly interested in this decision, as it parked important votes in the hands of his affiliates.

COUNT II

(Breach of Fiduciary Duty – Direct Claim)

144. The allegations of paragraphs 1 through 143 of the complaint are incorporated by reference as if fully set forth herein.

145. As directors and officers of Xurex, Defendants owed the company fiduciary duties of care and loyalty. Additionally, Defendants Johnston, Rose, and Olson exercised effective control over Xurex in their capacity as the entirety of the Xurex Board.

146. Defendants Johnston, Rose, and Olson caused Xurex to issue excessive shares of stock to themselves and their affiliates in order to provide both (i) excessive self-compensation, and (ii) a sufficient number of shares to complicate, if not entirely frustrate, the termination of their incumbency – either by removal or election of successors at an annual meeting (which has not been held for well over a year). By concealing their actions from Xurex's stockholders until

after the actions were taken, Defendants Johnston, Rose, and Olson prevented the other stockholders from removing them as directors or otherwise interfering with their exercise of control over Xurex.

147. The improper Stock Issuance caused a corresponding decrease in the share percentage and voting power owned by the other stockholders, including DuraSeal. This self-dealing stock issuance expropriated both economic value and voting power from DuraSeal and Xurex's other stockholders to Defendants.

COUNT III

(Breach of Fiduciary Duty - Unauthorized Solicitation)

148. The allegations of paragraphs 1 through 147 of the complaint are incorporated by reference as if fully set forth herein.

149. The Defendant Directors and the Defendant Employees have caused Xurex to solicit proxies for the upcoming annual meeting of Xurex on behalf of the Defendant Directors without authority to do so.

150. The Xurex Board never approved Xurex's nomination of any candidates for director at Xurex's annual meeting. Nor did the Xurex Board approve Xurex's solicitation of proxies. And neither of the two Proxy Solicitation Letters was approved by the Xurex Board.

151. Absent Board approval, Xurex's management is not authorized to select candidates for directorship, to solicit or to vote proxies, or to devote corporate resources to support the election of directors not nominated by the Xurex Board.

152. Defendants breached their fiduciary duties in exerting unlawful control over Xurex to cause Xurex to support the election of themselves or their favored candidates without the approval of the Xurex Board.

COUNT IV

(Disclosure Violations – Direct Claim)

153. The allegations of paragraphs 1 through 152 of the complaint are incorporated by reference as if fully set forth herein.

154. While exercising unlawful control over Xurex, the Defendant Directors and Defendant Employees caused Xurex to solicit proxies and seek stockholder action without first disclosing all material information to stockholders.

155. The Defendant Directors and Defendant Employees also issued materially false and misleading disclosures to Xurex's stockholders.

156. The materially false and misleading disclosures made by the Defendant Directors and the Defendant Employees are particularly damaging because the Defendant Directors and Defendant Employees used Xurex to make the disclosures.

157. If not corrected, the disclosure violations will prevent Xurex's stockholders from casting informed votes at Xurex's annual meeting and thereby cause irreparable harm to Xurex and its stockholders.

COUNT V

(Usurpation of Corporate Opportunity – Derivative Claim)

158. The allegations of paragraphs 1 through 157 of the complaint are incorporated by reference as if fully set forth herein.

159. Xurex was at all relevant times financially capable of exploiting the opportunity to develop, position, and license or sell its products for use in coating proppants.

160. The sale or license of Xurex's coatings for use in connection with proppants falls within Xurex's line of business.

161. Xurex had an interest and expectancy that Johnston, as a director and officer of Xurex, would develop any potential new market for Xurex's products for the benefit of Xurex and would develop within Xurex the expertise necessary to develop, position, and license or sell its coatings for use in connection with proppants. Xurex also had an interest and expectancy that the efforts of its employees, Tarwater and Contractor would not be used to develop business opportunities for any other entity.

162. By taking the opportunity to develop, position, and sell Xurex's product for use in the proppant market for his own, through CVM, Johnston placed himself in a position inimical to his fiduciary duties to Xurex.

163. Johnston did not remedy his usurpation of corporate opportunity by offering to purchase a license for HabraCoat from Xurex. By late 2013, Johnston had already usurped Xurex's opportunity to obtain the expertise to develop, position, and sell or license its product for use in the oil and gas industry itself rather than licensing its product to a third party without the benefit of that internal expertise. Furthermore, by improperly obtaining Xurex's confidential information and using it for the benefit of CVM, Johnston ensured that Xurex did not have the negotiation leverage that it would have had with respect to a third party or that it would have had if the opportunity to sell coated proppant had been presented to Xurex for Xurex to investigate and develop.

164. Johnston, through CVM, has earned substantial profit from usurping the opportunity to develop, position, and sell coated proppants or to sell Xurex's product or a license for Xurex's product for himself.

165. Xurex has been injured by the usurpation of this corporate opportunity and the corporate opportunity to develop, position, and sell coated proppants or to sell its product or a license for its product to a third-party in a balanced, arms-length transaction.

COUNT VI

(Usurpation of Corporate Opportunity – Direct Claim)

166. The allegations of paragraphs 1 through 165 of the complaint are incorporated by reference as if fully set forth herein.

167. DuraSeal was at all relevant times financially capable of exploiting the opportunity to sell coated or uncoated proppants.

168. The sale of coated or uncoated proppants falls within DuraSeal's area of business.

169. DuraSeal had an interest and expectancy that Johnston, as a director and officer of DuraSeal, would develop any potential business opportunities within the oil and gas industry for the benefit of DuraSeal.

170. By taking for himself the opportunity to sell proppants within the oil and gas industry through CVM, Johnston placed himself in a position inimical to his fiduciary duties to DuraSeal.

171. Johnston has earned substantial profits by forming CVM to develop the opportunity to sell proppants within the oil and gas industry for himself.

172. DuraSeal has been injured by the usurpation of the corporate opportunity to sell proppants within the oil and gas industry.

COUNT VII

(Breach of Fiduciary Duty/Misappropriation of Corporate Resources – Derivative Claim)

173. The allegations of paragraphs 1 through 172 of the complaint are incorporated by reference as if fully set forth herein.

174. As directors and officers of Xurex, Defendants owed the company fiduciary duties of care and loyalty.

175. As set forth above, Defendants misused and misappropriated Xurex's resources for their own benefits in an effort to retain control of Xurex in advance of Xurex's 2013 Annual Meeting.

176. Johnston further misappropriated Xurex's resources in order to expand and develop CVM for his personal benefit.

177. Xurex suffered damages as a result of Defendants' misuse and misappropriation of its corporate resources.

WHEREFORE, DuraSeal respectfully requests that the Court enter its order and judgment:

A. Adjudicating and decreeing that Defendants breached their fiduciary duties owed to Xurex and DuraSeal (both as a stockholder of Xurex and directly), including their duty of loyalty;

B. Ordering that the Stock Issuance is cancelled and/or rescinded;

C. Awarding Xurex the amount of damages sustained as a result of Defendants' breaches of fiduciary duty and usurpation of corporate opportunity, in an amount to be determined at trial, together with prejudgment and post-judgment interest thereon at the maximum rate allowed by law;

D. Awarding DuraSeal the amount of damages sustained as a result of Defendants' breaches of fiduciary duty and usurpation of corporate opportunity, in an amount to be determined at trial, together with prejudgment and post-judgment interest thereon at the maximum rate allowed by law;

E. Awarding DuraSeal all costs and expenses of this action, including attorney's fees, expert fees, accountancy fees, and related expenses; and

F. Granting such other and further relief as the Court deems just and proper.

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/s/ Emily V. Burton

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Date: February 5, 2013

CERTIFICATE OF SERVICE

I, Emily V. Burton, Esquire, hereby certify that on February 27, 2014, a copy of the foregoing document was served on the following counsel in the manner indicated below:

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